APPENDIX C.

ADVISORY GROUP COMMENTS ON DRAFT DOCUMENTS

Appendix C includes all written comments by Advisory Group members on the CCRC draft reports containing reform recommendations. The comments are organized by date received, ending with the most recent comments. This Appendix does not include any responses CCRC had to the comments.

Comments of U.S. Attorney's Office for the District of Columbia
on D.C. Criminal Code Commission Recommendations
for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability
Submitted Feb. 22, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on the Recommendations for Chapter 2 of the Revised Criminal Code (Basic Requirements of Offense Liability) provided for Advisory Group review:

- Temporal Aspect of Possession (pages 15-17)
  - Section 22A-202(d) requires that the government prove that the defendant exercised control over property for period of time sufficient to provide an opportunity to terminate the defendant's control over the property.
  - Commission staff authors acknowledge that this approach takes a component of the "innocent or momentary possession" affirmative defense (the momentary possession component) and makes it an element that the government must now prove (versus an affirmative defense that the defendant must prove).
  - The Advisory Group should discuss this change further inasmuch as it is a substantive to D.C. law.

- Causation Requirement: § 22A-204
  - Factual Cause
    - Page 29: The Advisory Group should consider the "factual cause" definition in light of gun-battle liability, which is predicated upon "substantial factor" causation.

- Page 31 re: § 22A-204(b) (Definition of Factual Cause)

  - Commission staff authors appropriately concede that the proposed definition for "factual cause" would be a substantive change from current D.C. law. Specifically, the proposed rule would eliminate the "substantial factor" test, and would thereby appear to eliminate the basis for urban gun-battle causation as a theory of factual causation.

  - However, in cases such as *Roy* and *Fleming*, factual cause includes situations where the defendant's actions were a "substantial factor" in bringing about the harm. The D.C. Court of Appeals has stated that "[i]n this jurisdiction[,] we have held findings of homicide liability permissible where: (1) a defendant's actions contribute substantially to or are a substantial factor in a fatal injury . . . and (2) the death is a reasonably foreseeable consequence of the defendant's actions." *Fleming v. United States*, 148 A.3d 1175, 1180 (D.C. 2016) (quoting *Roy v. United States, 871 A.2d 498* (D.C. 2005) **(petition for rehearing *en banc* pending**))

  - Concerns regarding an "unnecessarily complex analysis" required by a "substantial factor" test in all cases can be addressed easily by a jury instruction (*e.g.*, if the jury finds "but for" causation, the analysis ends; where there is no "but for" causation, the jury would consider whether defendant's conduct was a "substantial factor" – and this would be unnecessary in most cases, where causation is not meaningfully at issue).

  - Of course, as noted above, the *Roy* petition for rehearing is pending and the decision of the D.C. Court of Appeals *en banc* would be decisive on this point.

o Legal Cause

- Page 29: Delete the "or otherwise dependent upon an intervening force or act" language. An intervening force or act does not negate legal causation if that intervening force or act is reasonably foreseeable.

- Similar/conforming revisions should be made at page 35 (to the text that immediately precedes footnote 31) and at page 38 (to the text that immediately precedes footnote 49).

- Culpable Mental State Requirement: § 22A-205

    - Regarding mens rea as to results and circumstances (the last sentence of page 42), USAO-DC notes that, more recently, the D.C. Court of Appeals has held in *Vines* that "it is clear that a conviction for ADW can be sustained by proof of reckless conduct alone. If reckless conduct is sufficient to establish the requisite intent to convict a defendant of ADW, it necessarily follows that it is enough to establish the intent to convict him of simple assault." *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), as amended (Sept. 19, 2013). By "reckless conduct," the D.C. Court of Appeals meant that the defendant was reckless as to the possibility of causing injury*, i.e.*, the defendant was reckless as to the result.

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: February 22, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

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 Commission's First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt

On page 1, the Report begins with § 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt. Subparagraph (c)(2) defines a result element. It states that a "Result element" means any consequence that must have been caused by a person's conduct in order to establish liability for an offense." The problem is that while "Conduct element" is defined on page 1 in 22A-201

[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.

(c)(1)[2] and "Conduct Requirement" is defined on page 9 in 22A-202 (a), the word "conduct," itself, is not defined. It appears that the interpreter is left to assume that the word takes on the meanings associated with their usage in those separate definitions (or at least the one in 22A-201 (c)(1)). The need for the word "conduct" to be replaced, or defined, is highlighted by the Report's observations on page 6. There it recognizes that conduct includes an action or omission. To make § 22A-201 (c) (2) clearer, we propose incorporating the concepts from pages 6 and substituting them for the word "conduct" in 22A-201(c)(2) The definition would then read "Result element" means any consequence that must have been caused by a person's act or omission in order to establish liability for an offense." The advantage of this definition is that the terms "act" and "omission" are defined in 22A-202.

§ 22A-202, Conduct Requirement

On page 9, in paragraph (c) the term "Omission" is defined. It states ""Omission" means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists…" Neither the text of the proposed Code nor the Commentary explains what is meant by the term "culpably unaware." The Code should define this term, or at least, the Commentary should focus on this term and give examples of when a person is "culpably unaware" that a legal duty to act exists as opposed to merely being unaware that there is a legal duty to act.

In § 22A-202 (d) the term "Possession" is defined. Included in that definition is a requirement that the person exercise control over the property "for a period of time sufficient to allow the actor to terminate his or her control of the property." As noted in the Report, this is a departure from current District law. On page 15 of the Report it states "The latter temporal limitation dictates that a person who picks up a small plastic bag on the floor in a public space, notices that it contains drug residue, and then immediately disposes of it in a nearby trash can has not "possessed" the bag for purposes of the Revised Criminal Code…." What this definition of possession misses, or at least what the Commentary does not address, is that there are times when a person may be culpable for possession even in less time than it would take to "immediately dispose[] of it in a nearby trash." Consider the following hypothetical. Two people walk over to a person who is selling heroin. One of them hands the seller money in exchange for the drug. As soon as the transaction is completed, the other person, who is an undercover police officer, arrests both the buyer and the seller. In that case, though the buyer literally had possession of the heroin for a fraction of a second, there is no question that the buyer knew that he or she possessed illegal drugs and intended to do so. In this situation, there is

[2] Subparagraph (1) states that a "Conduct element" means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense."

no reason why there should be a temporal limitation on how long the heroin must have been in the buyer's possession before a law violation would have occurred.

§ 22A-203, Voluntariness Requirement

On page 20, the Report defines the scope of the voluntariness requirement. Subsection (b)(1) states that an act is voluntary if the "act was the product of conscious effort or determination" or was "otherwise subject to the person's control." Based on the associated Commentary, it seems to be designed to capture circumstances, such as intoxication or epilepsy, when someone with a condition that can cause dangerous involuntary acts knowingly enters circumstances in which that condition may endanger others. The theory seems to be that, for example, driving while intoxicated is "subject to [a] person's control" because the person can prevent it by not drinking and driving in the first instance. The same analysis applies to an accident that could arise due to an epileptic seizure. This makes sense; a person cannot willfully expose others to a risk at point X, and when the actual act that would constitute the offense takes place, insist that the act was not voluntary so that they cannot be held responsible for it. The question is whether there is some threshold of risk to trigger voluntariness here; otherwise, any involuntary act that was brought about in circumstances that were voluntarily chosen would be considered to be voluntary. Is this what was intended? If not, what is the threshold of risk that would "trigger" voluntariness here – and how would a court make that determination? Take the epilepsy example. Suppose a person knows that there is a .05% (or .005%) chance that he or she will experience an epileptic seizure if they don't take their medication, but drives that way anyway. If a crash occurs, will driving the vehicle have been enough to trigger the "otherwise subject to the person's control" prong of voluntariness or is it too remote? The Commentary should address this issue.

§ 22A-204, Causation Requirement

On page 29, the Report defines the "Causation Requirement." In paragraph (a) it states "No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result." Paragraphs (b) and (c) then define the terms "Factual cause" and "Legal cause." Section 22A-204 (b) states ""Factual cause" means:

> (1) The result would not have occurred but for the person's conduct; or
>
> (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result."

On pages 30 and 31, the Commentary addresses "Factual cause." It states:

> In the vast majority of cases, factual causation will be proven under § 22A-204(b)(1) by showing that the defendant was the logical, but-for cause of a result. The inquiry required by subsection 22A-204(b)(1) is essentially empirical, though also

> hypothetical: it asks what the world would have been like if the accused had not performed his or her conduct. In rare cases, however, where the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under § 22A-204(b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result. Although in this situation it cannot be said that but for the defendant's conduct the result in question would not have occurred, the fact that the defendant's conduct was by itself sufficient to cause the result provides a sufficient basis for treating the defendant's conduct as a factual cause.

While much of this explanation is intuitive, what may be more difficult for people to understand is how factual causation works when the result element is satisfied by a person's omission to act. Consider the following hypothetical. A father takes his toddler to the pool. He sees the child crawl to the deep end of the pool and fall in. The father sits there, doesn't move, and watches the child drown. In this situation it is awkward to think about the father's lack of movement as "performing" conduct, as opposed to doing nothing. The Commission should review whether there needs to be a third definition of "factual cause" that addresses acts of omission or whether merely an explanation and example in the Commentary about how to apply factual causation in cases of omission is sufficient. Clearly in this example, the father had a duty to perform the omitted act of saving his child. See § 22A-202 (c)(2).

§ 22A-206, Hierarchy of Culpable Mental States

On page 49, the Report defines the Hierarchy of Culpable Mental States. In paragraph (c) Recklessness is defined. It states

> RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:
>
> (1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result.
>
> (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.
>
> (3) In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.
>
> (4) In order to act recklessly as to a result or circumstance "under circumstances manifesting extreme indifference" to the interests protected by an offense, the

person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.[3]

While it is meaningful to say that recklessly means … "With respect to a result, being aware of a substantial risk that one's conduct will cause a result, it is not meaningful to say that recklessly means "In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation." The formulation of paragraphs (3) and (4) do not flow from the lead in language. It lacks symmetry. While it appears that paragraph (3) relates in a meaningful way to paragraph (1), as paragraph (4) relates in a meaningful way to paragraph (2), the text does not explain how each of these sets of definitions relate to each other internally. A tenant of a well written definition for use in a Code provision is that, niceties of grammar aside, the definition should be able to be substituted for the defined term in the substantive offense and the sentence should retain its meaning. One cannot do that with the definition of recklessness.[4] We propose that the definition of recklessness be redrafted so that the terms have more exacting meanings within the context of an offense. [5] One way to accomplish this is to redraft the definition as follows:

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

(1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result and that either the person's conduct *viewed as a whole* grossly deviates from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.[6]

[3] It is unclear why the term" under circumstances manifesting extreme indifference" is in quotes in paragraph 4.

[4] Similarly, it is unclear at this time whether the definition of "Factual Cause" in § 22A-204 suffers from the same infirmity. After seeing how this term is actually used in the revised Code it may need to be amended. At this time, the definition appears not to define "factual cause" as such, rather it appears to operate more like an if-then ("A person's is a factual cause of a result if the result would not have occurred without the conduct"). We will be able to evaluate this definition when we are able to take the phrase "the result would not have occurred but for the person's conduct" and substitute it for the term "factual cause" in the text of the Code. If the sentence has meaning than the definition works.

[5] The same issues concerning the definition of Recklessness exists in the definition of Negligence.

[6] In the proposed text we added, in italics the phrase "viewed as a whole." Italics was used to show that the phrase was not in the original Code text. This language is taken from the explanation of the gross deviation analysis on page 68 of the Report. Given the importance of this statement, we propose that it be added to the actual definition of Recklessness.

> (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists and that either the person's conduct *viewed as a whole* must grossly deviate from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

On page 58, in regard to § 22A-206(c)(3) it states "In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person's conduct constituted a "gross deviation" from a reasonable standard of care under § (c)(3). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in § 22A-206(c)(3) is intended to be guided by the following framework."[7] If this definition is to remain, the comment should be expanded to explain which part of (c)(3) the Commission believes is discretionary or otherwise explain this point. Paragraph (c)(3) does not contain the word "discretionary" nor does it use a term that would lead the reader to believe that any part of it could be discretionary.

Of perhaps greater concern is that the Commentary elucidates a precise three-factor test to determine whether something is a "gross deviation" but does not actually incorporate that test into the codified text. The Commission should consider whether a legal standard of that nature should be codified.

The definition of recklessness states that in order for someone to act recklessly, his or her conduct must "grossly deviate from the standard of care that a reasonable person would observe in the person's situation," and in order for that conduct to take place "under circumstances manifesting extreme indifference" to the interests protected by a particular offense, the conduct must be an "extreme deviation from the standard of care that a reasonable person would observe in the person's situation." The difference between "grossly deviating" and an "extreme deviation" is not clear, and the Report does not clarify it. On page 58 the Report states that "[t]he difference between enhanced recklessness [requiring extreme deviation] and normal recklessness [requiring gross deviation] is . . . one of degree." This does not sufficiently illuminate the distinction. Whether through additional explanations, examples, or a combination of the two, the Commentary should make clear the distinction between a gross deviation and an extreme deviation.

There is another aspect of the recklessness definition: being "aware of a substantial risk" which should be further explained. The Report maintains that "recklessness entails awareness of a

[7] While we suspect the word "discretionary" means not that a court can choose whether to apply it, but rather that its application in any particular case requires significant case-specific judgment, the Report does not actually say that.

risk's substantiality, but not its unjustifiability." The language, however, is not altogether clear in that respect. Being aware of a substantial risk doesn't necessarily mean being aware that the risk is substantial – the very same kind of ambiguity that inspired element analysis to begin with. Take the following hypothetical. Suppose a person drives down a little used street at 150 miles an hour at 3:00 am. In order to be considered reckless, does the person have to be aware that there is a substantial risk that he will hit and kill someone or that if he hits someone they will be killed.

§ 22A-207 Rules of Interpretation Applicable to Culpable Mental State Requirement

On page 73, in § 22A-207 (b)(2), the proposed text states one of two ways that the Council can indicate that an element is subject to strict liability. It states that a person is strictly liable for any result or circumstance in an offense "[t]o which legislative intent explicitly indicates strict liability applies." This language is subject to multiple interpretations. If the phrase "legislative intent " is meant to include indicia from legislative history, it's not clear what it means for the legislative history to "explicitly indicate" something (leaving aside the tension in the phrase "explicitly indicate"). Does this provision mean that if a committee report explicitly says "strict liability should apply to X," that's good enough? What if there are contrary statements at the hearing, by a witness or a councilmember? If, alternatively, the phrase was meant to simply mean "when another statutory provision can fairly be read to indicate that strict liability should apply" the language should be modified to refer to other statutory provisions explicitly indicating that strict liability applies, rather than the "legislative intent explicitly" so indicated.

In the Commentary following the Rules of Interpretation Applicable to Culpable Mental State Requirement there are a few examples that demonstrate how the "rule of distribution" works. We believe that two additional examples are needed to fully explain how it works in situations of strict liability.

The first example in the Commentary explains how to interpret "knowingly causing bodily injury to a child" and the second, in the footnote, contrasts that explanation with the explanation for how to interpret "knowingly causing injury to a person, negligent as to whether the person is a child. Given the rule that strict liability only applies to the element specified (and does not follow through to subsequent elements), we suggest that the Commentary add two additional examples. The first would be where there is a mental state provided for the first element, the second element is modified by the phrase "in fact", and where there is no mental state associated with the third element. The purpose of that example would be to show that the mental state associated with the first element would also apply to the third element. The second example would contrast the previous examples with one where there is a mental state stated for the first element, the second element is modified by the phrase "in fact", and the third element is also modified with the phrase "in fact."

The following examples could be used, "Knowingly causing injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation the mental state of "knowingly" would apply not only to the causing injury to a person, but would also apply to the circumstance of the knife. This illustration could be contrasted with "Knowingly causing injury to a person, who is, in fact, a child, with what is, in fact, a knife." We leave it to the Commission to decide where in the presentation of the Commentary it would be most informative to place these additional examples.

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 24, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Mistake, Deliberate Ignorance, and Intoxication

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 Commission's First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance.

On page 3, the Report discusses § 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance. We believe that the Commentary, if not the provision itself, should clarify the types of mistakes or ignorance of law, if any, to which this applies.[2] For example, it is our

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

[2] While the Commentary, at the top of page 5 of the Report does have a brief discussion concerning mistake of fact or non-penal law, we do not believe that that explanation is sufficient to address the issues raised here. Similarly while, footnote 20, on page 8, quotes LaFave that

understanding from the meetings that this provision does not mean that the government would have to prove that the defendant was aware that the act itself was illegal or the exact parameters of the prohibition. Two examples may be helpful. First, a person would be guilty of distribution of a controlled substance even if what the government proved was that the defendant thought that she was selling heroin, but she was really selling cocaine. Second, the government would not need to prove that a person knew that he was a mandatory reporter and that mandatory reporters must report child abuse in order to secure a conviction for failing to report child abuse.[3]

Section 22A-208 (b) is entitled "Correspondence between mistake and culpable mental state requirements. Subparagraph (3) states, "Recklessness. Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake." [Emphasis added] Subparagraph (4) states, "Negligence. Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake. " [Emphasis added] At the meeting the Commission staff explained why these two subparagraphs are not parallel and why the inclusion of the word "recklessly" logically follows from the rules of construction already agreed upon. To be parallel, subparagraph (b)(4) on "Negligence" would not include the phrase "recklessly or." If the Commission is going to keep this nonparallel structure then the Commentary should explain the reason why a reference to "recklessness' is included in the statement on "negligence." This is not a concept that may be intuitive to persons who will be called upon to litigate this matter.

§ 22A-209, Principles of Liability Governing Intoxication

On page 25, the Report discusses § 22A-209, Principles of Liability Governing Intoxication. Paragraph (b) is entitled "Correspondence between intoxication and culpable mental state requirements." The subparagraphs explain the relationship between a person's intoxication and the culpable mental states of purpose, knowledge, and recklessness. However, there is a forth mental state. Section 22A-205, Culpable mental state definitions, in addition to defining purpose, knowledge, and recklessness, also defines the culpable mental state of "negligently." [4] To avoid needless arguments in litigation over the relationship between intoxication and the culpable mental state of negligently, § 22A-209 should include a statement that explicitly states

"mistakes or ignorance as to a matter of penal law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the mens rea of an offense…" this provision is speaking in terms of the current law and not what the law would be if § 22A-208 were enacted. The Commentary should make it clear that no change in the law is intended.

[3] See D.C. Code §§ 4-1321.01 through 4-1321.07.

[4] On page 26 of the Report there is a statement that says, "Notably absent from these rules, however, is any reference to negligence, the existence of which generally cannot be negated by intoxication."

that a person's intoxication does not negate the culpable mental state of negligence. A litigator should not have to go to the Commentary to find the applicable law.
On page 28 of the report it states, "Subsections (a) and (b) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, while § (c) precludes exculpation based on self-induced intoxication for recklessness or negligence." However, § (c) is entitled "Imputation of recklessness for self-Induced intoxication." While referring to a person being "negligent" as a factor in determining if there should be imputation of recklessness for self-induced intoxication, that paragraph does not, as written, appear to actually preclude exculpation of negligence (probably because it is not needed for the reasons stated above). This portion of the Commentary should be rephrased.

Section 22A-209 was clearly drafted to explain the relationship between intoxication and culpable mental states in general and not when the offense itself includes the requirement that the government prove – as an element of the offense - that the person was intoxicated at the time that the offense was committed.[5] The Commentary should note this.

[5] For example, it would be an ineffectual offense statute that permitted a person's self-induced intoxication to negate the mental state necessary to prove driving while impaired (intoxicated).

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 24, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions [1]

COMMENTS ON THE DRAFT REPORT

§ 22A-102, Rules of Interpretation

On page 3, the Report discusses § 22A-102, Rules of Interpretation. Paragraph (a) states, "(a) GENERALLY. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary, the structure, purpose, and history of the provision also may be examined." [Emphasis added]. The provision does not state "necessary for what." The Commentary, does include the statement that "However, in addition to its plain meaning, a provision also may be interpreted based on its structure, purpose, and history when necessary to determine the legislative intent." To make the Code clearer, we suggest that the phrase "to determine the legislative intent" be added to the text of § 22A-102 (a). The amended provision would read "(a) GENERALLY. To interpret a statutory provision of this title, the

[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.

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."

§ 22A-102, Interaction of Title 22A with other District Laws

On page 7, the Report discusses § 22A-103, Interaction of Title 22A with civil provisions in other laws. Paragraph (b) states, "The provisions of this title do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action.". The Commentary says that this is intended to mean, for instance, that "the conviction or acquittal of a defendant for a crime will not affect subsequent civil litigation arising from the same incident, unless otherwise specified by law." [Emphasis added] We have two concerns about that statement, both of which suggest that the language needs to be clarified or changed. First, it is unclear if paragraph (b) means what the Commentary says that it does. Paragraph (b) says simply that the "provisions of this title" – i.e., the existence and interpretation of the criminal offenses listed in this title – does not alter any right or liability to damages. However, that statement is different from saying that being convicted of any one of those crimes will not alter someone's right or liability to damages. Despite the statement in the Commentary that "Relation to Current District Law. None," saying that conviction of a crime will not "affect" any civil action for the same conduct seems to be a significant change to existing law. Being convicted of a crime for certain conduct can collaterally estop someone, or otherwise prevent them from relitigating the issue of liability based on that same conduct. For example see *Ross v. Lawson*, 395 A.2d 54 (DC 1978) where the Court of Appeals held that having been convicted by a jury of assault with a dangerous weapon and that conviction having been affirmed on appeal, appellee, when sued in a civil action for damages resulting from that assault, could not relitigate the issue of liability for the assault. [2] So the Commentary is not correct when it says that "the conviction… will not affect subsequent litigation…" Unfortunately, the phrase in the Commentary that "unless otherwise specified by law" actually compounds the issue. The question then becomes whether the example, of *Ross,* falls under the "unless otherwise specified by law" statement in the Commentary. It is not clear whether the caveat is a reference to statutory law or common-law. An argument could be made that for common-law purposes, there is no impact because this is the result that the common-law actually requires.

[2] It is true, however, that an "acquittal" is less likely to have an impact on civil cases because the acquittal simply allows the conduct at issue to be re- litigated in a subsequent civil proceeding. But note that an "acquittal" or "dismissal for want of prosecution" is one key requirement for a malicious tort claim (plaintiff must show that he or she prevailed on the underlying claim – in this case a criminal matter—that was instituted in bad faith or for malicious purposes).

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: April 24, 2017

Re: Comments on First Draft of Report No. 3: Recommendations for Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 3. However, PDS has the following concerns and makes the following suggestions:

1. With respect to the Principles of Liability Governing Accident, Mistake, and Ignorance -- Although the Report explains that mistake and accident are not defenses but are "conditions that preclude the government from meeting its burden of proof" with respect to a mental state,[1] the proposed statutory language at §22A-208 does not make that point clear. This is particularly important because, in the view of PDS, judges and practitioners too often incorrectly (whether mistakenly or accidentally) view "accident" or "mistake" as "defenses," creating a serious risk of burden shifting, a risk, as the Report notes, the DCCA has warned against.

   PDS proposes adding language to subsection (a) of § 22A-208 that states plainly that accident and mistake are not defenses and that is explicit with regard to how accident and mistake relate to the *government's* burden of proof. Specifically, PDS proposes changing §22A-208(a) to read as follows:

[1] "Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect to an offense's culpability requirement. In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims." First Draft of Report No. 3, March 13, 2017, at page 7. (footnotes omitted)

> Effect of Accident, Mistake, and Ignorance on Liability. A person is not liable for an offense when that person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense. Accident, mistake and ignorance are not defenses. Rather, accident, mistake, and ignorance are conditions that may preclude the government from establishing liability.

This proposal exposes another problem however. While the above proposal refers to the government establishing liability, the Revised Criminal Code General Provisions are silent with respect to the government having such burden. Indeed, all of the proposed General Provisions are written in the passive voice. There is no clear statement that the government bears the burden of proving each element beyond a reasonable doubt. Certainly the constitutional principle is itself beyond any doubt and therefore including it in the Code might seem superfluous. The problem is that a statute explaining the effect of mistake or accident on liability, without a statement about who bears the burden of proving liability, allows confusion about whether it is the government or the defense that has the burden of proof with the (mistakenly termed) "mistake and accident *defenses*."

PDS further notes that the General Provisions frequently speak in terms of a person's "liability." For example -- § 22A-201(b): "'Offense element' includes the objective elements and culpability requirement necessary to establish *liability*;" §22A-203(b)(1): "Where a person's act provides the basis for *liability*, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort…;" §22A-204(c): "'Legal cause' means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's *liability*." However, the most important subsection in the General Provision Chapter, §22A-201(a), Proof of Offense Elements Beyond a Reasonable Doubt, speaks only in terms of *convicting* a person and not at all in terms of the person's *liability*. Thus, PDS strongly believes the General Provisions generally should make more explicit the connection between the proof beyond a reasonable doubt requirement and a person's liability for an offense. Therefore, PDS proposes the following change to §22A-201(a):

> Proof of Offense Elements Beyond a Reasonable Doubt. No person may be convicted of an offense unless the government establishes the person's liability by proving each offense element ~~is proven~~ beyond a reasonable doubt.

The above proposed statement that the government bears the burden of establishing the person's liability now provides an express link for PDS's proposed language that accident, mistake and ignorance may preclude the government from establishing that liability. Together, these proposals should correct the too common misconception that mistake and accident are "defenses" and will prevent the unconstitutional burden shifting that can result from such misconception.

2. With respect to the Imputation of Knowledge for Deliberate Ignorance, at §22A-208(c) – PDS proposes a higher threshold before knowledge can be imputed to a person. Specifically, PDS proposes the following change to §22A-208(c):

> When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if: …
>
> (1) The person was reckless as to whether the circumstance existed; and
>
> (2) The person avoided confirming or failed to investigate whether the circumstance existed with the primary purpose of avoiding criminal liability.

The central problem, and PDS's main concern, with the willful indifference doctrine is that it permits culpability under a diluted *mens rea* standard. The willful indifference doctrine will allow convictions for offenses where knowledge of a circumstance is required when the person, in fact, did not have knowledge of the particular circumstance or when the government fails to prove that the person had the required knowledge. If the Revised Criminal Code is going to allow a backdoor for the government to use to convict someone for a crime serious enough that its *mens rea* is knowledge, then the backdoor should be difficult to open. Or more formally phrased, the Revised Criminal Code should distinguish between willfully blind actors who are more like knowing actors from those who are merely negligent or reckless. *See* Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness, 121 Harv. L. Rev. 1245, 1248-49 (2008).

It is PDS's position that the language in First Draft of Report No. 3 for §22A-208(c) creates a backdoor that is too easy for the government to open; it so dilutes the knowledge requirement that it is barely a shade more onerous than requiring proof of mere recklessness. The lock on the backdoor, as it were, has two parts that work together – sub-subsections (1) and (2) of §22A-208(c). Focusing on the first part, the required level of circumstance-awareness the person must have, PDS proposed for discussion at the April 5, 2017 meeting of the Advisory Group that the appropriate standard, instead of the reckless standard, should be the "high probability" standard used in the Model Penal Code at § 2.02(7); that is, our Code would read "the person was aware of a high probability that the circumstance existed." As was noted at that meeting and more fully explained in the Commission's Report No. 2: Basic Requirements of Offense Liability, the

difference between awareness to a practical certainty (the Revised Criminal Code proposed language) and awareness of a high probability (MPC's willful blindness language) might be so narrow that the distinction is not worth recognizing.[2] PDS acknowledges that if the Revised Criminal Code is to have a deliberate ignorance provision at all, then it cannot be worded so as to require the same level of awareness as that required for knowledge.

If PDS is agreeing not to create a new level of awareness that would be less than knowledge but more than recklessness, then the strength of the "lock on the backdoor" must come from the second part. That is, if to satisfy the knowledge requirement, the government need only prove the reckless-level of awareness of the circumstance, then the purpose the person had for avoiding confirming the existence of the circumstance has to be a stringent enough test that it significantly distinguishes the deliberate avoider from the merely reckless person. Therefore, PDS proposes that to hold the person liable, the person must have avoided confirming the circumstance or failed to investigate whether the circumstance existed with the *primary* purpose of avoiding criminal liability. A primary purpose test embeds a *mens rea* element in that in order to have a primary purpose of avoiding criminal liability, a person must have had something approaching knowledge that the circumstance existed. Adding the requirement that avoiding liability was the person's primary purpose sufficiently separates the more culpable from those who were merely negligent or reckless.

3. With respect to § 22A-209, Principles of Liability Governing Intoxication – PDS recommends stating the correspondence between intoxication and negligence. The correspondence for this culpable mental state may be obvious or self-evident, but explaining the correspondence between three of the culpable mental state requirements and failing to explain the last comes across as a negligent (or even reckless) omission. PDS recommends the following language:

> (4) *Negligence*. A person's intoxication negates the existence of the culpable mental state of negligence applicable to a result or circumstance when, due to the person's intoxicated state, that person failed to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists, and the person's intoxication was not self-induced.

4. With respect to §22A-209(c), Imputation of Recklessness for Self-Induced Intoxication, PDS strongly recommends defining the term "self-induced intoxication." The imputation of recklessness for self-induced intoxication turns on whether the intoxication is self-induced. The outcome of some cases, perhaps of many cases, will depend entirely on whether the defendant's intoxication was "self-induced." The term will have to be defined; the only question is who should define it. While perhaps only a few of the modern recodifications have codified such

[2] First Draft of Report No. 2, dated December 21, 2016 at page 57.

general definitions and those that have codified intoxication definitions have drafted flawed ones,[3] the Commission cannot duck its responsibility to recommend the District's legislature proscribe criminal laws and define the terms used. The purpose of modernizing the District's Code is to reduce significantly the need for courts to create law by interpretation.

PDS recommends a definition that is based on the Model Penal Code definition at § 2.08. PDS's proposed definition differs from that of the Model Penal Code in how it treats substances that are introduced into the body pursuant to medical advice. PDS would agree to differentiate between individuals who abuse prescription drugs in order to induce intoxication and individuals who suffer unforeseen intoxicating consequences from prescribed medication. PDS does not disagree with treating the former as "self-induced intoxication," even if the substance was originally prescribed for a legitimate medical purpose. The latter, however, is <u>not</u> self-induced.

Specifically, PDS recommends the following definition:

> <u>"Self-induced intoxication" means intoxication caused by substances the person knowingly introduces into the body, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces the substances under such circumstances as would afford a defense to a charge of crime. Intoxication is not "self-induced" if it occurs as an unforeseen result of medication taken pursuant to medical advice.</u>

[3] First Draft of Report No. 3, March 13, 2017, at page 40.

Comments of U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations for Chapter 2 (Mistake, Deliberate Ignorance, and Intoxication) (1st Draft of Report No. 3) and for Chapter 1 (Preliminary Provisions) (1st Draft of Report No. 4) Submitted April 24, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

COMMENTS ON RECOMMENDATIONS FOR CHAPTER 2 (MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION) (First Draft of Report No. 3)

- Section 22A-208: PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE

  - In discussing the imputation of knowledge for deliberate ignorance (at 3), the Report states that the required culpable mental state is established if, among other things, "[t]he person avoided confirming or failed to investigate whether the circumstance exited with **the purpose of avoiding criminal liability**" (emphasis added).

  - This phrase could be misinterpreted as to require proof that a defendant knew that his/her actions would be against the law. In fact, what is relevant is a defendant's awareness of the circumstances, not the legality of his/her actions in that circumstance.

  - This language should be revised so that "criminal liability" is replaced with "knowledge of whether the circumstance existed." Thus, prong (2) would read: The person avoided confirming or failed to investigate whether the circumstance exited with the purpose of avoiding knowledge of whether the circumstance existed."

  - This revised language also would avoid the problem identified in the Commentary (at 23); that is, for example, the incurious defendant.

- Section 22A-209: PRINCIPLES OF LIABILITY GOVERNING INTOXICATION (at 25-40)

    - As footnote 27 indicates (at 29), for certain non-conforming offenses (*i.e.*, "those offenses that the [D.C. Court of Appeals] has classified as "general intent" crimes, yet has also interpreted to require proof of one or more purpose of knowledge-like mental states"), the Commission, staff, and Advisory Group will need to re-visit this principle as substantive offenses are addressed.

COMMENTS ON RECOMMENDATIONS FOR CHAPTER 1 OF THE REVISED CRIMINAL CODE: PRELIMINARY PROVISIONS (First Draft of Report No. 4)

- § 22A-102: RULES OF INTERPRETATION

  - Rule of Lenity

    The current language proposed (at 3) allows for an arguably broader application of the rule of lenity than under current D.C. Court of Appeals case law. USAO-DC proposes rephrasing as follows: "If ~~two or more reasonable interpretations~~ the meaning of a statutory provision remains genuinely in doubt after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies." *See United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997).

  - Effect of Headings and Captions

    - The draft commentary regarding Section 102(c) is incorrect in saying (at 7) that "There appears to be no case law in in the District assessing the significance of headings and captions for interpreting criminal statutes." In fact, the proposed language reflects the current practice of the D.C. Court of Appeals, , i.e., the D.C. Court of Appeals is willing to look at titles, captions, and headings, but the Court of Appeals recognizes that they may not always be illuminating. S*ee In re: J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) (interpreting the offense captioned "possession of implements of crime").

    - Also, the commentary text that precedes footnote 36 is misleading in suggesting that the proposed language is consistent with national trends. Specifically, the commentary is imprecise in saying that several jurisdictions have provisions "describing the relevance" of captions and headings. In fact, all of the jurisdictions cited in footnote 36 (Illinois, New Jersey, and Washington) expressly prohibit reliance on headings, as does South Carolina. *See* S.C. Stat. § 2-13-175 ("Catch line heading or caption not part of Code section."). And although the commentary notes that "two recent code reform efforts have adopted a similar provision," those reform efforts were not adopted, and instead both jurisdictions at issue expressly prohibit reliance upon captions or headings (*i.e.,* Illinois, (discussed *supra*) and Delaware (*see* 1 Del. C. § 306 ("titles, parts, chapters, subchapters and sections of this Code, and the descriptive headings or catchlines . . . do not constitute part of the law. All derivation and other notes set out in this Code are given for the purpose of

convenient reference, and do not constitute part of the law"). Thus, it appears that no jurisdiction has enacted a provision authorizing reliance on titles, captions, and headings.

- If the goal is to be consistent with current case law, USAO-DC proposes that Section 102(c) be revised as follows: EFFECT OF HEADINGS AND CAPTIONS. Headings and captions that appear at the beginning of chapters, subchapters, sections, and subsections of this title, may aid the interpretation of otherwise ambiguous statutory language. *See Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) ("The significance of the title of the statute should not be exaggerated. The Supreme Court has stated that the title is of use in interpreting a statute only if it "shed[s] light on some ambiguous word or phrase in the statute itself." *Carter v. United States*, 530 U.S. 255, 267, 120 S. Ct. 2159, 147 L.Ed.2d 203 (2000). It "cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998), although it may be a "useful aid in resolving an ambiguity" in the statutory language. 359 U.S. 385, 388–89, 79 S. Ct. 818, 3 L.Ed.2d 893 (1959). We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas*, 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.").

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: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

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 Commission's Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-206, Hierarchy of Culpable Mental States

On page 3, the Report defines the Hierarchy of Culpable Mental States. It states:

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires that one's conduct cause the result.

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

(2) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE & INTENT DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that one's conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(3) A person acts intentionally with respect to a result when that person believes that one's conduct is practically certain to cause the result.

(4) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

Paragraphs (a)(1), (b)(1), and (b)(3) use the same sentence construction and word choice. We believe that a slight non-substantive change to each would make these sentences clearer. They each start with "A person" then refer to "that person" and then discuss "one's" conduct. By changing the word "one's" to "his or her" there would be no question that it is the same person whose mental state and conduct is being considered.[2]

To be consistent with paragraph (a) of the proposed code, and the rest of the first paragraph of the commentary, the last sentence of the first paragraph of the commentary should also be changed. The sentence currently reads,, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the actor that it is at least possible that the person's conduct will cause the requisite result or that the circumstance exists." The rest of that paragraph refers to the "person" and not the "actor." To make the commentary more clear and consistent this sentence should be modified to say, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the person that it is at least possible that his or her conduct will cause the requisite result or that the circumstance exists."

On page 4, of the Report the commentary discusses inchoate liability. While footnote 2 appropriately gives examples of hypothetical offenses, there is no footnote that shows the difference in proof if these offenses used the phrase "with intent" rather than "with knowledge." To better explain these concepts the commentary should have another footnote. That footnote

[2] For example, Section 22A-206 (a)(1) would read, "A person acts purposely with respect to a result when that person consciously desires that his or her conduct causes the result."

should contain the same hypothetical offenses as footnote 2, but with the substitution of "with intent" for "with knowledge."[3]

[3] For example, "A hypothetical receipt of stolen property offense phrased in terms of possessing property "with intent that it is stolen" suggests that the property need not have actually been stolen."

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: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties.

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties. (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-801, Offense Classifications

On pages 3 and 4, the Report proposes offense classifications and defines the terms "felony" and "misdemeanor."

Paragraph (b) (1) states "'Felony' means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death ." We assume that by the inclusion of the phrase "or, in other jurisdictions, death" that the term "felony" will be used to define both

[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.

in jurisdiction and out of state conduct. To avoid any confusion, we suggest that the language be redrafted as follows:

> "Felony" means any offense punishable:
> (A) By an authorized term of imprisonment that is more than one (1) year; or
> (B) By death, in the case of a felony from a jurisdiction that permits capital punishment.

In addition, under current District law, there is one use of the word "felony" that does not comply with the definition in the proposal and which must be retained in the Revised Criminal Code. D.C. Official Code § 16-1022 establishes the offence of parental kidnapping. Section 22A-801 must be amended to account for offense.

Under certain circumstances the penalty for parental kidnapping is defined as a felony even though the maximum penalty is one year or less. D.C. Code § 16-1024 (b) states:

> **(b)** A person who violates any provision of § 16-1022 and who takes the child to a place outside the District or detains or conceals the child outside the District shall be punished as follows:
>
> **(1)** If the child is out of the custody of the lawful custodian for not more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not more than the amount set forth in [§ 22-3571.01] or imprisonment for 6 months, or both…
>
> **(2)** If the child is out of the custody of the lawful custodian for more than 30 days, the person is guilty of a felony and on conviction is subject to a fine of not more than the amount set forth in [§ 22-3571.01] or imprisonment for 1 year, or both …

The reason why these penalties are defined as "felonies" is so that persons who are charged with parental kidnapping may be extradited. See D.C. Code 23-563.[2] To allow for parental kidnapping to be designated a felony, and for any other situations where the Council may want to create a felony offense that has a penalty of one year or less or a misdemeanor offense of more than a year, 22A-801 (a) should be amended to say "Unless otherwise provided by statute."

[2]D.C. Official Code § 23-563 states:

> **(a)** A warrant or summons for a felony under sections 16-1022 and 16-1024 or an offense punishable by imprisonment for more than one year issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.
>
> **(b)** A warrant or summons issued by the Superior Court of the District of Columbia for an offense punishable by imprisonment for not more than one year, or by a fine only, or by such imprisonment and a fine, may be served in any place in the District of Columbia but may not be executed more than one year after the date of issuance…. [emphasis added]

Similar language should be added to the definitions of "Felony" and "Misdemeanor" found in 22A-801 (a) and (b).[3]

§ 22A-803, Authorized Terms of Imprisonment

Section 22A-803 (a) establishes the definitions for the various classes of felonies and misdemeanors. Paragraph (a) begins by saying that "… the maximum term of imprisonment authorized for an offense is ..." Except for a Class A felony, the definitions for all of the felony and misdemeanor offenses include the phrase "not more than..." The use of the term "not more than" appears redundant following that introductory language. For example, compare "the maximum term of imprisonment authorize for an offense is... for a Class 2 felony forty-five (45) years" with "the maximum term of imprisonment authorize for an offense is... for a Class 2 felony, not more than forty-five (45) years".[4]

In the commentary, in the last paragraph on page 8 of the Report, it states "Under Supreme Court precedent, offenses involving penalties of six months or more are subject to a Sixth Amendment right to jury trial…" We believe that this is a typo and that the phrase should say "Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth Amendment right to jury trial…" [emphasis added][5]

RCC § 22A-804. AUTHORIZED FINES.

Section 22A-804 (c) establishes an alternative maximum fine based on pecuniary loss to the victim or gain to the defendant. This provision states:

> (c) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:
>
> (1) not more than twice the pecuniary loss,
>
> (2) not more than twice the pecuniary gain, or

[3] Additionally, for the sake of clarity, the language "except as otherwise provided by statute" should also be added to the beginning of the paragraph that lists the penalty for "attempts." See § 22A-803 (b).

[4] The repeated use of term "not more than" pertaining to fines in § 22A-804 appears also to be redundant.

[5] See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) and Lewis v. *United States*, 518 U.S. 322 (1996).

(3) not more than the economic sanction in subsection (a) that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.

OAG recommends that the sentence "The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt" be modified and made into its own paragraph. In addition, OAG suggests changing the paragraph structure and language in the subparagraphs from "not more than" to "Up to" to make the paragraph clearer. Paragraph (c) should be amended to read:

(c) (1) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

(A) Up to twice the pecuniary loss;

(B) Up to twice the pecuniary gain; or

(C) Up to the economic sanction in subsection (a) that the defendant is otherwise subject to.[6]

(2) If the pecuniary loss or pecuniary gain exceeds the amount of fine authorized by subsection (a), the amount of gain or loss must be alleged in the indictment and proved beyond a reasonable doubt.

By rewording and breaking out new paragraph (c)(2) from former paragraph (c)(3) it is clear that the government only has to allege gain or loss in an indictment and prove the amount beyond a reasonable amount when it seeks an alternative maximum fine and not merely when the government wants to justify the court's imposition of a fine based on pecuniary loss or gain which is less than or equal to the statutory amount in subsection (a). This rewording makes it clear that it is only when the alternative maximum fine is sought that the government should have to allege and prove the amount of gain or loss.

OAG recommends that the Commission consider two substantive changes to § 22A-804 (d). This paragraph addresses the alternative maximum fine for organizational defendants. Paragraph (d) states, "Subject to the limits on maximum fine penalties in subsection (b) of this section, if an

[6] As there are three choices, we recommend that the word "greater" be replaced with the word "greatest." This would clarify what the court's options are if both the pecuniary loss and pecuniary gain are greater than the sanction in subsection (a), but are of unequal amounts. Under our proposed change it would be clear that the court could impose the largest sanction (not merely the greater of one of the sanctions and subsection (a)).

organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section."[7] First, there is no reason why the misdemeanor portion of this paragraph should be limited to Class A misdemeanors. Organizational defendants are frequently motivated by financial gain when committing offenses and a court should be able to set a fine that acts as a deterrent to such conduct. As the Council wrote in the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012,

> The reason for imposing an unusually high fine is appropriate for certain offenses in the interest of deterring violations. Of the listed offenses many were designed to deter corporate entities from engaging in prohibited conduct… While the penalty provisions may have low imprisonment terms, the larger fine currently associated with the provision is deemed important to deterring the specified conduct. In addition, organizational defendants are subject to section 1002(b) of the legislation – which effectively doubles any fine amount authorized under the law.[8]

The court should be authorized, in appropriate circumstance, to double the fine when an organizational defendant is convicted of any misdemeanor offense – not just a Class A misdemeanor.

Second, § 22A-804 (d) limits the court's ability to "double the applicable amount under subsection (a) of this section." This paragraph does not address the courts authority to double fines for organizational defendants when the underlining fine is established in the individual offense, as an exception to the standard fine.[9] Section 22A-804 (d) should be amended to add that "… a court may fine the organizational defendant not more than double the applicable amount under subsection(a) of this section or twice the maximum specified in the law setting forth the penalty for the offense." [Proposed language underlined]

[7] OAG recognizes that this paragraph is substantially based on D.C. Official Code § 22-3571.01(c).
[8] See Section 1102 on page 15 of the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012. Section 22A-804 (d) is based upon §1002(b) of Bill 19-214
[9] The Criminal Fine Proportionality Amendment Act of 2012 exempts numerous offenses that carry higher fines than those established in the Act.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	June 16, 2017
Re:	Comments on First Draft of Report No. 5: Recommendations for Chapter 8 of the Revised Criminal Code: Offense Classes & Penalties

PDS understands that the proposed classification system and the corresponding penalties are preliminary and subject to significant revision during the final phrase of the Commission's work. Despite the preliminary nature of the proposals in Report No. 5, PDS has two grave concerns it requests the Commission consider at this time.

1. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the felony classes – PDS disagrees with the Commission's approach of aligning its proposed felony classes and corresponding maximum imprisonment terms with current District sentencing norms. PDS believes that criminal code reform is an opportunity to rationally recalibrate our criminal justice system to reflect evidence-based research about public safety and crime. To start, PDS recommends the Commission eliminate the excessive sentence of life without release and all sentences above 20 years of incarceration. Sentences of life without release, particularly where there is no "second look" provision or parole eligibility, are not supported by evidence about dangerousness of the offender and are inhumane. The association between age and general criminal behavior is well established: most crimes are committed by young people and older adults have low rates of recidivism.[1] For instance, the Justice Policy Institute reported on the release of a large number of people, mostly age 60 and up who had been convicted of homicides in Maryland but released due to an appellate ruling. As of March 2016, of the more than 100

[1] See Alfred Blumstein, Jacqueline Cohen, and P. Hsieh, *The Duration of Adult Criminal Careers*, (1982).

people who had been released, none had been convicted of a new felony offense.[2] Over the past decade, New Jersey, New York, and Michigan reduced their prison populations by a range of 20 percent through front end reforms such as decreasing sentence length and through back end reforms in their parole systems. No adverse impacts on public safety were observed in these states.[3]

The Commission, and ultimately the Council, should also consider the fiscal impact of constructing such an expensive sentencing system. Because persons convicted of felony offenses and sentenced to prison are in the legal custody of the Bureau of Prisons,[4] the fiscal impact statements that accompany legislation creating felonies or changing felony penalties have not had to assess the costs of incarceration. When the Council promulgates new felony offenses, sets mandatory minimum prison sentences or increases the maximum term of imprisonment possible for a felony offense, it need never ask itself what the additional prison time will cost the District taxpayer. Many states are considering sentence reform because of budget deficits and the cost of prison overcrowding due to long sentences.[5] The National Conference of State Legislatures estimated that the taxpayers paid approximately $24 billion dollars to incarcerate persons convicted of something other than a non-violent offense; that estimate excludes spending on county and city jails and the federal corrections budget.[6] Given the tremendous support in the District for statehood,[7] and repeated calls for more local control over prosecutions and of the District's criminal justice system, the Commission, and ultimately the Council, should be mindful about building a sentencing system it would never be able to afford. Criminal code reform presents an ideal opportunity to weigh the high cost of long prison sentences against the little to no benefit in terms of increased public safety and propose the general reduction of

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[2] *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence*, ("Defining Violence") Justice Policy Institute, August 2016. http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf.

[3] Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, The Sentencing Project (2010).

[4] D.C. Code § 24-101.

[5] See e.g., "Skyrocketing prison costs have states targeting recidivism, sentencing practices." https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/19/skyrocketing-prison-costs-have-states-targeting-recidivism-sentencing-practices/?utm_term=.a13e38050348; "Fiscal and prison overcrowding crises could lead to Three-Strikes reform." http://www.mercurynews.com/2011/07/22/fiscal-and-prison-overcrowding-crises-could-lead-to-three-strikes-reform/.

[6] *Defining Violence* at page 20.

[7] "District voters overwhelmingly approve referendum to make D.C. the 51st state." https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04_story.html?utm_term=.5234e8fc29f3.

maximum terms of imprisonment for felonies and the elimination of the life without possibility of release penalty.

In further support of reducing the prison terms proposed for the felony classes in Report No. 5, PDS focuses on and strongly objects to the proposed 45-year term of imprisonment for the Class 2 felony. A 45-year term penultimate penalty is significantly more severe than the 20-year maximum recommended by the American Law Institute and than the 30-year maximum recommended in the Proposed Federal Criminal Code. Further, the 45-year penalty is not justified by the data included in Memorandum #9, which supplements Report No. 5.

According to Figure 1, there are nine criminal offenses in Title 22 that have a maximum penalty of 30 years imprisonment. This grouping of offenses would correspond with the proposed Class 3 felony and its recommended 30-year maximum. There are six offenses that have a maximum penalty of life without possibility of release (LWOR). This grouping corresponds with the proposed Class 1 felony. Between the 30-year maximum grouping of offenses and the LWOR maximum grouping in the D.C. Code, Figure 1 shows that there is one offense with a maximum penalty of 40 years (which I assume is armed carjacking) and one offense with a maximum penalty of 60 years (which I assume is first-degree murder).

Figure 3 is a little more complicated in that it compares the Sentencing Guidelines groups and the proposed felony classifications; the correspondence between the two is a little tricky. Category 3 on Figure 3 compares the maximum proposed penalty for Class 3 (30 years or 360 months) and the top of the box for the Master Grid Group 3 for column A and for column D. Figure 3 indicates that a maximum of 360 months for Class 3 felony offenses would more than adequately accommodates the top of the box for Column A, 180 months, and Column D, 216 months. PDS recommends lowering the penalty proposed for Class 3 to significantly less than 30 years. Category 2 in Figure 3 compares the 45-year (540 months) penalty proposed for Class 2 felony to the Master Grid Group 2 for column A and column D. Again, Figure 3 indicates that a maximum of 45 years for Class 2 felony offenses is significantly higher than top of the box for Column A, 288 months (24 years), and Column D, 324 months (27 years). PDS acknowledges that the maximum prison term for the class should be higher than the top of the box in Column D, for example to allow for aggravating circumstances of the particular incident. A maximum penalty of 45 years, however, allows for an excessive 18 years “cushion” above the top of the box for Master Grid group 2, column D. Category 1 in Figure 3 corresponds to Master Group 1, the group into which first-degree murder is ranked. Thus the one offense with a statutory maximum of 60 years (720 months), as shown on Figure 1, is the main offense (and variations of it) in Master Group 1 and the maximum penalty is 720 months for column A and column D.

Figure 4 is perhaps more helpful for recognizing the proposed penalty for Class 2 felony should be much lower than 45 years, even if that class were reserved for the most serious offense in the

Code. Figure 4 in Memo #9 shows that the average sentence and the mean sentence for Category 1 (meaning the average sentence for murder I) are both 30 years, both well below the 45-year penalty proposed for Class 2 felony. Category 2 on Figure 4 compares the 45-year (540 months) proposed for Class 2 felony to the average and mean sentences for Master Grid Group 2 offenses and also demonstrates that the 45-year penalty proposed for Class 2 could be greatly reduced and still well accommodate current sentencing practice for those offenses. The average sentence for that category is 225 months (18 years, 9 months) and the mean sentence is 228 months (19 years), lower than the proposed 45-year maximum by 26 years, 3 months and 26 years respectively.

While PDS focuses here on the maximum imprisonment terms proposed for the three most serious classes for RCC §22A-803, all of the penalties should be examined in light of the sentencing practices but also in light of evidence-based research on public safety and of the potential fiscal impact of incarceration.

2. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the Class B misdemeanor penalty – The Commission proposes in Report No. 5 to eliminate the 6-month prison term as the penultimate penalty for misdemeanor offenses and instead to have the 180-day prison term as the penultimate misdemeanor penalty.[8] The 180-day/6-month distinction is important because, as the Report notes, D.C. Code §16-705 requires a jury trial as compelled by the Constitution[9] or if the offense is punishable by imprisonment for *more than 180 days*.[10] Six months is longer than 180 days;[11] therefore offenses with a penalty of 6 months imprisonment are jury demandable; those with a penalty of 180 days are not. PDS would prefer that the maximum penalty for Class B be set at 6 months. PDS acknowledges that, under current law, a 6-month penalty would make every offense assigned to that class jury-demandable and that flexibility around this misdemeanor mid-point might have merit. Thus, to provide for such flexibility, PDS would not object to Class B having a maximum penalty of 180 days **IF** there were also a statutory provision that stated offenses categorized in Class B were jury demandable unless otherwise provided by law. Report No. 5 proposes the opposite default rule – that Class B misdemeanors would be non-jury demandable unless there were a plain statement in the offense definition that the offense was to be jury demandable. Because "trial by jury in criminal cases is fundamental to the American scheme of justice,"[12] the default should be that Class B misdemeanors are jury demandable unless there is a plain statement in the offense definition that the offense is not jury demandable.

[8] The ultimate term of imprisonment penalty for a misdemeanor is one year.

[9] D.C. Code § 16-705(a).

[10] D.C. Code § 16-705(b)(1).

[11] *Turner v. Bayly*, 673 A.2d 596, 602 (D.C. 1996).

[12] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Trial by jury is critical to fair trials for defendants. "The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta…. The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." [13]

Requiring jury trials is not only a acknowledgement of the core principle of American justice that a defendant should be tried by a jury of his or her peers, it also recognizes the importance to the community of serving as jurors. As the Supreme Court noted in *Batson v. Kentucky*, "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try…. [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."[14] Constructing a system that by default precludes jury trials harms not only the defendant but the community as a whole. The ability of District residents to participate in civic life is already curtailed compared to residents of States; the Commission should not restrict that participation further by default.

When the Commission engages in the work of adjusting penalties and gradation of offenses to provide for proportionate penalties[15] and when the D.C. Council promulgates new misdemeanors, they should have to explicitly decide to deprive the defendant and the community of a jury trial and they should have to publicly declare they made that decision, not hide behind a default rule buried in a penalty classification system.

[13] *Id*. at 151, 156.

[14] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

[15] D.C. Code § 3-152(a)(6).

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: July 17, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements

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 Commission's First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-805, Limitations on Penalty Enhancements

Section 22A-805 (a) uses the word "equivalent" but does not define it. Because it is defined in a later section the use of the word here is confusing, if not misleading.

Section 22A-805 (a) states:

> PENALTY ENHANCEMENTS NOT APPLICABLE TO OFFENSES WITH EQUIVALENT ELEMENTS. Notwithstanding any other provision of law, an offense is not subject to a

[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.

penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

In giving definitions to undefined Code terms the Court of Appeals has looked to definitions found in Code provisions that were enacted at a different time for a different purpose. See *Nixon v. United States*, 730 A.2d 145 (D.C. 1999), where the Court applied the definition of "serious bodily injury" found in a sex offense statute to the offense of aggravated assault. Because the very next section after § 22A-805 contains a definition for the word "equivalent" it is possible that, notwithstanding the limiting language in § 22A-806 (f)(2)[2], the Court of Appeals may look to that enacted definition when determining the meaning of the earlier use of the word "equivalent" in § 22A-805 (a). Clearly this is not what the Commission intends. To avoid any confusion about what the word means, to avoid making the Court of Appeals define the term, and to avoid unnecessary litigation, OAG suggests that the word "equivalent" be defined in § 22A-805 (a), a different word be used in § 22A-805 (a), or a definition be drafted that can be used in both sections.

Section 22A-805 (a) also uses the word "gradations." This word is also not defined. OAG suggests that the sentence be rewritten so that the word "gradations" is replaced by a term that includes "lesser included offenses."[3]

On page 4 of the Report there is a discussion of the holding in *Bigelow v. United States,* 498 A.2d 210 (D.C. 1985), and its application after the enactment of § 22A-805. The discussion initially leads the reader to believe that multiple repeat offender provisions would continue to apply when the dictates of *Lagon v. United Sta*tes, 442 A.2d 166, 169 (D.C. 1982), have been met. The paragraph then concludes with the statement "However, insofar as RCC § 22A-805 is intended to reduce unnecessary overlap in statutes, courts may construe the term "equivalent" in RCC § 22A-805 more broadly than under current law." It is OAG's position that this determination not be left to the courts to resolve. Rather, the Commission should unequivocally state that the holding in *Bigelow* would apply after enactment of these provisions.

§ 22A-806, Repeat Offender Penalty Enhancements

On page 8 of the Report the term "Prior Convictions" is defined. Section 22A-806 (f)(5)(i) states, "Convictions for two or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction…" However, the proposed language does not clarify what is meant by the word "occasion." Unfortunately, the addition of the phrase "during the same course of conduct" does not clarify it. Take, for example, the following scenario. An in-home worker who visits an elderly patient once a week is convicted for stealing from the victim. Afterwards, the government learns that the in-home worker actually started working for the patient at an earlier time and also stole from the patient during that

[2] Section 22A-806 (f)(2) states "For the purposes of this section, 'equivalent' means a criminal offense with elements that would necessarily prove the elements of the District criminal offense."

[3] For example, § 22A-805 (a) could be rewritten to say "Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense ~~contains an~~ or any of its lesser included offenses contains an element ~~in one of its gradations~~ which is equivalent to the penalty enhancement. "

previous time period. Would a second conviction of the in-home worker be the subject of an enhancement under § 22A-806 (f)(5)(i) or would it be considered "the same course of conduct"? Either the proposed code provision or the Commentary should address this issue. To the extent that there is current case law on this issue, it should be fleshed out in the Commentary.

In § 22A-806 (f)(5)(iv) it states "A conviction for which a person has been pardoned shall not be counted as a conviction. OAG suggests that this exception be expanded to include convictions that have been sealed by a court on grounds of actual innocence.

§ 22A-807, Hate Crime Penalty Enhancement

On page 17 of the Report the Hate Crime Penalty Enhancement is explained. Section 22A-807 (a) states:

> A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person's perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation. [Emphasis added]

Though not expounded upon in the Commentary, this penalty enhancement has narrower application than the current bias-related crime penalty. The definition of a "Designated act" in D.C. Code § 22-3701 includes not only injury to another person but property crimes as well. So long as the act is based upon prejudice, a bias-related crime penalty can currently be given when a defendant is guilty of injuring property, theft, and unlawful entry. See § 22-3701 (2). The Hate Crime Penalty Enhancement should be expanded to cover all of the offenses currently included under the law.

§ 22A-808, Pretrial Release Penalty Enhancement

On page 24 of the Report there are definitions for the misdemeanor, felony, and crime of violence pretrial release penalty enhancements. To be consistent with the wording of § 22A-806 (a), (b), and (c) two changes should be made to these provisions. First, the term "in fact" should be added to each of the pretrial release penalty enhancements. For example, § 22A-808 (a) should be redrafted to say "A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender*, in fact,* committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense." [Additional term italicized] Second, penalty enhancements found in § 22A-806 refer to "the defendant" whereas the penalty enhancements found in § 22A-808 refer to "the offender." To avoid arguments about whether the difference in wording has legal significance, the same term should be used in both sections.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	July 18, 2017
Re:	Comments on First Draft of Report No. 6: Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements

PDS has the following concerns and makes the following suggestions:

1. With respect to RCC § 22A-806, Repeat Offender Penalty Enhancements, PDS recommends the complete elimination of this section. Repeat offender penalty enhancements represent a triple counting of criminal conduct and work a grave miscarriage of justice for individuals who have already paid their debt to society in the form of a prior sentence. Repeat offender penalty enhancements exacerbate existing racial disparities in the criminal justice system and increase sentences that are already too long.

   The United States incarcerates more people than any other country in the world. The last forty years have seen relentless growth in incarceration.[1] The expansion in prison population is driven by greater numbers of people entering the system, less diversion, and longer sentences.[2] Enhancements create even longer sentences – beyond what the legislature originally envisioned for a particular offense committed by a broad range of potential culpable actors.

[1] The Sentencing Project, Ending Mass Incarceration: Charting a New Justice Investment, available at: http://www.sentencingproject.org/publications/ending-mass-incarceration-charting-a-new-justice-reinvestment.

[2] James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

The commentary to the Revised Criminal Code ("RCC") justifies, in part, the continued use of prior convictions to enhance criminal sentences on the lack of evidence on how the operation of criminal history in sentencing may affect racial disparities.[3] But evidence of the criminal justice system's disparate impact on African-Americans abounds. The Black-white "disparity-ratio" in male imprisonment rates was nearly 6:1 in 2014.[4] Hispanic-white ratios for males were 2.3:1.[5] In the District, nearly fifty percent of black males between the ages of 18-35 were under criminal justice supervision according to a study by the National Center on Institutions and Alternatives.[6] The Sentencing Commission's statement that "the number of non-black, felony offenders present too small a sample size for meaningful statistical analysis" tells the picture of who in fact is being sentenced on felony offenses.[7] While enhancements may not necessarily cause disparity in sentencing, the use of penalty enhancements has the effect of amplifying racial disparities already present in the criminal justice system.

For instance, consider the evidence of disparate prosecution for drug offenses. Although blacks and whites use drugs at roughly the same rates, African Americans are significantly more likely to be arrested and imprisoned for drug offenses.[8] "Black arrest rates are so much higher than white rates because police choose as a strategic matter to invest more energy and effort in arresting blacks. So many more blacks than whites are in prison because police officials have adopted practices, and policy makers have enacted laws, that foreseeably treat black offenders much more harshly than white ones."[9] Sentencing enhancements for multiple prior misdemeanor or felony drug offenses create a feedback effect that amplifies the existing bias, or choices, already made by the criminal justice system.

PDS is not arguing that consideration of prior convictions should have no place in our criminal justice system, but rather that the place these prior convictions hold is already sufficient. As noted in the commentary, a defendant's criminal history is a dominant feature in the Sentencing

[3] Commentary for RCC§ 22A-806 at 12.

[4] *See* Bureau of Justice Statistics, Prisoners in 2014 (2015), available at: https://www.bjs.gov/content/pub/pdf/p14.pdf; *see also*, The Sentencing Project, Fact Sheet, available at: http://www.sentencingproject.org/publications/trends-in-u-s-corrections

[5] *Id*.

[6] Eric R. Lotke, "*Hobbling a Generation*," National Center on Institutions and Alternatives, August 1997.

[7] Commentary for RCC§ 22A-806 at 12.

[8] Tonry, M., & Melewski, M. (2008), *The Malign Effects of Drug and Crime Control Policy on Black Americans*. In M. Tonry (Ed.), Crime and justice: A review of research (pp. 1-44). Chicago, IL: University of Chicago Press; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

[9] *Id*.

Guidelines.[10] A prior felony conviction will often mean that probation is excluded as a guidelines-compliant sentencing option. Because it will move a defendant to a higher column on the guidelines grid, a prior felony conviction will also mean that the corresponding guidelines-compliant prison sentence the defendant will face is longer. This is important because judges overwhelmingly comply with the Sentencing Guidelines and thus already abide by a system that heavily weighs prior criminal history. [11] In addition to being determinative of which box a defendant will fall into on the Sentencing Guidelines, prior criminal history must be considered in sentencing the defendant within that box. This is the case because the D.C. Code explicitly requires judges to "impose a sentence that reflects the seriousness of the offense and the criminal history of the offender."[12] Enhancements therefore create a system that triple counts prior convictions for individuals who have already faced consequences as a direct result of the prior conviction.

While misdemeanors are not covered by the Sentencing Guidelines or by D.C. Code § 24-403.01, there is no doubt that judges consider criminal history in deciding whether to impose incarceration and in deciding the amount of incarceration to impose. Prosecutors routinely argue for a sentencing result based in substantial part on the defendant's criminal history. Penalty enhancements for misdemeanors create the same issue of over-counting criminal history for offenses where the defendant has already paid a debt to society. Further, as acknowledged in the commentary, misdemeanor enhancements exist in a tiny minority of jurisdictions. According to the commentary, only Maine, Missouri, and New Hampshire allow enhancements for prior misdemeanor convictions.[13]

There is no evidence that longer sentences for defendants who have committed multiple misdemeanors produce meaningful long-term improvements in community safety or better individual outcomes. To the contrary, many misdemeanor offenses can be addressed through comprehensive community based programming rather than ever longer periods of incarceration. For example, repeated drug possession offenses or offenses that stem from drug addiction such as theft may be successfully addressed through referrals to drug treatment. [14] Current Superior Court policies establishing specialized courts for individuals with mental illness or issues with

[10] Commentary for RCC§ 22A-806 at 12.

[11] Voluntary Sentencing Guidelines Manual (June 27, 2016) at 1. The 2015 annual report for the District of Columbia Sentencing and Criminal Code Revision Commission lists compliance as "very high" and "consistently above 90% since 2011" and 96% in 2015. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Annual%20Report%202015%20Website%205-2-16.pdf .

[12] D.C. Code § 24-403.01(a)(1).

[13] Commentary for RCC§ 22A-806 at 13 fn. 43.

[14] Justice Policy Institute, Substance Abuse Treatment and Public Safety January 2008 available at: http://www.justicepolicy.org/uploads/justicepolicy/documents/08_01_rep_drugtx_ac-ps.pdf.

drug addiction reflect the community sentiment that there are better solutions to crime than more incarceration.

While the RCC does not propose specific mandatory minimums for enhancements, it contemplates a structure that would force a judge to sentence a defendant to a mandatory minimum once the prosecution proves the applicability of a repeat offender enhancement.[15] PDS opposes the use of mandatory minimums in the RCC. PDS believes that judges should be trusted to exercise discretion in sentencing defendants. Judges are in the best position to review the facts in each case and the unique history of each defendant. Judges make decisions informed by a presentence report, statements of victims, the community, and sometimes medical professionals. Judges should be trusted to weigh the equities in each case and impose, consistent with the law, a fair sentence.

2. With respect to RCC § 22A-807, Hate Crime Penalty Enhancement, PDS appreciates that the causal nexus between the crime and the bias is clarified in RCC § 22A-807. However, PDS has concerns about several of the broad categories of bias listed in the RCC. As acknowledged in the commentary for RCC § 22A-807, the list of protected categories is broader than other jurisdictions and includes several characteristics many states do not recognize, such as personal appearance, matriculation, marital status, and family responsibility.[16] PDS believes that it is appropriate to include these categories in the District's human rights law which prohibits discrimination in employment, housing, public accommodation, and education.[17] However, when used in the criminal code, these categories may allow for prosecution outside of the intended scope of the hate crime statute. For instance, by including marital status and family responsibility, a defendant who kills an ex-husband because of a bitter divorce or because the ex-husband fails to take on family responsibility may be subject to a hate crime enhancement. A teenager who commits a robbery motivated by anger at a complainant's flashy personal appearance could similarly be subject to a hate crime enhancement.[18] This expansion of the hate crime categories would allow for a sentencing enhancement to apply to what the legislature likely envisioned to be within the standard range of motives for the commission of an offense. Thus, PDS recommends removing the following categories from proposed §22A-807: marital status, personal appearance, family responsibility, and matriculation.

[15] The RCC § 22A-806(e) provides for at least the possibility of mandatory minimum sentences for the commission of repeat offenses. PDS understands that sentencing will be fully considered by the Commission at a later time.

[16] Commentary for RCC§ 22A-806 at 21.

[17] D.C. Code § 2-1402.01-§2-1402.41.

[18] PDS does not disagree with treating as a hate crime a crime committed because of a prejudice against a person's appearance or dress that is or appears to be different than the person's gender but believes that bias is covered by the "gender identity or expression" term in §22A-807.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	July 18, 2017
Re:	Comments on First Draft of Report No. 7: Recommendations for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 7. PDS has the following concerns, however, and makes the following suggestions:

1. The Commentary refers to two cases with the name "*Jones v. United States*": *(Richard C.) Jones v. United States*, 124 A.3d 127 (D.C. 2015), cited on pages 7 and 10; and *(John W.) Jones v. United States*, 386 A.2d 308 (D.C. 1978), cited on pages 13-14 and 18. We suggest that the defendants' first names be added to these citations to make it easier to distinguish between the two cases.

2. We suggest omitting two hypothetical examples from Footnotes 2 and 8 of the Commentary to avoid unnecessary confusion about the scope and application of attempt.

   ▪ The last sentence of Footnote 2, on page 4, poses the following hypothetical: "For example, to determine whether a person arrested by police just prior to pulling a firearm out of his waistband acted with the intent to kill a nearby victim entails a determination that the person planned to retrieve the firearm, aim it at the victim, and pull the trigger."

   As written, this example suggests that a defendant could be convicted of attempted assault with intent to kill where he had not yet pulled a firearm out of his waistband. We believe that this conduct, without more, would be insufficient to sustain a conviction for attempted assault with intent to kill. Moreover, the example raises complex questions that this group has yet to resolve concerning the interplay between attempt and gradations of assault offenses. We therefore propose that the footnote be deleted to avert the risk that readers will draw incorrect inferences about sufficiency.

   ▪ Footnote 8, on page 5, includes among its examples of incomplete attempts "the attempted felony assault prosecution of a person who suffers a debilitating heart attack just as he or she is

about to exit a vehicle and repeatedly beat the intended victim." We believe that these facts, without more, provide an insufficient basis for an attempted felony assault conviction. This hypothetical likewise raises questions about the type of proof necessary to establish an attempted felony assault, where felony assault requires a specific degree of harm. We propose that the hypothetical be deleted.

3. PDS proposes modifying § 22A-301(a)(3) to read as follows (alterations are underlined):

> (3) The person<u>'s conduct</u> is either:
>
> > (A) <u>Reasonably adapted to and</u> dangerously close to <u>the accomplishment of</u> that offense; or
> >
> > (B) Would be dangerously close to <u>the accomplishment of</u> that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to <u>the accomplishment of</u> that offense.

First, we suggest changing the subject of (a)(3) from "the person" to "the person's conduct," to make more explicit that the jury's focus should be on the conduct of the defendant.

Second, PDS proposes modifying subsection (A) to insert the phrase "reasonably adapted to" before the phrase "dangerously close," to make clear that the requirement of conduct "reasonably adapted" to completion of the target offense applies to *all* attempt charges, and not only those that fall under subsection (B). This alteration would comport with case law from the D.C. Court of Appeals, which has held that "[t]he government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime . . . ." *Seeney v. United States*, 563 A.2d 1061, 1083 (D.C. 1989); *see also Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *(John W.) Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978). The current draft, which uses the "reasonably adapted" language only in subsection (B), creates the impression—at odds with case law—that this requirement does not exist for attempts that fall under subsection (A), and could lead the jury to conclude that the conduct requirements under subsection (A) are looser than under subsection (B). This alteration would also align the draft provision with the current Red Book instruction, which reflects current District law in this area and which requires proof that the defendant "did an act reasonably adapted to accomplishing the crime." Criminal Jury Instructions for the District of Columbia No. 7.101, Attempt (5th ed. rel. 14).

Inclusion of the "reasonably adapted" language in subsection (A) would have the additional benefit of giving some substance to the "dangerously close" requirement and ensuring that innocent conduct is not punished as an attempt. PDS supports the draft's adherence to the "dangerously close" standard for conduct, which reflects current case law. The term "dangerously close," however, is not defined. Consistent use of the "reasonably adapted" language in both (A) and (B) would help to establish a clearer limitation on the conduct that can give rise to an attempt conviction. We believe that clear and exacting conduct standards are essential in the context of attempt, because the defendant's thoughts and plans play such a critical role in the question of guilt, but must often be inferred from a defendant's actions.

Third, we suggest modifying both (A) and (B) to replace the phrases "committing that offense" and "commission of that offense" with the phrase "the accomplishment of that offense." Like the

phrase "reasonably adapted," the "accomplishment" language appears in both the current Redbook instruction on Attempt and DCCA case law. *See, e.g., Seeney*, 563 A.2d at 1083; *Williams*, 966 A.2d at 848. Maintaining that terminology in the statutory provision would thus provide continuity and consistency. It would also avert confusion about the point at which the target offense has been "committed." Just as the "dangerously close" standard requires the jury to focus on the defendant's proximity to completing the target offense, rather than his preparatory actions, the "accomplishment" language keeps the jury's focus on the completion of the target crime.

Comments of the U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations

for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt (First Draft of Report No. 7)

and for Chapter 8 of the Revised Criminal Code: Penalty Enhancements (First Draft of Report No. 6)

Submitted July 21, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

RECOMMENDATIONS FOR CHAPTER 3 OF THE REVISED CRIMINAL CODE (DEFINITION OF A CRIMINAL ATTEMPT)
First Draft of Report No. 7

- Section 22A-301(a): Definition of Attempt - COMMENTARY
  - Page 3: tenant → tenet
  - Pages 5 (text accompanying footnotes 8 and 9), 14-15, 37: Advisory Group should discuss further whether the DCCA sees a meaningful distinction between the "dangerous proximity" and "substantial step" tests, considering *Hailstock*

RECOMMENDATIONS FOR CHAPTER 8 OF THE REVISED CRIMINAL CODE
(PENALTY ENHANCEMENTS)
First Draft of Report No. 6

- Section 22A-805: Limitations on Penalty Enhancements - COMMENTARY

    - Page 4: USAO-DC agrees that subsections (b) and (c) "codify procedural requirements for penalty enhancements . . . required in *Apprendi* . . . and subsequent case law."

- Section 22A-807: Hate Crime Penalty Enhancement (at page 17)

    - Section title: Labeling it a "hate" crime is a change from current law, which refers to this as a "bias-related crime."

    - (c) Definitions: (iii)-(v) should be subheadings within (ii)

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

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 Commission's First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2001. Property Offense Definitions

RCC § 22A-2001 defines "coercion", "consent", "deceive", and "effective consent." Those definitions are then used throughout the offenses contained in the first drafts of Reports number 9, 10, and 11. When reviewing some of the offenses that use one or more of these terms it is unclear what the penalty would be for a person who meets all of the other elements of the offense except that the "victim" turns out to be law enforcement involved in a sting operation. As written it would appear that the person would only be guilty of an attempt. Assuming, that the Commission will recommend that, in general, the penalty for an attempt will be lower than the penalty for a completed offense, we believe that that penalty is insufficient in this context. Take

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

the offense of Financial Exploitation of a Vulnerable Adult or Elderly Person under RCC §22A-2208. The elements of that offense in Report #10 are:

(a) A person is guilty of financial exploitation of a vulnerable adult or elderly person if that person:

(1) Knowingly:

(A) Takes, obtains, transfers, or exercises control over;

(B) Property of another;

(C) With consent of the owner;

(D) Who is a vulnerable adult or elderly person;

(E) The consent being obtained by undue influence; and

(F) With intent to deprive that person of the property, or

(2) Commits theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.[2]

Let's say that the police learn of a ring of criminals who prey on vulnerable adults. They set up a sting where the perpetrators believe that the police officer is a vulnerable adult. The perpetrators go through all of the acts to exercise undue influence[3], believe that they have excercised undue influence, and the police officer eventually gives them property. In this hypothetical, at the time that the perpetrator receives the property they "are practically certain that the police officer is a vulnerable adult and that they obtained his or her consent due to undo influence.[4] In this situation there is no reason why the perpetrators should not be subject to the same penalty as if they did the exact same things and obtained property from a person who was actually a vulnerable adult. To change the outcome, the Commission could change the definitions contained in RCC § 22A-2001 or have a general provision that states that in sting operations the person has committed the offense if the facts were as they believed it to be.

§ 22A-2003, Limitation on Convictions for Multiple Related Property Offenses.

Section 22A-2003 establishes a procedure whereby the trial court will only enter judgment of conviction on the most serious of certain specified property offenses that arise out of the same act or course of conduct. Should the Court of Appeals reverse the conviction it directs the trial court to resentence the defendant on the next most serious offense. Should the person have been found guilty at trial for multiple offenses that would merge under this standard, there could be successive appeals and resentencings.[5] Such a procedure would lead to increased litigation and

[2] See page 50 of First Draft of Report #10 – Recommendations for Fraud and Stolen Property Offenses.

[3] Undue influence is defined as "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."

[4] See the definition of "knowingly" in § 22A-205, Culpable Mental State Definitions.

[5] The charges that merge under RCC § 22A-2003 (a) are theft, fraud, extortion, stolen property, and other property damage offenses (including any combination of offenses contained in

costs and an increase in the amount of time before a conviction can be finalized. Rather than create such a system, OAG recommends that the RCC instead adopt a procedure which has already been accepted by the Court of Appeals for barring multiple convictions for overlapping offenses.

Section 22A-2003 (c) states, "Where subsections (a) or (b) prohibit judgments of conviction for more than one of two or more offenses based on the same act or course of conduct, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses." The Commentary, at page 52, states:

> The RCC limitation on multiple convictions statute does not raise double jeopardy issues or create significant administrative inefficiency… jeopardy does not attach to a conviction vacated under subsection (c), and the RCC statute does not bar subsequent entry of a judgment of conviction for an offense that was previously vacated under subsection (c)… A conviction vacated pursuant to subsection (c) of the RCC statute may be re-instated at that time with minimal administrative inefficiency. Sentencing for a reinstated charge may entail some additional court time as compared to concurrent sentencing on multiple overlapping charges at the close of a case. However, any loss to procedural inefficiency appears to be outweighed by the benefits of improving penalty proportionality and reducing unnecessary collateral consequences convictions concerning substantially overlapping offenses. [emphasis added]

Notwithstanding the Commentary's assertion that multiple appeals and resentencings would have minimal administrative inefficiency and take some additional court time, such a procedure would lead to increased court inefficiencies and increased litigation costs and times.[6] For example, a person could be found guilty of three property offenses that would merge under the provisions proposed by the RCC. At sentencing the judge would sentence the person only to the offense with the most severe penalty. The defendant's attorney would then file an appeal based solely on the issues that pertain to that count, write a brief, and argue the appeal. The prosecutors would have to respond in kind. After some amount of time, perhaps years, should the Court of Appeals

Chapters 21, 22, 23, 24, or 25 of the RCC for which the defendant satisfies the requirements for liability). The charges that merge under RCC § 22A-2003 (b) are Trespass and Burglary (and any combination of offenses contained in Chapters 26 and 27 of the RCC for which the defendant satisfies the requirements for liability.)

[6] It should be noted that the increase in litigation expenses would not only be born by the prosecution entities and by some defendants, but by the court who, under the Criminal Justice Act, must pay for court appointed attorneys to brief and argue multiple appeals and appear at multiple sentencings.

agree with the defense position on that one count, the count would be reversed and the case would be sent back to the trial court for resentencing. The process would then repeat itself with an appeal on the count with the next most severe penalty. Should the defense win again, the process would repeat again. It is more efficient to have all the issues in a case briefed and argued once before the Court of Appeals and have the judgment finalized at the earliest time.

In *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985), the D.C. Court of Appeals noted with approval the following practice where two or more counts merge. It suggested that the trial court can permit convictions on both counts, allowing the Court of Appeals to determine if there was an error that affected one count but not the other. *Id.* ("No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal."). Then, if no error is found, this Court will remand the case to the trial court to vacate one conviction, and double jeopardy will be avoided. If error was found concerning one count but not the other, no double jeopardy problem will arise because only one conviction would stand. *Id.*

On a separate note, Section 22A-2003 (c) ends by saying "where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses." The Commentary does not explain, however, what standards the judge should use in choosing which offense should be retained and which offense should be vacated. As the penalty is the same, the defendant has reduced interest in which offense remains and which is vacated. Given the broad authority that the prosecutor has in choosing what, if any, offenses to charge and to negotiate a plea offer that meets the state's objectives, after a sentence has been imposed, it should be the prosecutor that decides which sentences should be retained and which should be vacated.

To accomplish the more efficient procedure proposed in *Garris* and to address how the determination should be made concerning which conviction should stand and which should be vacated, OAG proposes that the following language be substituted for RCC § 22A-2003:

(a) *Theft, Fraud, Extortion, Stolen Property, or Property Damage Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 21, 22, 23, 24, or 25 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

(b) *Trespass and Burglary Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 26 and 27 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for

the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

(c) *Judgment to be Finalized after Appeal or Appeal Time has Run.* Following a remand from the Court of Appeals, or the time for filing an appeal has run, the court shall, in addition to vacating any convictions as directed by the Court of Appeals, retain the conviction for the offense, or grade of an offense, with the most severe penalty within subsection (a) or (b) and vacate any other offense within these chapters which are based on the same act or course of conduct. Where two or more offenses subject to subsection (a) or (b) have the same most severe penalty, the court shall impose a judgment of conviction for the offense designated by the prosecutor.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses[1]

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.[2]

[1] In OAG's memo on the First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions, we argued against the proposal for successive appeals and resentencings proposed in § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. We proposed a system based upon *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985) were there would be a single appeal and then a remand where the court would retain the sentence for the offense with the most severe penalty and then dismiss specified offenses that arose out of the same act or course of conduct. If that proposal were adopted, conforming amendments would have to be made to the provisions in this Report. For example, RCC § 22A-2103, (e) pertaining to Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking would have to reflect the new procedure.

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

COMMENTS ON THE DRAFT REPORT

§ 22A-2103, Unauthorized Use of a Motor Vehicle

Section 22A-2103 (a) establishes that a person commits this offense if he or she knowingly operates or rides as a passenger in a motor vehicle without the effective consent of the owner. Paragraph (c) states that only the operator of the motor vehicle is guilty of First Degree Unauthorized Use of a Motor Vehicle. A person who is a passenger in a vehicle he or she knows is being operated without effective consent is only guilty of second degree Unauthorized Use of a Motor Vehicle. This is a change from current law. As the commentary notes:

> … The current UUV statute is limited to a single grade, and it is unclear whether it reaches use as a passenger. However, liability for UUV as a passenger has been upheld in case law. In the revised UUV offense, liability for a passenger is explicitly adopted as a lesser grade of the offense. Codifying UUV case law for a passenger in the RCC does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis* and *Stevens v. United States*. Nor does codification of UUV for a passenger change the requirement in existing case law that a passenger is not liable if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized." [internal footnotes removed]

There are at least two reasons why the current single penalty scheme should be retained. First, a person who can be charged as a passenger in a UUV is necessarily an aider and abettor to its illegal operation and, therefore, faces the same penalty as the operator.[3] In fact, driving passengers in the stolen car is frequently the reason why the operator is using the vehicle in the first place. Second, stolen cars are frequently passed from driver to driver. A person who is a driver one moment may be a passenger the next and the passenger in a UUV may soon become the driver. The penalty for unlawful use of a motor vehicle should not be dependent on the luck of when the stolen car is stopped by the police.

§ 22A-2104. Shoplifting

The shoplifting proposal contains a qualified immunity provision. One of the requirements to qualify for the immunity under § 22A-2104(e)(1) is that "The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section…" [emphasis added]

[3] See Redbook Instruction 3.200 AIDING AND ABETTING which states "To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed."

However, stores frequently rely on surveillance and other technology to identify would be shoplifters and so, not all persons who are validly stopped for shoplifting committed the offense "in that person's presence." For example, stores frequently rely on video technology to observe people in the store. A security officer may be in a room on a different floor observing someone hide merchandise or exchange price tags. Without a definition of "committed in the in the person's presence" that includes the use of surveillance technology, store personnel would not have qualified immunity for stopping a person based on watching them commit the offense through a surveillance system.

Another, common anti-theft feature that stores rely on to reduce shoplifting is the use of Radio frequency (RF and RFID) tags. When someone goes through the store's doorway without paying for something, the radio waves from the transmitter (hidden in on one of the door gates) are picked up by something hidden in a label or attached to the merchandise. This generates a tiny electrical current that makes the label or attachment transmit a new radio signal of its own at a very specific frequency. This in turn sets off an alarm. People who set off the alarm are justifiably stopped to see if they have merchandise that was not paid for even though the offense, arguably, did not occur in the store employee's presence (or at least the store employee did not actually notice the merchandise being hidden. If the person, in fact, has such merchandise, and are held for the police, the store personnel should still qualify for immunity. The gravamen for having qualified immunity should not be whether the offense occurred in the store employee's presence, but whether the store employee's stop was reasonable. The Commission should either remove the requirement that the offense occur "in that person's presence" or it should define that term to include situations where the shoplifter is identified because of some technology, wherever the store employee is actually located.

RCC § 22A-2504. Criminal Graffiti

(a) RCC § 22A-2504 (a) states that "A person commits the offense of criminal graffiti if that person:
    (1) knowingly places;
    (2) Any inscription, writing, drawing, marking, or design;
    (3) On property of another;
    (4) That is visible from a public right-of-way;
    (5) Without the effective consent of the owner."

There is no reason why this offense needs to have the element that the graffiti "…is visible from a public right-of-way…" A person who paints a marking on the back of a person's house (that is not visible from a public right-of-way) has caused just as much damage to the house as if he painted something on the front of the house. In addition, to the extent that Criminal Graffiti may

be considered as a plea option for an offense that has a greater penalty, its availability should not be contingent on whether the marking is visible from a public right-of-way. In fact, it is counter-intuitive that if more people can see the marking Criminal Graffiti could be used as a plea down offense, but if fewer people can see it, because of its location, that the defendant would only be exposed to an offense with a greater penalty.

Paragraph (e) provides for parental liability when a minor commits criminal graffiti. It states, "The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court." While OAG appreciates that the Commission would want to include a provision that establishes parental responsibility, we request that paragraph (e) be stricken. We do this for two reasons. First, D.C. Code § 16-2320.01 authorizes the court to enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such restitution. The inclusion of RCC § 22A-2504 (e) is, therefore, unnecessary and could cause litigation concerning whether it trumps D.C. Code § 16-2320.01 or merely provides for a separate means to make parents and guardians liable for their children's behavior. In addition, there are no fine provisions contained in the juvenile disposition (sentencing) statute and, so, the court would never be in a position to require parents and guardians to be responsible for its payment. See D.C. Code § 16-2320.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses

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 Commission's First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2201. Fraud.

Section 22A-2201 (a) establishes the offense of Fraud. It states:

Offense. A person commits the offense of fraud if that person:
(1) Knowingly takes, obtains, transfers, or exercises control over;
(2) The property of another;
(3) With the consent of the owner;
(4) The consent being obtained by deception; and
(5) With intent to deprive that person of the property.

[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.

In the Commentary, on page 5, it discusses what is meant by "Knowingly takes, obtains, transfers, or exercises control over…" It states, "For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the defendant or received by the defendant. The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language." While we agree that the statute should reach this behavior, we suggest slightly modifying the statutory language to ensure that it is clear that it does. Section 22A-2201 (a)(1) actually states, that a person commits the offense when he or she "Knowingly … transfers…" the property. Before a person can transfer something, they must possess it in some way, which is not the case presented in the hypothetical. To ensure that the activity stated there is covered by the statute, it should actually say "causes the transfer." Then it is clear that a person is guilty of fraud "whether or not the transfer is to the defendant or received by the defendant."

RCC § 22A-2205. Identity Theft.

RCC § 22A-2205 criminalizes identity theft. We suggest that two additional situations be added to paragraph (a)(4) to cover situations where a person's identity was used to harm that person and where a person uses another's identifying information to falsely identify himself when being issued a ticket, a notice of infraction, during an arrest, to conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime. RCC § 22A-2205 states:

(a) A person commits the offense of identity theft if that person:
    (1) Knowingly creates, possesses, or uses;
    (2) Personal identifying information belonging to or pertaining to another person;
    (3) Without that other person's effective consent; and
    (4) With intent to use the personal identifying information to:
        (A) Obtain property of another by deception;
        (B) Avoid payment due for any property, fines, or fees by deception; or
        (C) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception.

All the conditions outlined in RCC § 22A-2205 (a)(4) have to do with using somebody's identity to enrich the person committing identity theft or some third party. Unfortunately, people also use identity theft to embarrass someone or to get even with them for a perceived slight. For example, a person may setup a Facebook account, or other social media, using the identity of a person that they would like to hurt, "friend" their friends,

and then put up false or embarrassing posts and pictures.[2] While some stalking statutes might cover repeated behavior similar to what is presented here, a single use of someone's identity would not come under a stalking statute no matter how traumatizing the use of the victim's identity may be to the victim. The traumatic effects on the person whose identity was impersonated can be just as devastating to him or her as the financial loss that may occur under the statute as written. We, therefore, suggest that a paragraph (D) be added to RCC § 22A-2205 (a)(4) which states, "Harm the person whose identifying information was used."[3]

The other issue with RCC § 22A-2205 is that it narrows the scope of the current law. As noted in the Commentary, on page 39, "the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime—conduct included in the current identity theft statute.[4] Most such conduct already is criminalized under other offenses, including the obstructing justice,[5] false or fictitious reports to Metropolitan Police,[6] and false statements.[7] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[8] and revised false statements offenses." Contrary to the assertion made in the quoted text, giving out false identifying information belonging to or pertaining to another person to identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime is not criminalized elsewhere in the Code. OAG takes no position on whether RCC § 22A-

[2] The practice is so common that there are numerous websites that explain what a person can attempt to do to report an account for impersonation. See for example, https://www.facebook.com/help/167722253287296

[3] If the Commission accepts this suggestion, then an amendment would have to be made to paragraph (c), gradations and penalties, to establish what penalty, or penalties, this non-value based offense would have. This would could be handled similarly to how the Commission ranked a motor vehicle as a Second Degree Theft, in RCC § 22A-2101 without it having a stated monetary value.

[4] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person. [This footnote and the following three are footnotes to the quoted text.]

[5] D.C. Code § 22-722(6).

[6] D.C. Code § 5-117.05.

[7] D.C. Code § 22-2405. Further, supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.

[8] RCC § 22A-XXXX.

2205 should be amended to add back the language that is currently in D.C. Code § 22-3227.02(3) or whether there should be a stand-alone offense that covers using personal identifying information belonging to or pertaining to another person, without that person's consent, to identify himself or herself at the time of he or she is given a ticket, a notice of infraction, is arrested; or to facilitate or conceal his or her commission of a crime; or to avoid detection, apprehension, or prosecution for a crime.[9] Note that under both the current law and OAG's suggestion the giving out of a fictitious name would not be an offense. The person has to give out the personal identifying information belonging to or pertaining to another person, without that person's consent. See D.C. Code § 22-3227.02(3).

RCC §22A-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person

RCC §22A-2208 establishes an offense for the financial exploitation of a vulnerable adult or elderly person. The Commentary, on page 52, correctly notes that D.C. Code § 22-933.01. "…provides an affirmative defense if the defendant "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed." Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence." [internal citations omitted]. RCC §22A-2208 would change current law and would instead require the government to prove the mental state of "knowingly" about the element that the victim was a vulnerable adult or elderly person and would remove the self-defense provision. If passed, the government would frequently not be able to meet its burden. How could the government prove the mental state of "knowingly" to the element that the person was 65 years old or that a given individual met the definition of a vulnerable adult[10] when all the defendant would have to do is put on something to show that he or she thought the person was 64 years old or had limitations that impaired the person's ability but that those limitations were not "substantial"? (Note that "substantial" is not a defined term.)

The current statute correctly establishes the burdens. It requires that government prove that the victim was, in fact, a vulnerable adult or elderly person and it provides an

[9] OAG's suggested language slightly expands the current law. While under current law it is illegal for a person to give someone else's name out at time of arrest, under OAG's proposal it would also prohibit the giving of such false information when the person is given a ticket or a notice of infraction. These two additional situations may also trigger state action against an innocent person and should likewise be made criminal.

[10] RCC § 22A-2001 (25) states that a vulnerable adult "means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests."

affirmative defensive, established by a preponderance of the evidence, that would allow the person to prove that he reasonably believed the victim was not a vulnerable adult of elderly person. All of the evidence concerning the person's belief are peculiarly within that persons' possession.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses

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 #11, Recommendations for Extortion, Trespass, and Burglary Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT[2]

RCC § 22A-2603. Criminal Obstruction of a Public Way[3]

The offense of Criminal Obstruction of a Public Way would replace D.C. Code § 22-1307(a), crowding, obstructing, or incommoding. It omits clarifying language that was added in the

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] The Extortion statute, RCC § 22A-2301, is limited to obtaining property by coercion. We assume that the Commission is planning to draft a separate provision that criminalizes forcing a person to commit an act or refrain from committing an act by coercion, so we did not recommend changes to that proposal.
[3] To the extent that the comments and recommendations to this provision apply to RCC § 22A-2605, Unlawful Obstruction of a Bridge to the Commonwealth of Virginia, they should be considered as comments and recommendations to that provision.

Disorderly Conduct Amendment Act of 2010 (the Act). Although prior to 2010, D.C. Code § 22-1307(a) did not state a minimum number of people who had to obstruct the public way, the Court of Appeals read the common law requirement that three or more persons must act in concert for an unlawful purpose before anyone could be convicted of this offense.[4] To address this Court interpretation and to make it clear that a single person or two could arrange their bodies in such a way that they could obstruct a public way, the Act added that it was unlawful for a person to act alone or in concert with others. We, therefore, recommend that this language be added back into the lead in language contained in paragraph (a).

In addition, the current law makes it unlawful for a person to "crowd, obstruct, or incommode" the public way.[5] The proposal would limit the reach of the law to people who "render impassable without unreasonable hazard."[6] Under this formulation, it arguably would not be a crime for two people to lie down and block two lanes of a highway if police were on the scene directing traffic around them to avoid them being run over. Because of the police presence, despite the affect on traffic the two people may not be considered causing an unreasonable hazard. This despite the ensuing traffic jam and inconvenience to drivers, commuters, and pedestrians. To address this situation, and others, RCC § 22A-2603 (a) should be redrafted to state "obstruct or inconvenience. [proposed addition underlined].[7]

Finally, D.C. Code § 22-1307(a) makes it illegal to obstruct "The passage through or within any park or reservation."[8] The Commentary does not explain why RCC § 22A-2603 omits these areas. Absent a strong reason why it should be permissible to obstruct one of these areas, we suggest that they be retained in the law. To accomplish this, RCC § 22A-2603(a)(2) should be redrafted to say, "A park, reservation, public street, public sidewalk, or other public way."

[4] For example, see *Odum v. District of Columbia*, 565 A.2d 302 (D.C. 1989).

[5] D.C. Code § 22-1307 **(a)** states:

It is unlawful for a person, alone or in concert with others:

(1) To crowd, obstruct, or incommode:

(A) The use of any street, avenue, alley, road, highway, or sidewalk;
(B) The entrance of any public or private building or enclosure;
(C) The use of or passage through any public building or public conveyance; or
(D) The passage through or within any park or reservation; and

(2) To continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding.

[6] See the definition of "obstruct" in RCC § 22A-2603 (b).

[7] The current law makes it a crime to inconvenience people and so adding this language would not expand the scope of the current law. To express this concept, D.C. Code § 22-1307(a) uses the word "incommode" which means "to inconvenience."

[8] See D.C. Code § 22-1307(a)(1)(D).

RCC § 22A-2604. Unlawful Demonstration

Paragraph (b) defines demonstration as including "any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view." D.C. § 22-1307(b)(2) describes a demonstration as "marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief." We believe that the current definition of a demonstration better describes the behavior that this provision is trying to reach. As the Commentary states that there is no intention to change the scope of the law on this point, we believe that RCC § 22A-2604 should be redrafted to include the current definition.

RCC § 22A-2701. Burglary

We have two suggested amendments to RCC § 22A-2701.[9] First, we agree with the basic formulation that "A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling…" However, the law should be clear that should the person enter the dwelling simultaneously with the victim or proceeds the victim by a couple of steps that those occurrences should also constitute first degree burglary. For example, it should not matter whether a person with gun forces someone to walk just a head of them into a dwelling to rape them or whether the person walks backwards with the gun on the victim into a dwelling intending on raping them; either way the statute should be clear that the person is guilty of burglary. The same should amendment should be made to second degree burglary.

Second, we suggest that the gradations and penalty section makes it clear that where a watercraft is used as a dwelling (e.g. houseboat), a person who commits the offense in paragraph (a) when a person is in the watercraft/dwelling is guilty of First Degree Burglary.

RCC § 22A-2702. Possession of Burglary and Theft Tools

Paragraph (a) states:

(a) Offense. A person commits the offense of possession of burglary and theft tools if that person:
(1) Knowingly possesses;
(2) A tool, or tools, created or specifically adapted for picking locks, cutting chains, bypassing an electronic security system, or bypassing a locked door;
(3) With intent to use the tool or tools to commit a crime.

As people are just as likely to commit a burglary by going through a window as a locked door, we suggest that RCC § 22A-2702(a)(2) be expanded to include tools created or specifically adapted for cutting glass.

[9] See RCC § 22A-2701(c)(1).

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	November 3, 2017
Re:	Comments on First Drafts of Reports 8 through 11, Property Offenses

The Public Defender Service makes the following comments.

Report #8: Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

1. Coercion.[1]

PDS makes two recommendations regarding the commentary explaining the meaning of "coercion." First, PDS recommends the modifying the explanation of sub-definition (H) of the definition at page 10 to read as follows:

> Subsection (H) covers threats to inflict wrongful economic injury on another person. It is intended to include not only causing wrongful financial losses but also situations such as threatening labor strikes or consumer boycotts when ~~. While labor activities are not inherently problematic, when~~ threats of labor or consumer activity are issued to order to personally enrich a person, and not to benefit the workers as a whole~~, such threats may constitute a criminal offense~~.

As currently written, the second sentence implies that simply threatening a labor strike or a consumer boycott may be "coercion." The rest of the paragraph, however, seems to say that such threat is only coercion if it is done for the personal enrichment of a person, rather than for the benefit of a group. The paragraph should be modified such that it is clear that a mere threat of a labor strike, without more, does not meet the definition of "coercion."

Second, PDS recommends rewriting the explanation for (J), the residual sub-definition of coercion. The residual sub-definition states that "'coercion' means causing another person to fear

[1] RCC § 22A-2001(5).

that, unless that person engages in particular conduct then another person will … perform any other act that is calculated to cause *material harm* to another person's health, safety, business, career, reputation, or personal relationships."[2] Currently, the explanation, at page 10 of Report #8, states that the conduct of threatening to lower a student's grade would fall within the provision, implying that any threat to lower any grade would necessarily constitute "material harm." PDS strongly disagrees. PDS agrees with the suggestion made during the November 1, 2017 public meeting of the Advisory Group to explain this residual sub-definition with an example that is clearly a threat of material harm, falling within the sub-definition, and an example that equally clearly is a threat of de minimis harm, falling outside the sub-definition.

2. Deceive and deception.[3]

The definition of "deceive" has unequal sub-definitions. Sub-definitions (A), (B), and (C) each have a "materiality" requirement as well as additional negative conduct. Sub-definitions (A) and (C) require a "false impression" and sub-definition (B) requires a person act to prevent another. Sub-definition (D), in contrast, makes it "deception" merely to fail to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property. Thus, it would be "deception" for a person to disclose an adverse claim to someone whom the person knows already has knowledge of the adverse claim. As was discussed at the November 2, 2017 public meeting of the Advisory Group, this sub-definition is most likely to be used when "deceive" is used in Fraud, RCC § 22A-2201, and perhaps also when used in Forgery, RCC § 22A-2205. PDS requests that the explanations for those offenses in Report #9 and the explanation of this sub-definition in Report #8, state that the deception must be causally connected to the consent. Thus to be convicted of Fraud, the person must not merely have obtained the owner's consent and failed to disclose a known lien or adverse claim, the person must have, knowingly, obtained the owner's consent *because* the person failed to disclose a known lien or adverse claim, etc.

3. Dwelling. [4]

PDS strongly recommends rewriting the definition of "dwelling" to read:

> "Dwelling" means a structure, or part of a structure, that is ~~either designed for lodging or residing overnight, or that is~~ used for lodging or residing ~~overnight~~. In multi-unit buildings, such as apartments or hotels, each residential or lodging unit is an individual dwelling.

The most significant problem with the Report #8 proposed definition is that by including structures that are "designed" for residing or lodging it is vague and if strictly applied, too broad. Across the original City of Washington, particularly in the Capitol Hill and Foggy Bottom neighborhoods, and in Georgetown, there are numerous structures that were "designed" as residences or lodgings, and were even used that way for years, that have since been converted solely for office or business use. The rooms inside some of these structures may not have even

[2] Report #8 at page 3 (emphasis added).

[3] RCC § 22A-2001(8).

[4] RCC §22A-2001(10).

changed. The kitchen and bathrooms may remain the same but the living and bedroom areas are now full of desks, bookshelves and computers.[5] To avoid the possibility that a converted house will be defined as a "dwelling" because of its original "design" and to avoid the courts defining which "design" is dispositive, the original or the redesigned interior, the definition of "dwelling" should be rewritten so that the actual use of the structure is dispositive.

Rewriting the definition to exclude "design" solves another problem. PDS does not disagree with categorizing as a "dwelling" "a car if a person is using the car as the person's primary residence." PDS does disagree, however, with categorizing as a "dwelling" a camper that is "designed" for residing or lodging but that is parked in front of a person's primary residence and used more often as a family vehicle than for camping.[6] It would be disproportionate, a result the reformed code should avoid, to treat a camper differently from a car merely because of "design."

The reason "dwelling" is distinguished from other structures in the RCC should inform the definition. The term is used in RCC arson, reckless burning, trespass, and burglary. In each, the term is used in a gradation with a higher punishment. PDS posits that this distinction is justified because "dwellings" are places where people expect privacy, where people can lock the door and feel it is safe to rest and safe to keep their possessions, where they can control who enters and who must leave. The Report #8 defines "dwelling" as a place "used for residing and lodging overnight". "Residing" and "lodging" are easy to understand terms; neither needs further modification.[7] The use of the word "overnight" is confusing. Is it to convey that even a single night could make a structure a "dwelling?" Is it meant to imply that sleep, which most people do at night, is a strong factor to consider when determining if a structure is for residing or lodging? Is it meant to exclude structures where sleeping might take place during the daytime? If someone consistently works a night shift and always sleeps in his rented room during the day, is that room not a "lodging" and therefore not a "dwelling"?

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[5] Importantly, the proposed "dwelling" definition does not allow for the reverse problem. There are also many buildings in D.C. that were originally designed for commercial or public use, such as warehouses or schools, that have since been converted to "loft" residences or condominiums, though the façade and even some internal design elements of the original building have not been changed. See for example, The Hecht Co. Warehouse, http://www.hechtwarehouse.com/. Because the Report #8 definition includes structures "used" as residences or for lodging, that the structures were "designed" for commercial use is not disqualifying. (Shockingly, see also the Liberty Crest Apartments, located on the grounds of Lorton Reformatory and their tasteless and insensitive retention of some original design elements. https://libertycrestapartments.com/).

[6] From this writer's childhood, see, the VW camper, https://en.wikipedia.org/wiki/Volkswagen_Westfalia_Camper, which the writer regularly drove in high school and college. See also, the RoadTrek, which was also parked regularly in front of a primary residence and was a family car far more often than a camping "residence." http://www.roadtrek.com/

[7] "Reside" means to settle oneself or a think in a place; to dwell permanently or continuously: have a settled abode for a time; "lodging" means a place to live, a place in which to settle or come to rest, a sleeping accommodation, a temporary place to stay. See Webster's Third New International Dictionary.

While sleeping in a place is a strong indication that the place is a "dwelling," it should not be dispositive. PDS objects to the term "dwelling" including, as Report #8 says it would, "a room in a hospital where surgeons or resident doctors might sleep between lengthy shifts." Other than the fact that people sleep there, there is nothing else about such a room that makes it a "dwelling." The people intended to sleep there do not control who else has access to the room; presumably, anyone hired by the hospital into certain positions and given certain security badges can enter the room. Such a room would not be distinguishable from a daycare center, where the infants and toddlers might sleep during their long "shifts," or from the pre-kindergarten rooms in the elementary school where those children might be expected to sleep during naptime every day. A person who enters the daycare room or the pre-k classroom with the intent to steal a computer therein has burgled a building, not a dwelling.

Finally, the definition and the explanation should make clear that in a multi-unit building, each residential or lodging unit is a separate dwelling but that also necessarily means that areas of the building that are not used for residing or lodging are not dwellings. The vestibule of the apartment building, the lounge in the college dorm, and the "party room" and the fitness room in the condominium building are not "dwellings."

4. Financial Injury. [8]

The "legal fees" sub-definition of "financial injury" is a significant and unwarranted expansion of the current law. [9] The Report #8 proposed definition's separate listing of "legal fees" is supposed to be "clarificatory" and "not intended to substantively change current District law." (See page 28.) However, the definition to which it "generally corresponds,"[10] D.C. Code § 22-3227.01, links "attorney fees" to the cost of clearing a person's credit rating, to expenses related to a civil or administrative proceeding to satisfy a debt or contest a lien, etc. Unmooring "legal fees" from those categories of losses, expands what fees could be considered part of "financial injury." For example, if the allegedly financially injured person is a witness at the criminal trial but hires an attorney because of a 5th Amendment issue that could arise tangentially, adding in the cost of that attorney could be considered "legal fees" under the Report #8 definition but definitely would not be considered "attorney fees" pursuant to D.C. Code § 22-3227.01. PDS recommends rewriting the definition to read as follows:

> "Financial injury" means all monetary costs, debts ….including, but not limited to:
>
> (A) The costs of clearing the person's credit rating, …;
>
> (B) The expenses…;
>
> (C) The costs of repairing…;
>
> (D) Lost time or wages …; and

[8] RCC §22A-2001(14).

[9] No doubt as a result of auto-formatting, the "legal fees" sub-definition of financial injury" is labeled as (J). All of the sub-definitions are mislabeled as (F) through (J). Correct formatting would label them (A) through (E), with (E) being "legal fees."

[10] Report #8 at page 28.

(E) Legal fees incurred for representation or assistance related to (A) through (D).

5. Motor vehicle. [11]

The term "motor vehicle" should more clearly exclude modes of transportation that can be propelled by human effort. A "moped" can be propelled by a small engine but it can also be pedaled, meaning it can operate simply as a bicycle. It should not qualify as a "motor vehicle." Also, the definition should be clear that it is a "truck tractor" that is a "motor vehicle;" a semitrailer or trailer, if detached from the truck tractor, is not a motor vehicle. The definition should be rewritten as follows:

> "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, ~~moped,~~ scooter, truck, ~~truck tractor,~~ truck tractor with or without a semitrailer or trailer, bus, or other vehicle solely propelled by an internal combustion engine or electricity or both, including any such ~~non-operational~~ vehicle temporarily non-operational that is being restored or repaired.

6. Services. [12]

The definition of "services" should be rewritten as follows to except fare evasion:

> "Services" includes, but is not limited to:
> (A) Labor, whether professional or nonprofessional
> (B) …
> (C) ~~Transportation, telecommunications,~~ Telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
> (D) Transportation, except transportation in vehicles owned and/or operated by the Washington Metropolitan Area Transit Authority or other governmental entity;
> (E) The supplying of food ….

As "services" is defined in Report #8, fare evasion could be prosecuted as theft or, potentially as fraud, both of which would be prosecuted by the U.S. Attorney's Office. There is a separate fare evasion offense in the D.C. Code, at D.C. Code §35-216. It is prosecuted by the Office of the Attorney General for D.C.[13] and because it is, it may be resolved through the post-and-forfeit

[11] RCC § 22A-2001(15).

[12] RCC § 22A-2001(22).

[13] D.C. Code § 35-253.

process.[14] Offenses prosecuted by the USAO, including theft and fraud, are categorically not eligible for resolution through post-and-forfeit.

The PDS recommendation to modify the definition of "services" would still provide for a "U.S. offense," theft, or even possibly fraud, but would make exclusively a D.C. offense that of fare evasion on a WMATA vehicle or other public transportation.

If fare evasion is criminalized as theft, it would exacerbate the consequences of the enforcement of what is really a crime of poverty. It will subject more people to the arrest, detention, criminal record and other consequences of contact with the criminal justice system as a result of failing to pay a fare that ranges from $2 to $6.

PDS supports Bill 22-0408, currently pending before the D.C. Council, to decriminalize fare evasion (D.C. Code §35-216). Even if that effort is unsuccessful, however, the Revised Criminal Code should exclude the conduct of fare evasion on WMATA or public transportation, allowing for exclusive local enforcement.

7. Limitation on Convictions for Multiple Related Property Offenses.

PDS strongly supports proposed RCC § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. The proposal represents a more thoughtful, comprehensive approach with predictable results than having to resort to the "Blockburger test" or the scattershot inclusion of offenses at D.C. Code § 22-3203. However, the grouping of theft, fraud and stolen property offenses pursuant to subsection (a) as completely separate from the grouping of trespass and burglary offenses pursuant to subsection (b) leaves one notable gap. Though likely not strictly a lesser included offense, a person necessarily commits the offense of trespass of a motor vehicle[15] every time he or she commits the offense of unauthorized use of a vehicle.[16] A person cannot knowingly operate or ride in as a passenger a motor vehicle without the effective consent of the owner without having first knowingly entered and remained in a motor vehicle without the effective consent of the owner. It may also be the case that a person necessarily commits the offense of trespass of a motor vehicle when he or she commits the offense of unauthorized use of property and the property is a motor vehicle.[17] However, because UUV and UUP are in Chapter 21 and TMV is in Chapter 26, RCC § 22A-2003 provides no limitation on convictions for these

[14] D.C. Code § 5-335.01(c). "The post-and-forfeit procedure may be offered by a releasing official to arrestees who: (1) meet the eligibility criteria established by the OAG; and (2) are charged with a misdemeanor that the OAG, in consultation with the MPD, has determined is eligible to be resolved by the post-and-forfeit procedure." Fare evasion may not have been determined eligible for resolution by the post-and-forfeit procedure and an individual arrested for it may not meet other eligibility criteria; however, because it is an OAG misdemeanor, it is an offense that the OAG could determine, in consultation with MPD, to be eligible for post-and-forfeit resolution. In contrast, no offense prosecuted by the USAO is eligible.

[15] RCC §22A-2602.

[16] RCC § 22A-2103.

[17] RCC § 22A-2102.

multiple *related* property offenses. PDS recommends amending RCC § 22A-2003 to address this problem.

Report #9: Recommendations for Theft and Damage to Property Offenses

1. Theft.[18]

PDS recommends changes to the gradations of theft[19] to make penalties for theft of labor more fair and proportionate. "Labor" as a type of property should be valued as time and not as a monetary fair market value. As currently structured, "property" is defined to include "services," which is defined to include "labor, whether professional or nonprofessional." Theft of property, therefore, includes "theft of labor." "Value" means the fair market value *of the property* at the time and place of the offense.[20] The gradations for theft are keyed to different levels of "value." For example, it is third degree theft if the person commits theft and "the property, in fact, has a value of $250 or more." Presumably, if the "property" obtained without consent of the owner were the owner's labor, the fair market value of that labor would be calculated based on the wages or salary of the owner. This would mean that stealing, to use the colloquial term, 8 hours of labor from a professional who charges $325 per hour would result in a conviction of 2nd degree theft. Second degree theft requires the property have at least a value of $2,500 (or that property be, in fact, a motor vehicle). $325 x 8 = $2,600. In contrast, stealing 8 hours of labor from a worker in the District making minimum wage would result in a charge of 4th degree theft. Fourth degree theft requires the property have any value. As of July 1, 2017, the minimum wage in the District was $ 12.50 per hour.[21] $12.50 x 8 = $100. The Fair Shot Minimum Wage Amendment Act will increase the minimum wage every year until July 1, 2020 when the wage will be set at $15 per hour. A full day's work at that top minimum wage rate still will not pass the third-degree theft threshold of $250. $15 x 8 = $120. Stealing a full days' work at the top minimum wage rate is <u>two</u> gradations lower than stealing even the rustiest of clunkers. The professional robbed of 8 hours of labor is not 26 times more victimized than the minimum wage worker robbed of 8 hours of labor. (325 ÷ 12.50 = 26.) And the person convicted of stealing 8 hours from the professional should not be punished as if his crime was categorically worse than had he or she stolen from a low-wage worker. PDS proposes that when the property is labor, the gradation should be keyed to time, specifically to hours of labor, rather than to monetary value. Thus, PDS proposes rewriting the gradations for theft as follows:

Aggravated theft -
(1) the property, in fact, has a value of $250,000 or more; <u>or</u>
<u>(2) the property, in fact, is labor, and the amount of labor is 2080 hours[22] or more.</u>

[18] RCC § 22A-2101.

[19] RCC § 22A-2101(c).

[20] RCC § 22A-2001(24)(A).

[21] See D.C. Law 21-044, the Fair Shot Minimum Wage Amendment Act of 2016.

[22] 2080 hours is fifty-two 40-hour weeks, or one year of work.

1st degree -
(1) the property, in fact, has a value of $25,000 or more; or
(2) the property, in fact, is a motor vehicle and the value of the motor vehicle is $25,000 or more; or
(3) the property, in fact, is labor, and the amount of labor is 160 hours[23] or more

2nd degree -
(1) the property, in fact, has a value of $2,500 or more; or
(2) the property, in fact, is a motor vehicle; or
(3) the property, in fact, is labor, and the amount of labor is 40 hours[24] or more

3rd degree -
(1) the property, in fact, has a value of $250 or more; or
(2) the property, in fact, is labor and the amount of labor is 8 hours[25] or more.

4th degree -
(1) the property, in fact, has any value; or
(2) the property, in fact, is labor and is any amount of time.

PDS recommends this same penalty structure be used for fraud, RCC § 22A-2201(c), and extortion, RCC §22A-2301(c).

2. Unauthorized Use of a Motor Vehicle. [26]

PDS recommends amending unauthorized use of a motor vehicle to eliminate riding as a passenger in a motor vehicle from criminal liability. Being in a passenger in a car, even without the effective consent of the owner, should not be a crime. Where the passenger is aiding and abetting the driver, the passenger can be held liable. Where the passenger and the driver switch roles, and the government can prove that the passenger has also been a driver, liability would lie. But merely riding in a car should not result in criminal liability. Decriminalizing the passenger also eliminates the problem of having to determine when the passenger knew he or she lacked effective consent of the owner and whether, after that time, the passenger had an opportunity to leave the vehicle but failed to do so. If riding as a passenger were decriminalized, there would only be a single penalty grade for the offense.

[23] 160 hours is four 40-hour weeks, or one month of work.

[24] 40 hours is five 8-hour days, or one workweek.

[25] 8 hours is one workday.

[26] RCC § 22A-2103.

3. Shoplifting.[27]

PDS recommends two amendments to the offense of shoplifting. First, element (2) should be amended to read: "personal property that is or was displayed, held, stored, or offered for sale." This change would take care of the problem of property that is still in "reasonably close proximity to the customer area"[28] but that is not presently for sale. For example, a person shoplifts[29] a seasonal item, such as a snow shovel or beach ball, that has just been moved to the back store room. Two, the qualified immunity provision at subsection (e) should be amended to replace the phrase "within a reasonable time" where it appears[30] with the phrase "as soon as practicable." Qualified immunity should only be allowed for a person who as promptly as possible notifies law enforcement, releases the individual or surrenders him or her to law enforcement. The District should not shield from liability a shop owner or agent who engages in a form of vigilante justice by locking a person in a room and taking their time to contact law enforcement.

4. Arson. [31]

PDS strongly objects to the revision of arson as proposed in Report #9. First, PDS objects to the significant lowering of the mental state for arson. While the D.C. Code may be silent as to the required mental state for a number of criminal offenses, the Code is explicit that malice is the culpable mental state for arson.[32] The D.C. Court of Appeals has held that the definition of "malice" is the same for arson and malicious destruction of property, which is the same as the malice required for murder.[33] The Court has defined malice as "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result."[34] The Court has noted that the "actual intent to cause the particular harm" corresponds to the "purposely" state of mind in the Model Penal Code and the "wanton and willful" act with "awareness of a plain and strong likelihood that such harm may result" "blends

[27] RCC § 22A-2104.

[28] Report #9 at page 36.

[29] Knowingly takes possession of the personal property of another that is *or was* offered for sale with intent to take or make use of it without complete payment.

[30] The phrase "within a reasonable time" appears once in RCC § 22A-2104(e)(3) and twice in RCC § 22A-2104(e)(4). RCC § 22A-2104(e)(4) should be rewritten: "The person detained or arrested was released ~~within a reasonable time of~~ as soon as practicable after detention or arrest, or was surrendered to law enforcement authorities ~~within a reasonable time~~ as soon as practicable.

[31] RCC § 22A-2501.

[32] D.C. Code § 22-301; "Whoever shall maliciously burn or attempt to burn any dwelling…" (emphasis added).

[33] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987); *Thomas v. United States*, 557 A.2d 1296, 1299 (D.C. 1989)

[34] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015).

the Model Penal Code's 'knowingly' and 'recklessly' states of mind."[35] The Revised Criminal Code proposes to use the mental state of "knowing" and eliminates mitigation. The effect is a significant and unjustifiable lowering of the mental state, which then greatly expands the conduct the revised offense criminalizes. PDS proposes that the mental state of "purpose" be applied to the RCC offense of arson.[36]

Second, the revised arson offense should not extend to a "business yard." A "business yard" is *land*, which is securely fenced or walled and where goods are stored or merchandise is traded.[37] It is "mainly *areas* that are surrounded by some sort of barrier, such as a fence, where goods are kept for sale."[38] While it is possible to damage land as a result of starting a fire or an explosion, it does not make sense to criminalize causing damage to land that happens to be securely fenced. If the point is to punish conduct that damages the fence or the wall, that is criminalized by criminal damage to property.[39] Similarly if the point is to punish conduct that damages the goods stored within the business yard, that too can be prosecution as a violation of the criminal damage to property offense. But there is no reason to distinguish between starting a fire that damages goods stored in a business yard and goods that happen to be within a fenced area but not for sale, or goods for sale but stored momentarily in an open parking lot. If, however, a fire set in a business yard damages the adjacent business *building*, then that is arson.

Third, the term "watercraft" is too broad. It would include canoes and rubber rafts, particularly a raft fitted for oars. Starting a fire that damages a rubber raft is not of the same seriousness as fire that damages a dwelling or building. PDS is not suggesting that damaging a canoe or a raft should not be a crime, only that it not be deemed "arson." Damaging a canoe or raft should be prosecuted as "criminal damage to property." The definition of "watercraft" should be similar to that of "motor vehicle"; it should be restricted to vessels that are not human-propelled. PDS recommends the following definition be added to RCC §22A-2001.

> "Watercraft" means a vessel for travel by water that has a permanent mast or a permanently attached engine.

Fourth, arson should require that the dwelling, building, (narrowly-defined) watercraft, or motor vehicle be *of another*. That is the current law of arson and it should remain so. Damaging one's own dwelling, building, etc. should be proscribed by the reckless burning offense.[40] Setting fire to one's own dwelling knowing that it will damage or destroy another's dwelling would be arson.

Fifth, the gradation of second degree arson should read: "A person is guilty of second degree arson if that person commits arson and the amount of damage is $2,500 or more." What is

[35] *Harris*, 125 A.3d at 708 n.3.

[36] PDS would also accept a mental state of knowing plus the absence of all elements of justification, excused or recognized mitigation.

[37] RCC § 22A-2001(3).

[38] Report #8 at page 8 (emphasis added).

[39] RCC § 22A-2503.

[40] RCC § 22A-2502.

proposed as revised second degree arson, that the person merely commits arson," should be third degree arson and it should have a misdemeanor classification. Thus, there will be four gradations of arson in total.

5. Reckless Burning. [41]

PDS recommends amending the revised reckless burning offense. First, for the reasons explained above with respect to arson, "building yard" should be removed from the offense and "watercraft" should be defined. Second, there should be gradations created as follows:

(c) *Gradations and Penalties*.
(1) *First Degree Reckless Burning*.
(A) A person is guilty of first degree reckless burning if that person commits reckless burning and the dwelling, building, watercraft, or motor vehicle, in fact, is of another.
(B) First degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *Second Degree Reckless Burning*.
(A) A person is guilty of second degree reckless burning if that person commits reckless burning.
(B) Second degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Starting a fire to one's own building *purposely* to damage another's building would be arson. Starting a fire to one's own building *reckless* as to the fact that the fire damages another's building would be first degree reckless burning. Starting a fire that damages only one's own building would be second degree reckless burning.

6. Criminal Damage to Property. [42]

PDS strongly objects to the revision that eliminates the offense of malicious destruction of property and replaces it with the much broader offense of criminal damage to property. Like revised arson, the offense of criminal damage to property significantly and unjustifiably lowers the mental state that currently explicitly applies to the offense, thereby greatly expanding the conduct criminalized by the offense. As it does for revised arson and for the same reasons, PDS strongly recommends that the mental state for criminal damage to property be "purposely."[43]

PDS also recommends adding mental states to two of the gradations. As currently written, it is second degree criminal damage to property to knowingly damage or destroy property that, <u>in fact</u>, is a cemetery, grave, or other place for the internment of human remains,[44] or that, <u>in fact</u>, is

[41] RCC § 22A-2502.

[42] RCC § 22A-2503.

[43] PDS would also accept a knowing mental state <u>plus</u> the absence of all elements of justification, excused or recognized mitigation.

[44] RCC § 22A-2503(c)(3)(ii) (emphasis added).

a place of worship or a public monument.[45] Rather than strict liability, PDS recommends that these elements require that the person be reckless as to the fact the property is a grave, etc. or a place of worship. An object weathered and worn down over time may not appear to be grave marker. A building with a façade of a residence or a business may be used as a place of worship but because of the façade, will not appear to be a place of worship.

7. Criminal Graffiti. [46]

With respect to revised criminal graffiti, PDS recommends eliminating the mandatory restitution and parental liability provisions. Without speculating as to the reasons why, indigent people are charged with crimes in D.C. Superior Court in numbers that are grossly higher than their numbers in the District of Columbia. Requiring restitution from individuals and families that cannot afford to pay it is a waste of judicial resources. A mandatory restitution order cannot be enforced through contempt because the person is unable, not unwilling, to pay. Most such orders, therefore, will simply be unenforceable. Restitution when the person can afford it is fair and the law should provide courts the discretion to impose such an order.

Report #10: Recommendations for Fraud and Stolen Property Offenses

1. Check Fraud.[47]

PDS recommends amending the offense for clarity.

> A person commits the offense of check fraud if that person:
> (1) Knowingly obtains or pays for property;
> (2) By using a check;
> (3) Knowing at the time of its use that the check ~~which~~ will not be honored in full upon its presentation to the bank or depository institution drawn upon.

If the revised offense does not require an "intent to defraud," then it is important that it be clear that the "knowing" that the check will not be honored occur at the time the check is used. It must be clear that gaining knowledge after using the check that the check will not be honored is not check fraud.

PDS objects to the permissive inference stemming from a failure to promptly repay the bank.[48] While true that a *permissive* inference means a jury is not required to apply it, such inferences still unfairly and inappropriately point the jury towards conviction. A law that serves to highlight

[45] RCC § 22A-2503(c)(3)(iii) (emphasis added).

[46] RCC § 22A-2504.

[47] RCC § 22A-2203.

[48] This permissive inference currently exists in the Redbook Jury Instructions at §5-211, though not in D.C. Code § 22-1510 which criminalizes uttering.

certain facts and suggests how those facts should be interpreted, allows the ignoring of other facts or context. Permissive inferences operate as an explicit invitation to make one specific factual inference and not others; though nominally permissive, such inferences signal that this is *the* inference jurors should draw. The permissive inference in revised check fraud, like others of its kind, "eases the prosecution's burden of persuasion on some issue integrally related to the defendant's culpability" and "undercut[s] the integrity of the jury's verdict."[49] "By authorizing juries to "find" facts despite uncertainty, such inferences encourage arbitrariness, and thereby subvert the jury's role as a finder of fact demanding the most stringent level of proof."[50]

The permissive inference in check fraud is additionally problematic *because* the revised check fraud offense has eliminated the explicit element that the person have an "intent to defraud.". For revised check fraud, the person must knowingly obtain or pay for property by using a check, knowing at the time the person uses the check that it will not be honored in full upon its presentation to the bank. The problem with this permissive inference is that it suggests that it is check fraud to fail to make good on the check within 10 days of receiving notice that the check was not paid by the bank. The permissive inference is supposed to mean that failing to make good on the check within 10 days of notice tells jurors something about what the person was thinking at the time the person presented the check. What the permissive inference does, however, is expand the time frame by suggesting that notice (or knowledge) that the check will not be honored, has not thus far been honored, constitutes check fraud if the bank is not made whole.

2. Unlawful Labeling of a Recording.[51]

   For the reasons explained above about the unfairness of highlighting certain facts and then sanctioning by law a particular interpretation of those facts, PDS objects to the permissive inference in the revised unlawful labeling of a record offense.

3. Alteration of Motor Vehicle Identification Number.[52]

   PDS recommends amending the gradations to clarify that whether it is the value of the motor vehicle or the value of the motor vehicle part that determines the gradation depends on whether the alteration of the identification number was intended to conceal the motor vehicle or the part. If the intention was to conceal the part, then the gradation will not be decided based on the value of the motor vehicle, but rather based on the value of the part.

   PDS also has concerns that the revised alteration of motor vehicle identification number offense sets too low the value used to distinguish the first degree from second degree gradation. If set at $1,000 as currently proposed almost all alteration of VINs would be charged as a first degree offense and second degree altering a vehicle identification number would only be available after

[49] Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1216 (1979).

[50] *Id*.

[51] RCC §22A-2207.

[52] RCC §22A-2403.

a plea. If the purpose of separating the offense into degrees is to distinguish between offenses with different levels of severity, than the $1000 dollar limit will fail to do so.

Report #11 Recommendations for Extortion, Trespass, and Burglary Offenses

1. Trespass.[53]

PDS again objects to the creation of a statutory permissive inference. The prosecution can argue and prove that property was signed and demarcated in such a way that it would be clear that entry is without the effective consent of the owner. The revised offense should not be drafted in such a way that alleviates or lessens the prosecution's burden of persuasion. If the revised offense maintains this permissive inference, PDS recommends that the language regarding signage should state that the signage must be visible *prior to* or *outside of* the point of entry.

Consistent with the intent of the RCC to separate attempt to commit trespass from the trespass statute and make attempt trespass subject to the general attempt statute, revised trespass should not criminalize the partial entry of a dwelling, building, land, or watercraft.[54] A partial entry of the physical space properly should be treated as an attempt to trespass. For instance, if a person tries to squeeze under a chain link fence in order to trespass on land, but he gives up because his head and chest cannot fit under the fence, that conduct should be charged as attempted trespass, not trespass. To the extent that the partial entry is to commit another crime, for instance to take property through a hole in the fence, numerous other statutes would cover that offense. To truly treat attempted trespass differently than trespass, the revised offense cannot accept partial entry as satisfying the element of knowingly entering or remaining.

The commentary explains: "A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass."[55] PDS believes that this provision should be added to the statutory language for the clarity of judges and practitioners.

The revised trespass offense defines the consent element of trespass as "without the effective consent of the occupant, or if there is no occupant, the owner." This element fails to address joint possession, joint occupancy, and joint ownership of property. The commentary explains that it is creating a "legal occupancy" model of trespass to address the conflicting rights of owners and occupants. This approach seems sensible when dealing with court orders barring a particular individual's access. But it leaves roommates, cohabitating spouses, and business cotenants subject to a trespass charge when they remain in a space that they lawfully occupy after an equal co-tenant demands that they vacate. It also subjects the guests of a cotentant to a trespass charge

[53] RCC § 22A-2601.

[54] See Report #11 at page 12.

[55] Report #11 at page 12.

when another tenant opposes the guest.[56] For instance, one roommate feuding with another over the upkeep of space could demand that the first roommate leave and not come back. When the messy roommate returns to occupy her rightful place in the home, pursuant to the revised offense, the messy roommate would be subject to arrest for trespass. The definition would also subject to arrest any visitor approved by one roommate but not another.

The revised offense creates this anomaly that one can be guilty of trespass on one's own land, because it discards the "entry without lawful authority" element of the unlawful entry statute.[57] To address the rights of cotenants, including their right to remain on property and have guests on property despite objections of an equal cotenant, PDS recommends rewriting the third element of the offense as follows:

> Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

This phrasing would establish that the accused could provide the consent to enter or remain on the property. In addition, the commentary should explicitly state that more than one person can be an occupant and that absent a superior possessory interest of the other occupant, it is not trespass for an occupant to enter or remain in a dwelling, building, land, or watercraft, or part therefore, even if the other occupant does not consent.

The commentary recognizes that trespass on public property is inherently different because of First Amendment concerns: "[T]he DCCA has long held that individual citizens may not be ejected from public property on the order of the person lawfully in charge absent some additional, specific factor establishing their lack of right to be there."[58] PDS believes that this statement should be included in the statutory language rather than in the commentary. A similar statement regarding the exclusion of liability for First Amendment activity is included in the statutory language of revised criminal obstruction of a public way,[59] and revised unlawful demonstration.[60]

2. Burglary.[61]

The revised burglary offense has the same joint occupancy problem as revised trespass does. Revised burglary, by doing away with the current burglary statute's requirement that the property

[56] Under property law, tenants and cotenants generally have a right to have invited guests on the property. Without a contractual limitation on a tenant's right to invite guests of his choosing, a landlord cannot unconditionally bar a tenant's guests from visiting the tenant or traversing common areas in order to access the tenant's apartment. *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999).

[57] *See Jones v. United States*, 282 A.2d 561, 563 (D.C. 1971), (noting entry without lawful authority is a requisite element of the offense of unlawful entry).

[58] Report #11 at page 20.

[59] RCC §22A-2603.

[60] RCC §22A-2604.

[61] RCC § 22A-2701.

is "of another," allows the burglary conviction of a joint tenant who, after being told to leave the apartment by a roommate without lawful authority to do, enters his own home with intent to steal a television belonging to the roommate. While the theft of the television would be unlawful, the conduct should not give rise to the additional, more severely punished, offense of burglary since the individual in fact had authority to enter the residence. As in trespass, the burglary definition fails to address the rights of cotenants and their guests. PDS again recommends amending the third element as follows:

> Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

Additionally, as with trespass, the commentary should explain that an equal occupant cannot be convicted of burglary though another occupant does not consent to the entry.

PDS strongly objects to treating partial entry the same as a full entry. Reaching in through a home's open window to steal something laying just inside is not the same as picking a lock and entering the same home at night and stealing the same object now laying on the floor of the bedroom of sleeping children. Revised burglary should distinguish between these two vastly different scenarios. To do so, PDS urges the RCC make partial entry into a dwelling or building, watercraft, or part thereof an attempt burglary rather than a completed offense. As stated in the commentary, burglary is a location aggravator. A location based aggravator makes sense because of the potential danger posed by individuals entering or remaining inside of dwellings or buildings. The danger inherent in that situation is not present when someone reaches a hand through a window or puts a stick through a chain link fence to extract an item.

PDS further proposes that, like with arson, a defendant must be *reckless* as to the fact that a person who is not a participant is present in the dwelling or building, rather than having an "in fact" strict liability standard. In the vast majority of cases when a defendant enters a home and that home happens to be occupied, the defendant will have been reckless as to occupancy. When a dwelling or building is used as a home or business, defendants can expect occupants or guests to be inside at any time, regardless of whether the lights are on or off, whether there is a car near the building, or whether there looks like there is activity from the windows. However, there will be instances, when a defendant enters a dwelling that truly appears to vacant and abandoned. For instance, if a defendant uses a crowbar to open a boarded up door in what appears to be an abandoned rowhouse in order to steal copper pipes and discovers inside this house, which lacks heat or running water, a squatter who entered through other means, without a *mens rea* applicable to the occupancy status of the home, that conduct would constitute first degree burglary. It would constitute first degree burglary although the defendant had every reason to believe that the seemingly abandoned building was unoccupied. By adding the requirement that a defendant must be reckless as to whether the dwelling is occupied, the RCC would appropriately limit the severely increased penalties of first degree burglary to situations that warrant the increased penalty. Further because recklessness could typically be proved contextually – in that the home does not appear to be boarded up – providing the mens rea does not decrease the applicability of the first degree burglary statute.

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: December 18, 2017

Re: Comments on First Draft of Report No. 12: Recommendations for Chapter 3 of the Revised Criminal Code – Definition of a Criminal Conspiracy

The Public Defender Service makes the following comments on the First Draft of Report No. 12.

1. PDS recommends the offense of criminal conspiracy be applicable only to conduct that involves conspiring to commit a felony offense. It is PDS's belief that conspiracy to commit a misdemeanor offense is almost never charged by the Office of the United States Attorney. Thus, limiting liability to felony offenses would merely reflect, not restrict, current practice. The underlying rationale for a separate substantive offense of criminal conspiracy is that agreement by multiple individuals for concerted unlawful action has the potential to increase the danger of the crime and the likelihood of its successful commission.[1] If the RCC accepts the notion that a criminal agreement is a "distinct evil,"[2] that "evil" is certainly less when the object of the conspiracy is a misdemeanor offense. A conspiracy to commit a misdemeanor offense frequently lacks the complex planning and commitment to criminal enterprise that warrants the punishment of the agreement and a single overt act as a separate additional offense. For instance, an agreement to shoplift may be formed by two teenagers, one who agrees to distract the clerk by asking for something behind the counter while the other takes something from the store. This conspiracy required *de minimis* planning, and resulted in no more harm than action by one individual. Both teenagers could be found guilty of shoplifting, under a theory of liability of

[1] See Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 922, 923-924 (1959).

[2] *United States v. Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

aiding and abetting or conspiracy, but where the societal harm did not increase as a result of the agreement itself, the teenagers should not be subject to the separate offense of conspiracy to commit shoplifting.

Misdemeanor conduct should be a line of demarcation below which separate offense liability cannot attach. This would be similar to the line of demarcation in the present statute of possession of a firearm during a crime of violence. The crime of violence serves as a demarcation line above which there can be liability for a separate offense. We do not separately punish possession of a firearm while driving recklessly or while committing disorderly conduct as a third substantive offense in addition to the possession of the firearm. Finally, allowing conspiracy liability where the underlying offense is a misdemeanor creates unfettered discretion for prosecutors. Since RCC § 22A-303 does not at this time propose penalty gradations, it appears likely that conspiracy would be criminalized as a felony; prosecutors could escalate misdemeanor conduct into a felony conviction without any showing of greater societal harm in the majority of instances when defendants act together.

2. PDS recommends technical amendments to two subsections to increase the clarity of the language of criminal conspiracy.

   A) PDS supports having the RCC continue the District's current bilateral approach to conspiracy. PDS believes, however, that the requirement that a criminal conspiracy must be bilateral or mutual could be written more clearly. To that end, PDS proposes amending to RCC § 22A-303(a)(1) to read as follows: "Purposely ~~agree~~ came to an agreement to engage in or aid the planning or commission of conduct which, if carried, out, will constitute every element of that planned [felony] offense or an attempt to commit that planned [felony] offense." Replacing "purposefully agree" with "purposefully come to an agreement" more clearly conveys the mutuality of the agreement that is the *sine quo non* of the District's current approach to conspiracy.[3]

   Clarifying that the (alleged) coconspirators must agree to engage in (or aid the planning or commission of) conduct which would constitute every element of the planned offense further bolsters the joint nature of the agreement required for criminal conspiracy liability. While "proof of a formal agreement or plan in which everyone sat down together and worked out the details"[4] is not required for conviction, liability does require that the "coconspirators" come to an agreement about the same conduct, conduct that if engaged in would result in the commission of the specific planned (charged) offense. So if the charge is conspiracy to commit a robbery and the evidence demonstrates that while coconspirator X believed the agreed upon conduct was to rob someone, coconspirator Y believed the agreed upon conduct was to assault someone, the lack of mutual agreement would result in a not guilty finding for the conspiracy to commit robbery charge. Though cited in the section explaining intent

[3] Report #12 at pages 6-7 codifying a bilateral approach to conspiracy.

[4] Report #12 at page 7, quoting D.C. Crim. Jur. Instr. § 7.102.

elevation, the Connecticut Supreme Court's opinion in *State v. Pond* is instructive here as well.[5] While the Connecticut Supreme Court in *Pond* extended its "specific intent" analysis to "attendant circumstances," its analysis began with requiring "specific intent" with respect to conduct elements, stating the "general rule" that "a defendant may be found guilty of conspiracy … only when he specifically intends that *every element of the object crime* be committed."[6]

B) PDS recommends amending the Principles of Culpable Mental State Elevation subsection, RCC §22A-303(b), to substitute "and any" where the draft uses the disjunctive "or." The commentary to the RCC makes clear that the principle of intent elevation, adopted by the RCC, requires that in forming an agreement the parties intend to cause any result required by the target offense and that the parties act with intent as to the circumstances required by the target offense.[7] The use of "or" as the bridge might wrongly suggest to a reader that the mental state elevation requirement is satisfied if applied to a required circumstance or result. PDS asserts that the proposed amendment better conveys the principle that mental state elevation applies to any required circumstance[8] and to any required result.[9]

3. Finally, PDS recommends that the RCC include language that acknowledges that where a conspiracy crosses jurisdictional lines and the conspiracy is planned in a jurisdiction where the conduct is not against the law, the legality of the conduct in the place where the agreement was formed may be relevant to the determination of whether the government has proved sections (a) and (b). As currently drafted section (e) could be read to bar the defense from arguing that the cross-jurisdiction disparity in legality is relevant to the considerations in (a) and (b).

[5] Report #12 at page 38; *State v. Pond*, 108 A.3d. 1083 (Conn. 2015).

[6] *Pond*, 108 A.3d at 463 (emphasis added).

[7] Report #12 at page 41.

[8] If an offense has more than one possible circumstance, such as whether something is dwelling or business yard, then it applies to at least one such circumstance.

[9] If an offense has more than possible result, such as damaging or destroying, then it applies to at least one such result.

Fully revised as PDS recommends, criminal conspiracy in the RCC would read as follows:

§ 22A-303 CRIMINAL CONSPIRACY

(a) DEFINITION OF CONSPIRACY. A person is guilty of ~~a~~ conspiracy to commit ~~an offense~~ a felony when, acting with the culpability required by that felony offense, the person and at least one other person:

(1) Purposely ~~agree~~ come to an agreement to engage in or aid the planning or commission of conduct which, if carried out, will constitute every element of that planned felony offense or an attempt to commit that planned felony offense; and

(2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

(b) PRINCIPLES OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO RESULTS AND CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be guilty of a conspiracy to commit ~~an offense~~ a felony, the defendant and at least one other person must intend to bring about any result ~~or~~ and any circumstance required by that planned felony offense.

(c) JURISDICTION WHEN OBJECT OF CONSPIRACY IS LOCATED OUTSIDE THE DISTRICT OF COLUMBIA. When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia, the conspiracy is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed in the District of Columbia; and

(2) That conduct would also constitute a criminal offense under:

(A) The laws of the other jurisdiction if performed in that jurisdiction; or

(B) The D.C. Code even if performed outside the District of Columbia.

(d) JURISDICTION WHEN CONSPIRACY IS FORMED OUTSIDE THE DISTRICT OF COLUMBIA. A conspiracy formed in another jurisdiction to engage in conduct within the District of Columbia is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed within the District of Columbia; and

(2) An overt act in furtherance of the conspiracy is committed within the District of Columbia.

(e) LEGALITY OF CONDUCT IN OTHER JURISDICTION IRRELEVANT. Under circumstances where §§ (d)(1) and (2) can be established, it is ~~immaterial and~~ no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed, however it may be relevant to whether the defendant acted with the mental states required by RCC § 22A-303(a) and (b).

(__) PENALTY. [Reserved].

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: December 19, 2017

SUBJECT: First Draft of First Draft of Report #12, Definition of a Criminal Conspiracy

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 #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-303 CRIMINAL CONSPIRACY

The offense of Criminal Conspiracy would replace D.C. Code § 22-1805a. The current offense is broader than that proposed in the Draft Report. D.C. Code § 22-1805a (1) states in relevant part:

> If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined … or imprisoned … [emphasis added]

[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.

RCC § 22A-303 (a) states:

> DEFINITION OF CONSPIRACY. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:
>
> (1) Purposely agree to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and
>
> (2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

The proposed language does not contain the underlined provision in D.C. Code § 22-1805a (1) pertaining to "defraud[ing] the District of Columbia or any court or agency thereof in any manner or for any purpose." OAG suggests that either RCC § 22A-303 be redrafted so that the Code continues to criminalize conspiracy to defraud "the District of Columbia or any court or agency thereof" or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement(s) criminalizes both conspiracy to commit a crime and conspiracy to defraud the District of Columbia or any court or agency thereof.

What is less clear is whether § 22A-303 narrows the applicability of current conspiracy law pertaining to whether a person can be prosecuted for conspiracy when that person "conspires" with an undercover law enforcement officer in a sting operation. RCC § 22A-303 (b) states, "Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense." Arguably a person who "conspires" with an undercover officer has not "conspired" with another person who intends to bring about a particular result or circumstance.[2] There are good reasons, however, that such behavior should be illegal. As Report #12, on page 25, quotes, an actor "who fails to conspire because her 'partner in crime' is an undercover officer feigning agreement is no less personally dangerous or culpable than one whose colleague in fact possesses the specific intent to go through with the criminal plan." [citation omitted].[3] OAG was only able to find one D.C. Court of Appeals case where a person was convicted at trial of conspiracy based upon conversations with an undercover officer. The case, however, does not discuss the issue of whether a person can be convicted of "conspiring" with a police officer. It was reversed on other grounds.[4]

[2] See footnote 7, on page 2, and related text.
[3] In addition, Report #12, on page 26, notes that the unilateral approach to conspiracy, the one that permits prosecution for conspiracy where the other party is an undercover officer, "reflects the majority practice in American criminal law…" See page 25 of Report #12 for an explanation of the "unilateral approach to conspiracy."
[4] See *Springer v. United States*, 388 A.2d 846, where the appellant was convicted by a jury of conspiracy to commit first-degree murder and of solicitation to commit a felony based upon evidence of tape recordings -- and transcripts thereof -- of conversations between the appellant and an undercover MPD detective.

OAG suggests that either RCC § 22A-303 (b) be redrafted so that a person may be convicted of conspiracy notwithstanding that the "co-conspirator" is an undercover officer working a sting operation or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement criminalizes conspiracy in a sting context or unless a separate offense is created that criminalizes this behavior.

RCC § 22A-303 (c) and (d) would narrow the current scope of the District's jurisdiction to prosecute offenses when the object of the conspiracy is located outside the District or when the conspiracy is formed outside the District. Both paragraphs contain the phrase "That conduct would constitute a criminal offense under the D.C. Code if performed in the District of Columbia."[5] [emphasis added] Unless the intent is to only encompass offenses in enacted titles (such as this one), these paragraphs should use the phrase "District law"; it should not be specific to the Code. OAG, therefore, recommends that all references to "D.C. Code" in paragraphs (c) and (d) be changed to "District law."[6]

[5] Paragraph (c)(2)(B) also contains a reference to "The D.C. Code."
[6] D.C. Code § 22-1805a (d) uses the phrase "would constitute a criminal offense." It is not limited to D.C. Code offenses.

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: March 9, 2018

SUBJECT: Third Draft of Report #2, Basic Requirements of Offense Liability

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 #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-206 HIERARCHY OF CULPABLE MENTAL STATES

RCC § 22A-206 should separately define the term "enhanced recklessness" and account for it in the hierarchy of culpable Mental states. RCC § 22A-206, as written, includes the definitions of purpose, knowledge, intent, recklessness, and negligence, as well as the hierarchy of the culpable mental states. Proof of a greater culpable mental state satisfies the requirements for a lower state. RCC § 22A-206 (d) (1) defines recklessness with respect to a result and (d)(2) defines recklessness with respect to a circumstance. On pages 20 through 22 the Commentary explains how recklessness differs from "enhanced recklessness." The explanation of enhanced recklessness is contained in RCC § 22A-206 (d)(3). As enhanced recklessness differs from recklessness, it should not be treated as a subpart of the definition of recklessness. Instead, the

[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.

definition should stand on its own and should follow the formatting of the other definitions in RCC § 22A-206. In other words, RCC § 22A-206 (d)(3) should be deleted and replaced with a new paragraph. That paragraph should be entitled "ENHANCED RECKLESSNESS DEFINED" and should be followed by two paragraphs that explains how "A person acts with enhanced recklessness" with respect to a result and a circumstance. The hierarchy should make clear that proof of recklessness is satisfied by proof of enhanced recklessness.

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: March 9, 2018

SUBJECT: First Draft of Report #13, Penalties for Criminal Attempts

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 #13, Penalties for Criminal Attempts. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-301 CRIMINAL ATTEMPTS

RCC § 22A-301 (c) (1) establishes that general penalty scheme for attempts. It states, "An attempt to commit an offense is subject to one half the maximum imprisonment or fine or both applicable to the offense attempted, unless a different punishment is specified in § 22A-301 (c) (2)."[2] We believe that the intent of this provision is to permit a sentence to be imposed that is up to ½ the stated imprisonment amount for the completed offense, ½ the stated fine amount, or up to ½ the stated imprisonment term and up to ½ the stated fine amount. As written, it is unclear, however, if the phrase "½ the stated" only modifies the word "imprisonment" or whether it also

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] OAG believes that it cannot fully evaluate this proposal until actual penalties are assigned to the underlying offenses. We are also curious as to how this proposal will affect the percentage of trials that are jury demandable.

modifies “fine” “or both.” We believe that this needs to be clarified either in the proposal or in the Commentary. If the Commission chooses to clarify this penalty provision in the Commentary, it should give an example.

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: March 9, 2018

SUBJECT: First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons

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 #14 Recommendations for Definitions for Offenses Against Persons. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1001. Offense Against Person's Definition

RCC § 22A-1001 (3) defines the word "Coercion." When the lead in language is read with many of the subparagraphs it is not clear which person must be affected. For example, the lead in language when read with the first subparagraph states, "'Coercion' means causing another person to fear that, unless that person engages in particular conduct, then another person will…" (A) Inflict bodily injury on another person…" It would be clearer if (A) stated, "Inflict bodily injury on that person or someone else." All other paragraphs that are phrased like (A) should be similarly amended.

[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.

RCC § 22A-1001 (11) defines the term "Law enforcement officer." Unlike D.C. Code § 22-405(a), this definition does not include District workers who supervise juveniles. A sentence should be added that states that a law enforcement officer also means "Any officer, employee, or contractor of the Department of Youth Rehabilitation Services."[2] In addition, neither this section nor the corresponding assault offenses address the jurisdictional provision contained in current law. D.C. Code § 22-405(a) includes a provision within the definition of a law enforcement officer that includes "any officer or employee of the government of the District of Columbia charged with the 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." RCC § 22A-1001 (11) must include such a statement or the District would lose jurisdiction to prosecute offenses that occur at New Beginnings.

RCC § 22A-1001 (15) defines the term "Protected person." Within the class of people who are protected are: a law enforcement officer, public safety employee, transportation worker, and District official or employee, but only "while in the course of official duties." See RCC § 22A-1001 (15) (D)-(G). It is unclear, however, whether one of these people would fall under this definition if they were assaulted, as a direct result of action they took in their official capacity, after they clocked out of work or whether they must be working at the time of the assault. A person may be assaulted or threatened at home for actions that they took on the job. In other words, what are the limits of the term "while in the course of official duties." To clarify, this definition should be expanded to say, "while in the course of official duties or on account of those duties."

RCC § 22A-1001 (17) defines the term "Serious Bodily injury." It includes within its definition "… obvious disfigurement." The question that must be clarified is obvious to whom? For example, if a person shoots off some else's big toe, depending on what shoe the victim wears the toe being missing may – or may not – be obvious. Similarly, if someone is shot on the inner thigh and has a scar, that scar may be obvious to the victim's spouse or other family members, but not to the general public. The Commission should consider either addressing this issue in the definition itself or in the Commentary.

RCC § 22A-1001 (18) defines the term "Significant bodily injury." It is unclear, however, if the government just fails to prove serious bodily injury, RCC § 22A-1001 (17), whether it would necessarily prove significant bodily injury. To improve proportionality, etc., the definition of significant bodily injury should always include the subset of offenses that are included in the definition of serious bodily injury. To use the example from the previous paragraph, if the government proves that the person was disfigured, but doesn't prove that it was obvious, then the disfigurement should qualify as a significant bodily injury.

[2] As many Department of Youth Rehabilitation Services facilities are staffed by contractors, as opposed to employees, the proposed language is a slight expansion of current law.

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: March 9, 2018

SUBJECT: First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses

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 #15 Recommendations for Assault & Offensive Physical Contact Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1202. Assault[2]

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

[2] In OAG's Memorandum concerning the First Draft of Report #14, Recommendations for Definitions for Offenses Against Persons, we noted that the proposed definition did not include the grant of jurisdictional authority that exists in current law. D.C. Code § 22-405(a) contains a provision that includes within the definition of a law enforcement officer, "any officer or employee of the government of the District of Columbia charged with the 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." If the jurisdictional issue is not resolved in RCC § 22A-1001 (11) then it needs to be resolved here, and in other substantive provisions.

RCC § 22A-1202 defines the offense of "Assault." Paragraph (a) establishes the elements for aggravated assault. Paragraph (A)(4) addresses protected persons in two contexts. RCC § 22A-1202 states, in relevant part, "A person commits the offense of aggravated assault when that person…:

(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and
(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;

This provision raises the question of what, in practice, it means to be reckless as to whether the complainant is a protected person. The definition of "protected person" includes a person who is less than 18 years old …and a person who is 65 years old or older.[3] As the Commentary notes, recklessly is a culpable mental state, defined in RCC § 22A-206, means that the accused must disregard a substantial and unjustifiable risk that the complainant is a "protected person." So, if a perpetrator sees a person who is 67 years old, looks her over, and decides that she looks to be in her early 60s, and then assaults the woman, is the perpetrator disregarding a substantial and unjustifiable risk that the complainant is a "protected person"? Clearly, it is inappropriate to penalize a 67-year-old victim by taking her out of the class protected persons for looking like she is in better health than her age would otherwise indicate. People who attack persons in their 60s and 70s should bear the risk that they are assaulting a protected person and will be committing an aggravated assault.

There are two ways that the Commission can clarify, or correct, this issue. The first is to directly address this issue in the Commentary making it clear that in this situation assaulting the 67-year-old woman would be an aggravated assault. The second is to change the mental state that is associated with age related offenses. To do this, the phrase "with recklessness as to whether the complainant is a protected person" would be split into two phrases. The first would be "when the person is, in fact, a protected person as defined in RCC § 22A-1001 (15) (A) and (B)" and the other would be "with recklessness as to whether the complainant is a protected person as defined in RCC § 22A-1001 (15) (C) through (H)." This would preserve the mental state of

[3] See RCC § 1001 (15) generally. The definition of "protected person" further requires that if the victim is a person who is less than 18 years old that the defendant must, in fact, be at least 18 years old and be at least 2 years older than the victim.

recklessness as an element for all non-age related protected persons, while establishing an "in fact" requirement for age related protected persons.

The elements of second degree assault are established in RCC § 22A-1202 (c). It states that:

> A person commits the offense of second degree assault when that person:
> (1) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon;
> (2) Recklessly causes significant bodily injury to another person; and
> (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
> (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
> (i) Law enforcement officer;
> (ii) Public safety employee;
> (iii) Participant in a citizen patrol;
> (iv) District official or employee; or
> (v) Family member of a District official or employee; [emphasis added]

RCC § 22A-1202 (c)(1) enhances the penalty over third, fourth, and fifth degree assault because the perpetrator causes bodily injury by using a dangerous weapon. It addresses society's interest in discouraging the use of weapons during an assault. RCC § 22A-1202 (c)(2) enhances the penalty provision when the perpetrator causes significant bodily injury to any protected person or to certain protected persons when the injury is caused with the purpose of harming the complainant because of the person's government affiliation. It addresses society's interest in discouraging assaults against law enforcement personal, government workers, and others involved in public safety or citizen patrols, as well as family members of a District official or employees. RCC § 22A-1202 (c)(1) and (c)(2), therefore, serve different societal interests.

As these two sets of elements are both penalized as second degree assault, there is no additional penalty for a person using a gun while causing significant bodily injury to a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or a family member of a District official or employee. In other words, if the perpetrator plans on causing significant bodily injury, they may as well use a dangerous weapon. To make the penalties proportionate, a person who uses a dangerous weapon against a person listed in RCC § 22A-1202 (c)(2)(B) and causes significant bodily injury should be subject to a higher penalty than if they use a dangerous weapon in assaulting one of those persons and only cause bodily injury. The Commission should create a new degree of assault that comes between the current first and second degree assaults to accommodate this offense.[4]

[4] A similar argument can be made concerning the need to amend aggravated assault under RCC § 22A-1202 (a).

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: March 9, 2018

SUBJECT: First Draft of Report #16 Recommendations for Robbery

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 #16 Recommendations for Robbery. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1201. Robbery

OAG would like to memorialize an observation that it discussed with the Commission. The Commission is charged with using clear and plain language in revising the District's criminal statutes.[2] We believe that the idea is to make the Code more understandable. We have described the problem as multi-step nesting. For example, in order to determine the elements of robbery (including which degree is appropriate in a given circumstance), one has to look up the elements of criminal menacing, and in order to determine the elements of criminal menacing, one must look up the elements of assault. While there are many sound drafting principles for using this approach to criminal code reform, it does leave proposals that may not be "clear" to a person who is trying to understand the elements of this offense.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] See D.C. Code § 3-152 (a)(1).

OAG would like the Commission to clarify the amount of force that is necessary to complete a robbery. OAG understands from conversations with the Commission that a person who grabs a purse out of someone's hand or from out from under someone's arm would be guilty of third degree robbery. Specifically, the force that is needed merely to take the purse would meet the requirement in Section 1201 (d) (4)(A) that it was accomplished by "Using physical force that overpowers any other person present…" On the other hand, the force that is necessary to complete a pick pocket (where the victim is unaware of the taking), would not be sufficient to convert the taking to a robbery. To ensure that the proposal is interpreted as intended, the Commission should consider adding more hypotheticals to the Commentary.

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: March 9, 2018

SUBJECT: First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat Offenses

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 #17 Recommendations for Criminal Menace & Criminal Threat Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

Both RCC § 22A-1203 and RCC § 22A-1204. Criminal Menace and Criminal Threat

OAG would suggest that that the titles to Sections 1203 and 1204 be changed to drop the word "Criminal." Instead of calling them "Criminal Menacing" and "Criminal Threats", we believe that they should simply be called "Menacing" and "Threats." By adding the word "criminal" to the name it unnecessarily raises the question what a non-criminal menacing and non-criminal threat is. The words "menacing" and "threat" meet the requirements of D.C. Code § 3-152(a) that the Criminal Code to "Use clear and plain language."

[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.

In addition, the Commentary should make clear that the effective consent defense in both offenses,[2] is the consent to being menaced or threatened, not consent to the underlying conduct constituting the offenses of homicide, robbery, sexual assault, kidnapping, and assault (and for criminal threats, the offence of criminal damage to property).[3]

[2] See RCC § 22A-1203 (e) and RCC § 22A-1204 (e).
[3] See RCC § 22A-1203 (a)(3) and (b)(2) and RCC § 22A-1204 (a)(2) and (b)(2).

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 9, 2017
Re:	Comments on First Draft of Report 13, Penalties for Criminal Attempts

The Public Defender Service makes the following comments on Report #13, Penalties for Criminal Attempts. PDS agrees with the principle embodied in proposed RCC 22A-301 of a substantial punishment reduction between completed and attempted criminal conduct. However, PDS strenuously objects to any revision of the criminal code that will result in longer periods of incarceration for individuals convicted of crimes. While before the RCC's sentencing provisions are drafted it is difficult to say exactly how many and by how much sentences will increase under RCC § 22A-301(c), it is clear that many sentences will increase under RCC § 22A-301. The commentary itself concedes[1] that pursuant to RCC §22A-301(c) various non-violent property offenses, currently punishable as misdemeanors with a maximum imprisonment term of 180 days,[2] would become felony offenses punishable by a term of years. This would not only increase the length of incarceration, it would also have negative consequences for persons' prospects for housing, education, and employment. By making some attempt offenses felonies rather than misdemeanors, options for record sealing and diversion programs would also likely decrease. Sentences for crimes such as attempted burglary, which under D.C. Code § 22-1803 carries a statutory maximum of 5 years imprisonment, may also increase under RCC § 22-301(c). Since the District has no locally accountable control over how offenses are ultimately prosecuted, whether diversion programs are offered, and what sort of plea offers are available to defendants, the District must take exceptional care in labeling offenses felonies and establishing statutory maxima.

[1] Report #13, page 14.

[2] D.C. Code § 22- 1803.

The principal benefit of the RCC's default rule of a 50% reduction between attempted and completed criminal conduct is bringing order and uniformity to legislation that has evolved piecemeal. Increased incarceration is too high a price to pay for the benefit of a clearer statutory scheme.

Therefore, for attempts, PDS proposes: 1) maintaining the sentencing consequences of D.C. Code § 22-1803, with a maximum punishment of 180 days of incarceration, for property offenses and other non-violent offenses covered in that section and the RCC equivalent; 2) maintaining the sentencing consequences of D.C. Code § 22-1803, with a five year maximum sentence for attempted crimes of violence such as burglary, as defined in D.C. Code § 23-1331; and 3) replacing D.C. Code § 22-401 (assault with intent to kill, rob, or poison or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse) with the RCC proposal to make the statutory maximum for the attempt crime half of that for the completed offense.

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 9, 2017
Re:	Comments on First Drafts of Reports 14 through 17, Offenses Against Persons

The Public Defender Service makes the following comments.

Report #14: Recommendations for Definitions for Offenses Against Persons

1. PDS recommends strengthening the definition of "bodily injury." PDS supports the overall structure of assault and offensive physical contact proposed for the RCC. To reduce unnecessary overlap of offenses and to improve the proportionality of penalties, RCC creates a number of assault gradations and creates a new offense of Offensive Physical Contact. Offensive Physical Contact "punishes as a separate offense … low-level conduct that was previously not distinguished from more serious assaultive conduct in current law."[1] The offense "criminalizes behavior that does not rise to the level of causing bodily injury or overpowering physical force."[2] PDS heartily endorses that approach. However, that approach becomes hollow when "bodily injury" is defined to include fleeting physical pain. To give real meaning to the distinction between "assault" and "offensive physical contact," the definition of "bodily injury" must be rewritten to set a higher floor for "assault", thus creating a more realistic ceiling for "offensive physical contact." PDS recommends "bodily injury" require at least moderate physical pain. Specifically, the definition should read: "'Bodily injury' means moderate physical pain, illness, or any impairment of physical condition." This proposal creates a more clear progression of criminalized physical touching: offensive physical contact; bodily injury, which requires moderate physical pain; significant bodily injury, which requires a bodily injury that warrants hospitalization or immediate medical treatment to abate severe pain; and serious bodily injury,

[1] Report #15, page 52.

[2] Report #15, page 50.

which requires a substantial risk of death, protracted disfigurement, or protracted impairment of a bodily member.

2. PDS recommends clarifying in the commentary for the definition of "dangerous weapon" that the issue of whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury"[3] is a question of fact, not a question of law.

3. PDS notes that the use and definition of the umbrella term "protected person" expands the application of certain enhancements to allow for greater punishment than in current law. For example, under current law the enhancement when the complainant is a minor only applies to offenses that are "crimes of violence," which does not include simple assault;[4] however, RCC Fourth Degree Assault would allow for increased punishment for conduct that results in (mere) bodily injury of a protected person.[5] Similarly, the elderly enhancement in current law does not apply to simple assault,[6] but bodily injury assault would be punished more severely if committed against a protected person (elderly person). Under current law, there is no law enforcement enhancement for the offense of robbery in contrast with RCC section 1201 for robbery.[7] PDS does not object to this expansion only because it is included in the proposed restructuring of assaults and robbery that incorporates a number of currently free-standing penalty enhancements, thus preventing stacking of enhancements.[8]

Report # 15: Recommendations for Assault & Offensive Physical Contact Offenses

1. The commentary states that for both Section 1202(a)(4)(A) and (a)(4)(B), the complainant must be a protected person.[9] However, the statutory language does not specify that the complainant must "in fact" be a protected person. As it is currently written, the "protected person" circumstance element could be read to apply when a person causes the requisite injury reckless as to whether the complainant might be a protected person regardless of whether the complainant actually is. Thus, PDS recommends that wherever the "protected person" circumstance element

[3] See RCC § 22A-1001(4)(F).

[4] See D.C. Code §§ 22-3611, 23-1331, 22-404.

[5] RCC § 22A-1202(e)(1).

[6] See D.C. Code § 3601.

[7] Compare D.C. Code §22- 2801 and RCC § 22A-1201(a)(2)(B), (b)(2)(iii), (c)(2)(iii).

[8] See e.g., Report #15, page 22.

[9] See Report #15, page 7. Although the commentary on this point only cites "protected person" for aggravated assault, presumably the requirement that the complainant actually be a protected person extends to each gradation that has a "protected person" circumstance element.

appears, it be rewritten to clarify that the circumstance element requires that the complainant must, *in fact*, have that status. For example, aggravated assault should be rewritten as follows:

"(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person and the complainant, in fact, is a protected person; or

(B) (i) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

~~(i)~~(I) Law enforcement officer;

~~(ii)~~(II) Public safety employee;

…

~~(v)~~(V) Family member of a District official or employee; and

(ii) the complainant, in fact, has that status;

2. PDS recommends eliminating the use of the mental state "recklessly, under circumstances manifesting extreme indifference to human life" where it is used throughout the assault section. The added component of "under circumstances manifesting extreme indifference" means that the various gradations of RCC Assault fail to merge with (become lesser included offenses of) RCC Robbery. For example, Aggravated Robbery requires Third Degree Robbery plus recklessly causing serious bodily injury by means of a dangerous weapon. Aggravated Assault, in contrast, requires recklessly under circumstances manifesting extreme indifference to human life causing serious bodily injury by means of a dangerous weapon. Because each offense has an additional element - aggravated robbery requires 3rd degree robbery and aggravated assault requires "under circumstances manifesting extreme indifference to human life" - they do not merge. PDS recommends replacing the "reckless with extreme indifference" mental state with "knowing" for the more serious gradation and with simple "recklessness" for the less serious gradations. "Knowing" and "reckless" are easier to differentiate from each other and more of the gradations of assault will merge with gradations of robbery.

Specifically, PDS recommends rewriting the four most serious gradations of assault as follows:

"**Section 1202. Assault**

(a) *Aggravated Assault.* A person commits the offense of aggravated assault when that person:

(1) Purposely causes serious and permanent disfigurement to another person;

(2) Purposely destroys, amputates, or permanently disables a member or organ of another person's body;

(3) Knowingly ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

(4) Knowingly ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person; and

(A) Such injury is caused knowing ~~with recklessness as to whether~~ the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(b) *First Degree Assault*. A person commits the offense of first degree assault when that person:

(1) Recklessly~~, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

(2) Recklessly causes serious ~~significant~~ bodily injury to another person ~~by means of what, in fact, is a dangerous weapon~~; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(c) *Second Degree Assault.* A person commits the offense of second degree assault when that person:

(1) Recklessly causes significant bodily injury to another person by means of what, in fact, is a dangerous weapon;

(2) Recklessly causes serious bodily injury to another person;

(3) Recklessly causes significant bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(d) *Third Degree Assault.* A person commits the offense of third degree assault when that person:

(1) Recklessly causes significant bodily injury to another person; or

(2) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon; …

3. PDS objects to increasing the severity of assault based on strict liability as to whether the object that is the means of causing the requisite injury is a "dangerous weapon."[10] For example, a person commits RCC Fifth Degree Assault when that person recklessly causes bodily injury to another person;[11] a person commits RCC Second Degree Assault when that person recklessly causes bodily injury to another person by means of what, *in fact, is a dangerous weapon*.[12] PDS recommends that the mental state of "negligence" apply to whether the object that is the means by which the requisite injury is caused is a "dangerous weapon." A series of hypotheticals will illustrate the unfairness of strict liability and the ease with which the prosecution will likely be able to prove negligence in most cases.

   A. Defendant hits complainant with a light cloth purse. Beading on the purse scratches the complainant and causes a "bodily injury" → Perhaps RCC 2nd degree offensive physical contact. Perhaps RCC 5th degree assault, if the jury finds that the defendant was aware of a substantial risk that hitting someone with a cloth purse would result in a bodily injury. But not a more severe gradation of assault because the cloth purse is not a per se dangerous weapon.[13] If the offense allowed strict liability, it's unlikely that the jury would find "in fact" that the cloth purse was a dangerous weapon, that is, that the defendant used it in a manner that was likely to cause death or serious bodily injury. A negligence standard would probably lead to the same result -- it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the cloth purse, "in the manner of its actual use, was likely to cause death or serious bodily injury."[14]

   B. Defendant lunges at the complainant with a switchblade, nicks the complainant, causing bodily injury → perhaps 2nd degree assault, if the jury finds that the defendant recklessly caused bodily injury by means of an object -- if strict liability were the standard, the jury would find that "in fact" the switchblade was a per se dangerous weapon;[15] likely the same result if negligence were the standard as the jury would almost surely find that the

[10] This objection and corresponding recommendation applies throughout the Offenses Against Persons Chapter of the RCC, not just to the Assault Section.

[11] RCC § 22A-1202(f) at Report #15, page 4.

[12] RCC §22A-1202(c)(1) at Report #15, page 3 (emphasis added).

[13] See RCC §22A-1001(4)(A) – (E).

[14] See RCC §22A-1001(4)(F).

[15] See RCC §22A-1001(4)(B); (13)(E).

defendant was negligent in failing to perceive a substantial risk that the object in her hand was a switchblade, a per se dangerous weapon.

C. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse, a Kindle tablet, causes bodily injury (physical pain) → similar to (A) but more likely than (A) to result in RCC 5th degree assault (versus just RCC 2nd degree offensive physical contact) because the jury might more easily find that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury. But like (A), this would likely not result in a more severe assault gradation. A Kindle tablet is not a per se dangerous weapon. If the standard were negligence, it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the manner in which she used the heavy cloth purse/Kindle tablet would likely result in death or serious bodily injury. It is similarly unlikely that strict liability has a different result; it is improbable that the jury would find, in fact, that the cloth purse/Kindle tablet, in the manner in which it was used was likely to cause death or serious bodily injury.

D. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse causes bodily injury (physical pain). The heavy object is a firearm, a per se dangerous weapon.[16] If strict liability were the standard, the defendant in this scenario could be found guilty of RCC 2nd degree assault if the jury found that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury; if the jury found that it was the heavy object in the purse that caused the bodily injury, then "in fact" the heavy object was a firearm, which is a per se dangerous weapon. Thus, the defendant is guilty of recklessly causing bodily injury by means of what, in fact, is a dangerous weapon. However, the negligence standard could lead to a different result, a result more proportionate to the previous hypos. To find the defendant guilty of RCC 2nd degree assault, the jury would have to find, much like in (C), that the defendant was aware of a substantial risk that the conduct of swinging a heavy cloth purse would result in bodily injury. Then, again, if the jury found that it was the heavy object within the cloth purse that caused the bodily injury, the jury would have to find that the defendant failed to perceive a substantial risk that the "heaviness" was a firearm (a per se dangerous weapon) or find that the defendant failed to perceive a substantial risk that the heavy object was used in a manner that was likely to cause death or serious bodily injury. It is possible that there will be evidence to show that the defendant was aware that the heaviness was a "firearm" or, more accurately, there could be evidence that would create a substantial risk that the heaviness is a firearm and the defendant was negligent in failing to perceive that risk. Even though using a firearm as a weight in a cloth purse to hit someone on their derriere is not the intended use of a firearm and is not likely to cause death or serious bodily injury, PDS does not object to applying the per se dangerous weapon to enhance assault in this way. PDS strongly objects however to enhancing

[16] See RCC § 22A-1001(4)(A).

assault to a more severe gradation based on strict liability that the mystery heavy object happens to be a firearm.

PDS recommends the dangerous weapon circumstance element be worded as follows (with modifications as necessary for the various levels of bodily injury): "recklessly causes bodily injury to another person by means of ~~what, in fact, is~~ an object and is negligent as to the object being a dangerous weapon."

4. PDS objects to Fourth Degree Assault criminalizing negligently causing bodily injury with an unloaded firearm. Criminalizing negligent conduct is severe and should be done rarely. The particular problem with Fourth Degree Assault is applying such a low mental state to conduct that is indistinguishable from conduct that would have the same result. Negligently causing bodily injury by means of an unloaded firearm is indistinguishable from negligently causing bodily injury by means of a cloth purse/Kindle tablet or by means of a rubber chicken. What sets a firearm apart from other objects or even other weapons is its use *as a firearm* (to fire a projectile at a high velocity), not its use as a heavy object or club. For this reason, PDS does not object to criminalizing negligently causing bodily injury by the discharge of a firearm. Fourth Degree Assault should be rewritten as follows: "Negligently causes bodily injury to another person by means of the discharge of what, in fact, is a firearm as defined at D.C. Code § 22-4501(2A)~~, regardless of whether the firearm is loaded~~;…"

Report #16: Recommendations for Robbery

1. PDS recommends rewriting Third Degree Robbery (on which all of the more serious gradations are based) and Second Degree Criminal Menace so that they are not circular. As currently written, one of the ways to commit Third Degree Robbery is to take property of another from the immediate actual possession or control of another by means of committing conduct constituting a Second Degree Criminal Menace.[17] Second Degree Criminal Menace can be committed when a person communicates to another person physically present that the person immediately will engage in conduct against that person constituting Robbery.[18] PDS agrees with the approach that a form of robbery could be committed by taking property of another by means of having made a communication threatening bodily injury and agrees that a form of criminal menacing could be committed by threatening to take property by use of force. Each offense statute however should be rewritten to specify culpable conduct without circular references to other offense statutes.
2. PDS objects to incorporating attempt conduct into the completed Robbery offense. Heretofore, the RCC has adopted the laudable principle of punishing attempts separately from completed

[17] RCC §22A-1201(d)(4)(C).

[18] RCC §22A-1203(b)(2)(B). Note, RCC §22A-1203(b)(2) uses the word "defendant;" this is clearly a typo and should be changed to "person."

conduct. [19] However, PDS is willing to accept incorporating attempt in this instance on two conditions. One, the commentary must include a concise statement that the attempt only applies to the element of taking or exercising control over the property; attempted or "dangerously close" conduct will not suffice for any other element of Robbery. Two, element (4) must be rewritten to eliminate the "facilitating flight" language.

RCC Robbery does not have a requirement of asportation or movement of the property.[20] That makes sense; if a completed robbery no longer requires property to have been taken – indeed, it does not require that there even be property[21] – then completed robbery cannot require property to have been moved.[22] Similarly, flight or facilitating flight is intrinsically tied to taking (controlling) the property. "A thief who finds it necessary to use force or threatened force after a taking of property in order to retain possession may in legal contemplation be viewed as one who never had the requisite dominion and control of the property to qualify as a 'possessor.' Hence, it may be reasoned, the thief has not 'taken' possession of the property until his use of force or threatened force has effectively cut off any immediate resistance to his 'possession.'"[23] District case law supports the nexus between taking property and flight. *Williams v. United States*,[24] cited in Report #16 to support the notion that force after the taking constitutes "robbery,"[25] does hold that the robbery was "still in progress" when the defendant was fleeing. However, *Williams* is clear in basing its analysis on "the asportation of goods" and in examining the particular circumstances that the defendant "was acting as a principal in effecting a robbery *by carrying away the proceeds of that robbery*."[26] Because pursuant to RCC Robbery, the robbery can be completed without having exercised control of the property (or without there being property) and

[19] See e.g., Report #9, page 54, Arson; Report #9, page 70, Reckless Burning; Report #9, page 81, Criminal Destruction of Property; Report # 10, page 6, Fraud; Report # 11, page 5, Extortion.

[20] Report #16, page 12.

[21] See Report #16, page 13, n. 56 ("For example, if a person causes bodily injury to another in an attempt to take property from that person, but finds that other person does not actually possess any property …, that person could still be found guilty of robbery.")

[22] Compare robbery that requires a taking ("shall take") and has an asportation requirement, even if minimal with armed carjacking that allows "attempts to do so" and does not require asportation.

[23] Report #16, page 16, n. 80 (Quoting 4 Charles E. Torcia, Wharton's Criminal Law § 463, at 39-40 (15th ed. 1996))(emphasis added).

[24] 478 A.2d 1101 (D.C. 1984).

[25] Report #16, page 16, n. 82.

[26] *Williams*, 478 A.2d at 1105. ("The asportation under our analysis continues so long as the robber indicates by his actions that he is dissatisfied with the location of the stolen goods immediately after the crime…" (emphasis added)).

because there is no "carrying away" requirement, District law does not, in fact, support extending the duration of robbery to include flight. Thus, "robbery" should complete when the person takes, exercises control over, or attempts to take or exercise control over, the property of another from the immediate actual possession or control of another by means of [physical force that overpowers]. This construction does not mean that the intent to take the property must be formed before the force is used nor does it mean that the force must be used with the purpose of creating an opportunity to take property.[27] It does mean, however, that the force necessary to elevate the conduct from a theft from the person to a robbery must occur before or simultaneous to the taking of the property; the force must create the opportunity to take or exercise control or the attempt to take or exercise control of the property. If the force occurs after the property is taken, then it is not a robbery. The taking is a theft from person and the force might separately be an assault.

3. As noted above, PDS supports the intent embodied in the structure of proposed RCC Chapter 12 to reduce unnecessary overlap of offenses and to improve the proportionality of penalties. Though the offenses are obviously meant to stack and build on each other, various "stray" elements mean that the offenses will not merge using a strict elements analysis. In addition, the way robbery is written, a more serious gradation could be charged based on an injury to someone other than the "victim" of the robbery (the robbery victim being the person in actual possession or control of the property).[28] It would not reduce overlap of offenses nor improve the proportionality of penalties to allow a conviction of a more severe gradation of robbery based on injury to a non-robbery victim and also allow an assault conviction for injury to the non-robbery victim when if the force were used against only the robbery victim, the assault or offensive touching or menacing conduct would merge.

   To further carry out the intent of the proposed structure, PDS strongly recommends that the RCC include a section that limits convictions for multiple related offenses against persons. Modeled on RCC § 22A-2003,[29] PDS proposes the following language be added to Chapter 12 of the RCC.

   > RCC § 22A-1206. Limitation on Convictions for Multiple Related Offenses Against Persons.
   >
   > (a) *Robbery, Assault, Criminal Menacing, Criminal Threats, or Offensive Physical Contact Offenses.* A person may be found guilty of any combination of offenses

[27] See Report #16, page 12, n. 17.

[28] An example would be a person who knocks Bystander out of the way in order to take wallet sitting on table in front of "robbery victim." The overpowering force used against Bystander would raise this taking to a robbery even though the property was in the control of the "robbery victim." See also Report #16, page 6, n. 14.

[29] See Report #8, First Draft at page 49.

contained in Chapter 12[30] for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct against the same complainant or based on the same act or course of conduct when the offense against one person is used to establish a gradation for an offense against another person.

(b) *Judgment to be Entered on Most Serious Offense.* Where subsection (a) prohibits judgments of conviction for more than one of two or more offenses based on the same act or course of conduct against the same complainant, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.

Report #17: Recommendations for Criminal Menace & Criminal Threats Offenses

PDS recommends that the RCC omit the words "criminal" in the titles of criminal threats and criminal menace language. The language is redundant and could cause the offenses to be judged more harshly in the contexts of employment, housing, and education.

[30] At this time, PDS is proposing this section to apply to robbery, assault, criminal menacing, criminal threats, and offensive physical contact. PDS anticipates proposing expanding this section or proposing another one to limit multiple related offenses for those offenses and homicide, sexual assaults, and kidnapping.

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: May 11, 2018

SUBJECT: First Draft of Report #18 Solicitation and Renunciation

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 #18 Solicitation and Renunciation. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-304. Renunciation Defense to Attempt, Conspiracy, and Solicitation

Section 22A-304(a)(1) says that for the defendant to be able to use the affirmative defense of renunciation, the defendant must have engaged in conduct "sufficient to prevent commission of the target offense." The discussion of that provision says it was drafted that way to include situations where the defendant attempts to "persuade" a solicitee who was actually an informant not to commit a crime he or she was never going to commit in the first place. However, in order for the conduct to be "sufficient to prevent the commission of the target offense", the defendant's actions must have at least decreased the likelihood of the offense happening. But when a defendant is "persuading" an informant not to act, the defendant's actions have no effect on the probability that the criminal conduct will take place. This provision should be rewritten to specifically include both situations; where the defendant engages in conduct that is sufficient to

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

prevent the commission of the target offense, as well as where the defendant's actions would have been sufficient to prevent the offense, if the circumstances were as the defendant believed them to be. The provision could be redrafted as follows:

> (a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that:
>
> (1) The defendant engaged in conduct sufficient to prevent commission of the target offense or would have been sufficient to prevent the commission of the target offense if the circumstances were as the defendant believed them to be;
>
> (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

Section 22A-304(b)'s title states that it is the provision that defines when a renunciation is voluntary and complete. However, the paragraph that follows actually says what isn't voluntary and complete renunciation. It states, "A renunciation is not 'voluntary and complete' within the meaning of subsection (a) when it is motivated in whole or in part by… [certain circumstances]." This implies that a renunciation is voluntary and complete as long as none of the elements in (b) are satisfied.

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: May 11, 2018

SUBJECT: First Draft of Report #19. Homicide

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 #19, Homicide. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1101. Murder

Section 22A-1101 (a)(2)(E) makes it an aggravated murder when the requisite elements are met and "The defendant committed the murder after substantial planning…" As noted on page 6 of the memorandum, "Subsection (a)(2)(E) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The accused must have formed the intent to kill a substantial amount of time before committing the murder." The phrasing of this subparagraph raises several issues. First, the plain meaning of the term "substantial planning" sounds as if the planning has to be intricate.[2] However, the Comment portion just quoted makes it sound like the word "substantial" refers to the amount of time the intent was formed prior to the murder. These provisions should be redrafted to clarify

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

whether the intent is to have the enhancement apply when the perpetrator plans the murder some period prior to actually committing it (even if it is a simple plan to just shoot the victim), whether the plan to commit the murder has to have many steps to it (even if it was conceived almost instantaneously with the commission of crime), or whether either will suffice.

If the term "substantial planning" refers to the time between the planning and the commission of the offense and that "Substantial planning requires more than mere premeditation and deliberation" How much more – and how will anyone know? As the discussion points out, premeditation can happen in the blink of an eye. How much more is needed for substantial planning?

Section 22A-1101 (a)(2)(I) makes it an aggravated murder when the requisite elements are met and "In fact, the death is caused by means of a dangerous weapon." However, this is a change from current District law. As noted on page 14 of the memorandum "Current D.C. Code § 22-4502 provides enhanced penalties for committing murder "while armed" or "having readily available" a dangerous weapon." While there may be arguments for not providing an enhancement for an unseen weapon that is not used, there should be enhancements for when weapons are used or brandished. For example, a perpetrator shoots a person in chest and then sits on the bleeding victim and chokes him to death. While it cannot be said that "the death was caused by means of a dangerous weapon" the use of the gun certainly prevented the victim from defending herself. Similarly, victims may be less likely to defend themselves if assailants have guns aimed at them while they are being assaulted. To take these scenarios into account, we suggest that § 22A-1101 (a)(2)(I) be redrafted such that the enhancement applies any time a weapon is displayed or used, whether or not it in fact caused the death.

Section 22A-1101 (f) establishes a mitigation defense. Subparagraph (1)(B) says one mitigation defense to murder is "[a]cting with an <u>unreasonable belief</u> that the use of deadly force was necessary…" [emphasis added] Our understanding is that this was intentional, and wasn't meant to say "<u>reasonable</u>." We ask because of the discussion of it on page 9 of the memorandum. That discussion seems to say that a reasonable belief of necessity would be a complete defense to murder, while an unreasonable belief merely mitigates murder down to manslaughter. But the leadoff sentence in the comment implies the opposite. It says that "[s]ubsection (f)(1)(B) defines mitigating circumstances to include acting under <u>a reasonable</u> belief that the use of deadly force was necessary" [emphasis added] – suggesting that a reasonable belief merely mitigates down to manslaughter. This discussion needs to be clarified.

Subparagraph (3) of § 22A-1101(f) explains the effect of the mitigation defense. It states:

> (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant shall not be found guilty of murder, but may be found guilty of first degree manslaughter.

> (B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant shall not be found guilty of murder, but may be found guilty of aggravated manslaughter.

Paragraphs (A) and (B) dictate what the defendant is guilty of if the government fails to prove the absence of mitigation circumstances beyond a reasonable doubt. We have a few observations and suggestions concerning this provision.

First, paragraphs (A) and (B) are written in terms of what a trier of fact may do as opposed to what the law is concerning mitigation (i.e. "shall not be found guilty of murder, but may be found guilty…"). These paragraphs should be rewritten to state what the law is concerning mitigation, as follows:

> (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant is not guilty of murder, but is guilty of first degree manslaughter.
>
> (B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant is not guilty of murder, but is guilty of aggravated manslaughter.

Second, a successful mitigation defense results in a conviction for either first degree or aggravated manslaughter not withstanding that, but for the mitigation defense, the person committed an aggravated murder, first degree murder, or second degree murder. In other words, the penalties for committing these offenses are no longer proportionate to the conduct. More egregious conduct is penalized the same as less egregious conduct. There are a number of ways that the Commission could make these offenses proportionate. For example, a successful mitigation defense could lower the offense by one level.[3]

[3] Under this proposal a person who would have been guilty of aggravated murder, but for a successful mitigation defense would be guilty of first degree murder, and a person who would have been guilty of first degree murder, but for a successful mitigation defense would be guilty of second degree murder.

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: May 11, 2018

SUBJECT: First Draft of Report #20. Abuse & Neglect of Children, Elderly, and Vulnerable Adults

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 #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

COMMENTS ON THE DRAFT REPORT

RCC § 22A- Section 1501 and 1502. Child Abuse and Child Neglect.[1]

The Commission should consider changing the names of these proposed offenses. The terms "child abuse" and "child neglect" have long been associated with the District's child welfare system. See D.C. Code § 16-2301 (9). Calling the criminal offense and the civil offense by the same name will cause unnecessary confusion. We recommend renaming the RCC child abuse provision, "criminal cruelty to a child" and renaming RCC child neglect, "criminal harm to a child."[2]

RCC § 22A- Section 1501. Child Abuse.

[1] Third Degree Child Abuse includes "Recklessly … us[ing] physical force that overpowers a child." As noted in previous memoranda and discussions, the term "overpower" is not defined.
[2] There may be other names that the Commission may choose that avoids confusion with the child welfare system.

In establishing the offense degree, the Child abuse statute utilizes the terms "serious bodily injury" and "significant bodily injury" that were developed to distinguish between the various degrees of offenses against persons. While those definitions may be appropriate when distinguishing between injuries for adults, they are not sufficient to distinguish between injuries to a baby or small child. Either the definitions need to be expanded or additional degrees of child abuse need to be established. For example, it appears that the following injuries to a baby would not qualify as a first or second degree child abuse: regularly failing to feed the baby for 24 hours; causing a laceration that is .74 inches in length and less than a quarter of an inch deep; failing to provide medicine as prescribed, which causes the baby to suffer pain, problems breathing, or a serious rash; holding a baby's hand against a stove causing a first degree burn; and chocking the child, but not to the point of loss of consciousness.[3] As drafted, a parent who injured a child in one of the ways described in these examples would be guilty of third decree child neglect along with parents who merely "Recklessly fail[ed] to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child." [4]

RCC § 22A- §1501 (f)(1) establishes the parental discipline defense. Subparagraph (D) limits the defense to conduct that does not include burning, biting, or cutting the child; striking the child with a closed fist; shaking, kicking, or throwing the child; or interfering with the child's breathing. We suggest that that list be expanded to include, interfering with the child's <u>blood flow to the brain or extremities.</u>

[3] This is a representative list of injuries that someone may inflict on a baby that, under the current draft, appears either to be a third degree child abuse or not child abuse at all.
[4] Similarly, it is not clear what offense a parent would be committing if the parent intentionally blew PCP smoke into a baby's face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injuy.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	May 11, 2018
Re:	Comments on First Draft of Report No. 18, Solicitation and Renunciation

The Public Defender Service objects to the restriction in proposed RCC § 22A-304, Renunciation Defense to Attempt, Conspiracy, and Solicitation, that the defense is only available if the target offense was not committed. PDS recommends that the District of Columbia join the "strong plurality of reform jurisdictions [that] relax the … requirement that the target of the offense attempt, solicitation, or conspiracy actually be prevented/thwarted."[1]

Specifically, PDS recommends rewriting subsection (a) of RCC §22A-304 as follows:

> (a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy ~~in which the target offense was not committed~~, it is an affirmative defense that:
>
> (1)(A) The person ~~defendant~~ gave a timely warning to law enforcement authorities; or
>
> (B) The person made a reasonable effort to prevent the commission of the target offense; ~~engaged in conduct sufficient to prevent commission of the target offense;~~
>
> (2) Under circumstances manifesting a voluntary and complete renunciation of the person's ~~defendant's~~ criminal intent.

The PDS proposal does more to further both the incapacitating dangerous persons and the deterrence purposes of the renunciation defense.[2] For a solo criminal venture, "renouncing" the target offense,

[1] Report #18, pages 47- 48.

[2] Report # 18, page 49.

particularly when done under circumstances manifesting a voluntary and complete renunciation of the person's criminal intent, will almost always actually prevent the commission/completion of the target offense. Both the dangerousness and the deterrence purposes are served; the defendant's "reward of remission of punishment"[3] results in society benefitting from less crime. Even where the criminal venture involves more than one person, if the venture would end if one key person decides to stop participating, then the target offense will be actually prevented if that key person renounces. The problem is how to motivate a person to try to prevent or thwart the criminal venture if the venture will likely go forward whether that person continues his participation or not. The greater the chance that one of the [potential] participants will receive "the reward of remission of punishment," the greater the chance society has of benefitting from less crime. Where there is some chance that the crime will not actually be thwarted despite a person's reasonable efforts, the person's motivation to attempt renunciation then depends on the person's perception of his or her chances of being apprehended. If the person can just walk away from the venture, believing there is little chance that his involvement (solicitation or conspiracy or even steps sufficient to comprise attempt) will be prosecuted or maybe even realized by law enforcement authorities, there is more incentive to walk away and less incentive to make efforts to thwart the target offense, particularly by contacting law enforcement. Requiring that a person give timely warning to law enforcement or make other reasonable efforts to prevent the commission of the target offense encourages renunciation, encourages a person to take steps that might be sufficient to prevent the target offense and to take those steps even when they cannot guarantee they will be sufficient. Society benefits more from encouraging a potential participant to take a chance on preventing the crime rather than taking a chance on getting away with the crime (the crime of attempt, solicitation and/or conspiracy).

[3] Report #18, page 49.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	The Public Defender Service for the District of Columbia
Date:	May 11, 2018
Re:	Comments on First Draft of Report No. 19, Homicide

PDS has the following comments and suggestions for the RCC's homicide offenses.

1. Elimination of Aggravated Murder and Reconsideration of Aggravating Circumstances

PDS proposes that the RCC eliminate the offense of aggravated murder, RCC § 22A-1101(a). One problem with RCC § 22A-1101(a), identified by PDS at the May 2nd public meeting of the CCRC, is its inclusion of "in fact, the death was caused by means of a dangerous weapon" as a circumstance element sufficient to raise first degree murder to aggravated murder. The use of a dangerous weapon is exceedingly common in homicides – it is how most murders are committed. According to the Metropolitan Police Department Annual Report for 2016[1], during the previous five year period, 91% of homicides were committed with a gun or knife. Blunt force trauma accounted for 7% of homicides, the vast majority of which would have also involved the use of an object that would likely meet the definition of "dangerous weapon." For the remaining 2% of homicides, 1% was committed by strangulation and 1% by other means not specified. Thus the RCC's definition would make between 91 and 98 percent of all homicides in the District an "aggravated murder." The RCC's goal of creating proportionality between offenses would be defeated if every homicide could be charged as aggravated murder.

Rather than having an offense of aggravated murder, PDS suggests that the RCC retain first degree and second degree murder as in the current Code. PDS questions the need for having any aggravating circumstances to add to the maximum punishment for murder. Both first and second degree murder will already carry high statutory maximum prison sentences, leaving room for judges to exercise their discretion to sentence defendants to greater sentences based on the

[1] Available at: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202016_lowres.pdf

particular circumstances of the case or the unique vulnerability of the decedent. Statutes allowing for even greater sentences for murder in particular instances are thus not necessary.

However, in so far as the CRCC believes it needs to include in the RCC certain aggravating circumstances, such as for instance, the killing of a child or of a police officer, PDS suggests that the RCC include a separate enhancement or aggravator provision. While other parts of the RCC incorporate traditional enhancements or aggravators within different offense grades, PDS recommends the RCC treat murder differently. A separate statute for aggravating factors would also provide clarity because as currently drafted many of the aggravating factors listed in RCC § 22A-1101 cannot be logically applied in the sections where they have been assigned. For instance, it is first degree murder when a person acting with "extreme recklessness"[2] causes the death of another[3] after substantial planning.[4] A separate enhancement section would resolve the factual impossibilities included in this drafting.

2. Reconsideration of Aggravators

As drafted, the RCC provides an aggravating factor to homicide where the decedent is a minor, an adult age 65 or older, a vulnerable adult, a law enforcement officer, a public safety employee, a participant in a citizen patrol, a transportation worker, a District employee or official, or a family member of a District official or employee. While some of these aggravators are long-standing or included in the Code as stand-alone offenses, for instance the murder of a police officer in the course of his or her duties[5], the RCC proposes to add the murder of District employees and their family members to the list of possible aggravators. This addition is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list. For example, a dispute at the Fort Totten Waste Transfer Station that leads to the death of a District employee is not categorically more dangerous to the community than an employee's death at a similar privately-run facility. PDS recommends removing District employees and their family members from this list of possible aggravators. If there is a particular vulnerability that makes the murder of a District employee more dangerous or blameworthy, judges will have sufficient discretion to sentence defendants to the statutory maximum in such instances. Since the statutory maxima will necessarily be high for murder offenses, it will allow for judicial differentiation in sentencing in instances where the defendant's culpability is heightened because of the decedent's status.

[2] "Extreme recklessness" is shorthand for "recklessly, under circumstances manifesting extreme indifference to human life," the mens rea for second degree murder at RCC § 22A-1101(c).

[3] RCC §§ 22A-1101(b)(2), (c).

[4] RCC § 22A-1101(b)(2)(E).

[5] D.C. Code § 22-2106, murder of law enforcement officer.

The RCC also provides aggravators when the defendant mutilated or desecrated the decedent's body or when the defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death. This type of evidence typically would not be relevant to the question of whether the defendant committed the charged offense and therefore would often be inadmissible in a criminal trial.[6] However, as the RCC is currently drafted, evidence of these aggravating circumstances would have to be presented to a jury and would be presented at the same time as all the other evidence in the case. In cases where the defense asserts that another individual committed the crime or that the defendant was misidentified, the evidence of torture or desecration of the decedent's body would be highly inflammatory and would not add anything to the jury's consideration of the key questions in the case.[7] For this reason, PDS recommends that if the RCC keeps these provisions as aggravators, the RCC should also include a requirement that this evidence can only be introduced and proved at a separate hearing in front of a jury following an initial guilty verdict.

PDS also questions the need for a separate aggravator for homicides perpetuated because the decedent was a witness in a criminal proceeding or had provided assistance to law enforcement. This aggravating circumstance would also be charged as the separate substantive offense of obstruction of justice.[8] Creating an aggravating circumstance that will be amply covered by a separate offense contravenes the CCRC's goal of streamlining offenses and eliminating unnecessary overlap.

3. Elevation of Mens Rea in First Degree Murder

PDS recommends that the RCC use the mens rea of purposely in first degree murder. RCC § 22A-1101(b), first degree murder, currently requires a mens rea of knowingly rather than purposely. While the definitions of knowingly and purposely are closely related, purposely is a

[6] Only relevant evidence is admissible in a criminal trial. For evidence to be relevant, it must be "related logically to the fact that it is offered to prove, ... the fact sought to be established by the evidence must be material ... and the evidence must be adequately probative of the fact it tends to establish." *Jones v. United States*, 739 A.2d 348, 350 (D.C.1999) (internal citations omitted). The trial judge has the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" within this context means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999).

[7] *See Chatmon v. United States*, 801 A.2d 92, 101 (D.C. 2002) (noting that the prosecutor's repeated reference to a photo of the decedent in a pool of blood while asking jurors to come to a decision that they could live with was improper and calculated to enflame the passions of the jury without adding to the proof in the case).

[8] D.C. Official Code § 22-722, obstruction of justice.

higher mental state and requires a "conscious desire" to bring about a particular result.[9] The RCC should use the highest mental state to describe the most serious and severely punished crimes in the Code. The RCC requires purposely as the mental state for aggravated assault (RCC § 22A-1202), child abuse (RCC § 22A-1501), first degree abuse of a vulnerable adult (RCC § 22A-1503), and unlawful obstruction of a bridge to the Commonwealth of Virginia (RCC § 22A-2605). The RCC should not use a lower mens rea for first degree murder.

4. Retention of the Element of Premeditation and Deliberation in First Degree Murder

PDS recommends that first degree murder in the RCC have as an element that the person acted with premeditation and deliberation as is currently required by the Code for first degree murder. RCC § 22A-101(b) removes this element from first degree murder. While the CCRC notes in the commentary that the DCCA has interpreted this element as requiring little more than turning a thought over before reaching the decision to kill,[10] in practice, this element is critical to separating impulsive murders from those committed with some degree of forethought. The distinction has been important for the United States Attorney's Office in making decisions about charging a homicide as first degree or second degree murder. The element of premeditation and deliberation has appropriately limited the cases that the United States Attorney's Office brings as first degree murder to those where there is the additional culpability of some form of deliberation. Rash homicides that take place over the course of several angry seconds or that stem from immediate action after or during a dispute may meet the technical definition of deliberation, but are not charged this way. The additional reflection is a meaningful way of differentiating between the offenses of first degree and second degree murder and should not be lightly set aside by the CCRC.

5. Drafting Recommendation for First Degree Murder

RCC § 22A-1101 Murder.

(b) *First Degree Murder.* A person commits the offense of first degree murder when that person:

(1) ~~Knowingly~~ Purposely causes the death of another person; ~~or~~
(2) with premeditation and deliberation; ~~or~~
~~(2) Commits second degree murder and either:~~
~~(A) The death is caused with recklessness as to whether the decedent is a protected person;~~
~~(B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:~~
~~(i) Law enforcement officer;~~

[9] RCC § 22A-206(a), purpose defined.

[10] Report #19, pages 25-26.

~~(ii) Public safety employee;~~
~~(iii) Participant in a citizen patrol;~~
~~(iv) District official or employee; or~~
~~(v) Family member of a District official or employee;~~
~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~
~~(D) The defendant mutilated or desecrated the decedent's body;~~
~~(E) The defendant committed the murder after substantial planning;~~
~~(F) The defendant committed the murder for hire;~~
~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
~~(I) In fact, the death is caused by means of a dangerous weapon.~~

6. Drafting Recommendation for Second Degree Murder

PDS recommends changes to RCC § 22A-1101(c), second degree murder, to accommodate the changes made to first degree murder and the retention of premeditation and deliberation in first degree murder. PDS recommends adding to the definition of second degree murder, murders that are committed knowingly, but without premeditation and deliberation. Many of the District's homicides that are committed with firearms would constitute knowingly causing the death of another. In such instances, where there is not premeditation and deliberation, that individual's mental state much more closely aligns with knowing that death is certain than with being reckless that death may result. Where the conduct is knowing, but without premeditation and deliberation, the offense definition and the instructions that a jury receives should more closely fit the conduct. It would be a fiction to call that mental state in all instances merely one of recklessness. The option of knowingly committing the homicide should exist within second degree murder.

PDS therefore recommends the following language:

(c) *Second Degree Murder*. A person commits the offense of second degree murder when that person:

(1) Knowingly causes the death of another person; or

(2) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or

(3) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual

abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnapping, or kidnapping]; provided that the person or an accomplice committed the lethal act; and

7. Availability of Mitigation Defense

PDS recommends rewriting part of the mitigation defense to recognize that the defendant may act with belief that deadly force was necessary to prevent someone other than the decedent from unlawfully causing death or serious bodily injury. For example, the defendant may have believed (unreasonably) that X was about to kill or seriously injure him; when reaching for a gun, the defendant is jostled so he fatally shoots Y rather than X. Just as a person would still be liable if he with premeditation and deliberation aimed to shoot X but due to poor aim or a defective firearm fatally shot Y instead, a person should still be able to avail himself of the mitigation defense if he causes the death of someone other than the person he believes is threatening death or seriously bodily injury. Further, the change PDS proposes would bring this part of the mitigation defense, at RCC § 22A-1101(f)(1)(B), in line with another, at RCC § 22A-1101(f)(1)(A). As explained in Report # 19, the "'extreme emotional disturbance' [that is mitigating pursuant to § 22A-1191(f)(1)(A)] need not have been caused wholly or in part by the decedent in order to be adequate."[11]

PDS proposes rewriting §22A-1101(f) as follows:

(f) *Defenses.*
(1) *Mitigation Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:
(A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be;
(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent ~~the decedent~~ another person from unlawfully causing death or serious bodily injury; ….

8. Burden of Proof for Mitigation Defense

RCC § 22A-1101(f)(2) frames mitigating circumstances in first and second degree murder as an element or multiple elements that must be disproved by the government if "evidence of mitigation is present at trial." PDS recommends that RCC §22A-1101(f)(2,) burden of proof for

[11] Report #19, page 18.

mitigation defense, mirror DCCA case law on the amount of evidence that must be presented to trigger the government's obligation to disprove the existence of any mitigating circumstances. Under current law, a defendant is entitled to a jury instruction such as mitigation for first degree and second degree murder or self defense if "the instruction is supported by any evidence, however weak."[12]

PDS recommends redrafting RCC § 22A-1101(f)(2) as follows:

> *Burden of Proof for Mitigation Defense*.
>
> If some evidence of mitigation, however weak, is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

9. Manslaughter

For clarity and consistency, PDS recommends that the RCC eliminate the offense of aggravated manslaughter, RCC § 22A-1102(a) and group status based aggravators where the decedent is, for instance a law enforcement officer or public safety employee, in a separate aggravator statute.

PDS believes that manslaughter should remain a lesser included offense of first and second degree murder and therefore would request a specific statutory provision that makes manslaughter a lesser included offense of murder even if the elements of the revised offenses do not align under the *Blockburger* test.[13]

[12] *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009); *see also Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (internal citations omitted) "Generally, when a defendant requests an instruction on a theory of the case that negates his guilt of the crime charged, and that instruction is supported by any evidence, however weak, an instruction stating the substance of the defendant's theory must be given."

[13] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	The Public Defender Service for the District of Columbia
Date:	May 11, 2018
Re:	Comments on First Draft of Report No. 20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Public Defender Service makes the following comments RCC Section 1501, Child Abuse.

1. Age Difference between the Child and the Adult

   RCC § 22A-1501(a)-(c), first through third degree child abuse, prohibits abusive acts committed against children by parents, guardians, individuals acting in a parental role and by anyone, regardless of any parental role, who is more than two years older than the child. Under this definition, an 18 year old who fights with a 15 year old may be found guilty of child abuse. This would be the case although the 15 and 18 year old go to school together, take the same classes and play sports together. In this context, 15 and 18 year olds are very much peers, and physical conflicts between them should not be given the label of child abuse. The label does not make sense given the close age of the individuals involved and the comparable vulnerability of the 15 year old. A 15 year old is often as large and as strong as an 18 year old. A 15 year old often has a substantial degree of independence and the ability to seek help from members of his neighborhood or school community. A conviction for child abuse comes with significantly more stigma and probable collateral consequences than a conviction for assault. This is the case in part because the offense of child abuse connotes predatory and violent conduct towards young children who are incapable of defending themselves against adults. When the actors are 15 and 18 and the age difference is a little more than two years, the label of child abuse should not apply. PDS proposes the age difference be four years as it is with child sexual abuse at D.C. Code §§ 22-3008, 22-3009.

PDS therefore suggests the following modification to RCC§ 1501(a)-(c):

(2) In fact:

(A) that person is an adult at least ~~two~~ four years older than the child; or

(B) that person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

2. Criminalizing the Use of Physical Force that Overpowers a Child

RCC §22A-1501(c), third degree child abuse, criminalizes any use of physical force that overpowers a child. Young children who are so much smaller than adults are easy to overpower with physical force without causing any physical or emotional harm. For instance, a child who is pushing in line, or cutting in line, could be carried to the back of a line by an adult with no relationship to the child. Physically removing a 10 year old to the back of a line in a way that does not cause any injury to the child should not be criminalized as child abuse. That contact may be a fourth or fifth degree assault pursuant to RCC § 22A-1202(e) and (f) and should be charged as such. Charging it as assault will adequately address the conduct without exaggerating the harm to the child by labeling the offense as child abuse.

PDS therefore recommends that the RCC amend third degree child abuse as follows:

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

(A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child; or

(B) Recklessly causes bodily injury to~~, or uses physical force that overpowers,~~ a child; and

(2) In fact:

(A) That person is an adult at least ~~two~~ four years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

3. Burden of Proof for Parental Discipline Defense

PDS also recommends a change in the RCC's language for the trigger for the reasonable parental discipline defense. RCC § 22A-1501(f)(2) provides that "if evidence is present at trial of the defendant's purpose of exercising reasonable parental discipline, the government must prove the

absence of such circumstances beyond a reasonable doubt."[1] The question of whether any exercise of parental discipline is reasonable is uniquely within the province of the jury. It is a fact-based inquiry that, according to the District of Columbia Jury Instructions, involves consideration of the child's age, health, mental and emotional development, alleged misconduct on this and other occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence deemed relevant.[2] Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant's purpose was parental discipline, not on the reasonableness of that discipline. Therefore PDS recommends removing "reasonable" from the burden of proof language.

In addition, for consistency with requests in other provisions, PDS suggests the following language:

> (f)(2) Burden of Proof for Parental Discipline Defense. If some evidence, however weak, is present at trial of the defendant's purpose of exercising ~~reasonable~~ parental discipline, the government must prove the absence of such circumstances beyond a reasonable doubt

4. Merger Provision

In order to limit offense overlap and duplication, PDS recommends that the RCC include a specific merger provision to allow for the merger of offenses prohibiting the abuse and neglect of vulnerable persons and assault offenses.

[1] Emphasis added.

[2] Criminal Jury Instructions for the District of Columbia, No. 4.100 (5th ed., rev.2017).

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins
Date:	July 13, 2018
Re:	Comments on First Draft of Report No. 21, Recommendations for Kidnapping and Related Offenses

In general, the Public Defender Service for the District of Columbia supports the Criminal Code Reform Commission's approach to reforming the District's kidnapping statute, D.C. Code § 22-2001, by narrowing the offense of "kidnapping" and creating the offense of "criminal restraint." PDS makes the following specific comments.

1. PDS proposes rewriting Criminal Restraint, RCC §22A-1404, to address a number of issues related to how the offense treats families and guardians.

    A. Criminal restraint needs to be rewritten to clarify that (a)(2)(A), (B), and (C) are for conduct involving adult complainants and (a)(2)(D) is the only alternative available for charging criminal restraint of a person who is a child under the age of 16. This approach is supported by the commentary, which notes that the current kidnapping statute fails to specify and the DCCA has failed to determine "whether a person can commit kidnapping by taking a child with the child's consent, but without the consent of a parent or legal guardian." The commentary goes on to explain, "[h]owever, the RCC criminal restraint statute specifies that a person may commit criminal restraint by interfering with the freedom of movement of a person under the age of 16, if a parent, legal guardian, or person who has assumed the obligations of a parent has not freely consented to the interference, *regardless of whether the person under 16 has provided consent*."[1] If the consent of the person under 16 can be disregarded, then it should be clear that a person cannot be charged with criminal restraint pursuant to (a)(2)(A), (B), or (C), all of which base liability on whether the defendant had the consent of the person with whose freedom s/he interfered.

[1] Report # 21, page 35 (emphasis added).

B. PDS agrees with the Commission's decision to "set the age of consent for interference with freedom of movement at 16 years."[2] However, the Commission failed to account for the fact that persons under age 18 are still "children," both under current D.C. law, see e.g., D.C. Code § 16-2301(3), and as proposed for the RCC, see §22A-1001(23). And children must follow the instructions of their parent(s) or they may be found to be a "child in need of supervision." D.C. Code § 16-2301(8) defines a "child in need of supervision" as a child who "is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable."[3] Thus, a 16-year-old cannot decide to live someplace other than where his parent says he must live. A parent who tells her 17-year-old, "Stay in your room or you'll be sorry," should not be committing a criminal offense, even if the words are considered a threat to cause bodily injury (assuming the "threat" is to exercise reasonable parental discipline). PDS proposes that the 16 and 17 year olds be able to give or withhold consent regarding their freedom of movement with respect to persons who are not their parent or guardian; however, if a parent or guardian substantially interferes with the freedom of movement of a 16 or 17-year-old, then the conduct should not be criminal restraint.[4]

C. PDS strongly objects to the elimination of the "parent to a minor exception" to Kidnapping in D.C. Code §22-2001.[5] Understood in the context of the breadth of the kidnapping statute, excepting the conduct of parents to minors is sound policy that recognizes that minors must obey their parents' lawful commands, perhaps particularly with respect to their freedom of movement. "We're going on a trip and you're coming with us." "Go to your room." Do not leave this house." "You're living with your grandmother for the summer." RCC § 22A-1404, as drafted in Report # 21, fails to recognize this relationship. It criminalizes the conduct of parents but provides a defense. PDS proposes that for Criminal Restraint the conduct of parents, with respect to their children under age 18, be excepted from criminal liability as under the current statute.

D. PDS agrees with the Commission's recognition that persons age 18 or older may have legal guardians with the legal authority to dictate the freedom of movement of their wards.[6] However, the Commission fails to define "legal guardian" or recognize the variety of "guardianships," and grants too much authority to "legal guardians" and not enough authority to wards.

[2] Report # 21, page 35.

[3] D.C. Code § 16-2301(8)(A)(iii).

[4] The conduct of the parent or guardian could still be criminal under the child abuse and neglect statutes.

[5] "Whoever shall be guilty of …kidnapping… any individual by any means whatsoever, and holding or detaining…such individual … *except, in the case of a minor, by a parent thereof*, shall, upon conviction thereof, be punished by imprisonment…" D.C. Code § 22-2001 (emphasis added).

[6] See RCC §22A-1404(a)(2)(D) ("When that person is a child under the age of 16 *or a person assigned a legal guardian*…") (emphasis added).

District law allows for the appointment of a "guardian" to an "incapacitated individual" pursuant to Chapter 20 of Title 21 of the D.C. Code. An "incapacitated individual" is "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator."[7] An adult might also be only "an incapacitated individual for health-care decisions."[8] A "guardian" may be a "temporary guardian," who is appointed for a finite period of time to serve as an "emergency guardian," a "health-care guardian," or a "provisional guardian."[9] A guardian may also be a "general guardian," whose guardianship is neither limited in scope nor in time by the court,[10] or a "limited guardian," whose powers are limited by the court and whose appointment may be for a finite period of time or for an indeterminate period of time.[11] In guardianship proceedings, the court is to "exercise [its] authority …so as to encourage the development of maximum self-reliance and independence of the incapacitated individual."[12] "When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated individual in duration and scope…."[13] A general or a limited guardian may "take custody of the person of the ward and establish the ward's place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward."[14] However, no guardian to an incapacitated individual has the power "to impose unreasonable confinement or involuntary seclusion, including forced separation from other persons…."[15]

PDS proposes that the offense of "criminal restraint" follow the framework of the guardianship laws by maximizing the self-reliance and independence of the person, despite the fact that they have a guardian, and do so by recognizing their ability to consent or to withhold consent to the substantial interference with their movement. On the other hand, guardians who have the legal authority to take physical custody of their ward should not be criminally liable for exercising that authority. Relatedly, a guardian with the authority to take physical custody of a person, meaning they have authority to dictate or restrict their ward's freedom of movement at least to some degree, should have

[7] D.C. Code § 21-2011(11).

[8] D.C. Code § 21-2011(11A).

[9] D.C. Code § 21-2011(8)(A).

[10] D.C. Code § 21-2011(8)(B).

[11] D.C. Code § 21-2011(8)(C).

[12] D.C. Code § 21-2044(a).

[13] Id.

[14] D.C. Code § 21-2047(b)(2).

[15] D.C. Code § 21-2047.01(7).

that authority accorded respect in the criminal code by criminalizing the conduct of a person who substantially interferes with the ward's freedom of movement without the consent of the guardian.

E. PDS proposes that, rather than making it a defense to a prosecution under what is currently RCC §22A-1404(a)(2)(D) that a person is a "relative" of the complainant, "relatives" be excepted from (a)(2)(D). The result is the same, the "relative" will not be convicted. The difference is whether on the way to that inevitable result, the relative can be charged with a crime, have an arrest record, be subject to pretrial detention or restrictions on his or her life, such as requirements to wear a GPS monitor, to submit to drug testing, to observe a curfew or a stay away for person(s) and/or location(s). In addition, because (a)(2)(D) necessarily involves a person under the age of 16, the conduct which constitutes that offense is always aggravated if the relative is more than 2 years older than the child. Since the aggravated form of the offense can almost always be charged, the burdens and risks of arrest – a worse charge on the arrest record, a greater likelihood of pretrial detention - correspondingly increase. The more fair and merciful approach would be to except the conduct rather than make it a defense.

In light of the above objections and proposals, PDS proposes rewriting the offense definition for criminal restraint as follows:

(a) *Offense Definition*. A person commits the offense of criminal restraint when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age and the defendant is not the parent, legal guardian, or person who has assumed the obligations of a parent to that person:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately

would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or

(C) When that person is a child under the age of 16 and the defendant is not a relative or legal guardian of the child, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or

(D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian.

2. PDS proposes that criminal restraint have a "Good Samaritan" defense for instances when a person substantially interferes with another's freedom of movement because the person has a reasonable belief that such interference is necessary to prevent imminent bodily harm to the other person. For example, a stranger seeing a young child wandering alone might, even knowing he does not have the consent of the child's parent, detain the child while he calls the police for help. Or an adult child of an elderly parent with dementia or Alzheimer's but who is not the "guardian" of their parent might, despite the protestations of the parent, bolt the doors of their shared home to prevent the parent from wandering off in the night and getting lost or wandering into traffic. PDS proposes the following language –

(d) *Defenses*. (1) It is a defense to prosecution under this section that the defendant acted based on a reasonable belief that such action was necessary to protect the complainant from imminent physical harm.

(2) Burden of proof – If evidence, however weak, is present at trial of the defendant's purpose to protect the complainant from imminent physical harm, the government must prove the absence of such circumstances beyond a reasonable doubt.

3. PDS proposes rewriting Kidnapping, RCC §22A-1402, to change how parents and guardians are treated under the offense. As it did for criminal restraint, PDS proposes that guardians of adult wards be treated separately and have their consent tied to the guardian's authority to take physical custody of their ward. PDS also proposes separate sections for persons who are 18 years of age or older, persons who are 16 or 17 years of age, and persons who are children under the age of 16. Although both persons who are 18 years of age or older and 16 and 17 year old are of the age of consent, PDS proposes treating them separately in order to accommodate guardians. Persons who are 18 years of age may or may not have guardians who have the legal authority to take physical custody of them, and that possibility matters for whether the consent of the adult (ward) or the guardian controls. In contrast, 16 and 17 year olds, always have guardians with the legal authority to take them in physical custody; they are generally called "parents." However, PDS supports the decision to make 16 the "age of consent" for freedom of movement. Unlike with criminal restraint, where PDS proposed excepting parents and, in some instances relatives, from criminal liability, PDS recognizes that the "with intent" element in kidnapping sufficiently narrows the criminal conduct. With one exception, PDS does not disagree that a parent,

guardian, or other relative, may not hold their minor child for ransom or reward, use their minor child as a shield of hostage, to facilitate the commission of any felony, etc. However, a parent, guardian, or person who has assumed the obligations of a parent must be free (not criminally liable) to substantially interfere with the freedom of movement with their minor child (under age 18) with the intent to inflict bodily injury when that infliction is in the exercise of parental discipline.

Specifically, PDS recommends that the offense definition of Kidnapping be written as follows:

(a) *Offense Definition*. A person commits the offense of kidnapping when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (C) When that person is a child under the age of 16, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
    (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian; and
  (3) With intent to:
    (A) Hold the complainant for ransom or reward;
    (B) Use the complainant as a shield or hostage;
    (C) Facilitate the commission of any felony or flight thereafter;
    (D) Inflict bodily injury upon the complainant, <u>except in the exercise of parental discipline by a parent, legal guardian, or person who</u>

has assumed the obligations of a parent against a complainant under the age of 18;

(E) ~~or to commit~~ Commit a sexual offense as defined in RCC XX-XXXX against the complainant;

(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;

(G) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or

(H) Hold the person in a condition of involuntary servitude.

PDS also recommends adding the term "parental discipline" to subsection (c), Definitions, and defining it by reference to the "parental discipline defense" for child abuse at RCC §22A-1501(f).

4. PDS recommends adding a Good Samaritan defense to Kidnapping, using the same language as proposed for Criminal Restraint.

5. PDS objects to aggravating kidnapping or criminal restraint based on the aggravator "with the purpose of harming the complainant because of the complainant's status."[16] Conduct against a law enforcement officer, public safety employee, citizen patrol member, or District official or employee is aggravated pursuant to subsection (a)(2)(A), when that person is a "protected person." The additional aggravator at subsection (a)(2)(B) is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list.

[16] Subsection (a)(2)(B) of both aggravated kidnapping and aggravated criminal restraint.

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	July 13, 2018
Re:	Comments on First Draft of Report 22, Accomplice Liability and Related Provisions

The Public Defender Service for the District of Columbia makes the following comments on Report #22, Accomplice Liability and Related Provisions.

1. RCC § 22A-210 provides that a person is an accomplice in the commission of an offense by another when that person is "acting with the culpability required by that offense." Report #22 at footnote 5, states that any broader aspect of culpability, such as "proof of premeditation, deliberation, or the absence of mitigating circumstances" is encompassed within culpability when required by the specific offense.

   PDS wholeheartedly agrees with footnote 5 and believes it is consistent with and required by *Wilson-Bey v. United States*.[1] PDS is concerned, however, that this view of what culpability encompasses will not be applied if it remains only in a footnote to the commentary. RCC § 22A-201(d), Culpability Requirement Defined states that "culpability requirement" includes each of the following: "(1) The voluntariness requirement, as provided in § 22A-203; (2) The causation requirement, as provided in § 22A-204; and (3) The culpable mental state requirement, as provided in § 22A-205." It is unclear whether "premeditation, deliberation, or the absence of mitigating circumstances" are "culpability requirements" for principle liability given this definition and also unclear whether, from this definition, premeditation and deliberation and any lack of mitigating circumstances would be necessary for accomplice liability. Without a statutory definition broad enough to encompass premeditation, deliberation, and absence of mitigating circumstances, there is a substantial risk that culpability for accomplice liability would be

[1] *Wilson-Bey v. United States*, 903 A.2d 818, 822 (2006) (holding that in any prosecution for premeditated murder, whether the defendant is charged as a principal or as an aider or abettor, the government must prove all of the elements of the offense, including premeditation, deliberation, and intent to kill).

watered down. Even if practitioners and judges found footnote 5 to argue from, the narrow culpability requirement definition could be read to supersede a footnote from the commentary. PDS proposes amending the definition of "culpability requirement" to include premeditation and deliberation and any lack of mitigation.

2. RCC § 22A-210(a)(2) allows for accomplices to be held liable when, with the requisite culpability required for the offense, the defendant "purposely encourages another person to engage in specific conduct constituting that offense." The act of encouraging a criminal offense, even with the intent required for the commission of the offense, extends criminal liability to those who merely utter words in support of an offense but who have no meaningful impact on whether the offense is carried out.

   For example, two friends may be walking together after leaving a bar when one friend sees her ex-husband's car. The ex-wife hates her ex-husband and her friend knows all the reasons behind the hatred. The ex-wife sees a piece of metal on the ground and raises it to smash the windshield of her ex-husband's car. As she raises the piece of metal, she says to her friend, "I'm going to smash his windshield." The friend replies "go for it." Under RCC §22A-2503, criminal damage to property, the friend who said "go for it" would only need to possess a mental state of recklessness to be held liable as an accomplice for criminal damage to property. RCC § 22A-206 states that a person acts with recklessness with respect to a result when "(A) that person is aware of a substantial risk that conduct will cause the result; and (B) the person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation." It is PDS's understanding from the commentary to Report #22 and from the position of the CRCC that any causation requirement from RCC 22A § 201(d) would not apply to the substantive offense of criminal damage to property. Thus, the friend's encouraging words, "go for it" do not have to be a but for cause for the criminal damage to property.

   It unfair to hold people criminally liable for mere words, even if they are specific, when those words have no meaningful impact on the commission of an offense. The ex-wife was going to smash the window even in the absence of the encouraging words of "go for it." In such circumstances only one individual should be criminally liable for the conduct. Therefore, for the encouragement prong of RCC 22A-210, PDS recommends that the CRCC insert causation language to prevent punishment for de minimus conduct.

PDS suggests the following revision:

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or

(2) Purposely encourages another person to engage in specific conduct constituting that offense and the encouragement is a substantial factor in the commission of the offense.

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: July 13, 2018

SUBJECT: First Draft of Report #21. Recommendations for Kidnapping and Related Offenses

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 #21 - Recommendations for Kidnapping and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1401. Aggravated Kidnapping

The offense definition of aggravated kidnapping includes when a person commits kidnapping with the purpose of harming the complainant because of the complainant's role in public safety or their status as a District official or employee, or a family member of a District official or employee.[2] The word "harm", however, is not defined. Merriam-Webster defines harm as

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

[2] RCC § 22A-1401 (a)(2)(B) establishes that one of the ways that a person commits aggravated kidnapping is when they commit kidnapping as defined in RCC § 22A-1402 and who does this "With the purpose of harming the complainant because of the complainant's status as a [:] Law enforcement officer; Public safety employee; Participant in a citizen patrol; District official or employee; or Family member of a District official or employee…"

"physical or mental damage."[3] Therefore, one would assume that this word has a broader meaning then the phrase "bodily injury" which is contained in the definition of the underlining offense of kidnapping or that term would have been used in the aggravated assault provision. See RCC § 22A-1402(a)(3)(D). To avoid needless litigation, the Commission should either define the word "harm" or explain in the Commentary the difference between the definitions of "harm" and "bodily injury."

RCC § 22A-1401(d) states, "Multiple Convictions for Related Offenses. A person may not be sentenced for aggravated kidnapping if the interference with another person's freedom of movement was incidental to commission of any other offense."[4] This limitation appears to be included to address the situation where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can immediately be robbed). What is left unanswered, however, is the boundaries of this exception. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can be robbed but because a movie lets out the victim is kept in the alley for 20 minutes until everyone walks by.) The Commentary should give examples of what is clearly incidental to the commission of another crime and what is not.[5]

RCC § 22A-1402. Kidnapping

The offense of kidnapping requires that the person interferes with the victim's freedom of movement in specified ways. Paragraph (a)(2) lists those ways.[6] One of the ways is "With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury…" See RCC § 22A-1402 (a)(2)(C). It is not apparent from the text or the Commentary how the government could prove this counterfactual. The

[3] See https://www.merriam-webster.com/dictionary/harm

[4] The same limitation on sentencing is contained in the kidnapping, aggravated criminal restraint, and criminal restraint provisions. See RCC § 22A-1402 (e), RCC § 22A-1403 (d), and RCC § 22A-1404 (e).

[5] The same issue arises in the context of RCC § 1403, Aggravated Criminal Restraint, and RCC § 1404, Criminal Restraint. See RCC § 1403(a)(2)(B) and RCC § 1404(a)(2)(C).

6 RCC § 22A-1402 (a)(2) establishes the ways that a person's freedom of movement should not be substantially interfered with. They are:

(A) Without that person's consent;
(B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;
(C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
(D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian;

victim in this situation has been deceived. He or she would have no way of knowing what the person would have done had the deception failed and, so, the government would not have evidence that enables it to meet this offense prong. The Commentary does not shed any light either on how this element would be proved or whether any other Model Penal Code jurisdiction has adopted an element that requires the government to prove what would have happened, but did not.

Additionally, to be convicted of kidnapping the deceived victim, the government must prove the first element of the offense, that is that the person "knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But so long as the deception lasts, it cannot be said that the victim's freedom of movement was curtailed because the victim chose to be in the location where he or she was.

The same issue arises when the victim is under the age of 16. Paragraph (a)(2) states that a person can commit the offense of kidnapping, "When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian." See RCC § 22A-1402 (a)(2)(D). On page 12 of the Commentary it states, "enticing a child to get into a car and remain in the car as it drives away with the truthful promise of candy at the final destination may constitute kidnapping assuming the defendant also satisfied the intent requirement under subsection (a)(3)."[7] However, to be convicted of kidnapping a child the government must also prove the first element of the offense, that is that the person "Knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But if the child willingly goes into the car and happily stays there then it cannot be shown that the child's freedom of movement has been interfered with. The child has merely been persuaded to stay in the car.[8]

The offense of kidnapping requires that the person restrains the victim's movement with a specified intent. Subsection RCC 22A-1402 § (a)(3)(A) specifies that kidnapping includes acting with intent to hold the complainant for ransom or reward. However, the Commentary, on page 11 states, "Holding a person for ransom or reward requires demanding anything of pecuniary

[7] RCC § 22A-1402 (a)(3) establishes the intent element for kidnapping. They are to:

(A) Hold the complainant for ransom or reward;
(B) Use the complainant as a shield or hostage;
(C) Facilitate the commission of any felony or flight thereafter;
(D) Inflict bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;
(E) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
(F) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
(G) Hold the person in a condition of involuntary servitude.

[8] The same issues outlined in this section apply to the Criminal Restraint provision found in RCC § 22A-1404, Criminal Restraint.

value in exchange for release of the complainant." The problem is that the word "pecuniary" in the Commentary is too limited. Merriam-Webster defines "pecuniary" as either "consisting of or measured in money" or "of or relating to money."[9] Therefore, following the explanation in the Commentary, a person who was held until the perpetrators received specified jewelry of sentimental value or other property would not be guilty of kidnapping. The Commentary should be modified to read, "Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant."

[9] See https://www.merriam-webster.com/dictionary/pecuniary.

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: July 13, 2018

SUBJECT: First Draft of Report # First Draft of Report No. 22. Accomplice Liability and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #22 - Accomplice Liability and Related Provisions. [1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-210. ACCOMPLICE LIABILITY

The text of RCC § 22A-210 should make it clear that an accomplice can be convicted for assisting or encouraging a person to commit an offense even if the principal does not complete all of the elements of the offense and would only be guilty of attempt. RCC § 22A-210(b), (c), and (d) all speak in terms the "commission of an offense."[2] While the phrase "commission of an

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

[2] RCC § 22A-210 states:
(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

offense" in some sources is defined to include an attempt, in other sources it appears to require a completed offense.[3] Similarly, RCC § 22A-210(d) speaks in terms of establishing that an accomplice may be convicted of an offense even if the person claimed to have "committed the offense" has not been prosecuted or convicted, convicted of a different offense or degree of an offense, or has been acquitted. Subparagraph (d) does not specifically include attempts. A modification of the illustration on page 56 demonstrates the need for clarifying this issue. The illustration and explanation contained in the Report is modified as follows:

> a drug dealer asks his sister—who is unaware of her brother's means of employment—to deliver a package for him to a restaurant and to collect money for the package from the cashier. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police as she is about to deliver the package in transit to the restaurant, the drug dealer cannot be deemed an accomplice to the attempted distribution of narcotics by the sister since the sister cannot herself be convicted of that offense. Although she has engaged in conduct that satisfies the *objective elements* of the attempted offense, the sister nevertheless does not act with the

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
> (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

> (1) Has not been prosecuted or convicted; or
> (2) Has been convicted of a different offense or degree of an offense; or
> (3) Has been acquitted.

[3] The phrase "commission of an offense" is defined in one source as "The attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense in some dictionaries, see https://www.lectlaw.com/def/c065.htm. However, another source explains, the phrase "commission of an offense" is "The act of doing or perpetrating an offense or immediate flight after doing an offense is called commission of an offense", see https://definitions.uslegal.com/c/commission-of-an-offense/.

> required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance she attempted to deliver and receive cash for. Under these circumstances, the drug dealer can, however, be held criminally responsible for attempted distribution as a principal under a different theory of liability: the "innocent instrumentality rule."

As demonstrated above, there is no reason why the brother should not be guilty of attempted distribution of the narcotics. The language in RCC § 22A-210 should be modified to clarify accomplice liability for attempts.

The Commentary to RCC § 22A-210(c) makes clear that a person can have accomplice liability through omission.[4] The Commentary states, "Typically, the assistance prong will be satisfied by conduct of an affirmative nature; however, an omission to act may also provide a viable basis for accomplice liability, provided that the defendant is under a legal duty to act (and the other requirements of liability are met)." Footnote 7, on the same page, states "… For example, if A, a corrupt police officer, intentionally fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery…" The Commentary should distinguish this form of liability from the related, but distinct accomplice liability of a person encouraging another person to commit an offense by omission. For example, if AA, a corrupt police officer, talks his partner A, another corrupt police officer, to intentionally fail to stop a bank robbery committed by P, based upon P's promise to provide AA with a portion of the proceeds, AA may be deemed an accomplice to the robbery. In this example, AA purposely encouraged A to engage in specific conduct constituting an offense of omission.

RCC § 22A-210(c) states that "[a]n accomplice in the commission of an offense that is divided into degrees based on distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability." As the Report notes,[5] this means an accomplice can be convicted of a grade of an offense that is either higher or lower than that committed by the principal actor where the variance is due to distinctions between the two (or more) actors' state of mind. However, the example in the Commentary, does not demonstrate this principle.[6] The example demonstrates that an accomplice could be convicted of manslaughter when the principal is convicted of murder. However, manslaughter is not a "degree" of murder, nor is murder described as "aggravated" manslaughter. The question raised by the example, is not merely whether the Commentary should have used as an example an offense that was divided into degrees, but does the principle of culpable mental state equivalences applicable to results also apply between greater and lesser included offenses that are contained in different code provisions? If it does, as the example would suggest, RCC § 22A-210(c) should be split into two subparagraphs: one where the accomplice and principal commit an offense that is divided into

[4] See page 4.
[5] See page 6.
[6] See footnote 15 on page 6.

degrees based upon distinctions in culpability and another where distinctions in culpability is but one distinction between greater and lesser included offenses.

RCC § 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON

RCC § 22A-211 (a) states that "A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."[7] In the last sentence of the first paragraph of the Commentary it states, "Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement necessary to support criminal liability for causing another person to commit a crime." The problem is that the text of RCC § 22A-211 does not define the term "legally accountable," nor does it explicitly state that a person who is legally accountable for the actions of another is guilty of the offense.

RCC § 22A-211 (a) is titled, "USING ANOTHER PERSON TO COMMIT AN OFFENSE." [emphasis in original] The title is misleading. As drafted, it implies that the person acted with some intentionality in causing another person to act. As the Commentary makes clear, however, a person is legally accountable for the conduct of another – and thus guilty of an offense - even when the person does not intentionally use an innocent or irresponsible person to commit a crime. On page 61 of the Commentary it states:

> This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, "a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense." For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care. [internal footnotes omitted]

In the example given in the Commentary, the person who is liable for reckless manslaughter cannot be said to having "used" the other person to commit a crime.

[7] See page 52.

MEMORANDUM

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

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

From: Laura E. Hankins

Date: September 11, 2018

Re: Comments on First Draft of Report No. 23, Disorderly Conduct and Public Nuisance

PDS has the following comments about the RCC disorderly conduct and public nuisance offenses.

1. PDS recommends that both disorderly conduct[1] and public nuisance[2] have a third element: "[and] the person knowingly fails to obey a law enforcement officer's order that the person cease engaging in the conduct."

   The public order and safety benefit of a crime such as disorderly conduct is that it can allow for law enforcement intervention at a low level of harm (or disorder), before the conduct has a chance to escalate into more serious criminal conduct or provoke a criminal response by a third party. The challenge of criminalizing low-level conduct is that it increases the opportunities for negative contacts with law enforcement particularly in communities that many view as over-policed.[3] PDS agrees with the general approach the Commission takes with respect to disorderly conduct and public nuisance but thinks ultimately the Commission's proposal still allows too much room for over-policing and over-criminalizing the lives of marginalized persons. For example, RCC § 22A-4001 requires that the "apparent danger of bodily injury … must be unlawful, such as assaultive conduct."[4] "Horseplay" and other legal group activities would not, according to the Commentary, be disorderly conduct unless the conduct created a likelihood of

[1] RCC § 22A-4001.

[2] RCC § 22A-4002.

[3] As the D.C. Council Committee on Public Safety and the Judiciary explained "[t]he disorderly conduct [offense] is clearly important to quality of life as well as the public peace" while also noting that the D.C. Office of Police Complaints' detailed 2003 report on arrests for disorderly conduct "not surprisingly" included a finding that the disorderly conduct statutes were subject to abuse by arresting officers. See Council of the District of Columbia Committee on Public Safety and the Judiciary Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010, at pages 2-3.

[4] Report #23, page 4.

immediate bodily injury to someone not participating in the legal group activity.[5] However, the offense does not actually require that the conduct be unlawful. The crime is recklessly causing another to *reasonably believe* that the conduct is unlawful. While horseplay might be lawful, if the "horseplayers" are aware of a substantial risk that someone observing them will "reasonably believe" that their (lawful) conduct is in fact unlawful, then the "horseplayers" would be guilty of committing "disorderly conduct." Layer into this the widely accepted notion that certain behavior is often viewed as being "violent" when committed by African-Americans and recognizing that African-Americans are well aware that their innocent conduct creates a "substantial risk" that it will be viewed "reasonably" (as in, a belief commonly held by a majority of persons) as unlawful and potentially injurious to others or their property[6] and it is clear that, despite its best efforts to construct clear and narrow boundaries around this offense, the Commission left the back door unlocked, if not open.

That said, PDS also strongly supports intervention and defusing of situations while they are at a low-level rather than waiting until more serious offenses are committed. Adding an element that the person must fail to obey a law enforcement order that she cease engaging in the conduct creates a better balance between the desirable goals of a disorderly conduct statute to keep the peace and the risks of police abuse and over-criminalization. It allows, actually requires, law enforcement interaction – the order to cease – which will usually be sufficient to defuse a potentially unlawful situation or to establish that the conduct is lawful.[7] Plus, it provides an additional safeguard for the individual before she is subject to arrest and prosecution.

2. PDS recommends eliminating "taking of property" as a means of committing disorderly conduct." The basic offenses of assault (unlawful bodily injury to another person) and "[criminal] damage to property" only require "recklessly" as a mental state.[8] Theft, however, requires *knowingly* taking the property of another.[9] *Recklessly* engaging in behavior that causes another to reasonably believe there is likely to be an immediate [*reckless*] bodily injury to another or that there is likely to be immediate [*reckless*] damage to property makes sense and is plausible. In contrast, disorderly conduct (taking property) would require that a person

[5] Id.

[6] See e.g., driving while Black, walking while Black, swimming while Black, selling water while Black, sleeping while Black, barbecuing while Black, waiting for the subway while Black, playing with a toy in a public park while Black, being in one's own backyard while Black, being in one's own apartment located above a police officer's apartment while Black, etc., etc., etc.

[7] If the law enforcement interaction establishes that the conduct is lawful – e.g., the people involved explain they are actually playing rugby – then the law enforcement official will have no basis on which to order the conduct to cease. The officer's interaction will have established that it would be *unreasonable* to believe there is likely to be immediate and unlawful bodily injury to another person except, exactly at the Commentary explains, in situations where the conduct creates a likelihood of immediate bodily injury to a third party, a person not engaged consensually in the lawful group activity.

[8] See RCC § 22A-1202(f); §22A-2503(a).

[9] See RCC § 22A-2101(a).

recklessly engage in conduct that causes another to *reasonably* believe there is likely to be the immediate *knowing* taking of property. Conduct that is "dangerously close" to taking property should be prosecuted as attempt theft. As currently drafted, disorderly conduct (taking of property) either overlaps with attempt theft or criminalizes conduct that is *less than* "dangerously close" to theft. Including "taking of property" as a means to commit disorderly conduct weakens the offenses of theft and attempt theft; there is no point in requiring the knowing taking of property if one can be prosecuted for recklessly making someone believe property will be (knowingly) taken. PDS is concerned, assuming there even is reckless conduct that could create a reasonable belief about a knowing result, that the conduct would necessarily be very minor and ambiguous; so minor and ambiguous that to arrest and prosecute someone for it would be arbitrary and unjust.

3. PDS recommends that both disorderly conduct and public nuisance be jury demandable, regardless of the penalty attached. Because of the First Amendment implications of both offenses as well as the tension they create between preserving public order and over-policing/police abuse, the accountability that a jury provides is critical.

4. PDS recommends rewriting the definition of "lawful public gathering" in the public nuisance offense to narrow its reach.[10] The definition does not require that the gathering itself be public, so it would seem to be unlawful to intentionally interrupt a private gathering. The breadth and vagueness of the catch-all language, "similar organized proceeding," only reinforces the sweep of this provision. Are weddings "lawful public gatherings"? Is a high school graduation ceremony a "lawful public gathering?" PDS finds this means of committing the public nuisance offense troubling but would consent to a definition that is narrow and specific to funerals, that uses the word "means" instead of "includes," and that does not include any catch-all language.

5. PDS objects to the definition of "public building" in the public nuisance offense.[11] Although according to the Commentary, subsection (c)(4) is to "clarif[y] that a public building is a building that is occupied by the District of Columbia or federal government" and therefore is not meant to "apply to efforts to dissuade customers from patronizing a privately-owned business,"[12] the definition, by focusing on the physical building and by using the very general term "government", does not address situations where privately-owned business are co-located in buildings with any D.C. or federal government agency. The Commission clarified at its August 1 public meeting that subsection (c)(4) is "intended to prohibit purposeful (and not incidental) interruptions of [D.C.] Council hearings and similar proceedings, whether they occur at [the Wilson Building] or at an offsite location." [13] PDS recommends rewriting the definition of "public building" to more clearly convey that narrower intent.

[10] See RCC § 22A-4002(c)(4).

[11] See RCC § 22A-4002(c)(5).

[12] Report # 23, page 13.

[13] Minutes of Public Meeting, D.C. Criminal Code Reform Commission, August 1, 2018, page 4.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 24, Failure to Disperse and Rioting

PDS has the following comments about the RCC offenses of failure to disburse and rioting.

1. As reflected in the minutes of the CCRC meeting of August 1, 2018, PDS raised a concern about liability for failure to disperse where the individual does not know that a law enforcement officer has determined that her presence is substantially impairing the law enforcement officer's ability to stop a course of disorderly conduct. At the August 1, 2018 meeting staff clarified that a person must know that she is being ordered to disperse. Staff further noted that the person must be in the immediate vicinity of the course of disorderly conduct and that the officer's assessment about the need for the order to disburse must be objectively accurate. PDS requests that this clarification by staff be included in the commentary of RCC § 22A-4102.

2. RCC § 22A-4101 defines rioting, in part, as the commission of disorderly conduct when the defendant is "reckless" as to the fact that four or more people in the immediate vicinity are simultaneously engaging in disorderly conduct. PDS recommends that the CCRC substitute the mental state of recklessness with knowledge. Requiring that the defendant know that individuals in his immediate vicinity are engaging in disorderly conduct is appropriate given First Amendment concerns about rioting statutes. In the District, it is not uncommon for protests to involve thousands of people or even tens of thousands of people. Under these circumstances, during a mass protest, it may always be the case that a protester is aware of a substantial risk that others are engaging in disorderly conduct and that the standard of care that a reasonable person would observe is to remove himself from the protest.[1] Using a standard of recklessness would over-criminalize potentially constitutionally protected conduct. Just as the CCRC requires knowledge that a participant in the disorderly conduct is using or plans to use a weapon, the CCRC should require actual knowledge that others in the immediate vicinity are engaged in disorderly conduct.

[1] RCC § 22A-205.

3. PDS recommends eliminating "taking of property" as a means of committing rioting. Under the current RCC definition, an individual commits the offense of rioting when he commits disorderly conduct, reckless as to the participation of four or more people and when the conduct is committed with the intent to facilitate the commission of a crime involving bodily injury to another, damage to property of another, or the taking of property of another. Including taking of property within rioting has the potential of creating unnecessary overlap with the offenses of robbery and theft committed by codefendants. For example, under the current RCC definition of rioting, almost any robbery committed by four or more juveniles could also be charged as rioting. If the CCRC's inclusion of conduct "involving the taking of property of another" is intended to address crimes such as looting by multiple individuals, that conduct would already be covered by the inclusion of conduct "involving damage to the property of another." There are few instances when a group of four or more people could commit disorderly conduct and take property of another without also causing damage to property. Removing "the taking of property of another" from the definition would not cause any gaps in liability and would prevent overlap with property crimes committed by codefendants.

4. RCC § 22A-4101(3)(B) defines rioting as criminal conduct committed while "knowingly possessing a dangerous weapon." PDS recommends that this language be amended to "knowingly using or displaying a dangerous weapon." This amendment would mirror section (C) of rioting which establishes liability when the defendant "know[s] any participant in the disorderly conduct is using or plans to use a dangerous weapon."

   The possession of a dangerous weapon[2], such as false knuckles[3] or a knife with a blade over three inches in length, in a pocket, purse, or backpack while committing the offense of disorderly conduct does not increase danger to the community or elevate the fear experienced by bystanders. The possession of a dangerous weapon in a backpack would not be apparent to community members until the weapon is later recovered during a search incident to arrest. In such instances, where the weapon is not used or displayed, the possession of a weapon would be entirely ancillary to the offense of rioting.

   The possession of a dangerous weapon in a backpack, purse, or pocket would also be separately punishable as a stand-alone count of weapon possession. To decrease unnecessary overlap, the RCC should limit liability in rioting to occasions when the defendant knowing uses or displays a dangerous weapon.

[2] RCC § 22A-1001 (dangerous weapon defined).

[3] § 22A-1001(14) (prohibited weapon defined).

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 25, Merger

PDS has the following comments about the RCC principle of merger.

1. PDS recommends that merger, RCC § 22A-212 be restructured as a rule instead of a presumption. Presumptions are often difficult to apply and require either additional drafting language or appellate interpretation.[1] As currently framed, RCC § 22A-212, establishes rules for merger and an exception when the legislature clearly manifests the intent to allow multiple convictions. However, the use of a presumption for those rules makes them much more difficult to apply. In order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles, the RCC should reframe the merger provision as a rule.

2. RCC § 22A-212(d)(1) establishes a rule of priority that when two offenses merge, the offense that remains shall be "the most serious offense among the offenses in question." Although footnote 27 to the Commentary explains what the most serious offense "will typically be," the phrase is still open to interpretation and argument by the parties in individual cases. Rather than leaving the matter of which offense is most serious to the parties to dispute, PDS recommends that for the purposes of clarity and certainty, the RCC define "most serious offense" as the offense with the highest statutory maximum. Further, the definition should be included in the statute, not relegated to the Commentary.

[1] *See, e.g.*, D.C. Code § 23-1322 (detention prior to trial); *Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006); *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999).

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #23, Disorderly Conduct and Public Nuisance

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 #23 - Disorderly Conduct and Public Nuisance.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4001. Disorderly Conduct.

The proposed disorderly conduct statute varies from the current law in many ways. It appears to legalize a certain type of dangerous behavior. As the Comment section notes on page 4, to be disorderly conduct under the proposal, "The apparent danger of bodily injury must be to another person; a person cannot commit disorderly conduct where she poses a risk of harm to only herself." While we do not disagree with footnote 6 that "a person who is performing a dangerous skateboarding stunt, high wire act, or magic trick in a public square" should not be guilty of this offense, we disagree that "She has not committed disorderly conduct unless it appears likely that her conduct will cause bodily injury to someone other than herself or damage to property." D.C. Code § 22-1321(a)(3) currently makes it unlawful for a person to "Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence

[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.

by that person or another person." So, under current law, a person can commit disorderly conduct where she poses a risk of harm only to herself.

RCC § 22A-4001[2] would exempt police from being the target of all disorderly conduct offenses. Current law only exempts them from being the target of "Direct abusive or offensive language or gestures at another person … in a manner likely to provoke immediate physical retaliation or violence by that person or another person." This was because the Council acknowledged the special training that police should have. It does not exempt them from being the victim of **"**Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken" or "Incite or provoke violence where there is a likelihood that such violence will ensue" e.g. It would be disorderly conduct for a person to incite a mob to hurt a police officer by chanting, "stone the cop, kill the cop" when there were rocks nearby.

As to the current state of the law concerning the exemption of police from being the target for disorderly conduct offenses, OAG disagrees with the conclusion in the Relation to Current District Law portion of the Commentary that the proposal would merely clarify existing law. On page 7 the report says D.C. Code § 22-1321 (a)(1) and (a)(2) are "silent as to whether they cover conduct directed at law enforcement officers and no District case law addresses this issue." True, (a)(1) and (a)(2) do not specifically reference law enforcement officers, but their plain terms unequivocally cover them, just as they unequivocally reach other groups that aren't specifically mentioned (*e.g.*, tourists). Paragraph (a)(1) is satisfied by reasonable fear to "another person," which logically includes law enforcement officers. And (a)(2) refers to incitement of provocation of violence, without regard to the identity of the potential victim. It is only (a)(3), dealing with abusive or offensive language or gestures, that carves out police officers – which is no more than what the legislative history the report cites says. On page 8 of the Committee Report it states, in relevant part, the following:

> Subsection (a) proscribes breach of the peace; it prohibits conduct and language (e.g., fighting words) that is likely to provoke an outbreak of violence (e.g., a

[2] The offense portion of RCC § 22A-4001 is as follows:

(a) A person commits disorderly conduct when that person:
  (1) Recklessly engages in conduct that:
    (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      (i) Bodily injury to another person;
      (ii) Damage to property; or
      (iii) Taking of property; and
    (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

> fight) … The Committee Print rejects language proposed by OAG/MPD/USAO for paragraph (3) of this subsection because it would undercut an important purpose of the language: that the crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen. (See *Shepherd v. District of Columbia,* 929 A.2d 417,419 (D.C. 2007)). The law should have a bright line: that offensive language directed at police officers is not disorderly conduct. Further, it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else (see *Comments of the OAG, MPD, and USAO* attached to this report). [emphasis added][3]

When the Council enacted the legislation it created that bright line in the part of the disorderly conduct statute that relates to "Direct abusive or offensive language or gestures at another person" and included the limitation on police officers only in that offense. RCC § 22A-4001 does not clarify the limitation concerning police officers. It expands it.[4]

RCC § 22A-4002. Public Nuisance.

RCC § 22A-4002 provides that:

(a) *Offense.* A person commits public nuisance when that person:
  (1) Purposely engages in conduct that causes an unreasonable interruption of:
    (A) a lawful public gathering;
    (B) he orderly conduct of business in a public building;
    (C) any person's lawful use of a public conveyance; or

[3] The proposal by "OAG/MPD/USAO" appeared in an attachment to a letter written to Mr. Silbert of the Council for Court Excellence. The topic heading of that section was "Abusive or offensive words – Proposed D.C. Official Code § 22-1321(a)(3)" and the recommended change only applied to that provision (which was the only provision that had a law enforcement carve out). See page 89 of the legislative history for the Disorderly Conduct Amendment Act of 2010. So, when the Council rejected our proposal, they were necessarily only talking about the proposed rewording of (a)(3) concerning law enforcement officers in the context of abusive or offensive words.

[4] Given that the Council enacted D.C. Code § 22-1321 (a)(1), (2), and (3) at the same time and the Council only exempted law enforcement officers from (a)(3), it is unclear why the Commission is even delving into the legislative history to try and glean the Council's intent. Even the Court of Appeals does not look to legislative history when the plain terms of the statute does not produce a result that is "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982). "[I]n absence of persuasive evidence to the contrary, [this Court is] not empowered to look beyond the plain meaning of a statute's language in construing legislative intent." *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976). The current disorderly conduct statute is not ambiguous on this point.

(D) any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;

(2) While that person is in a location that, in fact, is:

(A) Open to the general public; or

(B) A communal area of multi-unit housing.[5]

One of the ways to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of business in a public building. See paragraph (a)(1)(B). The term "public building" is defined as "a building that is occupied by the District of Columbia or federal government." See paragraph (c)(5). However, the term "occupied" is not defined. While it is clear that this offense applies to a person who disrupts the orderly conduct of public business, it is unclear which of the following locations are considered occupied by the government: a building that is owned by the public, where government offices are located, to any location where the public is invited and government business is held, or all of these locations. The focus of the prohibition, however, is in ensuring that public business can take place without undue interruption. It should not matter, therefore, where the location of the public business is held. In order to clarify and simplify this offense, we suggest that paragraph (B) be rewritten to say, "the orderly conduct of public business." The offense would then be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of public business." The term "public business" could then be defined as "business conducted by the District of Columbia or federal government."

RCC § 22A-4002 (a)(1)(c) states that a person commits this offense when the person purposely engages in conduct that causes an unreasonable interruption of any person's lawful use of a public conveyance. It is unclear if this formulation is more narrow than current law. D.C. Code § 22-1321 (c) states, "It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons." [emphasis added] So, under current law a person may be guilty of this offense if they stand in front of the bus and refuse to let the

[5] Paragraph (c) lists the definitions for words and terms used in this offense. It states:

(1) The term "purposely," has the meaning specified in § 22A-206;
(2) The term "bodily injury" has the meaning specified in § 22A-1001;
(3) The term "property" has the meaning specified in § 22A-2001;
(4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;
(5) The term "public building" means a building that is occupied by the District of Columbia or federal government;
(6) The term "public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat; and
(7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.

bus continue on its route. The person is clearly "disrupting the lawful use of a public conveyance." But is that person "caus[ing] an unreasonable interruption of any person's lawful use of a public conveyance"? While the bus may be stopped, is a person's use of the conveyance interrupted? The Comment does not help to explain the drafter's intent. In fact, it appears to limit the scope even further. That comment states "The accused must have the intent and effect of diverting a reasonable passenger's pathway."[6] Nowhere in the current law or in the actual language of RCC § 22A-4002 (a)(1)(C) is this offense limited to pathways.

Another way to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am. As the Comments note, this provision replaces D.C. Code § 22-1321(d). However, that provision is limited by paragraph (a) (2) which requires that the person be in a location that is, in fact, open to the general public or is a communal area of multi-unit housing when they engage in their conduct. See paragraph (a)(1)(D).[7] There is no reason for this limitation. In D.C. Code § 22-1321, the requirement that the disorderly conduct occur in a place that is open to the general public or in the communal areas of multi-unit housing only applies to the offenses that are covered by the disorderly conduct provision in RCC § 22A-4001.[8] There is no reason to extend this limitation to the parts of the disorderly conduct offense that is covered by the public nuisance provision of RCC § 22A-4001.[9]

[6] See the last sentence on page 13 of the Report.
[7] Paragraph (a)(1)(D) states, "While that person is in a location that, in fact is … Open to the general public… or … a communal area of multi-unit housing," [emphasis added]. For purposes of this analysis, we assume that the "that person" refers to the person who commits the public nuisance and not the person referred to in the immediately preceding paragraphs (i.e. "(C) any person's lawful use of a public conveyance; or (D) any person's quiet enjoyment of his or her residence…").
[8] D.C. Code § 22-1321 (a) provides that:

> In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:
>
> **(1)** Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken;
>
> **(2)** Incite or provoke violence where there is a likelihood that such violence will ensue; or
>
> **(3)** Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person. [emphasis added]

[9] As noted in the text, both the disorderly conduct and the public nuisance provisions contain the requirement the person be in a location that is open to the general public. However, the definitions of what "open to the general public" is different in these two offenses. Subparagraph (c)(4) of the disorderly conduct provision states "The phrase 'open to the general public' excludes locations that require payment or permission to enter or leave." Subparagraph (c)(7) of

The possibility of arrest and prosecution under D.C. Code § 22-1321(d) has been an effective tool in quieting people who in their own house or apartment listen to their stereos, play musical instruments, or host parties that unreasonably annoy or disturb one or more other persons in their residences. In fact, D.C. Code § 22-1321(d) has been touted as the only effective tool used to combat noise that disrupts people's ability to enjoy their homes at night.[10]

There are other instances where the limitation of the location of the person who is engaging in the conduct that causes unreasonable interruptions, under (a)(2), is irrelevant. For example, "A person commits a public nuisance when that person [p]urposely engages in conduct that causes an unreasonable interruption of … a lawful public gathering…" See (a)(1)(A). Paragraph (c) (4) defines a "lawful public gathering as "any religious service, funeral or similar organized proceeding." It does not matter whether a person who wants to disrupt a funeral service is standing on a corner that is open to the public or is standing on the roof of a private building across the street when they use a megaphone to unreasonable interrupt the public gathering.

The revised public nuisance statute also eliminates urinating and defecating in a public place as a disturbance of the public peace offense. D.C. Code § 22-1321(e). OAG supports decriminalization. However, while public urination and defecation would be better handled as a civil infraction punishable by a civil summons and a fine, the District should seek to develop a robust civil infraction enforcement system.

the public nuisance provision, on the other hand, states, "the phrase 'open to the general public' excludes locations that require payment or permission to enter or leave at the time of the offense." [emphasis added] It is unclear whether the difference was intentional and if it was why these two related offenses would vary on a basic element.

A separate issue with the definitions of "open to the general public" cited above, is that the phrase only gives a slice of a definition, by identifying a specific thing that's excluded from the definition ("excludes locations that require payment…"). Ordinarily, a definition should be exhaustive, covering the realm of what the term includes as well as excludes.

[10] The Criminal Code Reform Commission may want to listen to the hearing on Bill 22-839, the "Amplified Noise Amendment Act of 2018" which was held on July 2, 2018. Although the hearing was focused on why the noise regulations contained in the DCMR are inadequate to address various noise problems, Councilmembers and witnesses where in near agreement that D.C. Code § 22-1321 (d), as written, was the only effective tool in addressing noise issues.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #24, Failure to Disperse and Rioting

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 #24 - Failure to Disperse and Rioting.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4102. Failure to Disperse.

The elements portion of the failure to disperse provision is as follows:

(a) *Offense.* A person commits failure to disperse when that person:
  (1) In fact:
    (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  (2) The person knowingly fails to obey a law enforcement officer's dispersal order;

[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.

(3) When the person could safely have done so.

One way that this offense can be committed is when a person "[is] in the immediate vicinity [of][2] a course of disorderly conduct…being committed by five or more persons…" See (a)(1)(A) above. On page 4, footnote 3, it states that the phrase "immediate vicinity," "as in the disorderly conduct statute, . . . refers to the area near enough for the accused to see or hear others' activities."[3] If this footnote is meant to articulate a specific definition for "immediate vicinity," that definition should be in the text (as it should be in the rioting statute).[4]

As noted above, one element of this offense may be "[t]he person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct…" [emphasis added] The Commentary notes, on page 4, that "Substantial impairment is more than trivial difficulty." There is a footnote to that statement that reads, "For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not alone amount to substantial impairment." The problem is that the word "substantial" is not defined in the proposal. It is a long way from "more than trivial difficulty" to "substantial." If the Commentary correctly captures the level of police impairment, then either the word "substantial" should be defined as "nontrivial" or the phrase in the Commentary should be substituted in the text of the offense.

Pursuant to paragraph (d), the "Attorney General for the District of Columbia shall prosecute violations of this section." We agree with this designation but would like to avoid needless litigation concerning the Council's authority to give prosecutorial authority to OAG. The penalty provision for the failure to disperse offense states, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." To avoid needless litigation over the history of this provision, whether it is a police regulation or a penal statute in the nature of police or municipal regulations, and its interplay with D.C. Code § 23-101, OAG recommends that the penalty provision be redrafted to state, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X] or a maximum fine of [X]."

In the Explanatory Note, and elsewhere in the Commentary it states, "The offense codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful

[2] The text of paragraph (a)(1)(A) states, "Is in the immediate vicinity a course of disorderly conduct …" This may be a typo. We assume that it was supposed to read, "Is in the immediate vicinity of a course of disorderly conduct …"

[3] The footnote should reference the rioting statute (RCC § 22A-4102(a)(2)), not the disorderly conduct statute (which doesn't use the phrase).

[4] The term "immediate vicinity", as noted in the text, is used in, but not defined in the redrafted rioting offense. Footnote 26 in the Commentary does state, "The term "immediate vicinity" in the revised rioting statute refers to the area near enough for the accused to see or hear others' activities" and then says, ". See *United States v. Matthews,* 419 F.2d 1177, 1185 (1969)." The Commission should include a definition in both the failure to disperse and rioting offenses based upon this footnote.

police order) in the context of group disorderly conduct."[5] It must be noted, that the regulation that this offence is codifying only relates to vehicular or pedestrian traffic. As the elements of the offense does not include reference to vehicular or pedestrian traffic, it appears to be broader in scope then the provision that it purports to be replacing. To the extent that it does not subsume the existing regulation, the explanation should be expanded and affirmatively state that the enactment of this provision is not intended to repeal that regulation. Examples of offenses covered by the existing regulation include when officers tells a woman who is double parked to move her vehicle and she does not, asks a man to partially roll down his window so that the officer can test for a tint infraction and he does not, or when an officer sees a woman lift the security tape labeled "POLICE LINE DO NOT CROSS" and she refuses to leave the area when told to do so by a police officer.

In the explanation of subsection (a)(1)(C) in the Commentary, it states, "The actor's engagement in conduct that is protected by the First Amendment, Fourth Amendment, or District law is not a defense to failure to disperse because such rights are outweighed by the need for law enforcement to effectively address group disorderly conduct."[6] While OAG agrees with this statement, at least as far as it speaks of the First Amendment and District law, the Fourth Amendment protects against unreasonable searches and seizures, as such, it is not apparent why it is referenced here.

RCC § 22A-4101. Rioting.[7]

[5] The regulation states, "No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles."

[6] The Fourth Amendment to the U.S. Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[7] The offense portion of RCC § 22A-4101, rioting, is as follows:

(a) A person commits rioting when that person:
  (1) Commits disorderly conduct as defined in § 22A-4001;
  (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  (3) And the conduct is committed:
    (A) With intent to commit or facilitate the commission of a crime involving:
      (i) Bodily injury to another person;
      (ii) Damage to property of another; or
      (iii) The taking of property of another;
    (B) While knowingly possessing a dangerous weapon; or

Paragraph (a) states that a person commits rioting when a person "(1) Commits disorderly conduct … (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct … (3) And the conduct is committed . . ." [emphasis added] We read this sentence to mean that "the conduct" in subparagraph (a)(3) refers to the person's conduct in (a)(1) and not the group conduct in (a)(2) notwithstanding that the reference to "group conduct" appears between these two iterations. To clarify this point we recommend that subparagraph (3) be redrafted to read "And the person's conduct is committed…"

One way that this offense can be committed is when a person commits disorderly conduct, reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct and the conduct is committed with intent to commit or facilitate the commission of a crime involving bodily injury to another person. [emphasis added] See (a)(3)(A)(i). As to the offense "involving bodily injury to another person", the question arises whether this other person must be someone other than the person who is committing the disorderly conduct, the four or more other persons who are also committing disorderly conduct, or both. We agree that the offense of rioting should not include situations where the person who is committing disorderly conduct, with others, hurts himself. We want to be clear, in addition, that the text was not meant to exclude situations where a person intends to commit a crime involving bodily injury to someone else who is also being disorderly. We note that the Comment would not require such a reading.[8] Take for example the situation where there is meeting of international finance ministers in the District and protests and counter-protests occur. These protestors represent different and contradictory perspectives on the direction of world finance, just as the counter-protestors do. A subset of the protestors, say anarchists become disorderly, a different subset, say a group supporting funding a repressive country's regime, also becomes disorderly, and a group of the anarchists decide to injure a few of the regime protestors. There is no reason why the offense of rioting should not apply to these anarchists.

(C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

[8] See Comment on page 10 that "'Another person' means any person who is not a participant in the rioting." So, another person may include a person who is disorderly, but not rioting.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #25, Merger

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 #25 - Merger.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-212. Merger of Related Offenses.

Section 22A-212 makes changes to District merger law as it has evolved under case law. On page 10 of the Commentary it states, "Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code."

Acknowledging that the current scope of the RCC does not include a redrafting of every District Code offence, the question not specifically addressed by the merger provision or its Commentary

[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.

is how this provision should be applied to merger questions where a defendant has been found guilty of both an RCC offense and another criminal offense that has not yet been redrafted.

While it is clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

RCC § 22A-212 (a) states that there is a presumption for merger in a number of circumstances. One of these is where "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense…" In the Commentary, on page 6, it states, "This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."[2] OAG believes that this clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision. It should state, "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."

Paragraph (d) establishes a rule of priority based upon the relative seriousness of the offenses as to which offense should remain when offenses merge. In the Commentary, on page 9, the Report says, "where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain." The term "serious", however, is not defined in the text. Footnote 27 offers something that can be used as definition.[3] We recommend incorporating the language of this footnote into the text of the merger provision.

OAG agrees with intent of paragraph (e), final judgment of liability, that no person should be subject to a conviction until after "[t]he time for appeal has expired; or … [t]he judgment appealed from has been affirmed."[4] [emphasis added] We make one technical suggestion. As the Court of Appeals may affirm, affirm in part, or remand, we suggest that paragraph (e)(2) be amended to say, "The judgment appealed from has been decided."

[2] The Commentary cites to *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (en banc)) for this proposition.
[3] Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d)."
[4] This provision states:

> FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:
>
> (1) The time for appeal has expired; or
>
> (2) The judgment appealed from has been affirmed.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	December 20, 2018
Re:	Comments on First Draft of Report 26, Sexual Assault and Related Provisions

The Public Defender Service makes the following comments on Report #26, Sexual Assault and Related Provisions.

1. RCC § 22A-1301(9) and (11) define the phrases "person of authority in a secondary school" and "position of trust with or authority over." Rather than creating a limited and precise definition, in these two instances the RCC use the word "includes" to describe the scope of the legal terms. In other instances in this chapter and in other chapters, the RCC uses the word "means" when defining a term or statutory phrase. The use of the word "includes" falls short of Due Process requirements to provide notice of criminal offenses.[1] It also fails to correct existing ambiguity in D.C. Code § 22-3009.03 and 22-3009.04. Precise definitions in these two instances are particularly important because the terms relate to sexual offenses that are criminalized only because of the status of the complainant or the relationship between the complainant and the defendant. In the absence of the prohibited relationship between the defendant and the complainant, these interactions may be consensual and legal.
2. PDS makes several recommendations for the definition of "person of authority in a secondary school" and for other terms in RCC § 22A-1305(a) and (b).

   With respect to RCC § 22A-1301(9), person of authority in a secondary school, PDS recommends the following language.

   (9) "Person of authority in a secondary school" ~~includes~~ means any teacher, counselor, principal, or coach in a secondary school attended by the complainant or where the complainant receives services or attends regular programming.

[1] See, e.g., *McNeely v. United States*, 874 A.2d 371, 379 (D.C. 2005).

In addition to being more precise, the RCC's definition should correspond to the harm it seeks to prevent. The term "person of authority in a secondary school is used in RCC § 22A-1305, Sexual Exploitation of an Adult. RCC § 22A-1305(a)(2)(A) and RCC § 22A-1305(b)(2)(A) prohibit sexual acts or contact where the defendant is a person of authority in a secondary school and the complainant is under age 20 and "is an enrolled student in the same school system." Consent is not a defense to RCC § 22A-1305.

"Same school system" is not defined in RCC § 22A-1305. As such, it appears that it would prohibit otherwise consensual sexual contact between any 19 year old enrolled at a DCPS school and most DCPS employees. It would prohibit a consensual sexual relationship between a 19 year old student at Wilson High School and a 23 year old athletics coach at Brookland Middle School. RCC § 22A-1305 would hold the coach criminally liable, and would likely require ten years of sex offender registration although nothing about the "complainant's" status as a student in the same school system played a role in the consensual relationship. Across the District, DCPS employs more than 7,000 individuals.[2] Prohibiting consensual relationships between adults because of the defendant's status as a DCPS employee goes too far. Under circumstances where the complainant is legally capable of consent, there is no allegation of non-consent, and there is no inherently coercive environment created by the complainant's status as a student at one school and the defendant's status as an employee at another, the RCC should not criminalize the conduct.

The term "same school system" may also be under inclusive. Nearly half of the District's students attend charter schools. Each charter school organization forms its own local education agency. Under this definition a relationship between a coach at one charter school and a student at another unrelated charter school would not fall under RCC § 22A-1305 even if the two charter schools have a close relationship and the student participates in sports at both schools.[3] A definition that requires a closer connection between the student and the school employee would resolve this.

RCC §22A-1305(a) and (b) should criminalize consensual relationships between adults, or teens age 16 and older, only where the circumstances are truly coercive because of the defendant's power within the school. A definition that limits liability to relationships where the student and the defendant are assigned to the same school, not just the same school system, appropriately draws the line at preventing coercion but not being overly broad.

Within the RCC § 22A-1305, the age of consent for sexual conduct with persons of authority in secondary schools should be set at 18 instead of 20, as currently proposed. It makes sense to add protections for youth age 16 and 17 given the potential for coercion in a school setting and the potential for consent derived from the pressures of that setting. However, once a student reaches age 18, he or she should be free to engage in consensual sexual conduct with others, including individuals who may have positions of authority within the school setting. Those relationship may very well violate employee norms and in

[2] https://dcps.dc.gov/page/dcps-organization.

those instances should lead to the serious sanction of job loss, but they should not result in criminal liability. Relationships between students and school personnel can be prosecuted under RCC § 22A-1303(b), second degree sexual assault, when the power differential or other actions taken by the defendant result in the coercion of the student.[4]

3. With respect to RCC § 22A-1301(11), "position of trust with or authority over," PDS recommends the following changes.

   (11) "Position of trust with or authority over" ~~includes~~ means a relationship with respect to a complainant of:

   (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
   (B) A legal or de facto guardian or any person, more than 4 years older than the ~~victim~~ complainant, who resides intermittently or permanently in the same dwelling as the complainant;
   (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and
   (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution where the complainant is an active participant or member, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program where the complainant is an active participant or member, ~~including~~ meaning a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff that has regular contact with the complainant in the above settings.

   These recommendations mirror PDS's recommendations for RCC § 22A-1305. The term position of trust or authority is used in the RCC provisions that criminalize sexual abuse of a minor and in sentencing enhancements. A position of trust and authority should be more than a label based on the defendant's employment or status. The definition should capture situations where the defendant's close relationship to the complainant or minor allow for an abuse of trust or additional harm.

4. PDS makes the following recommendations for revisions to the definition of coercion at RCC § 22-1301(3).

   The RCC definition of coercion is employed primarily in second and fourth degree sexual assault, RCC § 22A-1303(b) and (d). As currently drafted the defendant must knowingly cause the complainant to submit to or engage in a sexual act or contact through some coercive conduct as defined in RCC §22-1301(3). While the requirement that the

[4] RCC § 22-22A-1301(3) defines coercion as threatening, among other things, to take or withhold action as an official, or to cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

defendant knowingly caused the sexual act or conduct through coercion provides some strength to the offense definition, the RCC definition of coercion allows seemingly minor conduct to qualify as coercion. This will require jurors to decide the causal question of the connection between the alleged coercion and the sexual act rather than more appropriately limiting the charges that may be brought under a coercion theory.

The current RCC definition includes sexual acts coerced by threats of ridicule. Ridicule should not be included within the specific definition of coercion. Without more, there is insufficient reason to believe that the threat of ridicule would cause a complainant to perform or submit to a sexual act. Where the ridicule is serious or where the defendant knows that the complainant is particularly vulnerable due to his or her background or particular circumstances, the conduct will fall within the catchall provision of coercion, RCC § 22A-1301(3)(G). Similarly, a threat to cause hatred or contempt of a deceased person should be considered coercive only when it meets the standard of RCC § 22A-1301(G) and should not be a standalone provision of coercion. A watered down definition of coercion brings the possibility of arrests and pretrial incarceration for circumstances that are not sufficiently serious to compel the submission of a reasonable person in the same circumstances.

PDS also has concerns about how the RCC addresses coercion in the context of controlled substances and prescription medication.[5] Generally speaking, this sub-definition of "coercion" needs to focus more precisely on what makes the conduct "coercive" or what makes a person feel *compelled* to submit to or engage in a sexual act or sexual contact. The conduct that makes engaging in a sexual act or sexual contact *compulsory* must be as serious as the other conduct proscribed in the definition, such as threatening to commit a criminal offense against the person.[6] According to the commentary, this sub-definition was modeled on the current definition of "coercion" in the human trafficking chapter of the D.C. Code.[7] That definition refers to controlling a person's access to "an addictive or controlled substance."[8] PDS recommends that "coercion" should be about restricting access to an addictive substance (that is also a controlled substance), not merely about restricting access to a controlled substance. What makes restricting access to a substance coercive or compelling conduct is that the substance is one to which the person is addicted. It would not be coercive to restrict a person's access to cocaine *unless the person is addicted to cocaine*. As the Commission notes, limiting a person's access to alcohol, which is an addictive substance, "is not as inherently coercive as limiting a person's access to a controlled substance, as it is relatively easy to obtain alcohol by other means."[9] PDS agrees with the point but posits that the Commission drew the wrong conclusion from it. Restricting access to alcohol is not "inherently" coercive and, unless one is addicted to it, neither is restricting a person's

[5] RCC § 22A-1301(3)(F).

[6] See RCC § 22A-1301(3)(A).

[7] Report #26, page 10.

[8] See D.C. Code § 22-1831(3)(F).

[9] Report #26, page 10, footnote 40.

access to a controlled substance. More to the point, restricting a person's access to alcohol is not coercive at all *precisely because* it is relatively easy for a person to obtain alcohol by other means. A person faced with the demand, "have sex with me or I won't give you this beer," is unlikely to feel compelled to submit to the sexual act, as the person can easily get beer elsewhere. A person faced with the demand, "have sex with me or I won't give you this heroin," is also unlikely to feel compelled to submit to the sexual act if (A) the person is not addicted to heroin and (B) the person can get heroin from another source. Thus, to be "coercive" restricting access should be about restricting access to a controlled substance to which the person is addicted and should be about more than a mere refusal to sell, exchange, or provide. Finally, PDS asserts that the coercive or compelling conduct involving addictive substances and prescription medication is the same. It is not clear what the difference would be between "limiting access to a controlled substance" and "restricting access to prescription medication" and it is certainly not clear that there should be a difference.

The term "limit access" is too broad to truly reach coercive acts. Limit access would seem to include the defendant not sharing his own controlled substances, to which the complainant has no right. It also criminalizes as second and fourth degree sexual abuse commercial sex where the currency is controlled substances. For instance, it should not be second degree sexual abuse if the defendant requires a sexual act as payment for controlled substances. The conduct of limiting access by refusing to sell drugs unless the complainant performs a sexual act should fall squarely within commercial sex and should not be second or fourth degree sexual abuse. With respect to prescription medication, it should be clear that the coercive conduct is limiting a person's access to their own prescribed medicine. A pharmacist refusing to fill a prescription unless a sexual act is performed in exchange is engaging in prostitution, not attempted sexual assault. Because there are other pharmacies, a person who is unwilling to pay that price for his or her prescribed medication, is not being compelled to engage in the sexual act. However, restricting a person's access to their own medicine would in many circumstances be coercive.

PDS recommends the statutory language below.

(3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:
  (A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
  (B) Accuse another person of a criminal offense or failure to comply with an immigration regulation;
  (C) Assert a fact about ~~another person~~ the complainant, ~~including a deceased person~~, that would tend to subject ~~that person~~ the complainant to hatred, or contempt, ~~or ridicule~~, or ~~to~~ would substantially impair that person's credit or business repute;
  (D) Take or withhold action as a~~n~~ public official, or cause a public official to take or withhold action;
  (E) Inflict a wrongful economic injury;

(F) Restrict ~~Limit~~ a person's access to a controlled substance, as defined in D.C. Code 48-901.02, to which the person is addicted and ~~controlled substance~~ or restrict a person's access to that person's prescription medication; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

In addition to the drafting changes above, PDS recommends that the following language be added to the commentary: Restricting a person's access to a substance to which the person is addicted is not the same as refusing to sell or provide an addictive substance or refusing to fill a person's prescription. Nor is restricting a person's access the same as suggesting a sexual act or sexual contact as a thing of value in exchange for a controlled substance to which the person is addicted or for prescription medication. Such suggestion, and such exchange, may constitute prostitution or soliciting prostitution, but it is not, standing alone, coercion for the purposes of second and fourth degree sexual abuse.

5. PDS recommends a minor modification to RCC § 22A-1303. RCC § 22A-1303(a)(C)(i) prohibits administering an intoxicant without the claimant's effective consent "with intent to impair the complainant's ability to express unwillingness." The RCC should explicitly add: "with intent to impair the complainant's ability to express unwillingness to participate in the sexual act." The above recommendation clarifies the phrase "ability to express unwillingness" and ensures that the motive in providing the intoxicant is connected to the sexual assault.

6. RCC § 22A-1303(f) provides for penalty enhancements for sexual offenses based on the characteristics of the complainant and/or the defendant. PDS objects to the use of enhancements generally. Sexual offenses carry lengthy terms of incarceration. The Sentencing Guidelines provide wide ranges of guidelines-compliant sentences for sex offenses. Given the high statutory maxima and the wide ranges available under the Sentencing Guidelines, sentencing enhancements are not necessary to guide judicial discretion. Judges will examine the facts of each case and sentence appropriately. Defendants convicted of sexual crimes against children younger than 12 will typically receive longer sentences without the effect of any enhancement because the facts of the case will warrant a longer sentence. Sentencing enhancements do not serve a meaningful purpose in guiding judicial discretion and if they are assigned a mandatory minimum or a particular offense severity group on the Sentencing Guidelines they may inappropriately cabin judicial discretion to sentence based on the particular facts of the case.

   If the RCC retains sentencing enhancements, PDS recommends re-evaluating the purpose of RCC § 22A-1303(f)(4)(E) which provides for a penalty enhancement where "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, under 65 years old." If the intent is to focus on the unique vulnerabilities of the complainant, the age should be raised to over age 75. If the intent of the RCC is to punish young defendants who may take advantage of an individual who is over age 65, then the enhancement should also provide for an age gap. In that instance, RCC § 22A-1303(f)(4)(E) should read: "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, at least ten years younger than the complainant."

RCC § 22A-1303(C) adds a sentencing enhancement for instances where the "actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least two years older than the complainant." PDS objects to this sentencing enhancement in particular. It does not address a particular harm and draws lines that may be entirely arbitrary. A sexual assault of a 17 year old by a 19 year old may be no different than a sexual assault of an 18 year old by a 21 year old. The age distinction drawn in the RCC in many instances will have no correlation to the particular harm of this conduct as opposed to other similar conduct. Sexual assault has devastating consequences for all and arbitrarily drawing this additional age-based line does not enhance the proportionality of punishment or meaningfully distinguish between the harms inflicted. As stated above, judges will have sufficient sentencing discretion to appropriately consider the particular harms caused and the circumstances of the defendant.

7. RCC § 22A-1306, sexually suggestive contact with a minor, prohibits instances where "with the intent to cause the sexual arousal or sexual gratification of any person knowingly… (D) [the actor] touches the actor's genitalia or that or a third person in the sight of the complaint." As written the RCC criminalizes a minor's incidental viewing of sexual activity as a result of sharing a room or a home with others. RCC § 22A-1306(a)(2)(D) would criminalize a sibling masturbating or parents engaging in consensual sex in a room shared with a minor. The unintentional result is to criminalize typical conduct that occurs in households without private space for each individual. RCC § 22A-1306(a)(2)(D) should include an intent element that is related to the minor child. PDS proposes: "[the actor] touches the actor's genitalia or that of a third person in the sight of ~~complaint~~ a minor child with the intent to gratify the actor's sexual desire with respect to the minor child or to humiliate or degrade the minor child.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 27, Human Trafficking and Related Statutes

PDS has the following comments about RCC human trafficking and related offenses.

1. PDS recommends making the same changes to the definition of "coercion" as the term is used in the human trafficking chapter that PDS proposed for "coercion" for the sexual assault chapter.

2. PDS objects to the term "harbor" where it is used in Trafficking in Labor or Services,[1] Trafficking in Commercial Sex,[2] Sex Trafficking of Minors,[3] and Sex Trafficking Patronage.[4] Although it is used in the current D.C. Code,[5] that use is grammatically incorrect; the Revised Criminal Code should not perpetuate the misuse of the term. A "harbor" is a place of refuge. "To harbor" means to provide shelter or sanctuary. While we may speak of "harboring a fugitive" or "harboring a criminal," that is not an incorrect use of the term. Harboring a fugitive means to provide shelter for a fugitive. From the fugitive's perspective, the shelter is a "place of refuge;" it is simply that society does not want fugitives or criminals to have a place of refuge. In contrast, society likely supports persons and organizations that provide places of refuge to victims of trafficking.[6] PDS recommends replacing "harbor" with the term "house."

[1] RCC § 22A-1605(a)(1).

[2] RCC § 22A-1606(a)(1).

[3] RCC § 22A-1607(a)(1).

[4] RCC § 22A-1610(c)(2).

[5] For example, it is used at D.C. Code § 22-1833, Trafficking in labor or commercial sex acts, and at D.C. Code § 22-2704, Abducting or enticing a child from his or her home for purposes of prostitution, harboring such a child.

[6] See e.g., "Apple wins Stop Slavery Award, touts new initiative to hire human trafficking victims at retail stores," https://appleinsider.com/articles/18/11/14/apple-wins-stop-slavery-award-touts-new-initiative-to-hire-human-trafficking-victims-at-retail-stores.

3. PDS recommends changing the offense titles so the title better conveys the relative seriousness of the conduct. Forced labor or services and forced commercial sex make liable the person or the accomplice who, by means of coercion or debt bondage, causes another to engage in labor or services or in commercial sex. Whether or not the forced labor or services or forced commercial sex is part of a larger criminal enterprise, this conduct is at the core of the offense and is the most serious. The public perception of "trafficking" is that it is particularly serious, a form of modern-day slavery. Labeling the core offense as "forced commercial sex" and the supporting conduct as "trafficking" is precisely backwards. Thus, PDS recommends that "Forced Labor or Services" should be retitled to "Labor or Services Trafficking" and "Forced Commercial Sex" should be retitled to "Commercial Sex Trafficking." Further, "Trafficking in Labor or Services," "Trafficking in Commercial Sex," Sex Trafficking of Minors" should be retitled to "Assisting Labor or Services Trafficking," "Assisting Commercial Sex Trafficking," and "Assisting Sex Trafficking of Minors" respectively.

4. PDS recommends rewriting RCC § 22A-1605, Assisting Labor or Services Trafficking (formerly Trafficking in Labor or Services), and RCC § 22A-1606, Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex). The offenses criminalize conduct performed in aid of forced labor or services or forced commercial sex. As the Advisory Board discussed extensively with the Commission at the December 19, 2018 public meeting, there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime. Examples we discussed include the cab driver who drives someone he knows is a "trafficking victim" to the grocery store; the cab driver who one time drives someone she knows is being trafficked to a brothel; a pizza delivery person with a standing order to deliver pizza to a place the person knows houses trafficking victims; a hotel maid who cleans the room knowing it was a place where commercial sex trafficking took place. PDS strongly argues for a narrow offense and has a number of drafting recommendations. First, PDS agrees with the suggestion made during our Advisory Board discussion that the greatest concern is with persons who assist trafficking by housing, hoteling, [7] transporting, recruiting, and enticing. PDS therefore recommends narrowing the offense to criminalize only that conduct. Second, the offenses, including the penalties, and the commentary should make clear the seriousness of the offense and the culpability of the actors relative to each other. As stated above at PDS comment (3), labor or services trafficking or commercial sex trafficking, that is actually causing a person to engage in labor, services, or commercial sex by means of coercion or debt bondage, is the most serious conduct. A person who engages in conduct, such as transporting a person, *with the purpose* of assisting in the commission of the trafficking is liable as an accomplice and may be punished accordingly. Less serious, but still culpable, is an actor who knowingly recruits, entices, houses, hotels, or transports a person *with the intent* that the person be caused to engage in labor, services or commercial sex by means of coercion or debt bondage. "With intent" requires purpose or knowledge so it allows for a conviction based on a lower mental state than accomplice liability would require. But it solves the problem discussed at the December 19, 2018 Advisory Board meeting that the assisting offenses as currently drafted allow for criminal liability for an actor

[7] Though not commonly used as a verb, the Oxford English Dictionary confirms that "hotel" can be a verb.

who transports a person and who is aware of a substantial risk (or even knows) that the person is being trafficked, but the transportation does not aid the commission of the trafficking.

PDS recommends rewriting the offense elements of Assisting Labor Services Trafficking and Assisting Commercial Sex Trafficking as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports~~, provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to provide [labor or services][commercial sex];

(3) By means of coercion or debt bondage.

For the same reasons, PDS recommends rewriting the offense elements of RCC § 22A-1607, Assisting Sex Trafficking of Minors, as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports, ~~provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to engage in a commercial sex act;

(3) With recklessness as to the complainant being under the age of 18.

5. With respect to the RCC offenses of Commercial Sex Trafficking (formerly Forced Commercial Sex), Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex), and Assisting Sex Trafficking of Minors (formerly Sex Trafficking of Minors), PDS recommends clarifying that the provision or promise of something of value necessary to make the sex act "commercial" must be provided or promised by someone other than the actor who is "forcing" the commercial sex by coercion or debt bondage. This is necessary to distinguish those offenses from sexual assault. To understand how the offenses could currently overlap, imagine the following scenario: Actor restricts complainant's access to complainant's insulin by hiding it. Actor says, "I'll give you your insulin back if you have sex with me." If complainant complies, that would be second degree sexual assault by coercion.[8] PDS is concerned that, as currently drafted, the RCC forced commercial sex statute could be interpreted to also criminalize that conduct because the actor would be causing the complainant, by means of coercion, to engage in a sexual act that was made "commercial" by being in exchange for the insulin, a thing of value. The difference between sexual assault and forced commercial sex is that it is a third person who is giving something of value in exchange for the sexual act or sexual contact and that thing of value is different from that which is being used to coerce the complainant's compliance. PDS recommends rewriting Forced Commercial Sex as follows:

[8] See RCC § 22A-1303(b)(2)(A).

~~A person~~ An actor or business commits the offense of commercial sex trafficking ~~forced commercial sex~~ when that ~~person~~ actor or business:

(1) Knowingly causes a person to engage in a commercial sex act with another person;

(2) By means of coercion or debt bondage.

Assisting Commercial Sex Trafficking and Assisting Sex Trafficking of Minors should be rewritten similarly. For the same reason, Sex Trafficking Patronage should be modified to distinguish it from sexual assault. First Degree Sex Trafficking Patronage should be written as follows:

~~A person~~ An actor commits the offense of first degree sex trafficking patronage when that ~~person~~ actor:

(1) Knowingly engages in a commercial sex act;

(2) When coercion or debt bondage was used by another person or a business to cause the person to submit to or engage in the commercial sex act;

(3) With recklessness that the complainant is under 18 years of age.

Second and third degree sex trafficking patronage should be rewritten similarly.

6. With respect to RCC § 22A-1608, Benefitting from Human Trafficking, the RCC Commentary states that the offense "criminalizes knowingly obtaining any benefit or property by participating, other than through the use of physical force, coercion or deception, in an association of two or more persons…"[9] PDS questions where in the offense elements it is clear that the participation must be "other than through the use of physical force, coercion or deception." PDS recommends rewriting the offense to state more clearly the exclusion of the use of physical force, coercion or deception.

7. PDS recommends rewriting RCC § 22A-1608, Benefitting from Human Trafficking, to allow for greater differentiation between offender culpability. The only distinction between the two degrees of benefitting is whether the group, in which the actor participates, is engaged in forced commercial sex (first degree) or forced labor or services (second degree). Thus, the person who is a "kingpin" in a group and who gains significant benefits from their participation is treated the same as the person whose participation in the group is sufficiently marginal that they are only disregarding a substantial risk that the group participates in the forced commercial sex or labor or services. PDS recommends increasing the mental state for first and second degree to knowing that the group has engaged in conduct constituting forced commercial sex (first degree) or forced

[9] Report #27, page 49. The report also says "Subsection (a)(2) [of RCC § 22A-1608] specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." *Id*.

labor or services (second degree). PDS further proposes creating a third degree benefitting from human trafficking offense that encompasses both forced commercial sex and forced labor or services and that has the mental state of "recklessness" with respect to the forced conduct in which the group engages.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 28, Stalking

PDS has the following comments about the RCC offense of stalking.

1. PDS objects to the negligence mental state in the proposed stalking offense.[1] As currently proposed, a person commits stalking if the person purposely engages in a pattern of conduct directed at an individual and does so either (A) with intent to cause the individual to fear for his or her safety or with intent to cause the individual to suffer significant emotional distress or (B) negligently causing the individual to fear for his or her safety or to suffer significant emotional distress. Particularly because the purpose of the person's conduct (necessary to establish it as a pattern) need not be nefarious – for example, "a person might persistently follow someone with the goal of winning their affection"[2] – a negligence mental state standard is too low. Increasing the mental state to "recklessly," as PDS recommends, makes the second way of committing the offense on par with the first way. That a person's conduct is done with an awareness of a substantial risk that her conduct is causing the individual to fear for his safety is of similar seriousness as a person's conduct being done with the intent to cause such fear (whether or not it actually does). Allowing a conviction based only on proof that the person, who may otherwise have a benign or beneficent purpose, *should have been* aware that her conduct was causing the individual to fear for his safety would allow a conviction based on conduct that is of significantly lower culpability than the intentional conduct, yet the offense does not define them as different degrees.

2. PDS recommends increasing the separate occasions of conduct required to establish a pattern from two to three.[3] As the commentary explains, stalking concerns "longer-term apprehension," in contrast to breach of the peace statutes like disorderly conduct, rioting, and public nuisance

[1] See RCC § 22A-1801(a)(2)(B).

[2] Report #28, page 5, footnote 2.

[3] See RCC §22A-1801(d)(3).

which create "momentary fear of an immediate harm."[4] Requiring three occasions to establish a "pattern of conduct" does more to assure that the harm being punished is "longer-term apprehension" and better distinguishes between conduct that constitutes stalking and conduct that would constitute a breach of the peace.

3. PDS recommends rewriting the definition of "financial injury" to limit "attorney's fees" at sub-subsection (F) to only those attorney's fees "incurred for representation or assistance related to" the other forms of financial injury listed at (A) through (E). This is consistent with the objection and proposal PDS made on the definition of "financial injury" in its November 3, 2017 comments on Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions.

4. PDS appreciates the effort to protect the conduct of attorneys and private investigators acting within the reasonable scope of their official duties from prosecution pursuant to the revised stalking statute.[5] The list of excluded professionals is inadequate, however, to cover investigators employed by the Public Defender Service or by private attorneys appointed to represent indigent defendants pursuant to the Criminal Justice Act. PDS and CJA investigators are not "licensed private investigators." In addition, PDS and law school programs rely on college and law student interns to perform investigative tasks. PDS strongly urges rewriting the excluded professions list as follows: "(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, person acting as an agent of an attorney, process server, *pro se* litigant, or compliance investigator..."

5. PDS agrees with the explanation of "physically following" that is in the commentary.[6] PDS recommends including the term in the definitions subsection of the statute and using the explanation from the commentary. Specifically, PDS recommends adding to subsection (d) the following: "The term 'physically following' means to maintain close proximity to a person as they move from one location to another."

6. PDS suggests deleting footnote 10.[7] The Do Not Call Registry is not a good example of a government entity that might be the indirect source of notice to the actor to cease communications with the complainant. The Do Not Call Registry is for telemarketing calls only; it does not restrict calls from individuals.[8]

7. PDS recommends that the commentary clarify that the actor must know that the notice to cease communication is from the individual, even if the notice is indirect. The commentary should be clear that if the actor does not know that the person delivering the message to cease communicating with the individual is authorized to deliver such message on the individual's

[4] Report #28, page 10, footnote 40.

[5] See RCC § 22A-1801(e)(3).

[6] Report #28, pages 5-6.

[7] Report #28, page 6.

[8] Incidentally, the Registry does not restrict calls from charities or debt collectors either.

behalf, then the message does not qualify as the "notice" required by the offense. For example, the former paramour receives a message from the new paramour to stop calling and texting the individual will not satisfy the requirement that the actor (former paramour) "knowingly received notice from the individual" unless the actor knows that the new paramour is authorized to deliver the message to cease communications.

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: December 21, 2018

SUBJECT: First Draft of Report #26, Sexual Assault and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #26 - Sexual Assault and Related Provisions.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1301 (2), definition of bodily injury.

RCC § 22A-1301 (2) states that bodily injury "means significant physical pain, illness, or any impairment of physical condition." It is unclear from the text and the Commentary if the word "significant" is meant to modify only physical pain or whether it is meant to modify illness as well. Because of the wording of the definition of "bodily injury" in D.C. Code § 22-3001 (2), OAG assumes that the drafter's meant that bodily injury "means illness, significant physical pain, or any impairment of physical condition." OAG makes this assumption because the phrase "bodily injury", in DC Code § 22-3001(2), is defined as and "… injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." Note that there are no modifiers that apply to the words "disease" or "sickness" in the current law. However, if the drafter's meant the word "significant" to modify both words, then the definition should be

[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.

rewritten to say that it "means significant physical pain, significant illness, or any impairment of physical condition." The Commentary should then explain why it made that choice.

RCC § 22A-1301 (8), definition of effective consent, and, RCC § 22A-1301 (3), definition of coercion.

As written, an actor who threatens a complainant that they will expose or publicize a fact, whether true or false, that will subject the complainant to embarrassment cannot be charged with a sexual assault if the complainant acquiesces. In order to determine if a person has given "effective consent" in this context, we need to determine if the person was coerced. RCC § 22A-1301 (8) states that effective consent "means consent obtained by means other than physical force, coercion, or deception." RCC § 22A-1301 (3) defines coercion. One way that a person may be coerced is if the actor threatens the complainant that they will "assert a fact about another person, … that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute…"[2] The word "embarrassment" is notably missing from that list. However, the Council, as recently as December 4, 2018 recognized that persons may submit to unwanted sex rather than have something embarrassing made public when it passed the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018. In the legislation, a person commits the offense of blackmail if they threaten to "[e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation… or distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment or other injury to reputation…" [emphasis added][3]

The definition of "coercion" in paragraph (G) includes "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." For clarity, this phrase should explicitly

[2] The full definition of coercion is much broader. RCC § 22A-1301 (3) states that coercion "means threatening that any person will do any one of, or a combination of, the following:
(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;
(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;
(D) Take or withhold action as an official, or cause an official to take or withhold action;
(E) Inflict a wrongful economic injury;
(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or
(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and the same circumstances to comply."

[3] See lines 24 through 32 of the engrossed original of the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018 and the accompanying committee report. http://lims.dccouncil.us/Legislation/B22-0472?FromSearchResults=true

refer to another person. In other words, the phrase "same background and in the same circumstances" should have an object to which it refers. We suggest that the paragraph be rewritten to say, "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply"

RCC § 22A-1303, Sexual assault.

RCC § 22A-1303, and many of the other related provisions, ascribes the mental state of "knowingly" to many of the elements of the offense. As noted on page 58 of the Report, a consequence of using this mental state is that there will be a change in District law such that a person would be able to use self-induced intoxication as a defense.[4] While understanding why the Commission chose to use the mental state of knowingly in these offenses, a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense. If the Commission is going to use this mental state, then the Commission should create an exception that accounts for this situation. This exception would be similar to what the Commission is already proposing in § 22A-208 (c) concerning willful blindness.[5]

[4] The relevant portion of this discussion is found on pages 58 and 59 of the Report. There it states:

> Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22A-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense, and similarly logic would appear to apply to third degree sexual abuse. This case law precludes ~~preclude~~ an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime. This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily presenting evidence in support of—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse. In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute. [internal footnotes omitted] [strikeout added for clarity]

[5] RCC § 22A-208 (c) states "IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if … The person was reckless as to whether the circumstance existed;

RCC § 22A-1303 (a)(2) makes it a first degree sexual assault when a person causes someone to submit to a sexual act "… (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant." It is unclear whether the drafters meant for the phrase "force that overcomes, restrains, or causes bodily injury to the complainant" to modify "physical force" or also modifies the use of "a weapon." OAG believes that when a person uses a weapon to cause a victim to engage in a sexual act it should be a first degree sexual assault, without having to prove the effect of the use of the weapon on the complainant; it should be assumed. For the sake of clarity, paragraph (A) should be redrafted.[6]

RCC § 22A-1303 (a)(2)(C)(ii) makes it a first degree sexual assault when a person causes someone to submit to a sexual act by drugging the complainant when the substance in fact renders the complainant "…(ii) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or (iii) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act." There are two issues with the way that this is phrased. First, it is unclear in subparagraph (ii) what the word "physically" adds. In other words, after a person has been drugged, what is the difference between a person being substantially incapable "mentally" of appraising the nature of the sexual act and a person being substantially incapable "physically" of appraising the nature of the sexual act? The second issue is that these two statements do not reach the situation where a victim is drugged, can still appraise the nature of the sexual act and can communicate that he or she is unwilling to engage in a sexual act, but is physically unable to move anything but their mouth. The provision should clarify that first degree sexual assault covers a person who has sex with a victim after administering a drug that physically incapacitates the victim, though allowing the victim to think and speak.

RCC § 22A-1305, Sexual Exploitation of an Adult.

In paragraph (a)(2)(C) the subparagraph criminalizes sexual acts between a complainant and "member of the clergy" under specified circumstances. The phrase "member of the clergy" is not defined. To improve clarity and avoid needless prosecutions and litigation the Commission should define this term. The Commission could base its definition of "member of the clergy" on the list of clergy that appears in D.C. Code § 22-3020.52. This is the Code provision that requires "any person" to report information concerning child victims of sexual abuse but exempts "a priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia" when those persons are involved in a confession or penitential communication.

and …The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability."

[6] The Commission could redraft subparagraph (A) so that if follows the basic structure of subparagraph (B). It would look as follows:

"(A) By using:

(i) A weapon; or

(ii) Physical force that overcomes, restrains, or causes bodily injury to the complainant…"

RCC § 22A-1307, Enticing a minor.

One way that a person can commit the offense of enticing a minor is to knowingly persuade or entice, or attempt to persuade or entice, "the complainant to go to another location in order to engage in or submit to a sexual act or conduct." RCC § 22A-1307(a)(1)(B). As written, it is unclear if the phrase "in order to" refers to the actor's motivations or is part of what the actor must communicate to the complainant. The Commentary should clarify that "in order" refers to the actor's motivation for the communication to get the complainant to go to another location, not that the actor has to communicate to the complainant that a sexual act or contact is the reason for going to another place.

Pursuant to RCC § 22A-1307 (a)(2) a person can commit this offense when "The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and … (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age." There is a problem, however, with how this subparagraph is structured. Paragraph (C) is still subject to the overarching lead in language, so this law-enforcement language still doesn't apply unless the actor is 4 years older than the complainant. If the intent is to include any situation where an actor tries to entice a law enforcement officer who purports to be under 16 the provision should be restructured. For example, the Commission could redraft this provision to read:

> (2)(A) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:
>
> (1) The actor recklessly disregards that the complainant is under 16 years of age; or
>
> (2) The actor recklessly disregards that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant; or
>
> (B)(1) The actor, in fact, is at least 18 years of age,
>
> (2) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age; and
>
> (3) The actor recklessly disregards that complainant purports to be a person under 16 years of age.

RCC § 22A-1308, Arranging for sexual conduct of a minor.

While in general, OAG does not object to RCC § 22A-1308, the limitation on this offense is that "The actor and any third person, in fact are at least 18 years of age and at least four years older than the complainant" conflicts with the requirement that the actor recklessly disregards that the "complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer."

The relevant part of the provision is as follows:

"(a) Arranging for Sexual Conduct with a Minor. An actor commits the offense of arranging for sexual conduct with a minor when that actor:
(1) Knowingly arranges for a sexual act or sexual contact between:
(A) The actor and the complainant; or
(B) A third person and the complainant; and
(2) The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant; and
(3) The actor recklessly disregards that:
(A) The complainant is under 16 years of age;
(B) The complainant is under 18 years of age, and the actor knows that he or she or the third person is in a position of trust with or authority over the complainant; or
(C) The complainant purports to be a person under 16 years of age, while, in fact, the complainant a law enforcement officer.

The following example demonstrates the problem. Say the Actor is 20 years old and the complainant is an undercover police officer pretending to be 14 years of age. Notwithstanding that there is a mental state in subparagraph (3)(c) that requires that "The actor recklessly disregards that… The complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer…", arguably we never get to that mental state. That's because the mental state concerning the law enforcement officer is never reached because we can't jump the hurdle, in paragraph (a)(2) that "The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant…"

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: December 21, 2018

SUBJECT: First Draft of Report #27, Human Trafficking and Related Statutes

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 First Draft of Report #27 - Human Trafficking and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1601 (2)(D), definition of Coercion.

RCC § 22A-1601 (2)(D) states that the definition of the word "coercion" includes when a person "Take[s] or withhold[s] action as an official…" The word "official" is not defined in the text nor is it specifically addressed in the Commentary. OAG assumes that the word was chosen to refer to government action and not to the official action of a corporation or other organization. It is unclear, however, whether the term should be read broadly as "takes or withholds government action" or more narrowly as "takes or withholds District government action." Because all government action is "official, we recommend that the definition be rewritten to refer to "government action" rather than "official action." We believe that this will aid clarity.

RCC § 22A-1602, Limitations on liability and sentencing for RCC Chapter 16 offenses.

[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.

Paragraph (b) lists the "Exceptions to Liability." It states:

> Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:
>
> (1) Burning, biting, or cutting;
> (2) Striking with a closed fist;
> (3) Shaking, kicking, or throwing; or
> (4) Interfering with breathing.

There are a few problems with this formulation. As drafted, the paragraph implies that burning, biting, or cutting, etc. are typical forms of parental discipline.[2] Second, the term "typical" is not defined. Surely it should not mean that merely because a number of people do something harmful that it would qualify as an exception for liability. For example, just because it may be "typical" in some places for parents to neglect their child, see D.C. Code § 16-2301(9), those neglectful actions should not be an exception to liability when they are used as parental discipline. Finally, subparagraphs (1)-(4) are stated as an exclusive list. There are, however, other harms, including neglect, that a parent may typically inflict on a child that should also be excluded.[3]

RCC § 22A-1603, Forced labor or services.

Paragraph (b) establishes the penalties for the offense of forced labor or services. Though businesses can be convicted of this offense, the penalty structure is the same as for offenses that can only be charged against a person. As businesses cannot be subject to incarceration and as their collective motivation for this offense is financial, there should be a separate fine penalty structure for businesses that is substantial enough to act as a deterrent.

Paragraph (c) provides for a penalty enhancement when it is proven that "The complainant was held or provides services for more than 180 days." This sentence should be redrafted to make it clear that the enhancement should apply when the combined period of time that a person is held

[2] The paragraph can be read to say "Any parent… who requires his … child … to perform common household chores under threat of typical parental discipline shall not be liable for such conduct provided that the threatened discipline did not include… [b]urning, biting, or cutting…;" [emphasis added]

[3] Similarly, in RCC § 22A-1603 (e) the drafters use the word "ordinary." It is unclear what that term means in the context of that paragraph.

and forced to provide services – together – total more than 180 days.[4] The same comment applies to the penalty enhancement for RCC § 22A-1603 Forced commercial sex.

RCC § 22A-1607, Sex trafficking of minors.

It is unclear how the penalty provision in paragraph (b) should be read with the offense penalty enhancements in paragraph (c).[5] For example, in determining the penalty for a repeat offender who holds the complainant for more than 180days, do you apply the penalty enhancement in RCC §§ 22A-805 and then go to up one class or do you go up one class and then apply the enhancement in RCC §§ 22A-805?[6]

RCC § 22A-1608, Benefiting from human trafficking.

RCC § 22A-1608 (a)(2) states that the offense of first degree benefiting from human trafficking includes, as an element, "By participation in a group of two or more persons." It is unclear if whether this element is met when a business of two people are engaged in human trafficking. In other words, because its two people that participate is this element met? Or, because it is one business, albeit with two people, is this element not met?[7]

The Commentary to RCC § 22A-1608 (a)(2) states, "Subsection (a)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." Subsection (a)(2) does not contain this limitation. See text in previous paragraph.

RCC § 22A-1609, Misuse of documents in furtherance of human trafficking.

RCC § 22A-1609(a)(2) includes as an element of the offense that the person or business acted "With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person." [emphasis added] OAG recommends deleting the phrase "without lawful authority." The inclusion of the "without lawful authority" clause assumes that there are situations that it would be justified to, "With intent to prevent or restrict, or attempt to prevent or restrict the person's liberty to move or travel in order to maintain the labor, services,

[4] For example, the enhancement should apply to someone who holds a person in their basement for 90 days "while training them" and then forces them to provide services for the next 91 days.
[5] Paragraph (b) states, "Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." Paragraph (c) states, "The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days."
[6] This may be a global issue that applies to all penalty provisions where there are both general enhancements and offense specific enhancements.
[7] The same questions apply to element (b)(2) in the offense of second degree benefiting from human trafficking.

or performance of a commercial sex act by that person." We submit that that would never be the case. The Commentary does not explain why the phrase "without lawful authority" is necessary.

RCC § 22A-1609, Forfeiture.

It is unclear whether the forfeiture clause in RCC § 22A-1609 follows the holding in *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998). In that case, the government sought forfeiture of a vehicle valued at $15,500 that was owned by a person who was arrested for solicitation of a prostitute. The Court held that "the Constitution prevents the utilization of civil forfeiture as a penalty for the commission of an offense where the value of the property forfeited stands in gross disproportion to the gravity of the offense. Such a disproportion exists in the case at bar and the attempted forfeiture therefore violates the Excessive Fines Clause of the Eighth Amendment."

RCC § 22A-1613. Civil Action.

RCC § 22A-1613 permits victims of offenses prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court. The provision should explicitly state that the defendant in the civil action must be a person who can be charged as a perpetrator of one of those offenses.

RCC § 22A-1613 (b) contains the following provision. "(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later." OAG believes that a person who was a minor should have an opportunity to sue on their own behalf. As written, just as the minor was able to sue, because they reached the age of majority, they would be precluded from suing because they reached the age of majority. Instead, OAG suggests that the Commission adopt the language used in the engrossed original of B22-0021, the Sexual Abuse Statute of Limitations Amendment Act of 2018. That bill provides, "for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40, or 5 years from 40 when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;""

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: December 21, 2018

SUBJECT: First Draft of Report #28, Stalking

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 #28 - Stalking.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1801, Stalking.

RCC § 22A-1801(d)(4) contains the following definition, "The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:" [emphasis added] As written, the term "specific individual" refers to the person who is doing the staking. However, the lead in language to the stalking offense contains the sentence "Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following…" [emphasis added] See RCC § 22A-1801(a)(1). Using the term "specific individual" to refer to both the perpetrator and victim would be confusing. However, given the context, OAG believes that what The Commission meant in RCC § 22A-1801(d)(4) is, "as a result of the stalking of the specific individual."

[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.

RCC § 22A-1801(d)(8) states that the term "significant emotional distress" means "substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling." On page 10 of the Commentary it clarifies the government's obligation by stating, "The government is not required to prove that the victim sought or needed professional treatment or counseling." OAG believes that that for the sake of clarity and to avoid needless litigation. The sentence in the Commentary should be in the text of the substantive provision in RCC § 22A-1801(d)(8).

RCC § 22A-1801(e) contains the exclusions from liability. Subparagraph (e)(3) states:

> (e) A person shall not be subject to prosecution under this section for conduct, if:
> (A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, pro se litigant, or compliance investigator; and
> (B) Is acting within the reasonable scope of his or her official duties.

While it may be intuitive to understand what the official duties of a law enforcement officer, licensed private investigator, process server, and compliance investigator is within the context of this offense, it is unclear what the official duties of a pro se litigant is. Since a pro se litigant does not appear to have "official duties" (or "professional obligations," to borrow the phrase used on page 12 of the report) in the ordinary meaning of that phrase, OAG believes that the subparagraph needs to be redrafted. In addition, there are questions as to whether an attorney or journalist necessarily has "official duties" as opposed to professional obligations. Therefore, OAG recommends that this provision be redrafted as follows:

> (A) The person is a law enforcement officer, licensed private investigator, or compliance investigator and is acting within the reasonable scope of his or her official duties; or
> (B) The person is a journalist, attorney, or pro se litigant and is acting within the reasonable scope of that role.

RCC § 22A-1801(f) provides for the parental discipline affirmative defense. This defense is available to "A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person's minor child…" However, there are situations when this defense should not be given to a parent or legal guardian. For example, a parent or legal guardian may abuse their child and loose visitation rights or be subject to court orders limiting the person's contact with the child. The actions of these people in violating the provisions of RCC § 22A-1801 (a) may actually constitute stalking and, as such, these people should be subject to this offense.[2] RCC § 22A-1801(f) should be redrafted to ensure that

[2] RCC § 22A-1801(a) provides that a person commits stalking when that person:

"(1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:

(A) Physically following or physically monitoring;

(B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having

parents, legal guardians, or other people who have assumed the obligations of a parent can only avail themselves of this offense when they are exercising legitimate parental supervision and not when their rights are limited or nonexistent.

received notice from the individual, directly or indirectly, to cease such communication; or

(C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses…"

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: December 21, 2018

SUBJECT: First Draft of Report #30, Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability

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 #30 - Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 213, Withdrawal defense to legal accountability

RCC § 213 states that it as affirmative defense to a prosecution when

> a defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:
> (1) Wholly deprives his or her prior efforts of their effectiveness;
> (2) Gives timely warning to the appropriate law enforcement authorities; or
> (3) Otherwise makes proper efforts to prevent the commission of the offense.

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

The RCC does not define the phrase "proper efforts." The Commentary does note, "This catchall "proper efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances." [internal footnotes omitted] Neither the RCC nor the Commentary, however, explain the parameters of this defense. For example, it is unclear if the phrase "proper efforts" is meant to be broader, narrower, or the same as "reasonable efforts." The RCC should give more guidance on the applicability of this defense.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 1, 2019
Re:	Comments on First Draft of Report No. 31, Escape from Institution or Officer

PDS has the following comments about the RCC offense of Escape from Institution or Officer.

1. PDS recommends defining the term "custody" in subsection (c) of the statute. The commentary, citing *Davis v. United States*,[1] explains that "'[c]ustody' requires a completed arrest; there must be actual physical restraint or submission of the person to arrest."[2] Because of the range of interactions that law enforcement can have with persons on the street that fall short of custody, it is important for the statute to be as clear as possible about when leaving the presence of law enforcement crosses the line to becoming criminal "escape." Specifically, PDS recommends the following definition:

   > Lawful custody exists where a law enforcement officer has completed an arrest, substantially physically restrained a person, or where the person has submitted to a lawful arrest.

   This definition is supported by *Davis* and by *Mack v. United States*.[3] While completed arrest is not necessary for custody, fleeting or minor physical contact between an arresting officer and the individual does not qualify as custody for the purposes of escape. For example, in *Davis*, a law enforcement officer walked behind the defendant, grabbed the back of his pants and his belt and then unsnapped the handcuff case on his utility belt in order to handcuff the defendant. The defendant turned around, shoved the officer and took off running. On these facts, the Court of Appeals held that the officer did not have "sufficient physical control over appellant for him to be 'in custody' at the time of the purported escape."[4] Rather, custody for the escape statute requires some manifestation of physical restraint. In *Mack v. United States*, grabbing the

[1] 166 A.3d 944 (D.C. 2017).

[2] Report #31, page 4.

[3] 772 A.2d 813 (D.C. 2001).

[4] *Davis*, 166 A.3d at 949.

defendant, picking him up, and throwing him to the ground showed sufficient physical restraint. In *Mack*[5], the Court of Appeals announced its intention to follow the "physical restraint legal principle" from a line of cases from other jurisdictions that stand for the proposition that custody exists where there a person's liberty of movement is successfully restricted or restrained."[6] That liberty has been substantially, albeit briefly, restrained should be reflected in the definition.

2. PDS recommends that the offense be rewritten to clarify that a person escapes the "custody" of a law enforcement officer and escapes the "confinement" of a correctional facility. Given the definition of "custody," at least in the commentary and, if PDS's first recommendation is accepted, in the RCC statutory definitions, it does not make sense for the second element to be framed in terms of "custody", to wit "failing to return to custody," or "failing to report to custody." Even with respect to "leaving custody," the term only makes sense in the context of leaving the custody of law enforcement, because correctional facilities do not "physically restrain" persons "pursuant to a [lawful] arrest."

3. PDS recommends restructuring the penalties to better reflect the relative seriousness of the criminal conduct. RCC § 22E-3401(b) currently proposes to grade "leaving custody" as first-degree escape and "failing to return to custody" and "failing to report to custody" as second-degree escape. Leaving the custody of a law enforcement officer is not as serious as leaving the confinement of a correctional facility such as the DC Jail. Therefore, PDS recommends grading the latter as first-degree and grading the former, along with failing to return and failing to report, as second-degree.

4. PDS opposes mandating consecutive sentencing for this offense. PDS supports maximizing judicial discretion with respect to sentencing to allow the sentence (punishment) to fit the specific offense and specific offender. The conduct of a person who escapes from the DC Jail where he is confined to serve a sentence is more serious than the conduct of a person who is on probation and escapes from the lawful custody of a law enforcement officer on the street.[7] As drafted, RCC § 22E-3401 would mandate consecutive sentencing in both instances. Whether either or neither scenario would warrant consecutive sentencing should depend on a number of

[5] *Mack*, 772 A.2d at 817.

[6] *Medford v. State*, 21 S.W.3d 668, 669 (Tex. App. 2000), cited by *Mack*, 772 A.2d at 817.

[7] Report #31 does not explain what it means to "serve a sentence" and therefore leaves open the possibility that a person who was "sentenced" to probation would be considered to be "serving a sentence" when he encounters a police officer on the street. *Veney v. United States*, 738 A.2d 1185 (D.C. 1999), cited in footnote 58 at page 9 of Report #31, does not answer the question. In that case, Mr. Veney "while being detained by police …slipped out of the police station." *Id*. at 1190. As the Court noted, "Even if the term 'prisoner' is read broadly to include all persons detained by the police [as the government argued], the statute still requires, as a second element, an original sentence." *Id*. at 1199. Because at the time Mr. Veney was in police custody, he had not been "tried and convicted," the Court concluded that he was not "under an original sentence, or any sentence as far as the record shows" and therefore the mandatory consecutive sentencing provision did not apply. *Id*.

factors, but the unquestionable difference in severity of the two scenarios argues strongly in favor of judicial discretion at sentencing.

Accordingly, PDS recommends rewriting subsections (a) and (b) of RCC § 22E-3401 as follows:

(a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
  (1) In fact:
    (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or
    (B) 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 correctional facility or law enforcement officer:
    (A) Leaves confinement ~~custody~~;
    (B) Fails to return to confinement ~~custody~~; ~~or~~
    (C) Fails to report to confinement ~~custody~~; or
    (D) Leaves custody.

(b) *Gradations and Penalties*.
  (1) *First Degree.* A person commits first degree escape from institution or officer when that person violates subsection (a)(2)(A). First degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree.* A person commits second degree escape from institution or officer when that person violates subsection (a)(2)(B), ~~or~~ (C) or (D). Second degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  ~~(3) *Consecutive Sentencing*. If the person is serving a sentence at the time escape from institution or officer is committed, the sentence for escape from institution or officer shall run consecutive to the sentence that is being served at the time of the escape from institution or officer.~~

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	March 1, 2019
Re:	Comments on First Draft of Report 32, Tampering with a Detection Device

The Public Defender Service makes the following comments on Report #32, Tampering with a Detection Device.

1. Pursuant to RCC § 22E-3402(a)(2)(B) a person commits tampering with a detection device when she or he "alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so." The terms alter and mask appear to be redundant of "interfere with the operation of the detection device." The commentary provides that "alter" means to change the device's functionality, not its appearance, and that "mask" means changing the device's detectability, not its appearance.[1] Under those definitions, masking and altering are means of interfering with the operation of the device. The operation of the device, since its purpose is to monitor the individual wearing it, necessarily includes detection and function. However, by including mask and alter in the statute, but placing the definitions for those terms only in the commentary, the terms appear to criminalize something other than interference with the operation of the device. An individual looking at the statute could come to the conclusion that altering includes decorating or vandalizing the device and that masking means covering from view. For simplicity and clarity, PDS recommends that the RCC remove mask and alter from the statutory language. Clarity in the statutory language itself rather than the commentary would be particularly helpful in this instance as it is easy to imagine that this statute would be read by the court or supervision officers to individuals who are required to wear detection devices.

[1] Report #32, page 4.

2. The commentary for RCC § 22E-3402 states that "'interfere' includes failing to charge the power for the device or allowing the device to lose the power required to operate."[2] For clarity and to assist any reader, PDS recommends that the commentary specifically mention the applicable *mens rea* in the failure to charge language. Failure to charge is a common infraction for individuals wearing detection devices in part because the charging requirements are onerous for individuals without secure housing. Under current practice, the failure to charge often results in an admonishment from the court rather than a new criminal charge. PDS does not believe the Commission intends to change that practice and does not expect that RCC § 22E-3402 as written necessarily would. However, the RCC should recognize that practitioners may sometimes only quickly read the commentary before advising individuals about pleas or the strength of the government's case. Therefore, for the sake of clarity and out of an abundance of caution, PDS recommends that the commentary state that failing to charge a detection device falls within the scope of interference only when it is done with the conscious desire to cause the device to fail.[3]

   PDS recommends adding the following language to the commentary:

   "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate <u>when done purposely, meaning with the conscious desire to interfere with the operation of the device</u>.

3. RCC § 22E-3402(a)(1) should specify that the defendant is required to wear a detection device as a result of an order issued in relation to a D.C. Code offense or by a judge in D.C. Superior Court. The offense should not reach violation of court orders imposed by other jurisdictions, where the District has no role in ensuring the fulfillment of due process protections for defendants or control over the underlying statutes that allowed for the placement of a detection device.

4. PDS suggests the modifications below.

RCC § 22E-3402. <u>Tampering with a Detection Device.</u>

(a) *Tampering with a Detection Device*. A person commits tampering with a detection device when that person:
   (1) Knows he or she is required to wear a detection device <u>pursuant to a D.C. Code offense or order issued by a judge of the Superior Court of the District of Columbia</u> while:
      (A) Subject to a protection order;
      (B) On pretrial release;
      (C) On presentence or predisposition release;

[2] Report #31, page 4.

[3] See RCC § 22A-206(a).

(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
(E) On supervised release, probation, or parole; and

(2) Purposely:
(A) Removes the detection device or allows an unauthorized person to do so;
(B) ~~Alters, masks, or i~~Interferes with the operation of the detection device or allows an unauthorized person to do so.

(b) *Penalties*. Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:
(1) The terms "knows" and "purposely" have the meaning specified in § 22E-206; and
(2) The term "detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and
(3) The term "protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	March 1, 2019
Re:	Comments on First Draft of Report 33, Correctional Facility Contraband

The Public Defender Service makes the following comments on Report #33, Correctional Facility Contraband.

1. RCC § 22E-3403(c)(5) includes halfway houses within the definition of "correctional facility." PDS objects to this expansion of the definition of correctional facility and requests that halfway houses be removed from the definition. Many of the concerns about possession of contraband inside of a jail or secure juvenile facility are not applicable to halfway houses. For instance, the possession of handcuff keys, hacksaws, and tools for picking locks and bypassing doors are not a realistic concern in halfway houses where individuals already have a degree of freedom and access to the outside. RCC § 22E-3403(c)(6)(K) prohibits the possession of a correctional officer's uniform, law enforcement uniform, medical staff clothing and any other uniform. It is certainly common for individuals in halfway houses to work at jobs that require uniforms. Those individuals should be able to keep their uniforms at the location where they may be housed for months. RCC § 22E-3403(c)(6)(C) prohibits the possession of flammable liquid – meaning a lighter. A person who lawfully smokes cigarettes while outside of the halfway house should not be subject to a separate criminal offense for returning to the halfway house at the end of a day of work with a lighter.

   Further, the possession of controlled substances inside a halfway house is not dissimilar from possession of controlled substances in the community. There is little difference between a halfway house resident who possesses a controlled substance across the street from the halfway house and a halfway house resident who possesses a controlled substance inside the halfway house for personal use. Since individuals at halfway houses typically have regular and unsupervised access to the community, there are not the same concerns about a coercive or violent drug trade taking root inside a halfway house as in the setting of complete confinement. Rather than expanding the criminal offense of correctional facility contraband to include halfway houses, under the RCC, possession or distribution of

unlawful items in a halfway house should be prosecuted under the general statutes applicable to all individuals. Possession of items listed in RCC § 22E-3403 and other rule-violating behaviors while in a halfway house will still be punished, either as a criminal offense that applies equally in the community or by remand to the D.C. Jail for failure to comply with halfway house rules.

2. PDS recommends the following changes to RCC § 22E-3403 (d), exclusions from liability, to ensure that the medical exclusion covers each instance that lawyers, investigators, social workers, experts and other professionals carry otherwise prohibited items to secure facilities for their health and safety.

(d) Exclusions from Liability.

(1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution.

(2) A person does not commit correctional facility contraband when the item:

(A) Is a portable electronic communication device used by an attorney during the course of a legal visit; or

(B) Is a controlled substance, <u>syringe, needle, or other medical device that is prescribed to the person and for which there is a medical necessity to access immediately or constantly</u>.

PDS recommends adding explanatory language to the commentary that section (d)(2)(B) applies to medicines and medical devices necessary to treat chronic, persistent, or acute medical conditions that would require constant or immediate medical response such as diabetes, severe allergies, or seizures.

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: March 1, 2019

SUBJECT: First Draft of Report #31, Escape from Institution or Officer

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 #31 - Escape from Institution or Officer.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3401. Escape from Institution or Officer.

OAG suggests that the RCC § 22E-3401 be amended to specifically state that a person commits the offense of Escape from Institution or Officer when that person, in fact, leaves, a correctional facility without effective consent when that person "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

RCC § 22E-3401 (a) provides that:

> (a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
> (1) In fact:
> (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or

[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.

(B) 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 correctional facility or law enforcement officer:

(A) Leaves custody;

(B) Fails to return to custody; or

(C) Fails to report to custody.

According to the Commentary, this offense replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a. Unlike D.C. Code § 22-2601,[2] RCC § 22E-3401 does not specifically state that it is an offense to escape from, "An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed."[3] Unlike in when a person is detained in adult cases or in pre-adjudicated juvenile cases, a juvenile who is committed to the Department of Youth Rehabilitation Services (DYRS) is not detained, "subject to a court order" nor is a DYRS staffer or contractor necessarily a "law enforcement officer of the District of Columbia." While in a disposition hearing, a judge may commit a juvenile to DYRS, the judge does not have the authority to order that the respondent be confined. The confinement decision for juveniles is vested solely in DYRS.[4]

The Criminal Code Amendment Act of 2010 amended D.C. Code § 22-2601 to add to that offense the situation where a youth escaped from, "An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." On page 14 of the Committee Report, the Council explained, in relevant part, that this language:

[2] D.C. Code § 22-2601, Escape from institution or officer, states:

(a) No person shall escape or attempt to escape from:

(1) Any penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia;

(2) The lawful custody of an officer or employee of the District of Columbia or of the United States: or

(3) An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.

(b) Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, said sentence to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape.

[3] OAG understands that the Commission meant for this offense to cover escapes from DYRS placements and it acknowledges that the Commentary states that the "word 'authorizing' makes clear that an order permitting a custodial agency to choose a secured or unsecured residential placement is sufficient."

[4] See generally, D.C. Code § 16-2320 (c)(2), *In Re P.S.*, 821 A.2d 905 (D.C. 2003), and In re J.M.W., 411 A.2d 345, 348 (D.C. 1980).

> Amends D.C. Code § 22-2601 (escape) to include persons committed to the Department of Youth Rehabilitation Services (DYRS). This amendment will close a loophole. Under current law, it is illegal for a youth to escape or attempt to escape from a DYRS facility pre-disposition because he or she is confined pursuant to a court order. It is also illegal for a youth to escape while in transit because he or she will be in the lawful custody of an officer of the District of Columbia or the United States. It is not illegal, however, for the same youth to escape or attempt escape from a DYRS facility after he or she has been adjudicated delinquent because, first, a court order committing a youth to DYRS is not a court order to confine that person in an institution or facility. DYRS makes the decision whether to place the youth in an institution or facility. Second, a youth committed to DYRS who is placed in a contract facility is not necessarily "in the lawful custody of an officer or employee of the District of Columbia or the United States."

Given the history of the amendments to this offense and the Council's rational for them, the Commission's mandate to use language in the recommendations that are clear and plain [5], and to avoid needless litigation, OAG suggests that RCC § 22E-3401 (a) (1) be amended to add a paragraph (C) which states, "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

OAG recommends that the definition of "correction facility" be amended to clarify that it includes DYRS congregate care facilities for purposes of the proposed escape statute. RCC § 22E-3401 (c) defines the term "correction facility." It states that the term means:

> (A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
> (B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
> (C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

> Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states that subparagraph (B) is meant to apply only to adult facilities, such as halfway houses.[6] The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff

[5] See D.C. Code § 3-152 (a)(1) which states that the comprehensive criminal code reform recommendations "use clear and plain language."
[6] See page 6 of the commentary.

secure. Under current law, youth who leave a shelter house or group home placements without consent have committed an escape.[7]

OAG recommends that RCC § 22E-3401 (c)(4)(C) be amended so that the definition of "correctional facility" explicitly includes DYRS congregate care facilities.[8] One way that the Commission could do this is to amend this definition to read as follows, "(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons committed to the Department of Youth Rehabilitation Services."

[7] Youth who leave shelter houses, or a shelter care placement, without consent violate court orders. Therefore, they are guilty of escaping from a "penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia." See D.C. Code § 22-2601(a)(1). Committed youth who leave group homes, or other congregate care facilities, without consent are also guilty of escape because they left "An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." See D.C. Code § 22-2601(a)(3).

[8] OAG is not suggesting that a youth who leaves any DYRS placement be guilty of escape. Just as the Commentary notes that for adults "the definition [of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs…", for youth, the definition should exclude family placements, foster care placements, and independent living programs.

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: March 1, 2019

SUBJECT: First Draft of Report #32 - Tampering with a Detection Device

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 #32 - Tampering with a Detection Device.[1]

COMMENTS ON THE DRAFT REPORT

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

RCC § 22E-3402 (a)(1) specifies that for criminal liability to attach the person must know that he or she is required to wear a detection device while:

(A) Subject to a protection order;
(B) On pretrial release;
(C) On presentence or predisposition release;
(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
(E) On supervised release, probation, or parole

Persons who are in the juvenile justice system may be required to wear a detection device while awaiting trial and placed in a shelter house or shelter care facility. These people are not on

[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.

pretrial or predisposition release, nor are they incarcerated or committed to the Department of Youth Rehabilitation. RCC § 22E-3402 (a)(1) should be amended to make it clear that it applies to people who are required to wear detention devices while placed in a shelter house or in shelter care facility.

There is a separate issue with the phrasing RCC § 22E-3402 (a)(1)(D). It states, "Incarcerated or committed to the Department of Youth Rehabilitation Services." While OAG believes that the Commission meant that the word "incarcerated" pertain to adults in the criminal justice system and "committed" pertain to persons in the juvenile justice system, the phrasing is ambiguous. As drafted, it is not clear whether the phrase "to the Department of Youth Rehabilitation Services" modifies just the word "committed" or whether it modifies the word "incarcerated" also. To ensure that this phrase is correctly interpreted, OAG suggests that this subparagraph be changed to read, "committed to the Department of Youth Rehabilitation Services or incarcerated."

RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, "(2) Purposely… (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so."

Although the Commentary suggests what the terms "alter," "mask," and "unauthorized person" are intended to mean, those definitions need to be included in the statute because they are not apparent from the current language nor from the words' dictionary definitions. On page 4 of the Report, in the Commentary, it states:

> Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so. "Alter" means changing the device's functionality, not its appearance. "Mask" means changing the device's detectability, not its appearance. "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate. An unauthorized person is a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device.

Just as RCC § 22E-3402 (c) states the definitions for the terms "knows", "purposely", "detection device", and "protection order", all terms used in this offense, so that the reader can easily understand the scope of the provision, subparagraph (c) should also list the definitions for "mask", "interfere", and "unauthorized person." These are terms that go to the heart of the offense.

There is a separate issue as to the definition of an "unauthorized person." As noted above the Commentary limits this phrase to "a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device." [emphasis added] However, RCC § 22E-3402 (a)(1)(D) also brings under the scope of this offense the unauthorized

tampering of a detection device that a person is required to wear by the Department of Youth Rehabilitation Services. The definition of an unauthorized person should be amended to include that agency.

As noted above, RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, "(2) Purposely… (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so." It is unclear from the text of the offense whether the phrase "with the operation of" only modifies the word "interferes" or whether it modifies the words "alters" and "mask" as well. In other words, subparagraph (B) can either be read to mean, "Interferes with the operation, alters, or masks the detection device" or "alters the operation of the detention device, masks the operation of the detention device, or interferes with the operation of the detention device."[2] The provision should be redrafted to make clear which interpretation is correct.[3]

[2] In pointing out the ambiguity in the way the offense language is written, OAG acknowledges that in the Commentary, as noted on the previous page of this memo, it states "Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so." That language should appear in the text of the offense.

[3] D.C. Code § 22-1211, the current tampering with a detection device provision, does not explicitly tether "masking" or "interfering" to the operation of the device. Section 22-1211(a) states:

> (A) Intentionally remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device;
>
> (B) Intentionally allow any unauthorized person to remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device; or
>
> (C) Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power.

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: March 1, 2019

SUBJECT: First Draft of Report #33, Correctional Facility Contraband

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 #33 - Correctional Facility Contraband.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3403. Correctional Facility Contraband

RCC § 22E-3403 provides that a person commits correctional facility contraband when they knowingly bring a prohibited item into a correctional facility without the effective consent of a specified individual. Subparagraph (c) (6) RCC § 22E-3403 (6) defines "Class A contraband" and RCC § 22E-3403 (c) (7) defines Class B contraband. The term "correctional facility" is defined in RCC § 22E-3403 (c)(5).

"Class A Contraband" means:

(A) A dangerous weapon or imitation dangerous weapon;
(B) Ammunition or an ammunition clip;
(C) Flammable liquid or explosive powder;

[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.

(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
(E) A shank or homemade knife;
(F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;
(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
(H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;
(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;
(J) Rope; or
(K) A correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, or any other uniform.

"Class B contraband" means:

(A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];
(B) Any alcoholic liquor or beverage;
(C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or
(D) A portable electronic communication device or accessories thereto.

The term "correctional facility" is defined in RCC § 22E-3403 (c) (5). It states that "correctional facility" means:

(A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states "With the exception of halfway houses, the definition [of correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs."[2] The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff secure. Just as it

[2] See page 7 of the Commentary.

dangerous for adults to bring Class A contraband (e.g. dangerous weapons, explosive powder, and shanks) and Class B contraband (controlled substances and hypodermic needles) into halfway houses, it is dangerous for persons charged as juveniles to bring those items into DYRS congregate care facilities.[3]

One way that the Commission could amend the Correctional Facility Contraband offense, to include DYRS congregate care facilities, is to amend RCC § 22E-3403 (c) (5) (C) to read, "Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons placed by the Department of Youth Rehabilitation Services."[4]

As mentioned above, the definition of Class B contraband includes "(D) A portable electronic communication device or accessories thereto."[5] The definition of "accessories" mentioned in the Commentary, drawn from an earlier Council committee report, should be incorporated into the definitions section of the proposed statutory language if it's intended to be controlling. OAG suggests that subparagraph (D) be redrafted to say, "A portable electronic communication device, chargers, batteries, or other accessories thereto."

RCC § 22E-3403 (e) establishes the facility's authority to detain a person. OAG has two suggestions on how to amend this provision. RCC § 22E-3403 (e) states:

> *Detainment Authority*. If there is probable cause to suspect a person of possession of contraband, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

Page 6 of the report says subsection (e) of the proposed statute "limits the correctional facility's authority to detain a person on suspicion <u>of bringing contraband</u> to a period of two hours." [emphasis added] However, subsection (e) does not refer to suspicion of bringing contraband into a facility, the offense described in subsection (a)(1). It refers to suspicion of possessing contraband by someone confined to a correctional facility, something prohibited only in (a)(2). There is no reason, however, to limit the amount of time someone can be detained, for possessing contraband in violation of (a)(2) because that person is already "someone confined to a correctional facility." OAG suggests that the text of RCC § 22E-3403 (e) be amended so that it covers persons who bring

[3]OAG is not suggesting that youth who bring contraband into all Department of Youth Rehabilitation Services (DYRS) be guilty of this offense. Just as the Commentary notes that for adults "[the definition of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs…", for youth, the definition should exclude family placements, foster care placements, and independent living programs.

[4] The Commentary should then make it clear that the phrase "placed by the Department of Youth Rehabilitation Services" includes situations where DYRS places the person in a facility pre-adjudication, pursuant to a court order, as well as after commitment to that agency.

[5] See RCC § 22E-3403 (c)(7)(D).

contraband into the facility (and, therefore, is consistent with the explanation in the Commentary).

The detainment authority in RCC § 22E-3403 (e) specifically states that the head of the facility "may detain the person… pending surrender to a police officer with the Metropolitan Police Department" (MPD). For the following reasons, OAG suggests that this provision be amended to say "law enforcement" rather than MPD.

D.C. Code § 10-509.01 authorizes the Mayor to designate any employee of the District of Columbia to act in a law enforcement capacity at the property which includes the current site of New Beginnings, in Laurel, Maryland.[6] In addition, for a period of time ending in 2002, the Department of Human Services, Youth Services Administration (the predecessor to the District's Department of Youth Rehabilitation Services) had an MOU with U.S. Park Police (USPP), pursuant to authority granted to it by the Mayor, obligating USPP to enforce the laws and regulations at the Oak Hill Youth Facility (now the site of New Beginnings). There is no reason why RCC § 22E-3403 (e) should limit the Mayor's authority to designate which law enforcement agency has responsibility for investigating and arresting people at this location.

OAG recommends that, pursuant to the two suggestions noted above, the Commission redraft this provision to state

> Detainment Authority. If there is probable cause to suspect a person who is not confined to the facility of possessing or bringing contraband into the facility, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a law enforcement officer.

[6] This authority was granted to the Mayor by Congress in 1956. See 70 Stat. 488, ch. 508, § 1.

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: March 1, 2019

SUBJECT: First Draft of Report #34, De Minimis Defense

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 #34 - De Minimis Defense.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 215. DE MINIMIS DEFENSE.

RCC § 215 provides for an affirmative defense to all misdemeanor and certain felony offenses. Currently, District law does not provide for a "defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction." See the Commentary on page 8. This provision states:

> (a) De Minimis Defense Defined. It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.
>
> (b) Relevant Factors. In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:

[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.

(1) The triviality of the harm caused or threatened by the person's conduct;

(2) The extent to which the person was unaware that his or her conduct would cause or threaten that harm;

(3) The extent to which the person's conduct furthered or was intended to further legitimate societal objectives; and

(4) The extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law.

(c) Burden of Proof. The defendant has the burden of proof and must prove all requirements of this affirmative defense by a preponderance of the evidence.

While OAG appreciates the value of some protection from convictions based upon de minimis behavior, we are not entirely clear how this defense is supposed to work and want to make sure that it is not used improperly as a way to argue for and obtain jury nullification. In particular, at least three aspects of this defense seem unclear:

(1) Are the expressly identified factors the factfinder must consider to be treated as pure questions of fact, or are any of them partially questions of law (e.g., whether a particular societal objective is "legitimate")?

(2) When a de minimis defense is raised, how does a judge decide what evidence can be excluded, given that the factfinder can consider seemingly anything that the factfinder thinks goes to blameworthiness? Can the judge make some decision on what constitutes relevant evidence of blameworthiness notwithstanding this expansive factfinder discretion – and if so, based on what?

(3) Suppose a de minimis defense is raised and then rejected by the jury. Assuming the jury instructions were proper, could the jury's rejection of that defense be challenged – and if so, what criteria would a reviewing court deploy?

These questions are especially significant because the proposal here – notably broader than many of the laws the Report cites from other jurisdictions – is very different from the court's power to govern its proceedings in the interest of judicial economy, a comparison the report repeatedly seeks to make. The proposal goes to the fundamental question of whether someone really deserves to be convicted of a crime.

OAG is particularly concerned about how this affirmative defense will operate as it only prosecutes adult misdemeanor offenses and some of these offenses are fine only or carry the penalty of fine or jail time. We are concerned that this provision will encourage jury

nullification of appropriate prosecutions, which is not encouraged in the District.[2] To put this another way, any de minimis defense provision has to be crafted in such a way that it is clear to the trier of fact that there must be something special concerning the individual circumstances of a defendant's actions when he or she commits an offense and not that the offense itself only criminalizes behavior that the trier of fact may believe is in and of itself, de minimis. It is up to the legislature to determine what behavior is criminal; the trier of fact should not be able to second guess that determination. OAG will continue to work with the Commission to try and craft an appropriate provision.

OAG does have one suggestion, however, at this point. To ensure that this defense is appropriately applied, RCC § 215 should include a requirement that in bench trials the judge must issue a written opinion stating his or her reasoning in determining that the requirements of this defense is met.

[2] As the Court stated in *Reale v. United States*, 573 A.2d 13 (D.C. 1990), at 15, "The common-law doctrine of jury nullification permits jurors to acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law. *Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976). While we cannot reverse such an acquittal, see *Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962), we do not encourage jurors to engage in such practice. Thus, we have upheld convictions in cases where, as here, the trial court instructs the jury that it is obligated to find the defendant guilty if the government meets all the elements of the charged offense. *Watts*, supra, 362 A.2d at 710-11."

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: March 1, 2019

SUBJECT: Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses

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 Commission's Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-2101, Theft

In the Commentary, on page 6, it says, "…non-violent pickpocketing or taking property from the immediate actual possession of another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon or for the status of the complainant." [emphasis added] The Commentary does not explain how the "use of a dangerous weapon" can be classified as non-violent. On page 7 of the Commentary, however, it states, "In addition, any actual use or display of a dangerous weapon during the taking would constitute robbery under the RCC." OAG suggests that for the sake of clarity, these two comments be joined as follows, "…non-violent pickpocketing or taking property from the immediate actual possession of

[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.

another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon, as the use or display of the weapon during the taking would constitute robbery under the RCC." The Commentary would then have a separate sentence explaining how the provision deals with the status of the complainant.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	April 11, 2019
Re:	Comments on First Draft of Report No. 35, Cumulative update to sections 201-213 of the Revised Criminal Code

PDS has the following comments about causation, RCC § 22E-204.

PDS has concerns that as drafted, the legal cause requirement in RCC § 22E-204(c) is vague and leaves juries ill-equipped to apply a defined legal standard to the facts of a case. Under RCC § 22E-204, a person's conduct is the legal cause of a result if the result is *not too unforeseeable* in its manner of occurrence and *not too dependent* upon another's volitional conduct to have a *just bearing* on the person's liability. The terms "not too dependent" and "not too unforeseeable" are indeterminate and are not further defined within causation or elsewhere in the RCC or commentary. And the term "just bearing" injects a completely subjective element of moral judgment that would lead to arbitrary and unpredictable results.

The current language raises issues of vagueness, fair notice, and arbitrariness that would likely run afoul of the Due Process Clause. Because RCC § 22E-204(c) does not indicate what it means for something to be "not too unforeseeable" or "not too dependent upon another's volitional conduct to have a just bearing," "lower courts would be left to guess." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). In *Burrage*, the Supreme Court rejected an analogous causation standard that would "exclude[]causes that are 'not important enough' or '*too insubstantial*.'" *Id.* (emphasis added) (citation omitted). Recognizing that no one could definitively say what it means for a cause to be "too insubstantial," the Court held that "[u]ncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Id.* Given the Supreme Court's rejection of a "too insubstantial" causation standard as unconstitutional, it is highly likely that the phrases "not too unforeseeable . . . and not too dependent . . . to have a just bearing" would be unconstitutional as well. *See id.*; *see also Seward v. Minneapolis Ry. Co.*, 25 N.W.2d 221, 224 (Minn. 1946) (rejecting vague "substantial factor" test because it "leave[s] the jury afloat without a rudder," "would leave a jury free to include remote causes or conditions as proximate causes and to decide the case according to whim rather than law"). Other precedent adds to this concern. In *Kolender v. Lawson*, 461 U.S. 352, 360 (1983), the Supreme Court considered a California statute that required individuals to

provide, when stopped by police, identification that was "credible and reliable," and that provided a "reasonable assurance of its authenticity." The Supreme Court found this statute – which is considerably more descriptive than "not too unforeseeable" and "not too dependent" to be void for vagueness. The language, without standards or precise definitions, left complete enforcement discretion to police. *Id*. at 361; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."). Similarly, in the context of punitive damages awards, the Supreme Court has held that due process requires states to provide a legal standard that "will cabin the jury's discretionary authority." *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007). Otherwise, a "punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose'; [and] it may threaten 'arbitrary punishments,' *i.e.,* punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Id.* (citations omitted). The concepts of "not too unforeseeable" and "not too dependent" to have a "just bearing" require law enforcement and jurors to proceed on a personal and highly subjective notion of fairness rather than a clear legal standard. Legal scholars have criticized a "just bearing" standard of causation for this reason. *See, e.g.*, Don Stuart, *Supporting Gen. Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective*, 4 Buff. Crim. L. Rev 13, 43 (2000) ("There is also reason to be concerned at the vagueness of the 'just bearing' formulation. Although nobody has been able to suggest a totally satisfactory approach; lawyers and triers of fact need a more workable test."); George P. Fletcher, *Dogmas of the Model Penal Code*, 2 Buff. Crim. L. Rev 3, 6 (1998) ("Including the word 'just' in this proviso, of course, leaves all the difficult problems unresolved, and therefore the attempted verbal compassing of the concept turns out to be words with little constraining effect.").

PDS agrees that the underlying purpose of the doctrine of legal causation is fairness, but that purpose should be served by the development of clear, definitive standards rather than an open appeal to the factfinder decide a case based on subjective moral intuition. While some jurists have described legal causation in terms such as "a rough sense of justice,"*Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting), these descriptions are generally pejorative rather than aspirational, *see id.* at 354 ("We draw an uncertain and wavering line, but *draw it we must as best we can*. Once again, it is all a question of fair judgment, always keeping in mind the fact that *we endeavor to make a rule in each case that will be practical* and in keeping with the general understanding of mankind." (emphasis added)). And in light of the constitutional concerns described above, such an open appeal to a sense of fairness is not a viable legal framework.

Moreover, a jury's sense of what is "just" would likely be skewed by entirely arbitrary and inappropriate factors. For example, a jury may be unaware that a defendant charged with a result-element offense could be charged and convicted of different offenses that lack the result element, including attempts. The jury may therefore erroneously believe that a guilty verdict is "just" because a culpable defendant would otherwise go unpunished. Similarly, the jury's sense of justice or fairness could be skewed by whether co-defendants are tried jointly or separately. Imagine, for example, a multi-car collision that kills a bystander. If all of the culpable drivers are tried jointly, then the jury's sense of fairness might lead it apportion blame amongst the different individuals and find that only the most directly responsible or culpable among them was the "legal cause" of the

death. If a driver is tried separately, however, then the jury's ability to apportion blame in this manner is curtailed, and the jury's sense of what is just might lead it to convict the only person that stands before them. Other unintended disparities would like arise. For example, the jury might deem it "just" to find that a principal is the legal cause of a result but not an accomplice, even though District of Columbia law "makes no distinction between one who acts as a principal and one who merely assists the commission of a crime as an aider and abettor." *Barker v. United States*, 373 A.2d 1215, 1219 (D.C. 1977). Or the jury might use *mens rea*, which is generally used to demarcate the degree of an offense, as a proxy for what is "just." Gradations of *mens rea* would not determine the degree of the offense of conviction, but whether a defendant is convicted at all.

An additional concern is the confusing use of a double negative in the phrase "not too unforeseeable." PDS proposes rephrasing this as "reasonably foreseeable," which eliminates the double negative. The "reasonably" qualifier also clarifies that the question is not whether it was *possible* to have foreseen the manner of occurrence (which would almost always be the case), but whether a reasonable person would have foreseen it.

PDS is also concerned that the concepts of foreseeability and volitional conduct incorporated into RCC § 22E-204 do not capture the entire field of relevant considerations for legal causation. The Supreme Court has said that legal causation encompasses a set of "judicial tools," *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992), and took "many shapes . . . at common law," *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010) (plurality). PDS agrees that foreseeability and volitional conduct of a third party are two of the most important of these "judicial tools" or "shapes," but they are not exclusive. The Supreme Court has also looked to whether the conduct caused a result directly or indirectly through a series of subsequent events, whether the conduct and the result are remote in time or space, and whether the causal connection was contingent on other events. *See, e.g.*, *Hemi Group*, 559 U.S. at 9 ("A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." (quoting *Holmes*, 503 U.S. at 271, 274) (alteration in *Hemi Group*)). In several cases, the Supreme Court has held that legal causation was lacking without looking to either foreseeability or a third party's volitional conduct. In *Holmes*, for example, the Court held that defendants who defrauded stock broker-dealers, rendering them insolvent and unable to pay their customers, were not the legal cause of the customers' losses. *See Holmes*, 503 U.S. at 271. The notion that defrauding a broker-dealer of substantial sums would render the broker-dealer insolvent is certainly foreseeable. And the insolvency of the broker-dealers could hardly be deemed "volitional." Still, the Supreme Court held legal causation was lacking because "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.* Similarly, in *Hemi Group*, the Court addressed a claim that a cigarette seller had caused New York City to lose tax revenue by refusing to provide a list of customers that would allow the city to collect unpaid taxes. *See* 559 U.S. at 5-6. The city's loss of tax revenue was certainly foreseeable — indeed, the seller's business model depended on its ability to undercut competitors who collected the tax from customers upfront. *See id.* at 12. And there was no indication that the customers' failure to pay the taxes was volitional — the customers may have been ignorant of their tax obligations, or perhaps merely negligent in failing to pay. Still, the Court held that the seller was not the legal cause of the tax loss because there were too many steps in the causal chain. *Id.* at 10 ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet [the] direct relationship requirement."). Both *Holmes* and *Hemi*

Group concerned application of a criminal statute, the Racketeer Influence and Corrupt Organizations Act, which also had a provision for civil damages. Given that, it is possible that criminal cases will arise in which legal causation would not be satisfied under present law, but would not be covered by the language in RCC § 22E-204(c). PDS therefore proposes that the language be broadened to include a "catch-all" provision that covers other concepts that the Supreme Court has held will defeat legal causation.

PDS recommends redrafting RCC § 22E-204 as below:

(a) *Causation Requirement.* No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.

(b) *Factual Cause Defined.* A person's conduct is the factual cause of a result if:

(1) The result would not have occurred but for the person's conduct; or

(2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) *Legal Cause Defined.* A person's conduct is the legal cause of a result if:

(1) the result is ~~not~~ reasonably ~~too~~ ~~un~~foreseeable in its manner of occurrence, and

(2)(A) the result is not directly ~~not~~ ~~too~~ dependent upon another's volitional conduct~~, to have a just bearing on the person's liability~~, or

(B) the connection between the conduct and the result is not otherwise remote, indirect, or purely contingent on other factual causes.

(d) *Other Definitions*. "Result element" has the meaning specified in RCC § 22E-201(c)(2).

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 29, 2019

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

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

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

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

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

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

OAG suggests that the language be amended to read:

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

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

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

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

RCC § 22E-301. CRIMINAL ATTEMPT.

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

RCC § 22E-303. CRIMINAL CONSPIRACY.

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

> (a) *Definition of Conspiracy*. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:
>
> (1) Purposely *agree* to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and
>
> (2) One of the parties to the *conspiracy* engages in an overt act in furtherance of the *conspiracy*. [emphasis added]

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

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

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

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

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

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

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

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

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

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

Comments on the Draft Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. USAO recommends removing subsection (b).

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

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

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

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

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

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

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

III. RCC § 22E-302—Solicitation

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

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

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

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

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

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

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

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

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

3. USAO recommends removing subsection (b).

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

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

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

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

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

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

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

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

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

IV. RCC § 22E-303—Criminal Conspiracy

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

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

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

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

2. USAO recommends removing subsection (b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #35, Cumulative Update to Sections 201-213 of the RCC	Date: May 20, 2019

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #35, Cumulative Update to Sections 201-213 of the RCC. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on the Draft Report

I. RCC § 22E-204—Causation Requirement

1. USAO recommends that, in subsection (c), the words "not too unforeseeable" be replaced with the words "reasonably foreseeable," and the words "not too dependent upon another's volitional conduct, to have a just bearing on the person's liability" be removed.

   With USAO's changes, § 22E-204(c) would provide:

   "(c) *Legal Cause Defined.* A person's conduct is the legal cause of a result if the result is ~~not too unforeseeable~~reasonably foreseeable in its manner of occurrence~~, and not too dependent upon another's volitional conduct, to have a just bearing on the person's liability~~."

As the RCC commentary acknowledges (at 20), "It is well established in the District that 'a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions.' Reasonable foreseeability is thus at the heart of legal causation under District law[.]" The RCC asserts (at 21) that "[n]otwithstanding the centrality of the phrase 'reasonably foreseeable' in the District's law of causation, however, it is far from clear what it actually means." But the RCC's alternative phrase, "not too unforeseeable," merely uses an unfortunate double-negative to "codify[] the requirement of reasonable foreseeability" (Draft 35 at 21). It seems needlessly indirect to define

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

a legal requirement by what it is not, particularly where the substitute phrase does not clarify the underlying concept. To the contrary, in a statute, a "double-negative adds frustrating complexity to [a term's] description." *Bogdanov v. Avnet, Inc.*, No. 10-CV-543-SM, 2011 WL 4625698, at *5 (D.N.H. Sept. 30, 2011). Nor would it be clear what is "too" unforeseeable. There is no case law using "not too unforeseeable," while there is abundant case law applying "reasonable foreseeability."

To the extent that "reasonable foreseeability" cases contain a "diversity and complexity of statements regarding the nature of reasonable foreseeability," (Report 35 at 21), it seems unlikely that "not too unforeseeable" will fare any better. And if (as seems likely) that same case law explaining "reasonable foreseeability" is to be referenced in interpreting the term "not too unforeseeable," then there seems to be even less justification for using "not too unforeseeable" in the first place. In our view, doing so would confuse rather than clarify, and thus would run counter to the RCC's stated purpose (at 21) that, when viewed collectively, the RCC provision and its commentary "articulate the unnecessarily legalistic and complicated DCCA case law on reasonable foreseeability in a more accessible and transparent way."

The RCC's inclusion of a separate requirement that a result be "not too dependent upon another's volitional conduct, to have a just bearing on the person's liability" suffers from the same imprecision and practical opacity as "not too unforeseeable" discussed above, and compounds that vagueness by requiring the factfinder to separately assess what amounts to a "just" "bearing" on liability. Nor is it necessary, as the "reasonable foreseeability" requirement already incorporates the idea that, depending on the circumstances of a particular case, the volitional acts of others might (or might not) break the causal link between act and result. *Compare Matter of J.N.*, 406 A.2d 1275, 1287–88 (D.C. 1979) (Newman, J., dissenting) (noting that under the reasonable foreseeability standard, "as a general rule voluntary infliction of harm by a second actor usually suffices to break the chain of legal cause," but also noting that some circumstances justify imposing liability, citing case under which "[t]he underlying rationale . . . is that the intentional wrongdoer should bear the risk of the victim's death because the aforementioned [voluntary] intervening acts [of others] are considered foreseeable and natural consequences of his wrongful act.")

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Revised Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3	Date: June 19, 2019

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

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

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

Revised Comment on the Draft Report

I. RCC § 22E-301—Criminal Attempt

1. USAO is no longer recommending that subsection (a)(2) be removed, but continues to rely on all of its previous recommendations.

Consistent with the discussion at the CCRC Advisory Group meeting on June 5, 2019, subsection (a)(2) is an appropriate statutory provision, as it provides a level of *mens rea* for an attempted offense.

[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.

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: July 8, 2019

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

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

COMMENTS ON THE DRAFT REPORT

RCC 22E-701. DEFINITIONS

RCC 22E-701 5[3] defines "Block." It states:

> "Block," and other parts of speech, including "blocks" and "blocking," mean render impassable without unreasonable hazard to any person.

[1] This Memorandum completes the review of the statutory language and commentary on Subtitle I (General Part) provisions in Chapters 4 and 7 of the report, and Subtitles II-V (Special Part). Comments on the statutory language and commentary on Subtitle I (General Part) provisions in RCC § 214 and Chapter 3 of the report was submitted on May 13, 2019.
[2] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[3] While the definitions are "numbered" in Appendix A, they are not numbered in the pdf file that contains both the Report and the Commentaries. For ease of communication, this memo will use the numbering system from the Appendix.

The portion of the definition that refers to "render[ing] impassable without unreasonable hazard to any person" is confusing. Why is rendering a space impassable without unreasonable hazard "blocking" but rendering impassable *with* an unreasonable hazard is not? The Explanatory Note says, "similar language" to this definition "is used in the current crowding, obstructing, or incommoding statute." However, the cited provision does not include any language comparable to this definition.

RCC 22E-701 6 defines "Bodily injury." It states, "'Bodily injury' means physical pain, illness, or any impairment of physical condition." The Commentary says that "impairment of physical condition" is intended to "includ[e] cuts, scratches, bruises, and abrasions." If that's the intent, the language of the text needs to be expanded. By phrasing it as "Impairment of physical condition" the RCC is implying that something actually has to be impaired. OAG recommends that the definition be redrafted to read, "'Bodily injury' means physical pain, illness, scratch, bruise, abrasion, or any impairment of physical condition."

RCC 22E-701 25 defines "Dangerous Weapon." It states, in relevant part, "'Dangerous weapon' means …(C)A sword, razor, or a knife with a blade over 3 inches in length" …or… (F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury." While OAG believes that the phrase "with a blade over 3 inches in length" was only meant to modify the word "knife", as drafted, it could be argued that that phrase actually also modifies the words "sword" and "razor." To clarify what the phrase modifies, the definition could either be redrafted to say, "A sword or a razor or a knife with a blade over 3 inches in length" or it could say, "A knife with a blade over 3 inches in length or a sword or razor."

The Commentary, on page 205, says that, under this definition, "a person's integral body parts… categorically cannot constitute a dangerous weapon." The modifier "integral" is not in the statute. In addition, it is not clear what the addition of the word "integral" adds. OAG recommends that the word be removed from the Commentary.

RCC 22E-701 30 defines "District Official." It states, "'District official' has the same meaning as 'public official' in D.C. Code § 1-1161.01(47)."

D.C. Code § 1-1161.01(47)(I) and (J) includes within the definition of "public official"

> (I) A District of Columbia Excepted Service employee, except an employee of the Council, paid at a rate of Excepted Service 9 or above, or its equivalent, who makes decisions or participates substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or acts in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and any additional employees designated by rule by the Board of Ethics and Government Accountability who make decisions or participate substantially in areas of

> contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or act in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and
>
> (J) An employee of the Council paid at a rate equal to or above the midpoint rate of pay for Excepted Service 9.

The definition of a "public official", therefore, is partially determined by a person's pay scale and by Board of Ethics and Government Accountability rules. While such determinations may be useful for determining who must file a public financial disclosure statement pursuant to D.C. Code § 1-1161.24(a), there is no reason why these people are deserving of more protection than other government employees.[4] OAG recommends that the definition be redrafted to state ""District official" has the same meaning as "public official" in D.C. Code § 1-1161.01(47) (A) through (H).

RCC 22E-701 39 defines a "Halfway house." It states, "'Halfway house' means any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program." The Commentary, on page 221, says a "work release program is a program established under D.C. Code § 24-241.01." As one of the goals of the RCC is to make the criminal code more understandable to non-lawyers, the definition of "Halfway house" in the statute should include this cross-reference.

RCC 22E-701 63 defines "Physically following." It states, "'Physically following', means maintaining close proximity to a person as they move from one location to another." The phrase "close proximity" is not defined in the text. However, on page 235, in the Commentary it states, "The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant." Given the importance of this definition, it should either be incorporated into the definition of "physically following" or it should be a standalone definition.

RCC 22E-701 70 defines "Protected person." It states, in relevant part "'Protected person' means a person who is Under 18 years of age when, in fact the actor is 18 years of age or older and at least 4 years older than the complainant." [emphasis added] The lead in language and the terms in the subparagraphs should use the same word so that it is clear that the provision is referring to the same person.

RCC 22E-701 84 defines a "Sexual Act." It states:

> "Sexual act" means:

[4] In fact, it could be argued that having greater penalties for injuring OAG prosecutors is more appropriate than having greater penalties for injuring someone who is paid at a rate of Excepted Service 9 or above.

> (A)Penetration, however slight, of the anus or vulva of any person by a penis;
> (B) Contact between the mouth of any person and the penis of any person, the mouth of any person and the vulva of any person, or the mouth of any person and the anus of any person; or
> (C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the desire to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person.

The definition fails to identify other body parts that could be used to penetrate an anus or vulva for the purposes listed in subparagraph (C). For example, a toe or a nose. OAG recommends that subparagraph (C) be amended as follows:

> (C) Penetration, however slight, of the anus or vulva of any person by an actor's body part, including, a hand or finger, or by any object, with the desire to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person.

RCC 22E-701 87 defines "Significant emotional distress." It states:

> "Significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. It must rise significantly above the level of uneasiness, nervousness, unhappiness or <u>the like</u> which is commonly experienced in day to day living. [emphasis added]

Though the second sentence is taken from a judicial opinion, the sentence should be redrafted to make it more understandable. The phrase "the like" is not clear, nor is it clear what "commonly experienced" means – or by whom. OAG suggests that the phrase "similar feeling" be substituted for the phrase "the like." OAG also suggests that the Commentary explain what is meant by "commonly experienced."[5]

RCC 22E-1101. MURDER

RCC 22E-1101(d)(3)(B) provides for an enhanced penalty "when a person commits first degree murder or second degree murder and the person … Commits the murder with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official." In the first full paragraph on page 7, talking about intent to "harm" someone because of his or her status under (d)(3)(B), the Commentary says harm "may include, but does not require[,] bodily injury," and that it "should be construed more broadly to include causing an array of adverse outcomes." If this is the intent, this clarification needs to be

[5] The word "is" at the beginning of the second sentence in the definition is a typo and should be deleted.

incorporated into the text, perhaps as a definition of the word "harm." The question that must be answered in the Commentary is, in addition to bodily injury, just what does "harm" encompass?[6]

RCC 22E-1202. ASSAULT

RCC 22E-1202(g) is entitled "Limitation on Justification and Excuse Defenses to Assault on a Law Enforcement Officer." The last of the three conditions is "(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary." OAG assumes that in the context of that sentence, what "appeared reasonably necessary" is how it appeared to the law enforcement officer. If the Commission meant something else, the language should be amended and further discussion would be warranted.

RCC 22E-1203. MENACING

RCC 22E-1203 (a)(1) and (b)(2) both contain as an element that the actor "knowingly communicates to a complainant who is physically present that the actor immediately will cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement. [emphasis added] Paragraph (c) states that "Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575." It is hard to imagine a situation where the Constitution, the First Amendment Assemblies Act, or the Open Meetings Act would prohibit the prosecution of a person who knowingly threatened an individual that they would immediately injure, sexually assault them, or confine them. Paragraph (c) should either be stricken or the Commentary should provide specific examples of when a person making these types of threats would be protected by the Constitution or the listed laws such that the person would not be committing this offense. (e.g. When a threat to immediately rape someone would be protected speech.)[7]

RCC 22E-1203(a)(3) & (b)(2) both contain the element that "With intent that the communication be perceived as a serious expression that the actor would cause the harm." The partial paragraph at the bottom of page 95 of the Commentary says that, under the requirement that the defendant "make the communication 'with the intent that' it be perceived as a serious expression of an intent to do harm", it is "not necessary to prove that the communication was perceived as a serious expression of an intent to do harm." OAG agrees with this explanation. However, it is at odds with a statement found on page 94 of the Commentary. There it states that part of requiring "communication" of intent to cause harm is that the "communication be 'received and understood'" by the other person [emphasis added].[8] In fact, there is no requirement in this offense that the communication be understood, at least by the victim, as a serious expression of an intent to do harm. The Comment on page 94 should be changed.

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[6] There are other provisions that also use the word "harm" or "harming." A general definition for that word would help with interpretation questions in those other provisions too. (e.g. An element in the kidnapping offense found at RCC § 22E-1401 (a)(2)(B)(ii)).

[7] The same issue exists in RCC 22-E-1206, Stalking.

[8] This same issue appears in the criminal threats offense, and the discussion on p. 107, second full paragraph, of the Commentary.

RCC 22E-1206. STALKING

RCC 22E-1206 (e) provides the penalties for the stalking offense. Subparagraph (e)(2)(A) provides a penalty enhancement for when "The person, in fact, was subject to a court order or condition of release prohibiting contact with the complainant." [emphasis added] There are many situations, however, where a person may be subject to a court order or condition of release that permits limited contact with the complainant under specified circumstances.[9] The reasons for having a penalty enhancement for stalking applies just as much in these circumstances as when all contact is prohibited. To account for these situations, OAG recommends that the provision be redrafted to say, "The person, in fact was subject to a court order or condition of release restricting or prohibiting contact with the complainant." [emphasis added]

Page 130 of the Commentary discusses RCC 22E-1206 (e), it states, "The term 'court order' includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim." The word "clearly" does not appear in the text and the mental state for this is "in fact." Accordingly, the word "clearly" should be stricken from the Commentary.

RCC 22E-1206 (e)(2)(B) provides for an enhancement when "The person, in fact, has one prior conviction for stalking any person within the previous 10 years." The Commentary, on pages 130 to 131 explains that "Subparagraph (e)(2)(B) allows a sentence increase for any person who has a prior stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a District criminal offense in subparagraph (a)(1)(C)." To clarify in the text that the prior stalking conviction could be in any jurisdiction, the provision should be redrafted to say, "Within the previous 10 years, the person, in fact, has one prior conviction for stalking any person, or committing a comparable offense."[10] The term "comparable offense" is defined in 22E-701 15. RCC 22E-1206 (e)(2)(D) provides for an enhancement when "The person caused more than $2,500 in financial injury." However, there is no mental state associated with this provision. RCC 22E-1206 (e)(2) (A) through (C), the other enhancement provisions, all have the mental state of "in fact." Paragraph (D) should be redrafted to include that mental state as well. It should read "The person, in fact, caused more than $2,500 in financial injury."

RCC 22E-1301. SEXUAL ASSAULT

RCC 22E-1301 (a)(2)(A) makes it a first degree sexual assault when the person causes the victim to engage or submit to a sexual act "By using physical force that overcomes, restrains, or causes bodily injury to the complainant." OAG is concerned that the term "overcomes" by itself may not be clear enough. OAG recommends that the term be replaced by the phrase "overcomes resistance."

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[9] For example, a person may be ordered released on a domestic violence charge and be ordered not to have contact with the victim, except for supervised contact when the person picks up his or her children from the victim.

[10] The Commission should incorporate the phrase "comparable offense" into any other sentencing enhancement that is based upon a prior conviction of a District offense.

RCC 22E-1301 (a)(2)(B) makes it a first degree sexual assault when the person causes the victim to engage or submit to a sexual act "By using a weapon against the complainant." While the phrase "Dangerous weapon is a defined term in the RCC, the term "weapon" is not. OAG recommends that the RCC adopt the following as the definition for "weapon", "A 'weapon' means an object that is designed to be used, actually used, or threatened to be used, in a manner likely to produce bodily injury."[11]

RCC 22E-1301 (c) provides the elements for third degree sexual assault. It includes causing a person to engage in a sexual contact "(B) By using a weapon against the complainant." There are times, however, when a victim may be coerced into having sexual contact with a person because of use of, or threatened use of, a weapon against a third party (e.g. the victim's child). Subparagraph (B) should be redrafted to account for that motivation.

RCC § 22E-1301 (g)(1) codifies a penalty enhancement for recklessly causing "the sexual conduct by displaying" a weapon. However, the phrase "sexual conduct" is not defined. The Commission should redraft this subparagraph by substituting the phrase "sexual act or sexual contact" for the phrase "sexual conduct."

RCC 22E-1302. SEXUAL ABUSE OF A MINOR

RCC 22E-1302 (g) provides a "Marriage or Domestic Partnership Defense." OAG recommends deleting the reference to domestic partnership in that affirmative defense. The substantive offenses found in RCC 22E-1302 (a),(b), and (c) require the minor to be under the age of 12, 16, and 18, respectively. RCC 22E-1302 (g) states that "It is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant that the actor and complainant were in a marriage or domestic partnership at the time of the offense. RCC E-701 32 states, "'Domestic partnership' has the same meaning specified in D.C. Code 32-701(4). D.C. Code 32-701(4) in turn refers the reader to D.C. Code §§ 32-702 and 32-702(i). D.C. Code §§ 32-702 (a) (1) requires that District domestic partners be "at least 18 years old…" D.C. Code §§ 32-702 (i) recognizes out of jurisdiction domestic partnerships "that are substantially similar to domestic partnerships" in the District. Therefore, the District only recognizes domestic partnerships where the parties are at least 18 years old. As the gravamen of the various gradations of sexual abuse of a minor is that the minor be under the age of 18, there is never a situation where a person will be able to use the domestic partnership defense.[12]

RCC 22E-1303. SEXUAL EXPLOITATION OF AN ADULT

[11] The same issue concerning the definition of a weapon appears in subparagraph (c)(2)(B) and the same solution should apply.

[12] The same analysis applies to RCC § 22E-1304 (b) which provides for a domestic partnership defense to the offense of sexually suggestive conduct with a minor.

The offense title is misleading. While it refers to the sexual exploitation of an adult an actor can commit this offense against a victim who is a minor. See RCC 22E-1303 (a)(2)(A)(ii) which includes situations where school personnel engage in sexual acts when "The complainant is under 20 years of age." Therefore, this offense applies when the victim is 15 years old as a 15 year old "is under 20 years of age." OAG recommends that the title be shortened to "SEXUAL EXPLOITATION."

RCC 22E-1303(a)(2)(C) makes it an offense when "The actor is, or purports to be a healthcare provider, a health professional, or a member of the clergy. While the Commentary, on page 192, is helpful when it states, "'Member of the clergy' is intended to be interpreted broadly, using the ordinary meaning of the term which refers to Christian and non-Christion religious officials", OAG believes that it would be better to have more specificity to avoid issues when a particular religion does not have an ordination process. OAG suggests that the term "clergy" be defined. It should say "'Clergy' means any priest, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia, and any duly accredited practitioner of Christian Science." This definition provides more guidance to non-lawyers who read the RCC and avoids debate about whether a particular religion's elder or deacon fit within the definition of "clergy."

RCC 22E-1304. SEXUALLY SUGGESTIVE CONDUCT WITH A MINOR

RCC § 22E-1304 (a) states:

> An actor commits sexually suggestive contact with a minor when that actor:
>
> (1) Knowingly:
> (A) Touches the complainant inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person;
> (B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks with intent to cause the sexual arousal or sexual gratification of any person;
> (C) Places the actor's tongue in the mouth of the complainant with intent to cause the sexual arousal or sexual gratification of any person; or
> (D) 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;

Because there may be legitimate reasons for a person, whether alone or in sight of others, to touch a minor inside his or her clothing or touch the minor's genitalia, anus, breast, or buttocks, OAG agrees that subparagraphs (A),(B), and (D) should include the requirement that the actor touched the minor to cause the sexual arousal or sexual gratification of any person."[13] However, it is less

[13] OAG agrees that by adding the phrase "with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person" it is clear that RCC § 22E-1304 does not apply to pediatricians and others who must perform examinations or otherwise touch a minor.

apparent when a person would have a legitimate reason place their tongue in a minor's mouth. Therefore, either the phrase, "with intent to cause the sexual arousal or sexual gratification of any person" should be stricken from RCC § 22E-1304 (a)(1)(C) or the Commentary should give examples of legitimate reasons why a person would put their tongue in a minor's mouth.

RCC 22E-1305. ENTICING A MINOR

RCC 22E-1305 (a)(2)(C)(iii) states that "In fact, the actor is at least 4 years older than the purported age of the complainant." By using the phrase "purported age" it appears that the minor must actually state his or her age (whether it is their actual age or not). Either the text or the Commentary should address what happens when a minor does not purport to be any specific age, but instead indirectly refers to their age range – and it is clear that they fall within the scope of this provision. For example, when a minor refers to their elementary or middle school they are not purporting to be any specific age, but, from that comment, the actor will know that the minor is a person who is under 16 years of age.

RCC 22E-1306. ARRANGING FOR SEXUAL CONDUCT WITH A MINOR

The statutory language in RCC 22E-1306 is confusing as currently numbered. Subsection (a) lists the elements for "arranging for sexual conduct with a minor," and it numbers those elements (1),(2), and (3). This would make sense if it required the satisfaction of all 3 paragraphs or if satisfying any of them was sufficient. However, we do not believe that that was the drafter's intent. It appears from the text that the drafters meant that one must satisfy (1), the "knowingly arranging" part and then satisfy either (2), a real 4-year age gap, or (3), pertaining to law enforcement. To reflect that intent, (a) needs to be rearranged. Subparagraph (1) should, like now, be the "knowingly arranging" part, but the other two subparagraphs should be grouped together under a new subparagraph (2).

RCC 22E-1306(a)(3) states:

> The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant; and the complainant:
>
> (A) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and
> (B) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age.

As drafted, it would not be an offense for a 17 year-old to arrange for a 12 year-old have sex with a 30 year-old. This provision could encourage juveniles to run prostitution rings for adults as the youth would not be committing an offense. This is true despite the fact that the harm to the 12 year old is the same whether the arrangement for them to have sex with a 30 year-old was made by a person who is 17 years of age or 18 years of age or older. To fix this problem, OAG recommends that the introductory language in (a)(3) be amended to say, "The actor or any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant."

RCC 22E-1310. CIVIL INFRACTION FOR FAILURE TO REPORT A SEX CRIME INVOLVING A PERSON UNDER 16 YEARS OF AGE[14]

RCC 22E-1310 (a) states, "a person commits the civil infraction of failure to report a sex crime involving a person under 16 years of age when that person…(1) knows that he or she has a duty to report a predicate crime involving a person under 16 years of age pursuant to RCC 22 E-1309…" In the Commentary, on page 249, it states, "'Knows' is a defined term in RCC § 22E-206 that here means the person must be practically certain that he or she has a duty to report as required by RCC § 22E-1309(a)." As RCC 22E-1309 requires every person 18 years of age or older to report, it is unclear what more than the person's knowledge of their own age is required by subparagraph (1). The Commentary should address this issue.

RCC § 22E-1401. KIDNAPPING[15]

RCC § 22E-1401(a) describes the offense of aggravated kidnapping. One alternative element of the offense occurs when, the actor confines the complainant without the complainant's effective consent and the actor does so "(3) with intent to…(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense …" On page 259 of the Commentary it states:

> Subparagraph (a)(3)(F) specifies that kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering significant bodily injury or a sex offense as defined in Chapter 13 of Title 22E. This element may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered significant physical injury or being subjected to a sex offense. This element does not require that the actor actually intends to inflict significant bodily injury or to commit a sex offense.

The Commentary, above, says that the element found in (a)(3)(F) "may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered significant physical injury or being subjected to a sex offense." If this is just meant to say the actor need not have actually intended to inflict bodily injury or commit a sex offense, this statement is accurate. But if it's meant to say it is enough for someone to believe the complainant would not be released without injury or offense, whether or not the actor intended anyone to believe that, it's not correct statement of that element. The Commentary should clarify that point.

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[14] It is unclear why the drafters put the obligation to report in RCC 22E-1309 and the infraction in RCC 22E-1310. There is no reason why these two provisions cannot appear in the same RCC section.

[15] The offense of kidnapping appears on both page 63 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19) and on page App. A 59. The two versions vary. For purposes of this memo, OAG is reviewing the version found on page 63.

Paragraph (c) contains the "Exclusions to Liability for Close Relatives With Intent to Assume Responsibility for Minor." It states:

> A person does not commit aggravated kidnapping or kidnapping under subparagraphs (a)(3)(G) or (b)(3)(G), when the person is a close relative of the complainant, acted with intent to assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant.

The phrase "bodily injury" appears broad enough to include corporal punishment. The Commentary should make clear whether that is the intent of that element.

RCC § 22E-1501. CRIMINAL ABUSE OF A MINOR

Footnote 26 on page 296 of the Commentary says that "If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age." The Commentary is thus equating "reasonableness" with "disregarding a substantial risk." OAG is not sure if that is a correct analysis of the proposed element. A reasonable belief the person was not under 18 does not necessarily negate recklessness – not if the person believes the other person is a minor, but also knows of (and disregards) a significant risk that that it is not true.

RCC § 22E-1601. FORCED LABOR OR SERVICES

Paragraph (d) of RCC § 22E-1601 contains the cross-references for definitions. It states, "The terms… 'debt bondage' 'labor,' and 'services,' have the meanings specified in RCC § 22E-701." While the term "services" is a defined term in RCC § 22E-701, neither "debt bondage" nor "labor" are. OAG agrees that both should be defined there[16].

Paragraph (e) establishes "Exclusions from Liability." It states, "An actor shall not be subject to prosecution under this section for threats of ordinary and legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services." [emphasis added] It is unclear, however, why the provision contains the word "ordinary." It makes sense that an actor should not be committing an offense when he or she makes threats to take legal employment actions – even when those legal employment actions are not "ordinary." OAG recommends striking the word.

RCC § 22E-1606. Benefiting from Human Trafficking.

RCC § 22E-1606(a) lists the elements for first degree offense of benefiting from human trafficking. They are:

[16] Likewise, paragraph (d) of RCC § 22E-1602, Forced Commercial Sex, and paragraph (d) of RCC § 22E-1604, Trafficking in Commercial Sex, reference RCC § 22E-701 for the definitions of "commercial sex act" and/or "debt bondage."

> (a) First Degree. An actor commits first degree benefiting from human trafficking when that actor:
> (1) Knowingly obtains any financial benefit or property;
> (2) By participation in a group of two or more persons;
> (3) Reckless as to the fact that the group has engaged in conduct that, in fact: constitutes forced commercial sex …, trafficking in commercial sex …, or sex trafficking of minors...

The last paragraph on page 364, going into page 365, of the Commentary says that the accused's participation in the group that is doing human trafficking "must be in some way be related to the conduct that constitutes forced commercial sex, trafficking in commercial sex, or sex trafficking of minors." OAG agrees with that statement as a policy matter. However, we do not believe that that statement is an accurate statement of the text of the provision quoted above. The text merely says the person must knowingly obtain a financial benefit or property by participating in a group and be reckless as to the fact that the group has engaged in various human trafficking offenses. Taking the hypothetical in footnote 5 on page 365 of the Commentary, suppose A takes part in a bowling team, and the team (without his participation but with his knowledge or at least knowledge of a substantial risk) engages in some of the trafficking conduct described. Then, A is liable under the text of this offense as long as he financially benefited from participation in the team, even if his participation in the group had nothing to do with the team's trafficking activities.

RCC § 22E-1607. MISUSE OF DOCUMENTS IN FURTHERANCE OF HUMAN TRAFFICKING

RCC § 22E-1607(a)(2) states that the actor must act "With intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person." [emphasis added]. OAG agrees with the Commentary, on page 366 that:

> Paragraph (a)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

However, paragraph (a)(2) also requires that the person have acted "in order to" maintain "labor, services, or performance of a commercial sex act." The Commentary should clarify that the phrase "in order to" also does not introduce a new mental state. Such an addition may avoid needless litigation on whether a new mental state has been introduced.

RCC § 22E-1612. LIMITATION ON LIABILITIES AND SENTENCING FOR RCC CHAPTER 16 OFFENSES

RCC § 22E-1612 bars a person from being charged as an accomplice or as a conspirator if, prior to commission of the offense, the person was himself or herself a victim of an offense under the human trafficking chapter by the principal or a party to the conspiracy. As noted in the Commentary, on page 379, under current law there are no such restrictions. While OAG agrees that victims of trafficking may be vulnerable to further manipulation by the principal while they are still being trafficked, the text of this provision creates a lifetime exemption to being charged as an accomplice or conspirator involving a principal for whom they were once trafficked. OAG suggests that the bar be redrafted such that it is limited to situations that occur while that person is being trafficked.

RCC § 22E-2002. DEFINITION OF "PERSON" FOR PROPERTY OFFENSES

RCC § 22E-2002 states, "Notwithstanding the definition of "person" in D.C. Code § 45-604, in Subtitle III of this Title, "person" means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity." While OAG has no comments concerning the text of the definition, we are concerned about its placement in subtitle III. First, people who are unfamiliar with the RCC will look to RCC § 22E-701 if they have a question about how the term "person" is defined for property offenses, rather than to the beginning of subtitle III. Afterall, neither Subtitle II nor IV have a definition as its first statute. Second, if people are interpreting offenses that occur in those subtitles, they will need to know that they should be looking to D.C. Code § 45-604 for the definition of a "person." Finally, by placing the definition in RCC § 22E-701 the definitions paragraph that is associated with each substantive offense can refer the reader to RCC § 22E-701 for the definition of "person" along with the other applicable definitions.[17]

RCC § 22E-2101. THEFT

Second Degree theft has as one of its elements that, "In fact: (A) The property has a value of $25,000 or more; or (B) The property is a motor vehicle, and has a value of $25,000 or more." If the value of the automobile is not $25,000 then the offense is third degree theft. To prove third degree theft, all the government must prove is that the property was, in fact, a motor vehicle. See RCC § 22E-2101 (c). The problem is that there is too wide a gap between a vehicle that is worth $25,000 and vehicle that has almost no value.[18] Because people need cars to get to work, for emergencies, for food shopping, and for other necessities (as well as for pleasure), the value of a car to a theft victim is worth more than its fair market value. In fact, the harm to the victim is amplified if the car is not insured for theft or if the victim cannot document that they kept their vehicle in better condition than what the "fair market" value of the car appears to be.

[17] By making the third point, OAG is not waiving the objections that it has previously made to having a definitions paragraph in each substantive offense.

[18] The definition of "value" applicable to a motor vehicle is "[t]he fair market value of the property at the time of the offense. See RCC § 22E-701 93.

Considering the impact of the loss on the victim, a loss of an automobile that is valued at $15,000 may be worth more to a victim than the loss of other property that is valued at $25,000. Therefore, OAG recommends that Second Degree theft be redrafted so that it states, "In fact: (A) The property has a value of $25,000 or more; or (B) The property is a motor vehicle, and has a value of $15,000 or more, but less than $25,000." [19]

RCC § 22E-2104. SHOPLIFTING

RCC § 22E-2104 (a)(1)(A) states that a person commits shoplifting when that person knowingly, "conceals or holds or carries on one's person" property offered for sale. [emphasis added] OAG has two observations about the way that that sentence is drafted. First, it is unclear if the modifier "on one's person" was meant to only modify the word "carries" or if it was meant to modify the words "conceals" and "holds" as well. Either way, it is unclear why that phrase is necessary. Take the following example, a person rolls a baby carriage into a store, takes merchandise off of a shelf, places it in the baby carriage, and wheels the carriage outside of the store with the intent to steal the merchandise. In this example, though that person did not conceal the merchandise on their person, hold it on their person, or carry it on their person, they certainly shoplifted the property. OAG, therefore, recommends that the phrase "on one's person" be struck from subparagraph (a)(1)(A). In the alternative, OAG suggests that the order of (a)(1)(A) be reversed so that it would read "carries on one's person, conceals, or holds" property offered for sale. By moving the last phrase, it would clarify that the phrase "on one's person" only modifies the word "carries."[20]

RCC § 22E-2105. UNLAWFUL CREATION OR POSSESSION OF A RECORDING

First degree Unlawful Creation or Possession of a Recording contains the element that "In fact, the number of unlawful recordings made, obtained, or possessed was 100 or more." [emphasis added] Similarly, the second degree offense contains the element that "In fact, any number of unlawful recordings were made, obtained, or possessed." [emphasis added] See RCC § 22E-2105 (a)(4) and (b)(4). OAG recommends striking the adjective "unlawful" in both subparagraphs. The word "unlawful" is virtually self-referential; it is both an element of the offense and describes conduct in violation of the offense. Given the context of subparagraphs (a)(4) and (b)(4), it is clear which recordings the element is referring to.[21] If the Commission is not inclined to strike the word "unlawful", then OAG recommends that the Commission change the word to "unauthorized", as in is in the current law. See D.C. Code § 22-3214 (b).

[19] If the Commission does not adopt OAG's proposal then this provision should be redrafted to remove the reference to an automobile in second degree theft. If an element of second degree theft is that "The property has a value of $25,000 or more" then the reference to an automobile being worth $25,000 or more is superfluous. Any automobile that is valued at $25,000 or more is necessarily property that is valued at $25,000 or more. See RCC § 22E-701 68 (B).

[20] Of course, this begs the question about how a person can "carry" something that is not on his or her person.

[21] In fact, (a)(3), merely refers to "the" recording, not "the unlawful" recording.

Paragraph (e) is the forfeiture provision. It states, "Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section." Given the dictates of *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998), OAG agrees with the phrasing that the court "may" order the forfeiture and destruction of "equipment used, or attempted to be used." However, "sound recordings" and "audiovisual recordings" that have been illegally created or possessed are contraband. The court should not have discretion to return contraband (necessarily created without the effective consent of the owner) to a defendant. OAG, therefore, suggests that the forfeiture provision be redrafted to stay:

> Upon conviction under this section, the court, in addition to the penalties provided by this section:
>
> (1) may order the forfeiture and destruction or other disposition of equipment used, or attempted to be used, in violation of this section; and
> (2) shall order the forfeiture and destruction or other disposition of all sound recordings and audiovisual recordings, made, obtained, or possessed in violation of this section.[22]

RCC § 22E-2202. PAYMENT CARD FRAUD

The offenses of first through fifth degree Payment of Card Fraud contain the element that the "person" obtains or pays for property by using the card "For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes." See RCC § 22E-2202 (a)(1), (b)(1), (c)(1), (d)(1), and (e)(1). While the lead in language uses the word "person", the substantive provisions use the phrase "employee's or contractor's own purposes." To be clear that the person and the employee are the same person, and to simplify the language, OAG suggests that those subparagraphs be redrafted to say, ""For the person's own purposes, when the person is an employee or contractor and the payment card was issued to the person for the employer's purposes."

RCC § 22E-2205. IDENTITY THEFT

Paragraph (g) contains the statute of limitations. It states, "The applicable time limitation under § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the victim knows, or reasonably should have known, of the identity theft, whichever occurs earlier." The term "victim" is not defined. It could mean either, or both, the person whose personal identifying information was created, possessed or used and/or it could mean the person who lost property by deception, lost payment due for property, fines, fees, etc. The text and the Commentary must clarify who the victim is for purposes of the statute of limitations. If it is the

[22] OAG recommends that RCC § 22E-2106(d), the forfeiture provision that applies to the Unlawful Operation of a Recording Device in a Motion Picture Theater, and RCC § 22E-2207(e), the forfeiture provision that applies to the Unlawful Labeling of a Recording, be similarly redrafted.

intent of the drafters that the term "victim" may refer to both of these persons, then the lead in language of the text should be amended to refer to an "actor" instead of a "person" and then paragraph (g) should be amended to state:

> The applicable time limitation under § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the later of
> (1) The person whose personal identifying information knows, or reasonably should have known, of the identity theft, whichever occurs earlier; or
> (2) The person whom the actor tried to obtain property from by deception or avoid payment of property, fines, or fees by deception knows, or reasonably should have known, of the identity theft, whichever occurs earlier.

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

RCC § 22E-2207 (c) states:

> Nothing in this section shall be construed to prohibit: (1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or
> (2) Any person who, in his own home, for his own personal use, transfers any sounds or images recorded on a sound recording or audiovisual work.

Subsection (c) should be redrafted so that it is clear that what is prohibited is actions, not people. If the subordinate clauses are removed from the current version of RCC § 22E-2207 (c)(1), it reads "Nothing in this section shall be construed to prohibit … Any broadcaster who … transfers any sounds or images recorded on a sound recording or audiovisual work" OAG proposes that the language be amended to say:

> Nothing in this section shall be construed to prohibit: (1) A broadcaster in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, from transferring any sounds or images recorded on a sound recording or audiovisual work; or
> (2) A person who is in his or her own home from transferring, for his or her own personal use, any sounds or images recorded on a sound recording or audiovisual work.

Because Unlawful Labeling of a Recording is technically akin to a fraud, OAG understands why the Commission proposes codifying this offense in the Fraud chapter. However, it is unlikely that an uninformed reader would look for it between the Identity Theft provisions and Financial Exploitation of a Vulnerable Adult or Elderly Person. OAG believes that persons looking for this offense would more likely look for it near § 22E-2105, Unlawful Creation or Possession of a Recording and § 22E-2106, Unlawful Operation of a Recording Device in a Motion Picture Theater (notwithstanding that those offenses appear in the theft chapter). Therefore, OAG proposes moving this offense to the theft chapter and placing it with the other offenses that deal

with recordings. If the Commission chooses to leave this offense in the fraud chapter, then OAG recommends recodifying it so that it comes after the offense of Fraudulent Registration.

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

An element of first through fourth degree Financial Exploitation of a Vulnerable Adult or Elderly Person is that the person commits the fifth degree version of this offense. One way that a person can commit the fifth degree version of the offense is if the person knowingly takes property of another "with [the] consent of an owner obtained by undue influence." See RCC § 22E-2208 (e)(1)(A). The phrase "undue influence" is no longer a defined term. See App. A 25 and page 35 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19). OAG recommends that the definition of "undue influence" be added back into the definitions section. In addition, vulnerable adults and elderly persons are not only more susceptible to undue influence than others, but they are also people who can be bullied or mislead into disposing of their property inconsistent with their wellbeing. To account for this, OAG suggests that the offense be redrafted to make it an offense when a person takes property of a vulnerable adult or elderly person without the effective consent[23] of an owner or by undue influence.

RCC § 22E-2501. ARSON[24]

RCC § 22E-2501 (a)(1) states, "Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building." As drafted this raises the question whether "damages or destroys…" modifies both fire and explosion or just explosion. Assuming that it was meant to modify both, the Commission may want to add two commas such that it reads "Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building."

RCC § 22E-2502. RECKLESS BURNING[25]

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[23] RCC § 22E-2208 34 states, "'Effective consent' means consent other than consent induced by physical force, a coercive threat, or deception.

[24] The offense of arson appears on both page 101 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19) and on page App. A 106. The two versions vary. The RCC version has a subparagraph (a)(3) that states, "The fire or explosion, in fact, causes death or serious bodily injury to any person" and an (a)(4) that states "who is not a participant in the crime." The version on page App. A 106 combines these two subparagraphs. It reads "The fire or explosion, in fact, causes death or serious bodily injury to any person who is not a participant in the crime." OAG agrees with the version in the Appendix.

[25] RCC § 22E-2502. Reckless Burning - The offense of Reckless Burning appears on both page 101 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19) and on page App. A 107. The RCC version contains a typo. It mislabels (a)(1) and (2) as (a)(3) and (4). The Comments in this memo will refer to the paragraph numbering as it appears in the Appendix.

Paragraph (a) states:

> A person commits reckless burning when that person:
> (1) Knowingly starts a fire or causes an explosion;
> (2) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building.

As drafted, there is an issue as to whether a person commits this offense by knowingly starting a fire (or causing an explosion) reckless as to the fact that the fire would damage (or destroy) a dwelling (or building) – whether or not it does - or whether it is an element of the offense that the dwelling (or building) must be damaged (or destroyed). If the drafters intended the former, then subparagraph (a)(2) should be redrafted to state, "With recklessness as to the fact that the fire or explosion would damage or destroy a dwelling or building." If the intent is the latter, then the Commentary should state that proposition and provide examples of both fact scenarios.

On page 117 of the Commentary, it says that the RCC creates a new affirmative defense that "allows a person to recklessly damage or destroy with a fire or explosion a dwelling or building, regardless of its occupancy, with proper government authorization." [emphasis added] The phrase "regardless of its occupancy" should be struck from this portion of the Commentary. The RCC provision that it is interpreting does not contain such an exception. In addition, the phrasing of the Commentary incorrectly implies that a permit allows someone to burn down a building even if there are people in it.

RCC § 22E-2503. CRIMINAL DAMAGE TO PROPERTY

On page 125 of the Commentary, in the section entitled "Relation to Current District Law", it states, "… when the item is only partially damaged, the revised CDP statute provides greater flexibility as to how the amount of damage may be proven—it may either provide proof of the "reasonable cost of the repairs" as recognized in prior DCCA case law or it may provide proof of the change in the fair market value of the damaged property." It is unclear which part of the text of this offense leads to this interpretation. The various degrees of the offense only speak to the value of the amount of damage, it does not state how that value is to be determined. If the drafters wanted to include a statement in the substantive offense that reaches the "reasonable cost of the repairs" it could do so or it could use the phrase "financial injury." "Financial injury" is a defined term in the RCC, but it is not used in this offense.[26]

[26] RCC § 22E-701 38 states:
"Financial injury" means the reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act, including, but not limited to:
(A)The costs of clearing a name, debt, credit rating, credit history, criminal record, or any other official record;
(B) The costs of repairing or replacing any property that was taken or damaged;
(C)Medical bills;

RCC § 22E-2601. TRESPASS

RCC § 22E-2601(a)(2), (b)(2), and (c)(2) establish the element that the person must enter the building "Without a privilege or license to do so under civil law.

RCC § 22E-2601(d) establishes exclusions from liability. Subparagraph (d)(2) states, "A person shall not be subject to prosecution under this section for violation of a District of Columbia Housing Authority barring notice, unless the barring notice was lawfully issued pursuant to 14 DCMR § 9600 et seq., on an objectively reasonable basis." While OAG does not object to the proposition that a person should not be prosecuted for trespass when the barring notice was unlawfully issued, we do caution that the RCC should not specifically reference "14 DCMR § 9600." The D.C. Municipal Regulations are constantly being amended and renumbered. There is no guarantee that the barring provisions will remain at that site. If it changes, the Council will have to enact a conforming amendment to the RCC. If the Council fails to, the RCC will refer the reader to the wrong location. To account for this possibility, OAG recommends that the provision reference the DCMR. generally. It should read "A person shall not be subject to prosecution under this section for violation of a District of Columbia Housing Authority bar notice, unless the bar notice was lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis."[27]

Page 136 of the Commentary states, "[a] person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass." The Commentary should clarify that that requirement is only meant to apply to situations where a person had a privilege or license to be in a location and being asked to leave is what gives notice to the person that the privilege or license has been revoked. A person should not need " a reasonable opportunity to leave" if they are otherwise on notice that they no longer have a privilege or license to be at the location. So, for example, if someone enters a department store before it closes and then is found by a security guard 2 hours after the store closes, that person should be in violation of this offense even if they are willing to leave immediately after being found.

Page 139, note 23, of the Commentary uses *D.C. v. Wesby*, 138 S. Ct. 577 (2018) to illustrate signs of "forced entry". OAG recommends removing this reference. The factors they talk about in that footnote may indicate unlawful presence on certain property, but they are not factors that show forced entry.

RCC § 22E-2701. BURGLARY

(D)Relocation costs;
(E) Lost wages or compensation; and
(F) Attorneys' fees.

[27] In the redrafting of this provision, OAG substituted the phrase "bar notice" for "barring notice." We did that because in numerous places in 14 DCMR 9600, et seq., the regulations refer to the written notice as a "bar notice."

RCC § 22E-2701(c), third degree burglary, states, in relevant part:

> An actor commits third degree burglary when that actor:
> (1) Knowingly and fully enters or surreptitiously remains in:
> (A) A building or business yard, or part thereof, without a privilege or license to do so under civil law;
> (B) That is not open to the general public at the time of the offense;

As the Commentary notes, on page 149, "…[T]he revised burglary offense requires proof that the defendant's presence in the location is "without a privilege or license…under civil law"—i.e. trespassory." Doesn't a person have a privilege or license under civil law to enter a building or business yard that is open to the public? If so, it is unclear why subparagraph (B) is needed.[28]

RCC § 22E-3402. TAMPERING WITH A DETECTION DEVICE

RCC § 22E-3402 (a)(1)(E) provides that a person commits Tampering with a Detection Device when that person satisfies the other elements of the offense and is "On supervised release, probation, or parole, in a District of Columbia criminal case." [emphasis added] OAG suggests that this language be amended to read "On supervised release, probation, or parole, in a District of Columbia criminal or delinquency case." Subparagraphs (B),(C), and (E) already provide that a juvenile would be subject to this offense when on pretrial release, predisposition release, and when committed to the Department of Youth Rehabilitation Services. Without this amendment there would be a gap in this offense for when a juvenile was on probation and tampered with a detection device.

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND

On page 14 of the Commentary, it notes that the current statute "includes as Class A contraband the possession of any civilian clothing." The Commentary does not state why possession of civilian clothing should not be contraband if it is possessed to aid in someone's escape. OAG suggests that civilian clothing be added to the list of Class B contraband.

RCC § 22E-4201. DISORDERLY CONDUCT

RCC § 22E-4201(a)(2)(C) states that a person may commit disorderly conduct when that person is in a place that is open to the public and "Purposely directs abusive speech to any person present, reckless as to the fact that such conduct is likely to provoke immediate retaliatory criminal harm involving bodily injury, taking of property, or damage to property." [emphasis added] On pages 2 and 3 of the Commentary it states, "Subparagraph (a)(2)(C) punishes directing 'fighting words' to someone in a public place, which are likely to provoke immediate, violent retaliation. To commit disorderly conduct by fighting words, a person must act with the purpose of directing abusive speech to another person." [internal footnotes omitted] [emphasis

[28] The same analysis applies to the requirement in second degree burglary that the property not be "open to the general public at the time of the offense" See RCC § 22E-2701(b)(1)(B)(1).

added] The problem with the Commentary is that the predicate language does not use the phrase "fighting words", it uses the phrase "abusive speech." The Commentary is thus circular in that in explaining abusive speech, it uses the phrase "fighting words" which then is defined as using "abusive speech."

RCC § 22E-4202. PUBLIC NUISANCE

RCC § 22E-4202 (a)(1) makes it a public nuisance to purposely cause significant interruption to a "A lawful religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public at the time of the offense." Paragraph (a)(1), unlike current law, refers to a "lawful" religious service. It is unclear how to determine when a religious service is lawful and when it is not and how this statute should be construed when a religious service that was lawful becomes not lawful. OAG assumes that by using the term "lawful" it means that the service is conducted in a manner that is consistent with District law. If that is what the drafters meant, does that mean that, once the service runs afoul of one District regulation, disrupting it is no longer a public nuisance? For example, suppose someone disrupts a religious service that exceeds the occupancy limit in the space it's using. Is that not a public nuisance? The Commentary should clarify what is meant by the word "lawful" and give examples that clarify this provision.

RCC § 22E-4202 (a)(3) makes it a public nuisance to purposely cause significant interruption to a "A person's quiet enjoyment of his or her residence between 10:00 p.m. and 7:00 a.m., and continues or resumes such conduct after receiving oral or written notice to stop such conduct." On page 12 of the Commentary it states, "An interruption of quiet enjoyment means a significant interference with the in-home activities of a person of ordinary sensitivity." That definition should be in the text of the statute.

RCC § 22E-4203. BLOCKING A PUBLIC WAY

RCC § 22E-4203(a) states:

> Except as provided in subsection (b), a person commits blocking a public way when that person:
> (1) Knowingly blocks a street, sidewalk, bridge, path, entrance, exit, or passageway;
> (2) On land or in a building that is owned by a government, government agency, or government-owned corporation; and
> (3) Continues or resumes such conduct after receiving a law enforcement officer's order that, in fact, is lawful, to stop such blocking.

Therefore, a person commits this offense when that person "knowingly blocks a[n] entrance… on land… that is owned by the government …" It is unclear from this phrasing whether it is the entrance that must be on public land or it is the person who must be on public land. Take the following example, a person blocks the entrance to a drug store. The drug store's sliding doors are on private property and the person is standing on the public sidewalk. If it is the entrance that

must be on public land then the person is not committing this offense even though he is blocking the entrance. However, if it is the person who must be on public land then the person is committing this offense.[29] OAG recommends that the elements of this offense account for the situation in the example above where a person is on the sidewalk blocking the drug store door. As both subparagraphs (1) and (3) refers to actions by the person, OAG suggests that subparagraph (2) be redrafted to make clear that it is the person who must be on public land, not the entrance. To accomplish this, OAG recommends that paragraph (2) state, "While on land or in a building that is owned by a government…"[30]

The offense of blocking a public way has as one of its elements that the person "Continues or resumes such conduct after receiving a law enforcement officer's order that, in fact, is lawful, to stop such blocking." See RCC § 22E-4203(a)(3). As drafted, and without explanation in the Commentary, this provision will cause litigation over whether the police must give a warning each time they see a person blocking a public way or whether after previously having given a warning the police may arrest a person who comes back to the location and blocks the public way. The Council expressed this concern when they enacted the current law. To avoid this from happening, OAG suggests that the Commentary quote language from page 7 of the Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010. In explaining the current blocking statute, the Committee Report states

> A difficulty with the CCE proposal is that it attempts to address a situation where a Person disperses after the police warning but then returns, so the CCE suggests that "An instruction by a law enforcement officer to cease the blocking shall remain in effect for a reasonable period of time, during which time a resumption of the blocking shall constitute a violation of this section." This is complicated and begs for litigation over what is "reasonable." It is the Committee's intent that a person can be arrested if he or she reappears in the same place after warning, even if some time later - e.g., if the officer gives the warning, remains present, the person stops incommoding, but then the person resumes incommoding in the officer's presence. If a homeless person, as another example, is asked by the same officer to move day after day from blocking a store entrance, and then the officer says something to the effect that "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again you will be arrested," the Committee expects that the person could be arrested without another warning.

On page 8 of the Commentary it states, "The accused must also be practically certain that his or her action constitutes a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order…" By having this mental state requirement for what

[29] A person who is blocking the entrance of the drug store from inside the store, on private property, is committing trespass, under RCC § 22E-2601, once they are asked to leave the store. (i.e. When their privilege to remain in the store is revoked.)

[30] Page 17 of the Commentary should be redrafted to state, "Paragraph (a)(2) specifies that while the person is doing the blocking he or she must be on land or in a building that is owned by a government, government agency, or government-owned corporation while."

constitutes a continuance or resumption of the blocking conduct, the statute, in many situations, will not meet the concerns that the Council expressed in the portion of the Committee Report quoted above. For example, a person may not be practically certain that if they come back to the same location a half an hour after being told to leave that their actions will be a resumption of the blocking conduct. To address this problem, OAG suggests that RCC § 22E-4203(a)(3) be given the mental state of recklessness.[31]

[31] RCC § 22E-206 (d) states that "A person acts recklessly: (1) As to a result element, when: (A)That person consciously disregards a substantial risk that conduct will cause the result; and (B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy; and
(2) As to a circumstance element, when: (A)That person consciously disregards a substantial risk that the circumstance exists; and
(B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	July 8, 2019
Re:	Comments on First Draft of Report No. 36, Cumulative update to RCC Chapters 3, 7 and the Special Part

PDS submits the following comments on Report #36 for consideration.

1. PDS recommends that the commentary explaining the definition of "coercive threat" be rewritten to include the more thorough explanation the Commission wrote in Report #36 Appendix D, Disposition of Advisory Group Comments & Other Changes to Draft Documents ("Appendix D"). Specifically, at page 22 of Appendix D, the Commission explains its reasoning for rejecting PDS's recommendation to omit the word "ridicule" from the definition of "coercion."[1] As part of that explanation, the Commission wrote: "Moreover, this language is intended to only include threats to reveal the types of secrets, facts, photographs, or videos that would have constituted blackmail. Threats to reveal a secret, fact, photograph, or video that would tend to subject a person to mild humiliation would not be sufficient. The revised definition clarifies this by specifically referring to threats to expose a fact that would cause 'other significant injury to personal reputation.'"[2] PDS recommends rewriting the Explanatory Note for the definition of "coercive threat" in the Commentary Subtitle I. General Part to read as follows:

> This form of 'coercive threat' is intended to only include threats to expose the types of secrets or assert facts that would have traditionally constituted blackmail. Threats to reveal a secret, fact, photograph, or video that would tend to subject a person to mild humiliation would not be sufficient. The revised definition clarifies this by specifically referring to threats to expose a fact that would cause 'other significant injury to personal

[1] PDS made this recommendation in comments it submitted to the Commission on December 20, 2018 on the First Draft of Report #26, Sexual Assault and Related Provisions. In Report #26, the term "coercion" was defined in part to mean "threatening that any person will …assert a fact about another person… that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute." (Emphasis added.)

[2] Report #36 Appendix D at App. D. 22 (emphasis added).

> reputation. This form of coercive threat also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of coercive threat.[3]

2. PDS recommends rewriting for clarity the second paragraph of footnote 41 on page 5 of Commentary Subtitle II. Offenses Against Persons to read as follows:

> It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. If X is charged with depraved heart murder, under current law evidence of her voluntary intoxication could *not* be presented to negate the culpable mental state required for second degree murder. *Wheeler v. United States, 832 A.2d 1271, 1273 (D.C. 2003) (quoting Bishop v. United States, 71 App.D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).* In the RCC, however, evidence of the actor's voluntary intoxication could be present in the case and considered by the jury to presume awareness of the risk and to negate the *mens rea*. For example, the government's affirmative case might focus on the fact that an ordinary, reasonable (presumably sober) person in X's position would have possessed the subjective awareness required to establish depraved heart murder—whereas X might have difficulty persuading the factfinder that she lacked this subjective awareness without being able to point to her voluntarily intoxicated state. *See, e.g.,* Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 Sup. Ct. Rev. 191, 200 (1996) (arguing that such an approach, in effect, creates a permissive, but unrebuttable presumption of *mens rea* in situations of self-induced intoxication); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev.943, 955 (1999) (arguing that "retain[ing] a *mens rea* requirement in the definition of the crime, but keep[ing] the defendant from introducing evidence to rebut its presence would, in effect, "rid[] the law of a culpability requirement"). Thus although the actor's awareness of the risk may be imputed, the jury could consider the non-culpable nature

[3] The footnotes were omitted from this excerpt only to emphasize the changes PDS proposes to the text. PDS is not suggesting that the Commission delete the footnotes included in the original explanatory note.

of the voluntary intoxication in this hypothetical and still acquit the actor of depraved heart murder.

3. PDS objects to the expansion of the definition of "financial injury" to include any natural person as long as the expenditure is "reasonably necessitated by the criminal conduct."[4] Currently, "financial injury" as used in stalking is defined to include only those monetary costs, debts, or obligations incurred by the complainant, member of the complainant's household, a person whose safety is threated by the stalking, or a person who is financially responsible for the complainant. PDS agrees with the Commission's limitation of the definition to apply only to the costs incurred by a natural person, and not to any costs incurred by an organization or agency. However, including the costs incurred by any natural person in the calculation of "financial injury," and thereby potentially triggering a penalty enhancement,[5] is too broad and vague. For example, the proposed definition might allow for the inclusion of the cost of installing an improved security system by a neighbor to the stalking victim who was alarmed to learn that the victim's home had been entered unlawfully by the alleged stalker. The proposed definition might allow for the inclusion of the relocation costs of the alleged stalker's previous girlfriend who learns about the current alleged stalking and feels alarm that the alleged stalker might next target her. The requirement that the costs be "reasonably necessitated by the criminal conduct" is insufficient guidance to actually act as a limitation. PDS strongly recommends that the categories of people from the current statute continue to be used. Thus, "financial injury" should be rewritten as follows: "'Financial injury' means the reasonable monetary costs, debts, or obligations incurred by a natural person who is the complainant, a member of the complainant's household, a person whose safety is threatened by the criminal act, or a person who is financially responsible for the complainant as a result of a criminal act...."

4. PDS objects to the limitations placed on the affirmative defense of reasonable mistake of age to the offense of sexual abuse of a minor. The affirmative defense of reasonable mistake of age, e requires that the actor's reasonable belief that the complainant was 16 (or 18) years of age or older at the time of the offense be supported by an oral statement made by the complainant about the complainant's age.[6] Absent a recording or writing record (e.g., text messages) of every communication between the actor and the complainant, whether the complainant made an oral statement about his/her age will always come down to a "she said, he said" and a question of credibility. Whether the complainant made an oral statement might be one aspect of whether the actor's belief that the complainant was 16 (or 18) or older was reasonable. Other evidence might shed more light on the reasonableness, or unreasonableness, of the actor's alleged belief. For example, the actor and complainant may have met at a bar that "cards" every patron prior to entry. The actor may have asked the complainant whether she was 16 (or 18) and the complainant nodded her assent. The complainant may have shown the actor a fake ID. On the

[4] See Commentary Subtitle I. General Part at page 216. See also Commentary Subtitle II. Offenses Against Persons at page 138 and Appendix D at page App. D. 70.

[5] See e.g., RCC § 22E-1306(e)(2)(D), which provides for a penalty enhancement of stalking if the actor caused more than $2,500 in financial injury.

[6] See RCC § 22-1302(g)(2)(A)(ii) and -1302(g)(2)(B)(ii).

other hand, despite an oral statement by the complainant about his/her age, the actor's belief may be deemed unreasonable. The actor may have picked the complainant up outside of middle school. The complainant may have claimed to the actor that she was 16 while her friend standing right behind her shook her head and rolled her eyes, indicating the claim should be disbelieved. Obviously, the requirement of the oral statement does not mean the jury could not consider that the evidence of the middle school meeting location or of the body language of the friend to determine the reasonableness of the belief. The point of the other evidence hypotheticals is to demonstrate that there are numerous circumstances a factfinder could consider to find the claimed belief about the complainant's age unreasonable, including circumstances so overwhelming that any evidence of an oral statement by the complainant to the contrary carries negligible weight with a factfinder. In deciding whether the actor had a reasonable belief about the complainant's age, a jury should be instructed to view the circumstances as a whole rather than evaluating oral statements in a vacuum.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC	Date: July 8, 2019

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

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

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

Comments on the Draft Report

I. General Comments.

1. USAO recommends using the current "while armed" language where applicable, instead of the language "uses or displays a dangerous weapon."

USAO recommends, throughout the RCC, replacing the words (or variations on the words) "displays or uses what, in fact, is a dangerous weapon or imitation dangerous weapon" with the following words:

> "The actor committed the offense while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon."

USAO believes that it is more appropriate to include language from the current "while armed" enhancement statute, *see* D.C. Code § 22-4502(a), than the RCC's current language of "displaying or using" a weapon. Under various provisions in the RCC, the defendant must commit an offense by "displaying or using" a weapon. Under current law, the "while armed" enhancement applies if the defendant either is "armed with or ha[s] readily available" the prohibited weapon. See D.C. Code § 22-4502(a). Under current law, there is no requirement that the defendant actually use or display the weapon during the offense. See Crim. Jur. Instr. 8.101 (B) (defining "readily available" language). The current statutory language is more appropriate, as the RCC's language is too limited. In addition to the increased fear or injury that a victim may experience if a defendant uses or displays a gun or other weapon, a defendant creates an

[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.

increased risk of danger by introducing a weapon to an offense. Even if a defendant does not use or display the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. A firearm could inadvertently discharge, and a complainant could suffer additional injury as a result of that weapon. Of course, the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense, and subsequent resultant injury. Therefore, either being armed with or having a readily available a weapon should both be punished more severely than if a defendant were to commit an offense without being armed with or having readily available a firearm. USAO believes that it is appropriate to require that the defendant "knowingly" be armed with or have readily available the weapon.

USAO further believes that it is appropriate to include both dangerous weapons and imitation dangerous weapons in this language. If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm. Imitation firearms are intended to look like real firearms, and often cannot be distinguished without test-firing them, or otherwise checking them for operability. Thus, if a defendant holds up a gun to a victim and flees the scene with the gun, and the gun is not recovered (which is a common situation) it will, practically, be impossible to prove whether that gun was real or imitation.

2. USAO recommends applying an affirmative defense of negligence to the circumstance of the complainant's protected person status, whether that status is categorized as an element of an offense or as an enhancement.

USAO recommends, throughout the RCC, replacing the words (or variations on the words) "reckless as to the fact that the complainant is a protected person" with the following words:

> "The actor committed the offense against a complainant who, in fact, is a protected person. It is an affirmative defense that the accused was negligent as to the fact that the victim was a protected person at the time of the offense. This defense shall be established by a preponderance of the evidence."

This affirmative defense is consistent with current law for several enhancements. *See* D.C. Code § 22-3601 (under enhancement for committing crime against senior citizen victims, creating an affirmative defense that defense must establish by a preponderance of the evidence "where the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed"); D.C. Code § 22-3611 (under enhancement for committing crime of violence against minors, creating an affirmative defense that defense must establish by a preponderance of the evidence where "accused reasonably believed that the victim was not a minor at the time of the offense"). Several other enhancements, by contrast, include strict liability. *See* D.C. Code § 22-3602 (enhancement for committing certain dangerous and violent crimes against a citizen patrol member); D.C. Code § 22-3751 (enhancement for offenses committed against taxicab drivers); D.C. Code § 22-3751.01 (enhancement for offenses committed against transit operators and Metrorail station managers).

Imposing an affirmative defense of negligence for the circumstance of the complainant's protected person status furthers the statute's purpose of protecting certain classes of individuals based upon their vulnerability (minors, vulnerable adults, senior citizens) or their significant role in providing public services to District residents (police and law enforcement, District officials, transit operators). USAO believes that a negligence standard is appropriate and consistent with current law.

II. Chapter 4. Justification Defenses.

A. RCC § 22E-405. Special Responsibility for Care, Discipline, or Safety Defense.

1. USAO recommends that subsection (a)(1)(B) be rewritten to codify current *in loco parentis* law.

   USAO recommends that subsection (a)(1)(B) be rewritten as follows:

   "(B) The actor is either:
   - (i) A parent or legal guardian of the complainant~~, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant~~; or
   - (ii) A person who has put himself or herself in the situation of a lawful parent or legal guardian, without going through the formalities necessary for legal adoption, by both assuming parental status and by discharging the duties and obligations of a parent toward a child ~~Someone acting with the effective consent of such a parent or person~~;

   The current jury instructions for In Loco Parentis include a definition of *in loco parentis*. Criminal Jury Instructions for the District of Columbia, No. 4.121 (5th ed. Rev. 2018). The RCC definition of *in loco parentis* is expansive than the current definition, and should be limited.

   USAO also believe that the provision, "person acting in the place of a parent per civil law" is confusing and should be eliminated.

2. USAO recommends that, in subsection (a)(1)(D), the words "under all the circumstances" be replaced by the words "under all the circumstances, including the child's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other relevant factors."

   With USAO's changes, this section would provide:

   "(D) Such conduct is reasonable in manner and degree, under all the circumstances, including the child's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other relevant factors;"

This change clarifies the law. The current jury instructions for Cruelty to Children include a statement of the reasonable parental discipline defense, Criminal Jury Instructions for the District of Columbia, No. 4.120 (5th ed. Rev. 2018), which includes this language. USAO also suggests including the word "size," which is not included in the jury instructions, but is a relevant factor to consider. Rather than relying on "all the circumstances," USAO believes it is more clear to point out some of the most relevant considerations in this analysis.

III. Chapter 6. Offense Classes, Penalties, & Enhancements.

Although this chapter is not directly under review in Report #36, there are implications for this chapter based on the review of Report #36 that affect the substance of the provisions in Report #36.

A. RCC § 22E-606. Repeat Offender Penalty Enhancements.

1. USAO recommends adding a Sexual Offense Repeat Offender Penalty Enhancement to RCC § 22E-606.

With USAO's changes, a new provision RCC § 22E-606(d) would provide:

"(d) *Sexual Offense Repeat Offender Penalty Enhancement.* A sexual offense repeat offender penalty enhancement applies to a sexual offense under chapter 13 of this Title when either:

(1) The offender, in fact, has one or more previous convictions for a District of Columbia sexual offense defined in Chapter 13 of this Title, or an offense equivalent to a current District of Columbia sexual offense defined in Chapter 13 of this Title, or

(2) The offender, in fact, is or has been found guilty of committing a District of Columbia sexual offense defined in Chapter 13 of this Title, or an offense equivalent to a current District of Columbia sexual offense defined in Chapter 13 of this Title, involving 2 or more victims."

USAO is concerned that that subsection (g) of RCC § 22E-1301 does not include a repeat offender penalty enhancement for sexual offenses. Because RCC § 22E-606 (Repeat Offender Penalty Enhancements) does not yet have a provision for penalties, USAO cannot yet fully comment on this section. But USAO is concerned that, in RCC § 22E-606, for misdemeanor repeat offender penalty enhancements and felony (other than crimes of violence) repeat penalty enhancements to attach, there must be *two* or more prior convictions. USAO is further concerned that this enhancement only applies to the number of prior convictions, rather than to the total number of victims.

Under current law, 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). Adding USAO's proposed provision to RCC § 22E-606 is consistent with current law, which permits the enhancement with only one

previous conviction, or if there are two or more victims in the instant case. The wording "is . . . guilty of committing sex offenses against 2 or more victims" means that one victim could be a victim in the instant case, and one a victim in a previous case. Further, the proposed wording of subsection (2) of this provision allows for the enhancement to apply if the defendant has been found guilty but has not yet been sentenced for the prior victim (including, for example, if there are two victims in the instant case, for which the defendant would be sentenced at the same time). This is consistent with current law, and is appropriate. Even though not all sex offenses are crimes of violence, they are sufficiently serious that they should be treated in the same manner as crimes of violence are treated in the RCC. *See* RCC § 22E-606(c).

IV. Chapter 7. Definitions.

A. RCC § 22E-701. Definitions.

1. USAO recommends that the definition of "Bodily injury" include the words "a contusion, an abrasion, a laceration, or other physical injury."

   With USAO's changes, the definition of "Bodily injury" would be:

   " 'Bodily injury' means physical pain, illness, a contusion, an abrasion, a laceration, or other physical injury, or any impairment of physical condition."

The RCC's definition of "bodily injury" is intended to be very expansive. The CCRC intends contusions, abrasions, lacerations, and other physical injuries to be included in the "bodily injury" definition. If physical pain constitutes a "bodily injury," and " 'any' impairment of physical condition is intended to be construed broadly and includes cuts, scratches, bruises, and abrasions" (RCC Commentary at 175), then this language should be included in the plain language of the definition as well. Including these explicitly, rather than in the Commerntary, will eliminate potential future confusion and litigation on this point. Further, because the "significant bodily injury" and "serious bodily injury" definitions require some level of "bodily injury," the plain language of this definition should encompass the minor lacerations and contusions that are lesser than the more serious lacerations and contusions specified in those definitions.

2. USAO recommends that the definition of "Class A Contraband" include additional provisions.

   With USAO's changes, the definition of "Class A Contraband" would be:

   "(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, ~~or~~ bypassing a locked door, or otherwise designed or intended to facilitate an escape; . . .
   (K) A law enforcement officer's uniform, medical staff clothing, or any other uniform, or civilian clothing;
   (L) A stun gun; or
   (M) Any controlled substance or marijuana;

(N) A portable electronic communication device or accessories thereto."

First, the change from "intended to facilitate an escape" to "a tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door" unnecessarily makes it more difficult to prosecute "homemade" implements of escape. USAO recommends including, in subsection (G), a catch-all provision that would encompass other tools not specifically named that are "otherwise designed or intended to facilitate an escape."

Second, civilian clothing has been removed from the list. Under current law, civilian clothing constitutes Class A Contraband. D.C. Code § 22-2603.01(2)(A)(viii). Civilian clothing can be used to facilitate an escape from a correctional facility, so USAO believes that it is appropriate to keep this defined as Class A Contraband.

Third, removal of "stun gun" as a prohibited item is unnecessary and dangerous. Under current law, a stun gun is included as Class A contraband. D.C. Code § 22-2603.01(2)(A)(iii)(III). DCCA law makes clear that a stun gun is not a dangerous weapon. Accordingly, it should be separately listed as a Class A Contraband item, as the possession of such an item in a correctional facility is inherently dangerous.

Fourth, there is no reason to lessen the penalties for possessing illegal narcotics inside a correctional facility, given the dangers that they cause when possessed inside a facility. The presence of illegal narcotics in a penal institution is dangerous. It not only affects the physical and mental stability of the inmates; it is a potential touchstone for conflict. If the Commission wants to differentiate between weapons and escape implements and all other contraband, perhaps an additional level of punishment should apply to the possession of drugs that further differentiates it from the possession of alcohol and drug paraphernalia.

Fifth, cell phones should be included as Class A Contraband, even though they are currently included as Class B Contraband. D.C. Code § 22-2603.01(3)(A)(iii). Cell phones can be used by inmates to coordinate escape or violent actions against correctional officers.

3. USAO recommends, in the definition of "Coercive threat," changing the title "Coercive threat" to "Coercion," and rewriting portions of the definition.

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

" 'Coercion' ~~'Coercive threat'~~ means either: a threat, express or implicit, that, unless the complainant complies, any person will do any of the following to any other person; or an act intended to induce the complainant's compliance that, in fact, constitutes any of the following, to any person:

(A) Engage in conduct that, in fact, constitutes:

(1) An offense against persons as defined in subtitle II of Title 22E; or

(2) A property offense as defined in subtitle III of Title 22E;

(B) Take or withhold action as a government official, or cause a government official to take or withhold action;

(C) Accuse another person of a crime;
(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:
(1) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
(2) Significant injury to credit or business reputation;
(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(F) ~~Restrict~~ Facilitate or control a person's access to an addictive or controlled substance ~~that the person owns~~, or restrict a person's access to prescription medication ~~that the person owns~~; or
(G) Engage in fraud or deception; or
(H) ~~(G)~~ Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply; or
(I) Knowingly participate in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business."

Under the RCC, there is no longer a general definition of "coercion"; rather, there is only a definition of a "coercive threat." The definition of a "coercive threat" includes only coercion obtained by means of threats, and not coercion obtained by means of force or fraud. Thus, force and fraud are no longer statutorily permissible ways of coercing another person to engage in an activity. This is problematic in several contexts, but particularly in the human trafficking context. For example, with respect to force, if a defendant were to viciously assault a person in front of a human trafficking victim as a means of asserting his domination over both individuals and coerce compliance over that victim, that action on its own may not constitute a "threat." It would certainly, however, constitute force, and should be criminalized under this definition. As a further example, with respect to fraud, if a defendant were to falsely advertise modeling opportunities, and a victim presented herself to a perpetrator on that basis, but then became entangled in what truly was a scheme that culminated in commercial sex, that should be criminalized under this definition as well.

Because trafficking requires use of a coercive threat, coercing an individual to engage in labor by either fraudulent means or by actual use of force would no longer subject an individual to liability for human trafficking. Use of actual force should be a basis for liability. The RCC Commentary states that the use of actual force carries an implicit threat, but that may not always be the case. To ensure that the use of actual force is plainly allowed as a mean of coercion under the RCC, USAO believes that the force or fraud language should remain in the text. USAO has revised the RCC's proposed language to be closer to the current coercion definition in D.C. Code § 22-1831(3).

This proposed RCC definition does not include situations where a complainant is coerced by being supplied with a controlled substance or medication. USAO recommends adding a

provision for facilitating or controlling access to a controlled substance, or an otherwise addictive substance that is not controlled. USAO also does not believe that the complainant has to own the substance or prescription medication for there to be coercion. If the complainant substance is addictive or medically necessary, it is irrelevant who has an ownership interest in the substance.

In the current RCC proposal, there is no provision for when a perpetrator makes a threat or takes an action against a third party to compel compliance. For example, if a perpetrator makes an express or implied threat against a complainant's relative in this country or elsewhere, that threat is not addressed in any provision other than the catchall provision, which, as noted above, would shift an assessment regarding the coercive power of the threat to the complainant. USAO believes that adding the words "to any person" to the first paragraph clarifies that these threats/harms need not be made to the complainant in order to induce the complainant's compliance.

USAO recommends that every subsequent provision referencing a "coercive threat" be changed to "coercion."

4. USAO recommends, in the definition of "Commercial sex act," including the word "masturbation."

   With USAO's changes, the definition of "Commercial sex act" would be:

   " 'Commercial sex act' means any sexual act, ~~or~~ sexual contact, or masturbation on account of which or for which anything of value is given to, promised to, or received by any person."

Particularly in the human trafficking, there are instances of individuals being forced to masturbate in front of other individuals, in exchange for money. This definition should include all forms of sexual violations, not only including sexual acts and sexual contacts, but also masturbation.

5. USAO recommends, in the definition of "Correctional facility," adding the words "or the U.S. Marshal's Service."

   With USAO's changes, the definition of "Correctional facility" would be:

   " 'Correctional facility' means any building or building grounds located in the District of Columbia, operated by the Department of Corrections or the U.S. Marshal's Service for the secure confinement of persons charged with or convicted of a criminal offense."

Although the D.C. Central Detention Facility ("D.C. Jail") and the D.C. Correctional Treatment Facility ("CTF") are operated by the D.C. Department of Corrections, the D.C. Superior Court cellblock is operated by the U.S. Marshal's Service. Thus, defendants who are currently incarcerated at either the D.C. Jail or CTF are transferred to the custody of the U.S. Marshal's Service every time they make a court appearance. Under the Escape provision in RCC

§ 3401, defendants are liable for First Degree Escape only if they escape from a "correctional facility or juvenile detention facility." Defendants who escape from a cellblock at the D.C. Superior Court should be punished equally to those who escape from the D.C. Jail/CTF. Including the U.S. Marshal's Service in this definition eliminates a loophole which would make a defendant less culpable for escaping a cell block.

USAO also recommends that, in sections that refer to this definition (for example, Escape, RCC § 22E-3401, and Correctional Facility Contraband, RCC § 22E-3403), the U.S. Marshal be included among the list of individuals required to give effective consent for the defendant to engage in the prohibited conduct. *See, e.g.*, RCC § 22E-3401(a)(2).

6. USAO recommends deleting subparagraph (E) from the definition of "Deceive" and "Deception."

Subsection (E) of the definition of "Deceive" and "Deception" excludes from those terms "puffing statements unlikely to deceive ordinary persons." As an initial matter, the Commission's proposed " 'deception' definition is not broadly supported by law in a majority of jurisdictions." *See* RCC App. J at 170. Subparagraph (E) is particularly problematic. First, there are certain cases where the definition is unworkable. In investment scheme cases, for example, defendants commonly present their victims with false promises of out-sized investment returns. The current Redbook instruction makes clear that criminal liability stems from whether the defendant intended to deceive, not whether an "ordinary person" would be deceived. *See* D.C. Crim. Jur. Instr. 5.200 (defendant "must have known that the statement or assertion was untrue when he/she made or used it, or have made or used it with reckless indifference as to whether it was, in fact, true or false"). Second, subparagraph (E) would create a new affirmative defense in all fraud cases that is not supported in current D.C. law. And indeed, as the Commission notes, "the line between 'mere puffery' and outright deception sufficient to create criminal liability is frequently litigated." RCC App J. at 345 n.1884. USAO believes that the RCC should minimize litigation, not create new grounds for litigation.

7. USAO recommends adding the words "deputy marshals" to subsection (H) of the "Law enforcement officer" definition.

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

"(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (B), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, deputy marshals, and probation and pretrial service officers."

Although they may already be included in this definition of "law enforcement officer," USAO wants to ensure that Deputy U.S. Marshals would be included in this definition, as they are essential law enforcement officers in the District who frequently interact with defendants, as they operate the cellblocks in D.C. Superior Court.

8. USAO recommends including the phrase "whether tangible or digital" in the definition of "Payment card."

   With USAO's changes, the definition of "Payment card" would be:

   " 'Payment Card' means an instrument of any kind, whether tangible or digital, including an instrument known as a credit card or debit card . . . ."

Financial instruments and payment methods are constantly changing. With the advent of services like Venmo and PayPal, and the proliferation of technologies that allow individuals to access their financial resources solely using the internet, USAO recommends that the RCC broaden the definition of "Payment card" to take into account the reality of the different ways in which criminals take advantage of victims' financial resources.

9. USAO recommends including, in the definition of "Property," the words "money," "documents evidencing ownership in or of property," and "captured or domestic animals."

   With USAO's changes, the definition of "Property" would be:

   " 'Property' means anything of value. The term 'property' includes, but is not limited to:
   (A) Real property . . . .
   . . . .
   (E) Debt;
   (F) Money;
   (G) Documents evidencing ownership in or of property;
   (H) Captured or domestic animals; and
   (H) A government-issued license, permit, or benefit."

USAO recommends this change in order to better align the proposed definition with the Proposed Federal Criminal Code and the Model Penal Code, as well as to account for common fact-patterns in D.C. criminal cases (which include the theft of money and domestic pets).

10. USAO recommends, in the definition of "Protected person," removing the age differential language.

    With USAO's changes, the definition of "Protected person" would be:

    " 'Protected person' means a person who is:
    (A) Under 18 years of age~~, when, in fact, the actor is 18 years or age or older and at least 4 years older than the complainant~~;
    (B) 65 years of age or older~~, when, in fact, the actor is at least 10 years younger than the complainant~~; . . ."

This is consistent with current law, which focuses solely on the age and vulnerability of the complainant. *See* D.C. Code § 22-3601 (enhanced penalty for crimes against senior citizen

victims); D.C. Code § 22-3611 (enhanced penalty for committing crime of violence against minors).

Certain age differential requirements exist in current law, and should remain in the RCC, such as the age differential requirement in the Sex Abuse of a Minor provision (providing, for example, that a defendant must be at least 4 years older than the complainant to be liable for that offense). The age differential requirements in that provision, however, serves a very different purpose than the age requirements here. The age differential requirements in the Sex Abuse of a Minor statute exclude from liability consensual or non-forced sexual acts/contacts between minors who are close enough in age that the law has deemed them capable of consenting. Indeed, the only thing that makes Sex Abuse of a Minor a crime at all is the age disparity between the defendant and complainant. Other provisions, however, are already criminal, regardless of any age disparity. The focus here should be on the particular vulnerability of the victim who has been subjected to a crime, not on whether the defendant happened to be a similar age. USAO believes that the RCC should track current law in this respect, and that this language should be removed.

11. <u>USAO recommends that subsection (D) of the definition of "Position of trust with or authority over" be modified to add a "contractor" and to remove the provision "under civil law."</u>

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

    "(D) Any employee<u>, contractor,</u> or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or other person responsible ~~under civil law~~ for the care or supervision of the complainant."

    USAO believes that adding the term "contractor" provides a more comprehensive definition of those responsible for the care and supervision of children at schools and other institutions. Many organizations do not hire all of their employees directly; rather, they enlist contractors as part of that staffing. The contractors have the same interactions with children and responsibilities as many of the direct employees do, and it makes no sense to distinguish them for purposes of liability.

    USAO supports the addition of the catch-all provision "or other person responsible . . ." As articulated in other provisions, however, USAO believes that the term "under civil law" is unnecessarily confusing, and needlessly requires a comprehension of civil law to interpret criminal law.

12. <u>USAO recommends that the definition of "Serious bodily injury" include the provision "or protracted loss of consciousness."</u>

    With USAO's changes, the definition of "Serious bodily injury" would be:

" 'Serious bodily injury' means a bodily injury or significant bodily injury that involves:
(A) A substantial risk of death;
(B) Protracted and obvious disfigurement; ~~or~~
(C) Protracted loss or impairment of the function of a bodily member or organ.~~;~~ or
(D) Protracted loss of consciousness."

Under current law, a "serious bodily injury" includes, among other things, "unconsciousness." D.C. Code § 22-3001(7). As the RCC Commentary notes (at 257 n.621), the D.C. Court of Appeals has addressed this "unconsciousness" provision in the context of aggravated assault, finding that a "brief loss of consciousness" did not amount to a serious bodily injury. *In re D.P.*, 122 A.3d 903, 908 n.10 (D.C. 2015); *see also Vaughn v. United States*, 93 A.3d 1237, 1269 n.39 (D.C. 2014). Although the D.C. Court of Appeals has specifically the "brief" loss of consciousness with respect to serious bodily injury, it has not addressed whether a "protracted loss of consciousness" would qualify as a serious bodily injury. USAO believes that a "protracted loss of consciousness" would qualify as a serious bodily injury under current law, and should be codified in the RCC's definition of a "serious bodily injury." The RCC Commentary (at 257–58) notes that "[m]ore lengthy losses of consciousness still may constitute serious bodily injury if the unconsciousness causes 'a protracted loss or impairment of the function of a bodily member or organ,'" but USAO believes that any protracted loss of consciousness, regardless of whether it causes such an injury, should qualify as a serious bodily injury.

13. USAO recommends that, in the definition of "Sexual act," the word "desire" be replaced with the word "intent."

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

"(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the ~~desire~~ intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person."

Under current law, the word "intent" is used in this provision, not the word "desire." The word "desire" is ambiguous, and is not defined in the RCC. The word "intent," however, is defined in the RCC and used frequently throughout the RCC.

14. USAO agrees with the addition of "sexual act" to the definition of "Sexual contact."

USAO supports this change, which makes a sexual contact a lesser-included of a sexual act, and believes that it is an appropriate way to codify this principle.

15. USAO recommends that, in the definition of "Sexual contact," the words "desire to sexually degrade" be replaced with the words "intent to abuse, humiliate, harass, degrade."

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

"(B) Touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the ~~desire to sexually degrade~~ intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person."

This change tracks the sexual intent language of the "Sexual act" definition. Sexual assault prosecutions often rely on the "abuse, humiliate, harass, or degrade" intent language, in addition to the "arouse or gratify" intent language. For example, if a defendant grabs the buttocks of a stranger, that victim will likely feel sexually violated, and this should be prosecuted as a sexual offense. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure, however, the government may not be able to prove that the defendant's actions were sexually arousing or gratifying. The government, however, would be able to show that, at a minimum, the defendant intended to humiliate or harass the victim. USAO also believes that "intent" is a more appropriate word than "desire," as explained above with respect to the "Sexual act" definition.

16. USAO recommends that, in the definition of "Significant bodily injury," the words "temporary loss of consciousness" be changed to either "brief loss of consciousness" or "any loss of consciousness."

    With USAO's changes, this subsection would provide:

    "Significant bodily injury' means . . . a ~~temporary~~ brief loss of consciousness;"

USAO believes that the word "temporary" is vague. Unless a victim dies or falls into an irreversible coma, any loss of consciousness is, by definition, temporary. USAO believes that the RCC's definition of "Significant bodily injury" is intended to encompass any loss of consciousness, including a brief loss of consciousness. The plain language of the statute should clarify that any loss of consciousness, however brief, would suffice. This is also consistent with the D.C. Court of Appeals case law with respect to a brief loss of consciousness in the serious bodily injury context, as discussed above.

17. USAO recommends that, in the definition of "Significant bodily injury," the words "a contusion or other bodily injury to the neck or head caused by strangulation or suffocation" be changed to the words "a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation."

    With USAO's changes, this subsection would provide:

    " 'Significant bodily injury' means . . . a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation."

USAO supports the CCRC's proposal including injuries caused by strangulation or suffocation in the "significant bodily injury" definition. As the Commentary notes, strangulation and suffocation are often linked to more serious patterns of violence (RCC Commentary at 269

& n.696). USAO believes that additional language should be added to this definition to clarify strangulation-related injuries.

"Petechiae" (the plural of the singular "petechia") are defined as "a form of bruising that results from rupture of capillaries, the body's smallest blood vessels. Petechiae are red, non-elevated, less than 3 mm in diameter, and can be a singular capillary rupture or multiple." Henry, T., ed. *Atlas of Sexual Assault. International Association of Forensic Nurses*. St. Louis, MI: Mosby, Inc., 2013. Petechiae often develop on a victim's face or neck as a result of strangulation or suffocation. Although petechiae may be included in the "other bodily injury" definition, USAO believes that it is appropriate to expressly include petechiae as a form of injury to eliminate potential future confusion and litigation.

USAO also believes that it is appropriate to include the eyes and face as specific areas where strangulation/suffocation injuries could manifest. Although they are likely included in the definition of "head," specifically listing them reduces potential future confusion and litigation.

18. <u>USAO recommends that the definition of "Significant bodily injury" include the words "or a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives."</u>

    With USAO's changes, this subsection would provide:

    " 'Significant bodily injury' means . . . . The following injuries constitute at least a significant bodily injury: a fracture of a bone, a laceration that is at least one inch in length and at least one quarter inch in depth<u>, or a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives</u>; a burn of at least second degree severity . . . ."

As the Commentary cites (RCC Commentary at 268 & n.690), under current law, lacerations requiring stiches are sufficient proof of significant bodily injury. *See, e.g.*, *Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010); *Flores v. United States*, 37 A.3d 866, 867 (D.C. 2011). There is no size requirement for lacerations requiring stitches. A layperson will likely not know the size of his or her laceration. Even if that layperson was able to measure the length of his or her own laceration, it would be nearly impossible for a layperson to measure the depth of his or her own laceration, particularly after stitches have been applied. Medical professionals often do not even measure the depth of a laceration, and measuring the depth of a laceration is not a standard procedure in a medical forensic evaluation. Thus, practically, every case involving this type of significant bodily injury would require medical testimony. This requirement is impractical, as medical testimony should not be required in every case to prove whether a significant bodily injury is present. Lay testimony about the required used of sutures is appropriate, and tracks current law. To allow a layperson to testify about the types of injuries he or she sustained, USAO believes that inclusion of this language is necessary.

Further, USAO recommends including "stitches, sutures, staples, or closed-skin adhesives" in this definition. These are all different tools that medical professionals use to close

open lacerations. Medical professionals often decide which tool to use based on the location of the injury on the body and the medical professional's judgment, not exclusively based on the length or width of the injury.

Finally, USAO recommends that the language provide that the complainant "required or received" these treatments. This encompasses both situations where the complainant actually received that treatment, and situations in which the complainant should have received the treatment but did not. This is consistent with the beginning of the "significant bodily injury" definition providing "a bodily injury that . . . *requires* hospitalization or immediate medical treatment beyond what a layperson can personally administer." RCC § 22E-701 (emphasis added).

19. USAO recommends rewriting the definition of "Value" to mean "the greater of" several different alternatives.

    With USAO's changes, the definition for Value would read:

    " 'Value' means the greater of:
        (A) The fair market value at the time and place of the offense;
        (B) The replacement cost of the property within a reasonable time after the offense; or
        (C) With respect to a credit card, check, or other written instrument, the amount of money, credit, debt or other tangible or intangible property or services that has been or can be obtained through its use."

USAO recommends this change to better align the definition of "Value" with the Model Penal Code, current federal law and the fairly recent amendments to the D.C. Omnibus Public Safety Amendment Act of 2009. *Cf.* U.S.S.G. §§ 2B1.1; Redbook Instruction 3.105.

20. USAO recommends deleting subsection (C) from the definition of "Value".

Subsection (C) of the definition of "Value" suggests a flat-rate dollar value for a payment card or an unendorsed check. This is plainly at odds with D.C. law. *See* Redbook Instruction 3.105 (" 'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument."). Indeed, the RCC acknowledges that there are no jurisdictions that have adopted subparagraph (C) in their definition of "value." *See* RCC App. J at 352-54. Although the Commentary suggests that New Hampshire has a "similar provision," that statute only proscribes a minimum value (not a fixed value) for a payment or unendorsed check. *See* N.H. Rev. Stat. Ann. § 637:2(V)(c).

21. USAO notes that the definition of "Comparable offense" appears to be superfluous, as the term is no longer used in the RCC.

    USAO is accordingly reserving comments on the definition of "Comparable offense."

22. USAO notes that the definitions of "Commercial sex act" and "Custody" are included in the Commentary, but are not included in the draft statute.

V. Chapter 11. Homicide.

1. USAO recommends that Felony Murder be classified as First Degree Murder, with two separate provisions for both enumerated and unenumerated felonies.

Subsection 22E-1101(b)(2) provides, among other things, that when the death of another person is committed in furtherance of committing or attempting to commit one of multiple enumerated felonies, this shall be classified as Second Degree Murder.

Subsection (b)(2) minimizes the seriousness of Felony Murder and ignores the deterrence theories that have been recognized by the D.C. Court of Appeals and other courts that support categorizing Felony Murder as First Degree Murder. As noted by the CCRC, "criminalizing felony murder as second degree murder is not generally supported by state criminal codes," recognizing that only six states do so. *See* RCC App. J at 188. The reasoning behind this is the long-standing view held by the courts that certain felonies carry such high risks of death and injury for victims and co-felons that they must be deterred. *See, e.g.*, *Wilson-Bey v. United States*, 803 A.2d 818, 835 (*en banc*) ("the underlying purpose of the felony murder doctrine . . . is designed to deter the commission of certain especially dangerous felonies because these particular crimes create an unacceptably high risk of death").[2]

2. USAO recommends removing the requirement that the defendant act negligently in causing death under Felony Murder (as related to enumerated felonies).

Subsection 22E-1101(b)(2) provides that in order to be guilty of Felony Murder (as related to enumerated felonies), a defendant must "negligently" cause the death of another person.

As it relates to Felony Murder involving enumerated felonies, subsection (b)(2) defeats the purpose of the statute, which is to deter certain crimes and to recognize that certain felonies create such a high risk of death that malice is presumed from the commission of these felonies. *See Wilson-Bey*, 903 A.2d at 838. Moreover, the CCRC cites no case law or support from a

[2] Assuming that the CCRC incorporates this change, the government submits that a third category of First Degree Murder is needed. This third category of First Degree Murder also will apply in the Felony Murder context where the actor purposely causes the death of an individual during the commission of an unenumerated felony. The CCRC mis-reads the current state of Felony Murder law as it relates to unenumerated felonies. The CCRC notes, and USAO does not dispute, that it is not appropriate to impose liability to a non-purposeful killing that occurs during the commission of a non-enumerated felony. However, what the CCRC fails to recognize is that the current statute only imposes liability for Felony Murder during the commission of a non-enumerated felony when the actor kills another purposely. *See* D.C. Code § 22-2101. In other words, engaging in the unenumerated felony is determined to be of the same significance as premeditation and deliberation. Thus, under the current statute, if an individual purposely kills another, either while engaged in an unenumerated felony or with premeditation and deliberation, he is guilty of First Degree Murder. The CCRC has provided no rationale for changing this long-standing law, and USAO believes that such a change is inappropriate.

majority of states that would support adding the requirement that the defendant act negligently. In fact, adding such a requirement undermines the very deterrence principle that Felony Murder is designed to promote – *i.e.*, deterring the commission of especially dangerous felonies. As recognized by the U.S. Supreme Court, "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Dean v. United States*, 556 U.S. 568, 129 S.Ct. 1849, 1855 (2009).

The Commentary provided by the CCRC correctly notes that there is no intent requirement as it relates to Felony Murder. However, the Commentary incorrectly relies on the *en banc* decision in *Wilson Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) to support the position that the D.C. Court of Appeals has indicated that negligence is required of all actors involved in the commission of Felony Murder. The D.C. Court of Appeals in *Wilson Bey* was discussing Felony Murder in the context of accomplice liability. In doing so, the Court indicated that, in determining whether an *accomplice* should be held liable for Felony Murder, the killing was "reasonably foreseeable." *Id.* In this respect, the accomplice is treated slightly differently from the principal involved in the Felony Murder, although the accomplice can still be found guilty of murder. That said, this language provides no support for the argument that it should be a requirement that the defendant/principal acted negligently in killing the decedent, as the statute's *mens rea* stems from the *mens rea* required by the underlying felony, rather than an additional *mens rea* requirement for the killing itself.

3. <u>USAO recommends removing the requirement that the lethal act be committed in furtherance of the underlying enumerated felony in a Felony Murder charge.</u>

Subsection 22E-1101(b)(2) provides that in order for a defendant to be guilty of Felony Murder when the underlying crime is an enumerated felony, the lethal act must have been "in the course of and in furtherance of committing or attempting to commit one of the [enumerated felonies]."

USAO submits this is directly contrary to current common law and that it will significantly undermine the deterrence behind the Felony Murder statute.

The Commentary appears to rely on the D.C. Court of Appeals language in *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982), that "[t]he mere coincidence in time between the underlying felony and death is insufficient for felony murder liability" to support the requirement that it is no longer sufficient that the death occurred during the commission or attempted commission of the felony. However, that is directly contrary to the *Head* decision. The D.C. Court of Appeals in *Head* indicated that simply because the robbery and murder occurred close in time did not, without more, prove Felony Murder. In other words, if, for example, a defendant shot his victim and then, as an afterthought, decided to rob the victim as the victim lay dying, this would not alone satisfy the requirements of Felony Murder. Rather, the government must prove that the murder occurred during the commission or attempted commission of the felony. In other words, the Commentary is incorrect in stating that it is not sufficient, as a matter of common law, that the "death happened to occur during the commission or attempted commission of the felony." The Court of Appeals in *Head* specifically stated that "[t]here must be evidence

sufficient to support a jury finding that the murder took place during the course of the robbery." *Head*, 451 A.2d at 625.

Similarly, the Court of Appeals in *Johnson v. United States*, 671 A.2d 428 (D.C. 1995), on which the Commentary also relies, further supports USAO's position. *Johnson* states that there must be a "causal connection between the homicide and the underlying felony" and then goes on to state that "it must appear that there was such actual legal relation between the killing and the crime . . . . that the killing can be said to ***have occurred as a part of the perpetration of the crime***." Johnson, 671 A.2d at 432. There is no requirement under *Johnson* that the killing have been committed in furtherance of the crime.[3]

Moreover, requiring that the murder be committed in furtherance of committing or attempting to commit one of the enumerated felonies ignores the deterrence rationale for the Felony Murder statute, as discussed above.

Lastly, from a practical perspective, if it is a requirement that the murder was committed in furtherance of committing or attempting to commit one of the enumerated felonies, this will significantly minimize the effectiveness of the Felony Murder statute. In many situations, the commission of the murder does nothing to further the underlying crime. In fact, it is often the case that the murder is the result of a spur-of-the moment decision the perpetrator undertakes during the commission of the underlying crime, as opposed to a well-reasoned decision to further the underlying crime. This requirement again ignores the primary purpose behind the felony murder statute, which is to deter those types of felonies that are so dangerous that they may result in death or serious bodily harm.

4. <u>USAO recommends including all categories of robbery and felonies involving controlled substances as enumerated felonies that can serve as the predicate in a Felony Murder charge.</u>

Subsection 22E-1101(b)(2) limits the types of crimes that can serve as the predicate crime in a charge of felony murder. As drafted, Fifth Degree Robbery, defined as robbery wherein the defendant knowingly commits the robbery by causing bodily injury to the complainant or another person (other than an accomplice), threatens to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or uses physical force to overpower the complainant or another person (other than an accomplice), is not considered an enumerated felony. Similarly, felonies involving controlled substances are no longer included as enumerated felonies.

First, the CCRC Commentary makes clear that not only is there no legal support in the common law for these changes, but that the CCRC has not researched whether or not there is any support from other jurisdictions for removing these predicate offenses.

More importantly, in charging Felony Murder, the government will need to prove that the defendant committed the murder in the course of perpetrating or attempting to perpetrate a specific crime. Under the draft RCC, First through Fourth Degree Robbery all include as an

[3] Notably, in Appendix J, the CCRC notes that a minority of jurisdictions, *i.e.*, less than 10, have a similar requirement that the murder be in furtherance of the underlying felony. *See* RCC App. J at 189 n.1115.

element that the defendant committed Fifth Degree Robbery and then distinguish between the level of injury that the victim then suffered and the mental state attached to the injury. The purported rationale for not including all degrees of robbery, according to the First Draft of Report 19 Homicide (at p. 36) is because the lower degrees of robbery "do not involve the infliction of significant bodily injury" and thus lack the dangerousness from the greater degrees of Robbery. To be clear, in the Felony Murder context, if Felony Murder is charged with a predicate offense of any degree of Robbery, the most severe type of bodily injury has occurred—*i.e.*, death. The problem is that the higher degrees of robbery require an increased mental state as it relates to the injury—*i.e.*, recklessly causing the injury. The concern of maintaining the statute's proportionality as to the degree of injury simply is not at issue in the context of Felony Murder.

Additionally, as discussed above, the primary rationale behind Felony Murder is to deter a defendant from committing certain felonies that carry an unacceptably high risk of death. Again, just from a practical stand point, many of the Felony Murder cases charged in this jurisdiction involve felony drug transactions that go wrong in some fashion, and as a result, someone is killed. Keeping in mind the desire to deter felonies that carry such a high risk of death, there simply is no rationale for removing felony drug crimes from the list of predicate enumerated felonies.[4]

5. <u>USAO recommends that a person who is guilty of Felony Murder should be held responsible for the killing of his/her accomplice.</u>

Subsection 22E-1101(b)(2) provides that an individual is ***not*** responsible for causing the death of his/her accomplice, even if all of the other factors required for Felony Murder are met.

As noted in Appendix J (at 189), again, only a minority of the states bar liability where the decedent was a participant in the underlying felony. The Commentary does not set forth specifically why the RCC proposed this change to bar liability where the decedent was a participant, but presumably, the argument is based on a theory that the decedent assumed the risk. The problem with this argument is that removing liability for an accomplice decedent completely ignores the deterrence principals upon which Felony Murder is based—*i.e.*, to deter certain felonies that create unacceptably high risks of death. The risk undertaken by the decedent should not weigh into this calculation any more than if the decedent is a neighborhood drug dealer who routinely stands on the same street corner and who is then gunned down during a robbery. A similar argument can be made that the drug dealer also assumed the risk, however, we do not put a value on human life.

[4] To be clear, USAO recommends that the list of enumerated felonies that can serve as the predicate offense under the Felony Murder statute should include: First or Second Degree Arson; First Degree Sexual Abuse; First Degree Sexual Abuse of a Minor, First or Second Degree Child Abuse; First Degree Burglary when committed while possessing a dangerous weapon on his or her person; First, Second, Third, Fourth, or Fifth Degree Robbery; First or Second Degree Kidnapping; or any felony drug offense.

6. USAO recommends that all parties involved in an enumerated felony be held accountable for Felony Murder.

Subsection 22E-1101(b)(2) provides that only the individual who commits the lethal act during the course of a Felony Murder is responsible for the killing.

One of the most troubling proposals in the RCC is that it bars an accomplice from being held responsible for Felony Murder. As an initial matter, the Commentary in Appendix J indicates that slightly less than half of states adopt this approach. To be clear, 18 states are referenced, and many of the citations do not support the proposed change. For example, in *State v. Sophophone*, the Kansas court did not absolve an accomplice of liability, rather, the court refused to hold a defendant liable for the lawful acts of a law enforcement officer. The Minnesota decision cited in footnote 1117, *State v. Branson*, declined to extend liability where the fatal shot was fired from an adverse group "***rather than by the defendant or someone associated with the defendant in committing or attempting to commit a felony"*** (emphasis added). The Nebraska case, *State v. Quintana*, states that felony murder "requires that the death of the victim result from an act of the defendant or the defendant's accomplice." Likewise, in *People v. Washington*, the court stated that the killing needs to be committed by "a robber or his accomplice." In other words, there is little support for the proposition that an accomplice should not be held liable for Felony Murder.

Moreover, as discussed above, the CCRC incorrectly relies on the *en banc* decision in *Wilson Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) to support the position that negligence is required of all actors involved in the commission of Felony Murder. As discussed above, *Wilson Bey* was discussing Felony Murder in the context of accomplice liability. The D.C. Court of Appeals indicated that, in determining whether or not an accomplice should be held liable for Felony Murder, the killing should be "reasonably foreseeable." *Id.* In this respect, the accomplice is treated slightly differently from the principal involved in the Felony Murder, while still holding the accomplice guilty of murder.

As a practical matter, if two individuals decide to engage in an armed robbery—a crime that clearly carries an unacceptably high risk of death—and, during the course of the robbery, both men fire their guns, it should not matter in terms of liability which perpetrator is the better shot. Simply because one perpetrator fires a shot that kills the victim and the other fires multiple shots but does not strike the victim is of no moment. They both engaged in a felony that must be deterred, and the question of who fired the fatal shot is irrelevant. Moreover, in many cases, it is virtually impossible to determine who inflicted the fatal injury. For example, if both men engage in an armed robbery and both men fire a gun, unless the men are stopped almost immediately still in possession of the weapons, and a bullet is recovered from the victim that is not so damaged that it can be compared to the weapon (which are all rare situations), it will be impossible to determine who fired the fatal shot.

7. USAO recommends removing the language "with extreme indifference to human life" from the Murder and Manslaughter statutes.

Subsections 22E-1101(b)(1) and 22E-1102(a)(1) provide that, in order to commit Second Degree Murder, the person must have acted "[r]ecklessly, with extreme indifference to human life." The extreme indifference to human life language is now a requirement for Second Degree Murder and Voluntary Manslaughter but not Involuntary Manslaughter. According to the commentary, recklessness requires a conscious disregard of a substantial risk whereas recklessness with extreme indifference to human life requires a conscious disregard of an extreme risk.

In including this additional requirement that the defendant acted "with extreme indifference to human life," the CCRC misinterprets the D.C. Court of Appeals ruling in *Comber v. United States*, 586 A.2d 26, 39 (D.C. 1990). The CCRC relies on this decision to support this new definition of what is commonly referred to as depraved heart murder. However, *Comber* makes clear that, under current law, "malice may be found where conduct is reckless and wanton, and a gross deviation from a reasonable standard of care, ***or*** such a nature that the jury is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm. In such circumstances, the defendant's behavior is said to manifest a wanton disregard of human life." *Id.* at 39 (emphasis added) (internal citations omitted).

Moreover, despite the attempt to distinguish between "recklessly" and "recklessly with extreme indifference to human life," the Commentary provides no case law that clarifies the distinction. The Commentary looks at what other factors are at play in the defendant's decision to act in a manner that is clearly reckless. For example, was the individual trying to advance a legitimate social objective at the time he or she was acting recklessly? There simply is nothing in the common law that supports a consideration of this type in determining whether or not the defendant was reckless. The issue is whether or not the defendant was aware of the serious risk, *i.e.*, whether or not the defendant is reckless. It is in that context, where the defendant has behaved recklessly, that the defendant is deemed to have acted with "a wanton disregard of human life." *Comber*, 586 A.2d at 39. In making a determination as to whether or not the defendant showed such a disregard for human life, the D.C. Court of Appeals does not indicate that the jury should also take into account whether or not the defendant had a legitimate social objective. The D.C. Court of Appeals equates recklessness with a disregard of human life. There simply is no distinction.

8. USAO recommends that the RCC preserve the long-standing rule that "mere words" are inadequate provocation to mitigate Murder to Manslaughter.

Under the proposed changes, the CCRC has indicated that a defendant could conceivably mitigate a murder charge to manslaughter solely on the basis of offensive or provocative words uttered by the victim. First Draft of Report #36 at 439 n.157. This proposed change abandons the long standing rule that "mere words" are inadequate provocation to mitigate murder to manslaughter. More than a century ago, it was already considered "well settled" that "mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter." *Allen v. United States*, 164 U.S. 492, 497 (1896). Traditional formulations hold

that "[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation." *Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977). This principle has been repeated and reaffirmed in modern times. *See West v. United States*, 499 A.2d 860, 865 (D.C. 1985); *Bostick v. United States*, 605 A.2d 916, 919 (D.C. 1992); *High v. United States*, 972 A.2d 829, 836 n.5 (D.C. 2009).

The reason for the rule's persistence is quite intuitive; to mitigate a murder charge to manslaughter, with the accompanying reduction in sentence and lessened societal condemnation, is a major step which courts have been reluctant to take absent extremely provoking circumstances. Provocation is adequate only in "the most exceptional cases" wherein the deceased "provoked a defendant by committing an offense that was so grave, and so heinous" that the resultant killing would be, though not justified, expected. *High*, 972 A.2d at 834. Mitigation can be defended only when the provocation is "so extreme that a reasonable person could conclude that '[the deceased] had it coming.'" *Id.* (quoting Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 Rutgers L.J. 197, 209 (2005)).

Mere words cannot satisfy this requirement. "[W]ords do not constitute adequate provocation because they amount to 'a trivial or slight provocation, entirely disproportionate to the violence of the retaliation.'" *Id.* at 836 n.5 (quoting *Nicholson*, 368 A.2d at 565). Simply put, courts have not embraced the prospect that words alone, however hostile or vile, could confer any legitimacy upon a killing. *Cf. West*, 499 A.2d at 864-65 (holding that an exchange of hostile words was not adequate provocation).

The insufficiency of words as even a partial excuse for a killing is complemented by the law's expectation that reasonable people will be able to control their reactions to insults or slights. A reasonable person is expected to "control the feelings aroused by an insult or an argument." *Commonwealth v. Bermudez*, 348 N.E.2d 802, 804 (Mass. 1976). Indeed, courts need to "encourage people to control their passions" rather than "countenance the loss of self-control," as doing otherwise may enable bad behavior. *People v. Pouncey*, 471 N.W.2d 346, 389 (Mich. 1991).

There is also a consistency in the law's refusal to accept mere words as mitigation across different types of crimes. Mere words, in the absence of some other hostile act, "cannot act as a defense to the criminal charge of assault." *Boyd v. United States*, 732 A.2d 854, 855 (D.C. 1999). Since "mere words alone do not excuse even a simple assault," it would seem illogical to allow mere words to mitigate the far greater crime of murder. *Allen*, 164 U.S. at 497. In sum, courts have recognized that mere words constitute provocation for neither manslaughter nor other types of aggression; to change this would render the law either inconsistent or deeply problematic. *See United States v. Alexander*, 471 F.2d 923, 936 n.26 (D.C. Cir. 1972).

9. <u>USAO recommends removing voluntary intoxication from Chapter 11.</u>

Subsection 22E-1101(c) provides a section describing voluntary intoxication as a defense to Murder.

As an initial matter, Voluntary Intoxication is already included in § 22E-209 of the RCC that focuses solely on the general principles of intoxication. USAO submits it is simply confusing and duplicative to include another subsection on the same topic in Chapter 11. Moreover, if the CCRC agrees with USAO position in Paragraph 7, above, and removes the language that the person acted "with extreme indifference to human life," there will be no need for this section at all.

10. USAO recommends the following technical changes to the requirements of a mitigation defense.

USAO proposes the following additions to § 22E-1101(f)(1)(A) and (B) that are meant to clarify and correctly state the current status of the law and are not meant to be substantive changes.

> "(1) *Mitigation Defense.* . . . Mitigating circumstances means:
> (A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause based on the conduct of another as determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be; or
> (B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent a person from unlawfully causing imminent death or serious bodily injury to the actor or another."

11. USAO recommends removing any other partial defense as a mitigation defense.

Subsection 22E-1101(f)(1)(C) defines mitigating circumstances to broadly include any other legally recognized partial defense to murder. In an attempt to provide legal support, the CCRC cites to *Evans v. United States*, 277 F.2d 354 (D.C. Cir. 1960); however, *Evans* merely provides support for the long-standing principle that, in a homicide case where self-defense is raised, the character of the decedent is relevant in determining who acted as the aggressor, regardless of whether or not the defendant was aware of this reputation. *See, e.g.*, *Harris v. United States*, 618 A.2d 140, 144 (D.C. 1982). In other words, nothing in the *Evans* opinion supports including other partial defenses to murder as a mitigation defense. Rather, *Evans* simply further defines one aspect of self-defense law.

Self-defense as a mitigating defense is based on the actor's "extreme emotional disturbance." It is not something that is treated lightly in the law, especially when deadly force is used. To mitigate a case from murder to manslaughter based on any undefined partial defense is without legal support and would allow a defendant to avoid liability for murder based on any number of factors that the courts have previously determined are not sufficient to mitigate murder to manslaughter, *i.e.*, mere words.

12. USAO recommends removing a mitigating defense as a defense to Felony Murder and First Degree Murder.

Subsection 22E-1101(f) provides that mitigating circumstances are a defense not only to Second Degree Murder, but also to Felony Murder and First Degree Murder. As indicated above, USAO submits that Felony Murder should continue to be categorized as First Degree Murder. However it is classified, mitigating circumstances should not be a defense to Felony Murder or First Degree Murder.

The cases are clear that, in the context of murder that is mitigated to manslaughter, the murder that is mitigated is Second Degree Murder. *See, e.g.*, *United States. v. Bradford*, 344 A.2d 208, 215 (D.C. 1975) ("[k]illings classified as voluntary manslaughter would in fact be second degree murder but for the existence of circumstances that in some way mitigate malice"); *West v. United States*, 499 A.2d 860, 964 (D.C. 1985); *Comber v. United States*, 584 A.2d 26, 52 (1990) ("[t]he four mental states recognized as malicious for purposes of second-degree murder exist in [voluntary and involuntary] manslaughter, as well. . . . If those two states of mind [that relate to mitigation to voluntary manslaughter] are accompanied by recognized circumstances of mitigation, however, the crime is voluntary manslaughter.") The rationale is obvious—the courts have long recognized that a defendant cannot claim self-defense, even imperfect self-defense, because "[t]he mitigation rationale is inapplicable if the defendant had the intention of killing the victim when he went to the fatal encounter, *i.e.*, *before* the perceived need to defend himself from the victim arose." *Smith v. United States*, 203 A.3d 790, 800 (D.C. 2019). Thus, in the case of First Degree Murder, which requires premeditation, imperfect self-defense is not available to the defendant. Similarly, as *Comber* recognizes, in intentionally committing certain felonies, under the doctrine of Felony Murder, "[m]alice, an essential element of murder is implied from the intentional commission of the underlying felony even though the actual killing might be accidental." *Comber*, 584 A.2d at 39. Once that malice is implied from the intentional commission of the underlying felony, similar to First Degree Murder, the defendant cannot then rely on mitigation principles that may have developed after the formation of the initial intent that the defendant had when he first undertook to commit the felony.

13. USAO recommends keeping the gross negligence standard currently required for Involuntary Manslaughter cases and the civil negligence standard currently required for Negligent Homicide.

Subsection 22E-1102(b) provides that "[a] person commits involuntary manslaughter when that person recklessly causes the death of another person." In other words, subsection (b) now seeks to make Involuntary Manslaughter a lesser-included offense of Voluntary Manslaughter.

As discussed above in Section 7, USAO submits that the attempt to distinguish between recklessly and recklessly with extreme indifference to human life is contrary to well-established case law. Assuming that the CCRC agrees with that position, then the definition of Involuntary Manslaughter as drafted in the RCC is duplicative of the definition of Voluntary Manslaughter. However, as discussed below, USAO submits that it is appropriate to keep the distinction

currently in place in the common law between Involuntary Manslaughter, which requires that the actor was grossly negligent, and the negligence standard applicable to Negligent Homicide.

As discussed in *Comber*, the mental state required for Involuntary Manslaughter is akin to gross negligence, *i.e.*, "[o]ne who acts in conscious disregard of an extreme risk of death or serious bodily injury is guilty of murder, but if he or she is only unreasonably unaware of such a risk, the crime is involuntary manslaughter." *Comber*, 584 A.2d at 52. This standard of negligence is akin to the "Negligence" standard set forth in § 22A-206. *See* First Draft of Report #19 at 61.

A "lesser offense," if you will, is found in "Negligent Homicide" which is currently identified in Title 50 relating to Motor and Non-Motor Vehicles and Traffic. USAO does not object to moving "Negligent Homicide" to be included with the remaining Homicide offenses; however, USAO suggests that, consistent with common law, the *mens rea* required for the commission of this offense be akin to the civil standard of negligence that is currently required. This standard allows the perceived benefit of the risk-creating activity, *i.e.,* a police officer's high speed chase of a violent felon, to be considered in determining the applicable standard of care.

The law in the District of Columbia has long recognized that it is appropriate to hold someone who causes another's death through the negligent operation of a vehicle to be subject to criminal, felony, exposure, not merely civil liability. However, it also recognizes that because of the decreased *mens rea* requirement, Negligent Homicide is appropriately sentenced as a lesser felony, currently in the same category of the Voluntary Sentencing Guidelines as Second Degree Burglary or Felony Assault on a Police Officer, with a maximum prison term of three years. USAO submits that this categorization appropriately reflects the culpability that the law attaches to the conduct giving rise to Negligent Homicide charges.

Recently, Maryland has adopted a Negligent Homicide charge which is less severe than what had been Maryland's lowest charge in vehicular homicide cases (Vehicular Manslaughter), for which the standard is gross negligence. In other words, Maryland has added a less severe category of homicide that is consistent with D.C.'s current law that criminalizes both gross negligence and civil negligence. Even more, given the changing demographics, population, and street schemes of D.C., there has been a significant increase in the number of vehicular homicides in recent years. Prior to 2015, there were typically between 25 and 28 vehicular homicides per year in D.C., however, in the last two years, there has been an increase to 35 vehicular homicides each year.

14. <u>USAO recommends that, with the exception of the enhancements directly applicable to First and Second Degree Murder, as set forth below, all other enhancements be addressed with the general enhancements set forth in Chapter 6.</u>

Subsections 22E-1101(d)(3) and 22E-1102(d)(3) currently provide for enhanced penalties for Manslaughter and Murder. As it relates to enhancements for First and Second Degree Murder, USAO does not believe it is necessary to set forth those enhancements again, to the extent they are already provided for in Chapter 6.

USAO recommends that the enhancements directly applicable to First and Second Degree Murder, currently provided for in Section 22E-1101(d)(3)(C)-1101(d)(3)(G), remain with the edits discussed below.

15. USAO recommends that the enhancement for a defendant previously convicted of Murder be added to the enhancements for Murder.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who is convicted of murder who has previously been convicted for murder.

Current law enhances the penalty for individuals previously convicted of murder; however, the RCC has removed that enhancement because it is argued that it enhances the penalties twice and also is covered by the general recidivist enhancement. USAO submits that this enhancement can be included in a way that does not permit the actor to be sentenced under a general recidivist enhancement, as well as this recidivist enhancement, and allows for a greater enhancement to the sentence of a twice-convicted murderer.

The argument that inclusion of this enhancement results in the defendant suffering from enhanced penalties twice overlooks the consequences to the community when someone is murdered. A defendant who has a significant prior history score that is the result of multiple gun or misdemeanor offenses should not be sentenced the same as one who has previously taken a life, was given a second chance, and then takes yet another life. In the situation of an individual who has killed before and was afforded that second chance, especially in light of the Incarceration Reduction Amendment Act, an enhanced penalty is necessary.

USAO now regularly sees defendants who were incarcerated in the 1990s for murder and who are now being released. In multiple cases, these defendants, who have been afforded a second chance, have taken another life within a short time of being released from incarceration. USAO submits that this behavior warrants providing the Court the opportunity to impose an enhanced sentence.

16. USAO recommends that the enhancement for Murder of an individual capable of providing information to law enforcement be added to the enhancements for Murder.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who kills a victim who was or is believed to be a witness. The reasoning set forth by the CCRC is that the enhancement is not necessary because the defendant is subject to criminal liability under the Obstruction of Justice statute.

This reasoning fails for two reasons. First, the enhancement that is being removed is broader than the obstruction statute and penalizes additional behavior. For example, individuals are routinely killed because there is a belief that the individual already “snitched” to the police, when, in fact, the individual had not. Under the enhancement currently included in the law, because this witness was capable of providing this information (even if the victim had not), the enhancement still applies. However, because the intent of the defendant was to punish the victim

for (the mistaken belief) that the victim had already provided the information, the defendant cannot be charged with obstruction of justice if the victim had not actually provided the information. Additionally, often when a potential witness is killed, the case quickly turns cold and is not solved for years. In these situations, whereas the statute of limitations for murder has not yet run, including the enhancement, the government is time-barred from prosecuting the defendant for obstruction of justice.

Second, and more fundamentally, the murder of an individual believed to be a witness or who is or was a witness strikes at the core of the judicial system. The system simply does not work when witnesses, or perceived witnesses, are killed for cooperating with law enforcement. In the current "anti-snitch" culture, in which witnesses are regularly threatened and intimidated, the murder of a witness or perceived witness must be punished more severely given the damaging effects to the community, the victim, and the justice system.

17. USAO recommends that the enhancement for a defendant who commits First Degree Premeditated Murder during a Kidnapping, Robbery, Arson, Rape, or Sex Offense be added to the enhancements for Murder in certain circumstances.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who is convicted of a murder that is committed during a kidnapping, robbery, arson, rape, or sex offense. The rationale is that if an individual is convicted of Felony Murder, he is essentially punished twice for the underlying felony.

While this rationale may be sound in some contexts, it clearly does not apply in situations where the predicate felony for Felony Murder differs from the felony used to provide for an enhanced penalty. For example, in a case where the predicate felony is Kidnapping, and the Robbery is committed as an afterthought, the Robbery is not used as a predicate for the Felony Murder charge. Moreover, if the statute of limitations has already run for the Robbery charge, and this enhancement is removed, the defendant will not be subjected to any penalty for this additional egregious behavior. Similarly, if a defendant plans to commit a murder, and is guilty of First Degree Premediated Murder, but then commits the arson or rape as an afterthought, the government submits that this enhanced penalty is appropriate. To address the CCRC's concern, USAO suggests adding a limitation providing that the Felony Murder predicate and the basis for the enhancement must be different offenses.

18. USAO recommends that the enhancement for a drive-by or random shooting be added to the enhancements for Murder.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who is convicted of a murder that is a drive-by or random murder because the CCRC states that 'drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence." First Draft of Report #36 at 17.

USAO disagrees with this position. In today's environment, many homicides are the result of neighborhood "beefs" that do not target a specific person, and rather target a community as a whole. The perfect example of this is the murder of ten-year-old Makiyah Wilson. In a

situation such as that, where dozens of shots are fired randomly into a community, without any care for who is struck, a more severe sentence is absolutely warranted. Crime scenes today often are littered with upwards of 50 cartridge casings. The government may not be in a position to identify each and every person in the "zone of danger" such that it can effectively charge the defendant for shooting in the direction of each of those potential victims, but certainly an enhanced penalty for the complete disregard the defendant showed toward the safety of those individuals is warranted.

19. USAO recommends that the enhancement in § 22E-1101(d)(3)(E) be amended to more accurately reflect current case law.

Subsection 22E-1101(d)(3)(E) provides for an enhanced penalty if the defendant "[k]knowingly inflicts extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death."

USAO has no objection to codifying what previously has been referred to as "heinous, atrocious, and cruel," but recommends that it be changed to indicate that the defendant "knowingly inflicts extreme physical pain or mental suffering" and removes the references to a "prolonged period of time" and that it occurred "immediately prior" to the decedent's death.

For example, if a defendant tortures a victim, but the torture is not prolonged, this enhancement would not apply. USAO can think of countless examples of cases where the victim was subjected to incredible pain through the removal of various parts of the body, however, this may not be defined as occurring over a "prolonged period of time." Moreover, in the case of *U.S. v. Darron Wint*, the government was not in a position to show that the torture the victims endured occurred "immediately prior" to the decedent's death, but rather that it occurred at some point during the 22 hours preceding death. It should be sufficient to show that the torture was inflicted, even if it was inflicted ten hours before the fatal blow was executed. Because the only person who may be able to speak to the length or timing of the torture will necessarily be deceased, the government frequently will not be able to prove the length or timing of the torture, even if the evidence is clear that the torture took place.

20. USAO recommends removing § 22E-1101(e), which requires a bifurcated trial when certain enhancements are present.

Subsection 22E-1101(e) provides that when the government charges the enhancements that the defendant inflicted "extreme physical pain or mental suffering" or "mutilates or desecrates the decedent's body," that the evidence of extreme pain, mental suffering, mutilation or desecration be presented during the second phase of a trial. The rationale for this provision is to prevent the admissibility of unfairly prejudicial evidence. USAO submits there are two fundamental problems with this provision.

First, the bifurcation ignores the practical effects that will result from longer trials and repeatedly calling the same witnesses during both phases. For example, in almost all circumstances, the evidence technicians and medical examiners will need to be called during both phases of the trial, placing an increased burden on already limited resources. The medical

examiner will need to testify in the first phase regarding the cause and manner of death in some sort of sanitized fashion. During the second phase, the medical examiner will need to return to discuss in more detail the severity of the injuries inflicted upon the decedent. In addition to these professional witnesses, some civilians who are already reluctant to testify may be forced to testify twice, which can be a very difficult experience.

Second, and more importantly, in almost every case, it will be necessary to show the extensive injuries in proving intent, premeditation and deliberation, and in some cases, even in proving identity. For example, the extent of the injuries inflicted may be necessary to show the prior relationship between the decedent and the defendant, and hence the personal nature of the crime, in showing identity. In a situation involving a domestic homicide where the decedent was pregnant at the time she was killed, multiple stab wounds to the abdomen (as opposed to some other method of killing) could provide additional evidence that the wounds were committed by someone who was unhappy with the pregnancy. Moreover, in almost all cases, the best evidence of intent and deliberation can be found in the nature of how the crime was committed – *i.e.*, through the infliction of multiple stab wounds that tortured the victim for hours. In short, the exception to bifurcation, that "such evidence [that] is relevant to determining whether the defendant committed" the murder is permissible in the first phase of the trial, will consume the rule.

21. USAO recommends adding a "while armed" penalty enhancement.

This change would be consistent with current law. Under current law, the "while armed" enhancement applies to all crimes of violence and dangerous crimes, including murder. D.C. Code § 22-4502. Under the RCC, a defendant is equally culpable for a murder committed without the use of a dangerous weapon as a defendant who committed the murder without the use of a dangerous weapon. Although both scenarios result in the loss of a human life, the fact of a dangerous weapon should subject a defendant to a higher penalty. A defendant creates an increased risk of danger by introducing a weapon to an offense, which could result in additional harm to other potential victims than if the defendant committed the offense unarmed. USAO recommends using the language proposed in the General Comments.

VI. Chapter 12. Robbery, Assault, and Threats.

A. RCC § 22E-1201. Robbery.

1. USAO opposes removing a provision for a "sudden or stealthy seizure or snatching" robbery.

The current D.C. Code defines robbery as the taking of property from another person "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." D.C. Code § 22-2801. The RCC dramatically alters the current robbery statute by entirely eliminating "sudden or stealthy seizure or snatching" as a species of robbery. RCC § 22E-1201. In so doing, the RCC creates significant ambiguity concerning whether snatch-takings of property from a person against his or her will constitute robberies. The commentary provides that "depending on the specific facts, it is conceivable that a purse snatching could

involve sufficient use of physical strength to constitute 'overpowering physical force.'" RCC App. J at 194 n.1145. "However, this would be a highly fact specific inquiry, and the revised robbery statute is not intended to categorically include or bar purse snatchings." *Id.*

The statute, however, provides no guidance whatsoever concerning the circumstances under which a snatching would rise to the level of an overpowering use of force. For example, if a defendant pulls a phone out of a complainant's hand, USAO believes that this would constitute a robbery. In this example, the defendant overpowered the complainant by being able to take the phone from the complainant's hand. The RCC, however, is vague as to whether this would constitute a robbery. The law from other jurisdictions runs the gamut, with several jurisdictions—including reformed jurisdictions—concluding that snatching away the property of another necessarily requires the use of force sufficient to overcome the will of the victim. *See, e.g.*, *State v. McKinney*, 961 P.2d 1, 8-9 (Kan. 1998) (snatching purse away from victim constituted threat of bodily harm even if defendant did not push victim); *Com. v. Brown*, 484 A.2d 738, 741 (Pa. 1984) ("It is clear to us that any amount of force applied to a person while committing a theft brings that act within the scope of robbery under § 3701(1)(a)(v) . . . . The degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property in, on or about his body."); *State v. Stein*, 590 A.2d 665, 667-68 (N.J. 1991) (observing that some jurisdictions "implicitly recognize that victims do not turn over their property willingly, even if they do not resist or struggle with a thief. Thus, the amount of physical energy necessary to take the property is deemed sufficient to support a robbery conviction."). Indeed, in focusing on whether the use of force was "overpowering," the RCC suggests that the crime the defendant commits (robbery or theft) is entirely different depending on whether the victim of the crime resists and attempts to fend off the attacker or does not resist out of fear.

Moreover, the RCC introduces this ambiguity concerning whether forcefully snatching property from another constitutes robbery without creating an enhanced degree for theft from a person. *See* RCC § 22E-1201. While many jurisdictions hold that snatching constitutes larceny rather than robbery, those jurisdictions generally distinguish " 'larceny from the person,' which is usually a higher grade or degree of larceny permitting severer punishment irrespective of the value of the property." 4 Wharton's Criminal Law s. 465 (15th ed.) (citing Ariz. Rev. Stats. Ann., § 13-1802(C); Colo. Rev. Stats., § 18-4-401(5); Conn. Gen. Stats. Ann., § 53a-123(a)(3); Utah Code Ann., § 76-6-412(1)(a)(iv); Rev. Code of Wash. Ann. § 9A.56.030(1)(b)).

2. <u>USAO recommends creating a separate statutory provision for Carjacking, instead of subsuming Carjacking within Robbery.</u>

The RCC substantively alters current D.C. law by eliminating the offense of carjacking—which is currently the subject of its own detailed and thorough statutory provision (D.C. Code § 22-2801)—and subsuming it within the Fourth Degree Robbery provision. *See* RCC § 22E-1201(d). The RCC provides no justification for altering the law in this fashion, beyond stating that this alteration is "consistent with national norms." RCC App. J at 197. Yet the commentary to the RCC identifies five reformed jurisdictions that retain a separate offense of carjacking. *Id.* at 197 n.1168 (N.J. Stat. Ann. § 2C:15-2; 18 Pa. Stat. Ann. § 3702; 720 Ill. Comp. Stat. Ann. 5/18-3; Del. Code Ann. tit. 11, § 836; Tenn. Code Ann. § 39-13-404). The commentary appears to have overlooked two additional reformed jurisdictions that retain a separate carjacking statute.

See Wi. St. 943.23(1r); Kan. St. 21-3716 (defining aggravated burglary to include entering a car when a person is present with intent to commit a felony). Moreover, the reformed jurisdictions identified in the commentary that distinguish carjacking within their robbery statutes generally treat carjackings as among the most severe forms of robbery. *See* Conn. Gen. Stat. Ann. § 53a-136a (providing a separate penalty for carjacking robberies and imposing a three-year mandatory minimum for such offenses); N.Y. Penal Law § 160.10 (treating carjacking as second degree robbery); Utah Code Ann. § 76-6-302 (defining aggravated robbery to include carjacking). By eliminating the separate carjacking statute and subsuming carjacking within fourth degree robbery, the RCC proposes a dramatic change to the current law with little explanation. USAO believes that Carjacking should remain a separate statutory provision, and that it is inappropriate to subsume it into Robbery.

3. USAO recommends, in subsection (e)(4)(B), adding the words "or engaging in conduct that otherwise places the complainant or any person present other than an accomplice in reasonable fear of being killed, kidnapped, subject to bodily injury, or subject to a sexual act or sexual contact.

   With USAO's changes, this subsection would provide:

   "(B) Threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act or sexual contact against the complainant or any person present other than an accomplice, or engaging in conduct that otherwise places the complainant or any person present other than an accomplice in reasonable fear or being killed, kidnapped, subject to bodily injury, or subject to a sexual act or sexual contact;"

USAO believes that the RCC proposed Robbery statute is too limited and does not clearly enough encompass certain situations that should be prosecuted as robberies. If a defendant approaches a complainant, points a gun at the complainant, and tells the complainant to give the defendant money, it is not clear that that conduct could be prosecuted as a robbery under the RCC statute. While the commentary from "Criminal Threats" under RCC § 22E-1204 states that the word "communicates" should be construed broadly, and that "non-verbal conduct such as displaying a weapon" can constitute a threat (RCC Commentary at 106 & n.6), the language in the robbery statute alone is not as clear. Because the plain language of the statute will control, rather than the Commentary, USAO recommends that the plain language clarify that this type of action would be covered by the Robbery statute. This "putting in fear" robbery is properly criminalized under the current robbery statute, *see* D.C. Code § 22-2801, and should continue to be a basis for robbery liability.

4. USAO recommends tracking the "while armed" and "protected person" provisions consistent with the recommendations in the General Comments, above.

5. In the alternative, USAO recommends, in subsections (a)(2)(A), (b)(2)(B), (c)(2)(A)(ii), (c)(2)(B), replacing the words "a dangerous weapon" with the words "a dangerous weapon or imitation dangerous weapon."

This is already incorporated in subsection (d)(2)(A)(ii), and USAO believes that this language should be consistent throughout the statute. As discussed elsewhere in USAO's comments, if a gun is not recovered, it is impossible to ascertain if the firearm used is real or an imitation, and they often look identical. Injury could be caused by an imitation dangerous weapon, so it is important to clarify that

6. In the alternative, USAO recommends, in subsection (d)(2)(A)(ii), replacing the words "displays" with the words "displays or uses."

This is already incorporated in subsections (a)(2)(A), (b)(2)(B), and (c)(2)(A)(ii), and USAO believes that this language should be consistent throughout the statute.

7. USAO recommends, in subsection (e)(4)(B), replacing the words "sexual act" with the words "sexual act or sexual contact."

With USAO's changes, this subsection would provide:

"(B) Threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act or sexual contact against the complainant . . ."

"Sexual act" is a term defined in the RCC, which includes certain sexual offenses, but does not include a "sexual contact." Adding the term "or sexual contact" clarifies that robbery can be accomplished by either threatening to commit a sexual act or by threatening to commit a sexual contact (which would include, for example, contact between the penis and genitalia). This is consistent with other provisions in the RCC, including the Burglary statute, which states that a defendant committing a burglary may intend to commit, among other offenses, either a sexual act or sexual contact. RCC § 22E-2701(a)(4).

8. USAO recommends, in subsection (e)(4)(C), replacing the word "overpower" with the words "is sufficient to overpower."

With USAO's changes, this subsection would provide:

"(C) Using physical force that is sufficient to overpowers the complainant or any person present other than an accomplice."

This is consistent with current law regarding force in the sexual abuse context. Force is defined as, among other things, "the use of such physical strength or violence *as is sufficient* to overcome, restrain, or injure a person." D.C. Code § 22-3001(5) (emphasis added). This is consistent with the current sexual abuse jury instructions, which state: "Force means the use or threatened use of a weapon, the use of such physical strength or violence *as is sufficient to*

overcome, restrain or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim." D.C. Crim. Jur. Instr. 4.400 (emphasis added).

B. RCC § 22E-1202. Assault.

1. USAO recommends that the Assault provision include liability for assaults that do not result in bodily injury.

With USAO's changes, subsections (c) and (f) would provide:

"(c) *Third Degree.* A person commits third degree assault when that person:
(1) Recklessly causes significant bodily injury to the complainant
. . .
(2) Recklessly causes bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon; or
(3) With the intent to cause bodily injury to the complainant, uses force or violence against the complainant, while knowingly armed with or having readily available what, in fact is a dangerous weapon or imitation dangerous weapon.
. . .

(f) *Sixth Degree.* A person commits sixth degree assault when that person:
(1) Recklessly causes bodily injury to the complainant; or
(2) With the intent to cause bodily injury to the complainant, uses force or violence against the complainant."

Under the RCC, all assaults now require that the complainant suffer "bodily injury." Under current law, by contrast, an assault may be committed in one of three ways—attempted battery, intent to frighten, and non-violent sexual touching, none of which require that the complainant suffer bodily injury. *See* D.C. Crim. Jur. Instr. 4.100. Intent-to-frighten assaults and non-violent sexual touching assaults would no longer be prosecuted under the RCC Assault statute; to a large extent, intent-to-frighten assaults would be prosecuted under the RCC's Menacing statute. The RCC's Offensive Physical Contact and Nonconsensual Sexual Conduct statutes would fill the gap left by the exclusion of non-violent sexual touching assaults from the RCC's Assault statute.

With respect to attempted-battery assaults, however, the RCC statute shifts the focus from the defendant's conduct (using force or violence against another) to the results of the defendant's actions (causing bodily injury). The defendant's actions may be the same whether the defendant inflicts bodily injury or not, so it is more appropriate to focus on the actions of the defendant when assessing whether the defendant committed an Assault than solely on the injuries created by the defendant's actions. In making this change, the RCC statute may shield from liability under the Assault provision defendants who, using force or violence, intend to cause physical injury to another but do not achieve that result. *See Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986) ("Attempt-battery assault requires proof of an attempt to cause a physical injury, which may consist of any act tending to such . . . injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual

violence against the person."). It may also exclude from Assault liability defendants who actually cause physical injury to the complainant, but which the government is unable to prove at trial. This could include, for example, a situation where an eyewitness observes the entire assault, but cannot see whether the complainant had any visible injuries or suffered any physical pain. If the complainant is uncooperative, the government may rely exclusively on the eyewitness testimony to prove that the assaultive conduct took place. This defendant, however, should not be subject to lesser penalties for the same conduct (and subject to liability only for attempted assault or second degree offensive physical contact) simply because the complainant was uncooperative. The defendant's actions were the same, regardless of what injuries the complainant suffered, or what injuries the government was able to prove at trial. The government therefore believes that the crux of assault liability should rest on what actions the defendant took, not exclusively based on what injuries the complainant suffered.[5]

2. USAO recommends tracking the "while armed" and "protected person" provisions consistent with the recommendations in the General Comments, above.

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

USAO submitted a comment on this issue in its May 20, 2019 comments. USAO further notes, however, that a rebuttable presumption for charging a juvenile defendant as an adult pursuant to Title 16 only applies when the defendant is charged with "[m]urder, first degree sexual abuse, burglary in the first degree, robbery while armed, *or assault with intent to commit any such offense* . . . and any other offense properly joinable with such an offense." D.C. Code § 16-2307(e-2)(1)–(2) (emphasis added). There is no similar provision for attempts to commit such offenses. Thus, eliminating liability for assault with intent to commit offenses would limit USAO's ability to exercise its discretion in charging such individuals pursuant to Title 16.

In the alternative, if the RCC makes this change, the RCC would need to include a corresponding update to D.C. Code § 16-2307 replace "assault with intent to commit any such offense" with "an attempt to commit any such offense" so that Title 16 could continue to apply to these offenses.

4. USAO recommends adding a separate law criminalizing assaults and offensive physical contact on a law enforcement officer.

Unlike the Assault on a Police Officer ("APO") offense in current law, there does not appear to be a specific law criminalizing assaultive or offensive physical contact against a police officer under the RCC. USAO believes there should be such a law akin to the current APO law.

As written, the RCC criminalizes an assault on a law enforcement officer only if the assault results in some bodily injury to the complainant. *See* RCC § 22E-1202(a)(4) (first degree assault for serious bodily injury); RCC § 22E-1202(c)(1) (third degree assault for significant bodily injury); RCC § 22E-1202(e)(1) (fifth degree assault for bodily injury). "Bodily injury" is defined as "physical pain, illness, or any impairment of physical condition." RCC § 22E-701. If

[5] Consistent with current law, however, USAO believes that it is appropriate to have higher gradations of assault based on whether the complainant suffered either significant bodily injury or serious bodily injury.

bodily injury is not present, the person's physical actions towards a police officer would merely constitute second-degree offensive physical contact. *See* RCC § 22E-1205(b). USAO believes that there should be an RCC statute tracking the current APO statute, that creates liability for assaulting a police officer, regardless of whether injury results.

Based on the Table of Contents, it appears that that "Resisting Arrest" is a possible or planned RCC statute in Chapter 34 that has not yet been drafted. But USAO believes that a person's physical conduct might not qualify as "resisting arrest" and yet should still be criminalized.

For example, under the RCC, if a person pushes or shoves an officer, the person would not be guilty of an assault; the person would merely be guilty of the generic second-degree offensive physical contact. But, today, if a person shoves a police officer, the person would be guilty of assault on a police officer (APO). *See* D.C. Crim. Jur. Instr. 4.114 (APO does not require any bodily injury).

The Court of Appeals has recognized that the current APO statute "was intended to 'deescalate the potential for violence which exists whenever a police officer encounters an individual in the line of duty.'" *Coghill v. United States*, 982 A.2d 802, 806 (D.C. 2009) (quoting *In re C.L.D.*, 739 A.2d 353, 355 (D.C. 1999). USAO believes the RCC should separarly criminalize assault on and offensive contact with police officers, in recognition of officer's special roles and the potential for violence if a person does make offensive physical contact with the officer.

5. <u>USAO recommends adding the words "regardless of whether the arrest, stop, or detention was lawful" to RCC § 22E-1202(g)(B) and RCC § 22E-1205(c)(2).</u>

   With USAO's changes, RCC § 22E-1202(g)(B) and RCC § 22E-1205(c)(2) would provide:

   "The use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose<u>, regardless of whether the arrest, stop, or detention was lawful</u>;"

As written, the RCC states that a person cannot assert a justification or excuse defense to a charge of assault on a law enforcement officer if, among other things, the use of force "occurred during an arrest, stop, or detention for a legitimate police purpose." RCC § 22E-1202(g)(B). The word "legitimate" is undefined in the RCC. This could lead to unnecessary litigation over whether the police officer's actions were for a "legitimate" purpose.

In addition, the word "legitimate" could connote that the officer's purpose was also *unlawful*. The RCC should make clear that whether an officer's actions were *legitimate* is not related to whether the officer's actions were *lawful*. Indeed, the Court of Appeals explicitly made this point in *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989), when it held that a person acts without justifiable excuse if the officer is engaged in an arrest for any legitimate police purpose, "regardless of whether or not the stop or detainment was lawful." *See id.* at 128 ("We further note that when Congress amended D.C. Code § 22–505, it made clear that the common

law right to defend one's self against an illegal arrest henceforth did not apply in the District of Columbia.").

To synchronize the language of *Speed* with the rest of the language from the RCC, USAO suggests adding the phrase "regardless of whether the arrest, stop, or detention was lawful" to RCC § 22E-1202(g)(B) and RCC § 22E-1205(c)(2).

C. RCC § 22E-1203. Menacing.

1. USAO opposes eliminating "intent-to-frighten" liability from the Assault statute, and recommends subsuming the Menacing statute into the Assault statute.

Current law criminalizes conduct wherein an individual commits a "threatening act" that would "reasonably" create in another a "fear of immediate injury." D.C. Crim. Jur. Instr. 4.101. Such cases also require that the defendant have the "apparent ability to injure" the victim. *Id.* Where this threatening act is committed with a "dangerous weapon," it is classified as Assault with a Dangerous Weapon ("ADW"); where no weapon is involved, it is classified as a Simple Assault ("SA"). Two key elements differentiate these "intent-to-frighten" assaults from threats cases: a) the defendant must have the "present ability to inflict immediate bodily harm"; and b) the victim must have "concurrent awareness" of the assault. *Joiner-Die v. United States*, 899 A.2d 762, 766-67 (D.C. 2006). The RCC has transformed these intent-to-frighten cases into a new two-part "Menacing" statute. This incorporates former ADW-intent-to-frighten as First Degree Menacing and SA-intent to frighten as Second Degree Menacing. As USAO understands it, the distinction between "menace" and "threats" is that in "menace" cases a reasonable person would believe that the "harm would **immediately** occur" whereas threats cases merely require a reasonable person to believe that the harm would occur at some point.

The most common set of cases this will affect are what are commonly referred to as "gun point" cases—fact patterns where a defendant draws a weapon and points it at a victim but does not fire it. Such cases are currently explicitly labeled as ADWs, per the D.C. Criminal Jury Instructions. Particularly with respect to these ADW-intent-to-frighten / First Degree Menacing cases, USAO is concerned that this will result in ADW-intent-to-frighten cases being explicitly treated as lesser cases, and likely subject to lesser penalties. USAO believes that this does not represent the dangers created by this offense, and that a departure from current law is not warranted.

2. USAO opposes the creation of a right to a jury trial for all completed or attempted menacing cases.

The RCC specifically provides that menacing cases, whether charged as a completed offense or an attempt, are jury demandable. RCC § 22E-1203(d). USAO opposes this for multiple reasons. First, because no similar provision exists in the Assault statute, this provision will lead to incongruous results. Someone who commits Sixth Degree Assault and actually causes bodily injury will not have a right to a jury trial, whereas someone who commits Second Degree Menacing and only communicates that he or she intends to cause harm will have a right to a jury trial. Second, and more fundamentally, the offense of Menacing is unrelated to the

rationale that the RCC seeks to follow with respect to jury demandability. The RCC offers that the jury trial is "intended to ensure that the First Amendment rights of the accused are not infringed" because the District recognizes a "heightened need to provide jury trials to defendants accused of crimes that may involve civil liberties." It is unclear how there are any particular, unique constitutional interests created by this offense. Third, this will have a tremendous impact on misdemeanors prosecutions in D.C. The vast majority of misdemeanors are prosecuted in non-jury trials. There are significantly more resources required to prosecute jury trials, including USAO resources, court resources, defense resources, and community resources (as members of the jury). Creating jury trial rights for many crimes that have historically been prosecuted as misdemeanor non-jury trials (such as intent-to-frighten simple assault, or its analog Second Degree Menacing), would create a tremendous strain on already limited resources.

3. USAO recommends including an enhancement for committing this offense against a protected person.

USAO proposes using the language suggested in the General Comments, above. The RCC advocates removing the possibility of enhancements based on the victim's status (minor, senior citizen, transportation worker, District official or employee, or citizen patrol member) on the theory that those status-based enhancements should be reserved for cases involving physical injury and "other serious crimes such as sexual assault." First, this incorporates a value judgment that first degree menacing cases, which will involve threats of immediate harm with a dangerous or imitation dangerous weapon, are not "serious." Second, this enhancement reflects the added seriousness of committing these crimes against vulnerable community members. USAO believes that this enhancement should be available for the offense of Menacing.

D. RCC § 22E-1204. Criminal Threats.

1. USAO opposes the creation of a right to a jury trial for all completed or attempted threats cases.

The RCC specifically provides that threats cases, whether charged as a completed offense or an attempt, are jury demandable. RCC § 22E-1204(d). USAO opposes this for reasons similar to those articulated above with respect to the Menacing statute. First, it is incongruous that a right to a jury trial would exist for a Second Degree Threat but not for a Sixth Degree Assault, where that threat is carried out. Second, there are no particular constitutional interests creates by the Threats statute. Third, this will have a tremendous impact on misdemeanor prosecutions in D.C. Although under current law, Threats is punishable by 6 months' incarceration, and is therefore a jury-demandable offense, *see* D.C. Code § 22-407, Attempted Threats is punishable by 180 days' incarceration under the general attempt statute, and is therefore not a jury-demandable offense, *see* D.C. Code § 22-1803. Misdemeanor prosecutions almost always proceed under Attempted Threat theories, resulting in non-jury trials.

2. USAO recommends including an enhancement for committing this offense against a protected person.

USAO proposes using the language suggested in the General Comments, above. The RCC advocates removing the possibility of enhancements based on the victim's status (minor, senior citizen, transportation worker, District official or employee, or citizen patrol member) on the theory that those status-based enhancements should be reserved for cases involving physical injury and "other serious crimes such as sexual assault." First, a threat of bodily harm could be a serious offense in certain circumstances. Second, this enhancement reflects the added seriousness of committing these crimes against vulnerable community members. USAO believes that this enhancement should be available for the offense of Threats.

E. RCC § 22E-1205. Offensive Physical Contact.

1. If the RCC does not adopt USAO's recommendation to eliminate the "bodily injury" requirement from the Assault statute in RCC § 22E-1202, USAO recommends making second-degree offensive physical contact an explicit lesser-included offense of sixth-degree assault.

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

"(b) *Second Degree.* A person commits second degree offensive physical contact when that person:

. . .

(4) Or commits what would be sixth degree assault but for the absence of bodily injury.

USAO believes that the line between a sixth-degree assault and second-degree offensive physical contact will sometimes be hard to delineate. The question will often turn on whether the victim actually experienced "physical pain." *See* RCC § 22E-701 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."). That condition will sometimes be met with simply the victim's testimony (for example, "I experienced pain when he hit me."), but oftentimes the factfinder will have to make a determination as to whether the victim was truly in pain.

For this reason, and to eliminate the need for USAO to charge both second-degree offensive physical contact and sixth-degree assault in every run-of-the-mill assault case in which Person A hits Person B, USAO recommends that the RCC make explicit that second-degree offensive physical contact is a lesser-included offense of sixth-degree assault.

There are many situations in which a defendant's actions towards the victim are close to a sixth-degree assault. For example, a defendant might slap a victim in the face. The victim may report that the slap "hurt." The victim's statement may not be sufficient to qualify as "bodily injury" if the factfinder does not find that the victim actually experienced "physical pain." Moreover, there may be cases in which the victim does not testify (*e.g.*, the slap is captured on video, or testified to by a third-party witness), or the victim testifies at trial that the slap did *not*

hurt (despite initially saying otherwise). Even if a video or third-party witness testifies to all of the facts of the assault, those facts may not be sufficient to prove the fact of an injury, even if one existed. In these situations, the factfinder should have the option to find the defendant guilty of second-degree offensive physical contact.

2. USAO recommends including an enhancement for committing this offense against a protected person.

USAO proposes using the language suggested in the General Comments, above. The RCC advocates removing the possibility of enhancements based on the victim's status (minor, senior citizen, transportation worker, District official or employee, or citizen patrol member) on the theory that those status-based enhancements should be reserved for cases involving physical injury and "other serious crimes such as sexual assault." First, conduct that constitutes first degree offensive physical contact could be a serious offense in certain circumstances. Bodily fluid can contain transmittable disease, and can lead to serious consequences for a victim who comes into contact with that bodily fluid and become infected with a disease. Second, this enhancement reflects the added seriousness of committing these crimes against vulnerable community members. USAO believes that this enhancement should be available for the offense of Offensive Physical Contact.

F. RCC § 22E-1206. Stalking.

1. USAO recommends that, in subsection (a)(1), the culpability standard be changed from "purposely" to "knowingly."

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly ~~purposely~~, on two or more separate occasions . . ."

Knowingly is the proper intent for the course of contact necessary for a stalking charge. This is particularly the case for the "communicating to the complainant" prong. It is more appropriate to require proof that the defendant was aware that his actions were "practically certain" to result in communications, rather than that he "consciously desired" such a result. This is particularly the case with regard to electronic communications with the complainant.

2. USAO recommends removing the notice requirement in subsection (a)(1)(B).

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) Communicating to the complainant, by use of a telephone, mail, delivery service, electronic message, in person, or any other means ~~after knowingly receiving notice from the complainant, directly or indirectly, to stop such communication~~;"

As currently written, the onus is on the complainant to provide notice to the defendant to stop a course of repeated communication, and the defendant must "knowingly receiv[e]" such notice. Under current law, there is no requirement that the complainant provide notice to the

defendant. Adding this requirement engages in victim blaming as it suggests that a crime did not occur unless the complainant took action to stop someone's harassment. No other similar crime requires the victim to act in a certain way. The law should remain as is, whereby the government must prove only that the defendant either knew or should have known that his actions would reasonably cause the complainant or someone in the complainant's circumstances to be seriously disturbed or suffer distress. Further, consistent with the current statute, subsection (a)(1) provides the conduct that the defendant must engage in, and subsection (a)(2) provides the mental state that the defendant must possess with respect to the effect of the defendant's actions on the complainant. Inserting this notice requirement into the first subsection conflates the two subsections. To be liable for stalking, the defendant still must either intentionally or negligently cause the complainant to be in fear or suffer distress, which implies that the defendant either knew or should have known that the defendant's actions were unwelcome.

3. USAO opposes removing "using another individual's personal identifying information" from the stalking provision.

With USAO's changes, a new subsection (a)(1)(D) would provide:

"(D) Using another individual's personal identifying information."

Under current law, stalking includes "using another individual's personal identifying information." D.C. Code § 22-2132(8)(C). There is no reason to exclude this from the RCC stalking statute, as it is an appropriate provision. USAO recommends including it in the revised statute.

4. USAO recommends removing the exemptions in subsections (b)(2) and (b)(3)

USAO believes that there should not be a *per se* bar on stalking certain government officials. Even when a complainant is involved in their official duties, they could still be subject to stalking if the defendant is, for example, following that person home and harassing them in their personal space. If a complainant is involved in a work call while at home, that person would likely be involved in their "official duties." This exemption, however, should not be expanded so far as to permit a government official to be stalked or harassed in their personal space when they could arguably fall under this statute. There is no definition of "government official" in the RCC, so it appears that all government workers could fall within this provision. Moreover, any "employee of a business that serves the public" could include virtually all businesses, and therefore virtually all employees.

USAO believes that subsection (b)(1) encompasses the constitutional concerns that could otherwise be implicated by this statute, and is an appropriate catch-all for the concerns articulated in subsection (b)(3) as well.

5. USAO recommends removing subsection (d), which provides for a jury trial.

Under the RCC, both stalking and attempted stalking are jury demandable. Under current law, misdemeanor stalking is jury demandable, but attempted stalking is not. This is appropriate

and is consistent with current law. There is no particular interest in attempted stalking being jury demandable, as jury trials involve considerable resources that non-jury trials do not.

6. USAO recommends that, in subsection (e)(2)(A), adding the words "or was subject to a court order or condition of release prohibiting stalking, harassing, assaulting, or threatening the complainant."

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

   "(A) The person, in fact, was subject to a court order or condition of release prohibiting contact with the complainant, or was subject to a court order or condition of release prohibiting stalking, harassing, assaulting, or threatening the complainant;"

Orders prohibiting a defendant from stalking, harassing, assaulting, or threatening a complainant (often called a "No HATS order") are frequently used in D.C. Superior Court, and are often a result of a complainant wanting some legal protection from a defendant, but not wanting a complete stay away or no contact order. Because a defendant violating the "No HATS order" is violating a court order in the same manner as a defendant who violated a no contact order, the same penalty enhancement and consequence should apply. This is particularly true when one of the orders specifically prohibits the defendant from "stalking" the complainant.

7. USAO recommends that, in subsection (e)(2)(B), the word "one" be replaced by the words "one or more."

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

   "(B) The person, in fact, has one or more convictions for stalking any person within the previous 10 years;"

Certainly, if a defendant has more than one past conviction for stalking, that defendant should be subject to this enhancement as well.

8. USAO recommends that, in subsection (e)(2)(C), requirement that the defendant "recklessly disregarded" the complainant's age be removed.

   With USAO's changes, § 22E-1206(e)(2)(C), would provide:

   "(C) The ~~person was, in fact, 18 years of age or older and at least 4 years older than the complainant and the person recklessly disregarded that the~~ complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth in its General Comments regarding a protected person.

VII. Chapter 13. Sexual Assault and Related Provisions.

A. General Comments.

1. USAO recommends removing the Reasonable Mistake of Age defense from RCC § 22E-1302(g)(2) and removing the requirement of recklessness as to the complainant's age throughout the other provisions in Chapter 13 (Sexual Assault and Related Provisions) and Chapter 16 (Human Trafficking).

Under current law, an actor's mistake of the complainant's age is not a defense to child and minor sexual abuse misdemeanor and felony offenses or penalty enhancements. *See* D.C. Code §§ 22-3011(a) and 22-3020(a)(1) and (a)(2). Nor is an actor's actual knowledge of, or reckless disregard for, the complainant's true age an element of these crimes. *Id.* These well-established strict liability laws are based on the principles that children below a particular age are insufficiently mature to make a considered decision to engage in sexual acts with an adult, and that as a society, it is our obligation to protect children against sexual predators, pedophiles, adults who groom children for sexual acts, and adults who engage in sexual acts with children younger than an age at which the child can make an informed decision regarding consent. These laws also recognize that individuals who hold positions of trust or authority have greater power and control over the children they supervise. As such, only a child of more advanced years has the insight and maturity to make a reasoned decision to consent to a sexual relationship.

In each of the sexual abuse offenses involving child or minor complainants, the RCC introduces the actor's knowledge of, or reckless disregard for, the child/minor's age, either as an essential element for the government to prove or as an affirmative defense. *See* RCC § 22E-1301(g) (Sexual Assault Offense Penalty Enhancement if the actor recklessly disregarded that the complainant was under the age of 16, or the complainant was under the age of 18 and the actor was in a position of trust with or authority over the complainant); § 22E-1302(g) (Sexual Abuse of a Minor Defense, for a prosecution under subsection (b) and (e), if the actor reasonably believed that the complainant was under 16 years of age at the time of the offense, such reasonable belief was supported by an oral statement by the complainant about the complainant's age, and the complainant was 14 years of age or older; or, for a prosecution under subsection (c) and (f), if the actor reasonably believed that the complainant was under 18 years of age at the time of the offense, such reasonable belief was supported by an oral statement by the complainant about the complainant's age, and the complainant was 16 years of age or older; § 22E-1304(a)(2) (for Sexually Suggestive Conduct with a Minor, it is an element that the actor was reckless as to the fact that the complainant was under 16 or 18); § 22E-1305(a)(2) (for Enticing a Minor Into Sexual Conduct, it is an element that the actor was reckless as to the fact that the complainant was under 16 or 18); §22E-1306(a) (for Arranging for Sexual Contact with a Minor, it is an element that the actor was reckless as to the fact that the complainant was under 16 or 18); § 22E-1602(c)(1) (Forced Commercial Sex Offense Penalty Enhancement if the child was age 12 or over and the actor was reckless as to the fact that the complainant was under the age of 18); §22E-1604(c)(1) (Trafficking in Commercial Sex Offense Penalty Enhancement if the child was age 12 or over and the actor was reckless as to the fact that the complainant was under the age of 18); §22E-1605(a)(3) (for Sex Trafficking of Minors, it is an element that the actor was reckless to the fact that the complainant was under the age of 18); and §22E-1608(a)(3)

or (b)(2)(B) (for Commercial Sex with a Trafficked Person, it is an element that minor was under age 12 or over and the actor was reckless as to the fact that the complainant was under the age of 18); *see also* § 22E-1603(c) (Trafficking in Labor or Services Offense Penalty Enhancement if the actor was reckless as to the fact that the complainant was under 18 years of age).

USAO believes there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age. The change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws. To demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age. This evidence is the exact type that exposes the extremely intimate life of the victim (and here, a child victim) that the Rape Shield Laws were specifically designed to exclude except in the most unusual cases where the probative value of the evidence is precisely demonstrated. *See Brown v. United States*, 840 A.2d 82 (D.C. 2004) ("With rare exceptions, evidence of prior sexual activity by the victim with persons other than the defendant is not admissible in a rape case because it has no probative value on the issue of consent and no relevance to the victim's credibility."); *Brewer v. United States*, 559 A.2d 317, 320 (D.C.1989) (upholding the exclusion of evidence that rape victim had engaged in acts of prostitution when there was no showing that she consented to sexual intercourse with the defendant); *Meaders v. United States*, 519 A.2d 1248, 1254 (D.C.1986) ("[p]rejudice results when cross-examination probes into the private life of a rape victim").

Changes to the strict liability nature of these child/minor sexual abuse provisions in the RCC will also open the floodgates to admission of extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act. This could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc. Introduction of such evidence, through cross-examination of the victim or otherwise, would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case.

Nor is a reasonable mistake of age defense a legal principle that is well-recognized or uniformly adopted by other jurisdictions. The RCC notes that "there is mixed support in the criminal codes of the reformed jurisdictions for codifying an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years." RCC App. J. at 260.

USAO understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age. USAO believes that escaping liability if the actor has not "recklessly disregarded" the complainant's true age, without more, does not strike the proper balance of these competing interests. Were the RCC to modify the strict liability nature of the current law, which USAO strongly opposes, USAO recommends that strict liability remain for offenses involving complainants under the age of 14 when the actor is not in a position of trust with or authority over the complainant, or under the age of 18 when the offense involves an actor who is in a position of trust with or authority over the complainant.

2. USAO recommends removing the age differential language wherever it represents a change from current law.

Consistent with current law, USAO recommends that the age differential language be removed in many, but not all, the portions of this chapter. The requested changes are set forth below in their respective sections.

Certain age differential requirements exists in current law, and should remain in the RCC, such as the age differential requirements in the Sex Abuse of a Minor provision (providing, for example, that a defendant must be at least 4 years older than the complainant to be liable for that offense). The age differential requirements in that section, however, serve a very different purpose than the enhancements in the Sexual Assault provision. The age differential requirements in the Sex Abuse of a Minor statute exclude from liability consensual or non-forced sexual acts/contacts between minors who are close enough in age that the law has deemed them capable of consenting. The Sexual Assault statute, however, only deals with sexual acts/contacts involving force or violence. The age differential, therefore, is not a relevant consideration. The focus is on the particular vulnerability of the victim who has been subjected to forced sexual acts/contacts, not on whether the defendant happened to be a similar age. This is true regardless of whether the age differential applies to a child, or to an elderly person. *See* RCC § 22E-1301(g)(4)(E). USAO believes that the RCC should track current law in this respect, and that no additional age differentials should be added to the statute.

Further, as to the RCC's proposal to create an age differential requirement where the defendant is in a position of trust or authority over the complainant (for example, in RCC § 22E-1301(g)(4)(C), USAO recommends that this requirement be removed as well. In this situation, the important consideration is the power dynamic between the defendant and the complainant, not on the age differential. Because the defendant must be in a position of trust with or authority over the complainant to satisfy the enhancement in this subsection, the defendant's relative age is not relevant. The focus is on the relationship between the parties, and the defendant violating the trust that was put into him or her. The RCC notes that, although there is "strong support in the criminal codes of the 29 reformed jurisdictions for requiring an age gap between the actor and the complainant" in the first, second, fourth, and fifth degree sexual abuse of a minor statutes, "there is mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap." RCC App. J at 258-60.

3. USAO recommends applying the Offense Penalty Enhancements in subsection 22E-1301(g) to all offenses in RCC §§ 1301–1307.

   Under current law, the following aggravating circumstance apply to *all* sexual offenses:

   (1) The victim was under the age of 12 years at the time of the offense;
   (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim;
   (3) The victim sustained serious bodily injury as a result of the offense;
   (4) The defendant was aided or abetted by 1 or more accomplices;
   (5) The 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; or
   (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.

D.C. Code § 3020(a). Although these are mostly codified in RCC § 22E-1301(g),[6] USAO believes that, consistent with current law, these offenses should apply to all offenses in RCC §§ 1301–1307. It is important that these offenses apply to all sexual offenses, as the conduct that they seek to deter merits an enhancement. For example, if a defendant engaged in a non-forced sexual act with his 13-year-old biological daughter, that would be criminalized under the RCC as second degree sexual abuse of a minor under § 22E-1302(b). The fact that the defendant is the complainant's biological father, however, renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant. Because § 22E-1302 does not contain an enhancement recognizing the existence of a significant relationship, the RCC does not reflect the more serious nature of that relationship in categorizing and punishing that offense. Likewise, although the Sexual Abuse of a Minor offense accounts for the victim's age in its gradations, other offenses, such as Enticing a Minor Into Sexual Conduct and Arranging for Sexual Conduct with a Minor, do not account for the victim's age. A victim under 12 years old is more vulnerable than a victim who is at least 12 years old, and the offense should account for that additional vulnerability by creating an enhancement for a victim under 12 years old.

B. RCC § 22E-1301. Sexual Assault.

1. USAO recommends, in subsections (a)(1), (b)(1), (c)(1), and (d)(1), adding the words "engages in or."

   With USAO's changes, subsection (a)(1), (b)(1), (c)(1), and (d)(1) would provide:

   "(1) Knowingly engages in or causes the complainant to engage in or submit to a sexual [act/contact];"

[6] As discussed further above, USAO is recommending that a version of D.C. Code § 22-3020(a)(5), which provides an aggravating circumstance if the defendant "is or has been found guilty of committing sex offenses against 2 or more victims," be codified in RCC § 22E-606.

USAO believes that it makes more sense to focus on the actions of the defendant than on the actions of the complainant. This change also tracks the current law.

2. USAO recommends that, in subsections (a)(2)(A) and (c)(2)(A), the words "overcomes, restrains, or causes bodily injury" be replaced by the words "is sufficient to overcome, restrain, or cause bodily injury."

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

   "(A) By using physical force that is sufficient to overcome~~s~~, restrain~~s~~, or cause~~s~~ bodily injury to the complainant."

This is consistent with current law. Force is defined as, among other things, "the use of such physical strength or violence *as is sufficient* to overcome, restrain, or injure a person." D.C. Code § 22-3001(5) (emphasis added). This is consistent with the current jury instructions, which state: "Force means the use or threatened use of a weapon, the use of such physical strength or violence *as is sufficient to* overcome, restrain or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim." D.C. Crim. Jur. Instr. 4.400 (emphasis added).

3. USAO recommends, in subsections (a)(2)(B) and (c)(2)(B), replacing the words "using a weapon" with the words "displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon."

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

   "(B) By displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon against the complainant."

There is no definition of "weapon" in the RCC, so USAO believes that the word "dangerous weapon" is a better word than "weapon." USAO also believes that it is appropriate to include an imitation dangerous weapon in this provision. If a firearm is never recovered, it is impossible to prove that the firearm was a "firearm" as defined in D.C. Code § 22-4501(2A) and as required by the "dangerous weapon" definition. If the defendant flees the scene after committing the sexual assault, it will be very difficult, and frequently impossible, to recover the firearm used during the offense to ascertain if it was real or imitation. Moreover, imitation firearms often look identical to real firearms. It should be irrelevant to the offense of sexual assault whether the firearm used to compel a sexual act/contact was real or an imitation. The victim's belief that he/she was being threatened by a real firearm, and the victim's submission as a result of that belief, is the crux of the offense, not whether a firearm was truly a firearm.

USAO also believes that it is appropriate to include the words "in fact" to specify that the "knowingly" *mens rea* does not carry over to the dangerous weapon. This is consistent with the terminology in other sections that uses the words "in fact," including for Robbery*, see* RCC

§ 22E-1201(a)(2)(A), (b)(2)(B), (c)(2)(A)(ii), (c)(2)(B), (d)(2)(A)(ii), and Assault, *see* RCC § 22E-1202(a)(3), (b)(2), (c)(2).

USAO finally believes that it is appropriate to include the words "displaying or using" a dangerous weapon. "Using" a weapon could imply that the weapon needs to be discharged, which is not required under the law. Rather, "displaying" either a dangerous weapon or imitation dangerous weapon could compel a complainant to submit to a sexual act or contact, and should be criminalized as sexual assault. This is consistent with the terminology in other sections that uses the words "displaying or using," including for Robbery, *see* RCC § 22E-1201(a)(2)(A), (b)(2)(B), (c)(2)(A)(ii), and Assault, *see* RCC § 12E-1202(a)(3), (b)(2), (c)(2).

4. USAO recommends, in subsections (a)(2)(C) and (c)(2)(C), replacing the word "threatening" with the words "threatening or placing the complainant in reasonable fear."

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

   "(C) By threatening or placing the complainant in reasonable fear:"

This tracks current law, which provides liability for first degree sexual abuse by, among other means, "threatening *or placing that other person in reasonable fear* that any person will be subjected to death, bodily injury, or kidnapping." D.C. Code § 22-3002(a)(2) (emphasis added). The current law is an appropriate statement of the law. Threats must contain a communication. *See* RCC § 22E-1204. A complainant may be placed in reasonable fear through means other than a threat, and when the complainant engages in or submits to a sexual act/contact on that basis, that should be punished as sexual assault. There is no reason to limit this statute further than its current language.

5. USAO recommends, in subsections (a)(2)(C)(ii) and (c)(2)(C)(ii), replacing the words "sexual act" with the words "sexual act or sexual contact."

   With USAO's changes, subsections (a)(2)(C)(ii) and (c)(2)(C)(ii) would provide:

   "(ii) To commit an unwanted sexual act or sexual contact;"

This does not change the requirement of a sexual act for First Degree Sexual Assault, or of a sexual contact for Third Degree Sexual Assault. Rather, it clarifies the basis of the threat that can be a basis for those offenses. It is appropriate to include a sexual contact in this definition. If, for example, a defendant threatened to engage in a sexual contact with the complainant's child (contact between penis and genitalia), and the complainant submitted to a sexual act with the defendant because of that threat, the defendant's conduct should be criminalized as a sexual assault. A threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability.

6. USAO recommends, in subsections (a)(2)(C)(ii) and (c)(2)(C)(ii), removing the word "significant."

   With USAO's changes, subsections (a)(2)(C)(ii) and (c)(2)(C)(ii) would provide:

   "(ii) To . . . cause ~~significant~~ bodily injury to any person; or"

   USAO believes that the appropriate language is "bodily injury," rather than "significant bodily injury." If, for example, a defendant threatened to punch a complainant repeatedly in the face, and the complainant submitted to a sexual act on that basis, the defendant's conduct should be criminalized as first degree sexual assault. The defendant would likely have only caused "bodily injury" to the complainant, not "significant bodily injury," but that threat of force is sufficiently serious that it should be criminalized here. The current definition of "bodily injury" for sexual offenses in D.C. Code § 3001(2) is admittedly more limited in certain respects than the RCC's proposed definition of "bodily injury" in RCC § 22E-701. The current definition provides that "bodily injury" is "injury involving loss or impairment of the function a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." D.C. Code § 22-3001(2). Because this definition includes "injury involving significant pain," however, it is also far more expansive than the RCC's proposed definition of "significant bodily injury." Threatening to be punch someone repeatedly in the face could constitute a threat of an "injury involving significant pain" under current law, and should be equally criminalized under the RCC.

7. USAO recommends adding a provision to subsections (a)(2) and (c)(2) to provide "after rendering the complainant unconscious."

   With USAO's changes, a new subsection (a)(2)(E) and (c)(2)(E) would provide:

   "(E) After rendering the complainant unconscious."

   This language is included in the current statute in D.C. Code § 22-3002(a)(3) and § 22-3004(3). If, for example, a defendant physically assaults a complainant to the point of unconsciousness, and then engages in a sexual act or sexual contact with that complainant while the complainant remains unconscious, that conduct may not currently fall within the RCC's proposed definition of sexual assault. Tracking current law, this conduct should remain part of the offense, and should be an option for liability.

8. USAO recommends, in subsections (a)(2)(D)(ii) and (c)(2)(D)(ii), adding the provision, "Substantially incapable, mentally or physically, of declining participation in the sexual [act/contact]," and in subsections (b)(2)(B) and (d)(2)(B), adding the provision, "Incapable, mentally or physically, of declining participation in the sexual [act/contact]."

   With USAO's changes, new subsections (a)(2)(D)(ii)(IV) and (c)(2)(D)(ii)(IV) would provide:

"(IV) Substantially incapable, mentally or physically, of declining participation in the sexual [act/contact]."

With USAO's changes, new subsections (b)(2)(B)(iv) and (d)(2)(B)(iv) would provide:

"(iv) Mentally or physically incapable of declining participation in the sexual [act/contact]."

Under current law for Second Degree Sexual Abuse, a defendant commits that offense if, among other means, the defendant "knows or has reason to know that the other person is . . . (B) Incapable of declining participation in the sexual act." D.C. Code § 22-3003(2)(B); *see also* D.C. Code § 3005(2)(B) (Fourth Degree Sexual Abuse). It is appropriate to attach liability in this situation, and is consistent with current law.

9. USAO recommends removing subsections (e)(1)(A) and (e)(1)(B).

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

"(e) *Defenses.*

(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.~~

(2) *Burden of Proof.* If any evidence is present at trial of the complainant's effective consent to the actor's conduct or the actor's reasonable belief that the complainant gave effective consent to the actor's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt."

USAO believes that this exception should not exist here. If the complainant is under 16 years of age and the defendant is at least 4 years older, that conduct is appropriately criminalized in the Sexual Abuse of a Minor provision, and should not be further criminalized here, assuming the complainant gave effective consent.

10. USAO recommends, in subsection (g)(1), modifying the "while armed" enhancement.

With USAO's changes, subsection (g)(1) would provide:

"(1) The actor committed the offense of sexual assault while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon;"

USAO believes that it is more appropriate to include language from the current "while armed" enhancement statute, *see* D.C. Code § 22-4502(a), than the RCC's current language of "displaying or using" a weapon. Under subsection (g)(1), the defendant must commit an offense by "displaying or using" a weapon. Under current law, the "while armed" enhancement applies if the defendant either is "armed with or ha[s] readily available" the prohibited weapon. See D.C. Code § 22-4502(a). Under current law, there is no requirement that the defendant actually use or display the weapon during the offense. See Crim. Jur. Instr. 8.101 (B) (defining "readily available" language). The current statutory language is more appropriate, as the RCC's language is too limited. Even if a defendant does not use the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. As stated above, even if inadvertent, a firearm could discharge and subject a complainant or others to unanticipated injury. Of course, the presence of a firearm also increases the chances of an intentional discharge and subsequent resultant injury. This conduct should be punished more severely than an offense that does not involve a weapon. USAO believes that it is appropriate to require that the defendant "knowingly" be armed with or have readily available the weapon.

11. USAO recommends, in subsection (g)(2), removing the words "that were present at the time of the offense."

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

    "(2) The actor knowingly acted with one or more accomplices ~~that were present at the time of the offense~~;"

    First, the wording being "present at the time of the offense" is too vague. If the defendant and an accomplice jointly kidnapped, threatened, and assaulted a complainant, but each left the room while the other one engaged in a sexual act with the complainant, would each individual be deemed to be present "at the time of the offense"? It is unclear if "at the time of the offense" applies solely to the sexual act or sexual contact, or if it applies to the totality of the actions leading to the forced sexual act or sexual contact. Because this vagueness leaves room for the more limited reading, USAO believes that it is inappropriate. Second, the word "present" is too vague. Does this require a physical presence, or is a remote presence, such as by telephone, sufficient? Third, this is contrary to the current law, which allows for this enhancement if "the defendant was aided or abetted by 1 or more accomplices." D.C. Code § 22-3020(a)(4). Under current law, there is no requirement that an accomplice be present at the time of the offense, which is appropriate.

12. USAO recommends, in subsection (g)(3), removing the words "during the sexual conduct."

    With USAO's changes, subsection (g)(3) would provide:

"(3) The actor recklessly caused serious bodily injury to the complainant ~~during the sexual conduct~~;"

Under current law, this enhancement can apply if "[t]he victim sustained serious bodily injury as a result of the offense." D.C. Code § 22-3020(a)(3). The RCC proposed revision inappropriately limits this enhancement. If, for example, a defendant viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time had passed, the defendant would not have caused serious bodily injury "during the sexual conduct"—that is, during the sexual act. USAO believes that this enhancement should be applicable to this hypothetical, and the words "during the sexual conduct" limit it too far. Further, the words "during the offense" in current law are vague for the reasons set forth above with respect to subsection (g)(2), and duplicative in any event. It is clear that this enhancement can only apply when it relates to a sexual offense, because this is an enhancement listed in Chapter 13, so would likewise be unnecessary for the statute to specify that the injury be caused "during the offense."

13. USAO recommends removing the recklessness language and the age differential language in subsection (g)(4).

With USAO's changes, subsection (g)(4) would provide:

"(4) At the time of the offense:

(A)The complainant, in fact, was under 12 years of age ~~and the actor was, in fact, at least 4 years older than the complainant~~;

~~(B) The actor was reckless as to the fact that the complainant was under 16 years of age and the actor was, in fact, at least 4 years older than the complainant;~~

(C) The~~ actor was reckless as to the fact that the~~ complainant, in fact, was under 18 years of age,~~ that~~ and the actor was in a position of trust with or authority over the complainant~~, and that the actor, in fact, was at least 4 years older than the complainant~~;

~~(D)The actor was reckless as to the fact that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least 4 years older than the complainant;~~

(E) The ~~actor was reckless as to the fact that the~~ complainant, in fact, was 65 years of age or older ~~and the actor was, in fact, at least 10 years younger than the complainant~~; or

(F) The ~~actor was reckless as to the fact that the~~ complainant, in fact, was a vulnerable adult."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code § 22-3020(a)(1), (a)(2).

If the CCRC does not accept USAO's recommendation to remove subsection (e)(1)(B), as discussed above, then USAO recommends that these changes be made to subsection (e)(1)(B) as well.

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

1. USAO recommends removing subsection (g)(2), the Reasonable Mistake of Age defense.

USAO relies on the rationale set forth above in the General Comments to this Chapter.

If the CCRC includes some version of the Reasonable Mistake of Age defense, USAO makes the following recommendations.

a. USAO recommends, in subsections (g)(2)(A)(ii) and (g)(2)(B)(ii), adding the words "to the defendant."

With USAO's changes, subsections (g)(2)(A)(ii) and (g)(2)(B)(ii) would provide:

"(ii) Such reasonable belief is supported by an oral statement by the complainant to the defendant about the complainant's age;"

The only relevance of the complainant making an oral statement about the complainant's age is if the defendant was aware of that statement. Given that the defendant's subjective belief is the issue, and that this is the defendant's burden to prove, it is appropriate to require that the statement be made to the defendant for it to have any relevance.

b. USAO recommends, in subsections (g)(2)(A) and (g)(2)(B), adding the provision, "and the actor had not had a reasonable opportunity to observe the complainant."

With USAO's changes, subsections (g)(2)(A) and (g)(2)(B) would include a new subsection (iv) which would provide:

"and (iv) The actor had not had a reasonable opportunity to observe the complainant."

This is consistent with the current Sex Trafficking of Children statute, D.C. Code § 22-1834(b), which provides that if the defendant had a "reasonable opportunity to observe" the complainant, the government need not prove the defendant's knowledge or recklessness as to the complainant's age. This language is consistent with the federal Sex Trafficking of Children statute. 18 U.S.C. § 1591(c).

c. USAO recommends, in subsections (g)(2)(A)(iii) and (g)(2)(B)(iii), adding the words "in fact."

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

"(iii) The complainant, in fact, was 14 years or age or older."

With USAO's changes, subsection (g)(2)(B)(iii) would provide:

"(iii) The complainant, in fact, was 16 years of age or older."

USAO believes that it is the RCC's intent to have strict liability in these situations. Adding the words "in fact" clarifies this.

2. USAO recommends removing the age differential requirements in subsections (c)(3)(B) and (f)(3)(B).

With USAO's changes, subsections (c)(3)(B) and (f)(3)(B) would provide:

"(B) The actor is at least 18 years of age ~~and at least 4 years older than the complainant~~."

USAO relies on the rationale set forth above in the General Comments to this Chapter. USAO's change is consistent with current law, which does not require an age differential where the defendant is in a position of trust with or authority over the complainant. D.C. Code §§ 22-3009.01, 22-3009.02. The age differential is not appropriate here because it is the fact of the relationship, which creates a power imbalance, which is at the heart of the prohibition set forth in this statute. The age of the defendant is not the relevant consideration, as the power dynamic inherent in the relationship between the parties is the key element.

To be clear, consistent with current law, USAO is not requesting that the age differential language be removed in subsections (a), (b), (d), or (e).

3. USAO recommends, in subsections (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1), adding the words "engages in or."

With USAO's changes, subsections (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1) would provide:

"(1) Knowingly engages in or causes the complainant to engage in or submit to . . ."

Current law provides liability for First Degree Child Sexual Abuse when the defendant "engages in a sexual act with that child or causes that child to engage in a sexual act." D.C. Code § 22-3008. Consistent with current law, it is appropriate to provide liability for not only causing the complainant to engage in sexual conduct, but also for engaging in sexual conduct with the complainant. If, for example, a very young child were to "initiate" a sexual encounter with an adult defendant, and the defendant knowingly participated in the sexual encounter with the child, it could not be said that the defendant "caused" the child to engage in the conduct. However, liability should still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant.

4. USAO recommends, in subsection (g), adding a provision stating that consent is not a defense.

With USAO's changes, a new subsection (g)(4) would provide:

"(4) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1302, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

D. RCC § 22E-1303. Sexual Exploitation of an Adult.

1. USAO recommends changing subsections (a)(2) and (b)(2) to require strict liability instead of recklessness.

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

"(2) In one or more of the following ways:
(A) The actor, in fact, is a teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school and ~~recklessly disregards that~~:
(i) The complainant:
(I) Is, in fact, an enrolled student in the same secondary school; or
(II) In fact, receives services or attends programming at the same secondary school; and
(ii) The complainant, in fact, is under the age of 20 years."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code §§ 22-3009.03, 22-3009.04, 22-3011.

2. USAO recommends adding the words "or other person of authority" to subsections (a)(2)(A) and (b)(2)(A).

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

"(A) The actor, in fact, is a teacher, counselor, principal, administrator, nurse, coach, or security officer, or other person of authority in a secondary school;"

This catch-all exists under the current statute at D.C. Code §§ 22-3009.03, 22-3009.04, and should be included in the RCC as well. Although the RCC's list includes many of the potential positions of authority, it is retain to have a catch-all for any individuals this list may inadvertently fail to include. For example, a doctor at the school would not be included in this list, and a nurse would. This dichotomy would not exist if there were a catch-all.

3. USAO recommends, in subsections (a)(1) and (b)(1), adding the words "engages in or."

With USAO's changes, subsections (a)(1) and (b)(1), would provide:

"(1) Knowingly engages in or causes the complainant to engage in or submit to . . ."

The current law provides liability for First Degree Sexual Abuse of a Ward, Patient, Client, or Prisoner when the defendant "engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client or prisoner to engage in a sexual act." D.C. Code § 22-3013; *see also* D.C. Code § 22-3014 (same, with a sexual contact required). The current law for First Degree Sexual Abuse of a Patient or Client provides liability when the defendant "engages in a sexual act with another person . . ." and does not include the phrase "or causes the complainant to engage in or submit to a sexual act." D.C. Code § 22-3015(a); *see also* D.C. Code 22-3016(a) (same, with a sexual contact required). Consistent with current law on First and Second Degree Sexual Abuse of a Ward, Patient, Client, or Prisoner, it is appropriate to provide liability for not only causing the complainant to engage in sexual conduct, but also for engaging in sexual conduct with the complainant. If, for example, a prisoner were to initiate a sexual encounter with a prison guard, and the prison guard knowingly participated in the sexual encounter with the prisoner, it could not be said that the defendant "caused" the complainant to engage in the conduct. However, liability should still attach in this situation, as the defendant acted culpably by engaging in sexual conduct with the complainant.

4. USAO recommends adding the words "medical or therapeutic" to subsections (a)(2)(C)(i) and (b)(2)(C)(i).

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

   "(i) Falsely represents that the sexual [act or contact] is for a bona fide professional, medical, or therapeutic purpose."

The current statute provides liability when the actor "represents falsely that the sexual act is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided." D.C. Code § 22-3015(a)(1). To be consistent with current law, and to ensure that the medical and therapeutic purposes are expressly included in this statute, USAO believes the addition of this provision is appropriate.

5. USAO recommends adding a provision stating that consent is not a defense.

   With USAO's changes, a new subsection (d) would provide:

   "(d) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1303, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion. The consent law is currently codified at D.C. Code § 22-3017(a), and should be directly codified in the RCC as well.

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

1. USAO recommends changing subsection (a)(2) to require strict liability instead of recklessness.

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

   "(2) The actor, in fact, is at least 18 years of age and at least 4 years older than the complainant; and:
   - (A) The complainant, in fact, is under 16 years of age ~~The actor was reckless as to the fact that the complainant is under 16 years of age~~; or
   - (B) The complainant, in fact, is under 18 years of age, and the actor is in a position of trust with or authority over the complainant ~~The actor was reckless as to the fact that the complainant is under 18 years of age and the actor knows that he or she is in a position of trust with or authority over the complainant~~.

   USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code §§ 22-3010.01, 22-3011.

2. USAO recommends, in subsection (a), changing the word "contact" to "conduct."

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

   "(a) *Offense.* An actor commits sexually suggestive conduct ~~contact~~ with a minor when that actor:"

   This is not a substantive change, but clarifies the statute.

3. USAO recommends, in subsection (a)(1), adding a provision "or engages in or causes the complainant to engage in a sexual act or a sexual contact."

   With USAO's changes, a new subsection (E) would provide:

   "(E) Engages in or causes the complainant to engage in a sexual act or a sexual contact;"

   This would make Sexually Suggestive Conduct with a Minor a lesser-included offense of Second and Fifth Degree Sexual Abuse of a Minor. The current offense of Misdemeanor Sexual Abuse of a Child is frequently treated for plea purposes as a lesser charge to First and Second Degree Child Sexual Abuse. This change allows this current practice to continue. Assuming, further, that Sexually Suggestive Conduct with a Minor is a misdemeanor offense, and all of the various gradations of Sexual Abuse of a Minor remain felony offenses, it makes sense to have a misdemeanor lesser-included offense, which can benefit both the government and the defense.

4. USAO recommends modifying the language in subsection (a)(1)(A).

   With USAO's changes, subsection (a)(1)(A) would provide:

   "(A) Touches the complainant directly or causes the complainant to touch the actor directly, or inside the complainant's or actor's ~~his or her~~ clothing with intent to cause the sexual arousal or sexual gratification of any person;"

First, USAO believes that it is appropriate to modify the language to include touchings that are either direct or inside the clothing. As set forth in the next point, if a person is naked, it is unclear whether a touching would be "inside" the clothing. Second, USAO believes that it is appropriate to include liability for either the defendant touching the complainant, or the defendant causing the complainant to touch the defendant. Under current law, a defendant touching the stomach of a complainant while moaning and getting an erection would subject a defendant to liability under this subsection, while a defendant causes a complainant to touch the defendant's stomach while the defendant moans and gets an erection would not subject a defendant to liability under this subsection. This dichotomy does not make sense, as both acts should subject a defendant to liability under this subsection.

5. USAO recommends, in subsection (a)(1)(B), replacing the words "inside his or her clothing" with the words "directly or through the complainant's clothing."

   With USAO's changes, subsection (a)(1)(B) would provide:

   "(B) Touches the complainant directly or through the complainant's clothing ~~inside or outside his or her clothing~~ . . ."

Although the RCC's proposed language tracks the current law in the Misdemeanor Sexual Abuse of a Child statute, D.C. Code § 3010.01, USAO believes that this language is confusing. For example, if a child is completely naked and not wearing clothing, would a defendant be touching that child "inside or outside his or her clothing"? Certainly, it is equally (or more) culpable to engage in this sexual conduct with a naked child as with a clothed child. USAO believes that the language "directly or through the complainant's clothing" provides clarity and reduces confusion. This tracks the language in the "Sexual contact" definition in RCC § 22E-701.

6. USAO recommends, in subsection (a)(1)(B), adding the word "complainant's."

   With USAO's changes, subsection (a)(1)(B) would provide:

   "(B) Touches the complainant . . . close to the complainant's genitalia, anus, breast, or buttocks with intent to cause the sexual arousal or sexual gratification of any person."

This clarifies that the intimate body parts must belong to the complainant, not to the actor, which could be vague.

7. USAO recommends adding a provision stating that consent is not a defense.

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

"(4) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1304, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

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

1. USAO recommends changing subsection (a)(2) to require strict liability instead of recklessness, and to remove the age differential requirements in subsection (a)(2)(B).

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

"(2) The actor, in fact, is at least 18 years of age, and:

(A) The complainant, in fact, is under 16 years of age, and the actor, in fact, is at least 4 years older than the complainant; ~~The actor:~~

~~(i) Was reckless as to the fact that the complainant is under 16 years of age; and~~

~~(ii) In fact, is at least four years older than the complainant;~~

(B) The complainant, in fact, is under 18 years of age, and the actor is in a position of trust with and authority over the complainant; ~~The actor:~~

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

~~(ii) Knows that the actor is in a position of trust with or authority over the complainant; and~~

~~(iii)In fact, is at least four years older than the complainant;~~ or

(C) The complainant:

(i) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and

~~(ii) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age; and~~

(iii) In fact, the actor is at least 4 years older than the purported age of the complainant."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code §§ 22-3010, 22-3011.

To be clear, consistent with current law, USAO is not recommending that the age differential requirements be eliminated from subsection (a)(2)(A) or (a)(2)(C).

2. USAO recommends adding a provision stating that consent is not a defense.

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

"(c) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1305, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

G. RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

1. USAO recommends changing subsections (a)(2) and (a)(3) to require strict liability instead of recklessness.

With USAO's changes, subsections (a)(2) and (a)(3) would provide:

"(2) Either:

(A) The actor and any third person, in fact, are at least 18 years of age ~~and at least 4 years older than the complainant~~; and

(i) ~~(A)~~ The complainant, in fact, is under 16 years of age, and the actor and any third person are at least 4 years older than the complainant; ~~The actor was reckless as to the fact that the complainant is under 16 years of age;~~ or

(ii) ~~(B)~~ ~~The actor:~~

(a) ~~(i)~~ The complainant, in fact, is under 18 years of age ~~Was reckless as to the fact that the complainant is under 18 years of age~~; and

(b) ~~(ii) Knows that t~~The actor is in a position of trust with or authority over the complainant; or

(B) ~~(3)~~ The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant; and the complainant:

(i) ~~(A)~~ In fact, is a law enforcement officer who purports to be a person under 16 years of age~~; and~~

~~(B) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age~~."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This is consistent with current law. *See* D.C. Code §§ 22-3010.02, 22-3011.

2. USAO recommends adding a provision stating that consent is not a defense.

With USAO's changes, a new subsection (b) would provide:

"(b) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1306, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

H. RCC § 22E-1307. Nonconsensual Sexual Conduct.

1. USAO recommends rewriting subsections (a) and (b).

USAO recommends that the subsections be rewritten to provide:

"(a) *First Degree*. An actor commits first degree nonconsensual sexual conduct when that actor:
   (1) Knowingly causes the complainant to engage in or submit to a sexual act; and
   (2) Is negligent as to whether he is acting without the complainant's effective consent.

(b) *Second Degree.* An actor commits second degree nonconsensual sexual conduct when that actor:
   (1) Knowingly causes the complainant to engage in or submit to a sexual contact; and
   (2) Is negligent as to whether he is acting without the complainant's effective consent."

This change bifurcates the *mens rea* required for the defendant's actions and the *mens rea* as to the complainant's lack of consent. This change both clarifies the statute and elementizes this provision to make it consistent with other sexual assault provisions. It is appropriate for the defendant to be required to act "knowingly" with respect to his actions, as is required in the other sexual assault provisions in the RCC.

As to the lack of consent, negligence is the appropriate *mens rea*. The current misdemeanor sexual abuse statute essentially assigns a negligence standard to the defendant's *mens rea* as to the complainant's lack of consent, providing that the defendant must "have knowledge or reason to know that the act was committed without that other person's permission." D.C. Code § 22-3006. . Citing *Owens*, the RCC Commentary is concerned that "negligence is disfavored as a basis for criminal liability" (RCC Commentary at 237 n.22), but "this discussion in *Owens* merely reflects courts' longstanding reluctance to read a negligence standard into a criminal statute in the absence of 'a clear statement from the legislature.'" *Coleman v. United States*, 202 A.3d 1127, 1143-44 (D.C. 2019) (upholding "should have known," *i.e.*, negligence, liability as to stalking; "The 'should have known' language represents just the type of clear legislative statement not present in *Owens*, and it evinces the Council's intent to allow a conviction for stalking based on what an objectively reasonable person would have known.") (quoting *Carrell*, 165 A.3d at 320 (citing *Elonis v. United States*, ––– U.S. ––––, 135 S.Ct. 2001, 2011, 192 L.Ed.2d 1 (2015))). This negligence standard is consistent with the plain language of the current misdemeanor sexual abuse statute, the jury instructions on

misdemeanor sexual abuse, *see* D.C. Crim. Jur. Instr. 4.400(V)(2) (defendant "knew or should have know that s/he did not have [complainant's] permission"), and with case law defining misdemeanor sexual abuse, *see Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001).

2. USAO recommends removing subsection (c).

USAO believes that this provision is confusing and may inadvertently include conduct that should be criminalized. Lack of "effective consent" is required for the offense of Nonconsensual Sexual Conduct. "Effective consent" is defined in RCC § 22E-701 to include consent other than consent induced by "deception." Because deception is already included in the definition of effective consent, it is redundant to include it here.

I. 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.

1. USAO recommends placing § 22E-1309 and § 22E-1310 in the same location of the D.C. Code as D.C. Code §§ 4-1321.01 *et seq*.

For clarity, USAO recommends that these provisions be in the same location in the D.C. Code, which is a change from their current placement in the D.C. Code. RCC § 22E-1309 and § 22E-1310 address civil liability for failure to make a mandatory report, and D.C. Code §§ 4-1321.01 *et seq.* address criminal liability for failure of certain persons to make a mandatory report. To reduce confusion about mandatory reporting obligations, it makes sense to place them in the same location.

2. USAO recommends adding the word "Universal" to the heading of § 22E-1309.

With USAO's changes, the heading of § 22E-1309 would provide:

"RCC § 22E-1309. Universal Duty to Report a Sex Crime Involving a Person Under 16 Years of Age."

USAO believes that it is appropriate to clarify that this provision applies "universally." This universal reporting requirement is in contrast to the reporting requirements in D.C. Code § 4-1321.01 *et seq.*, which only apply to certain individuals specifically required to make a report of abuse or neglect, and which subject those individuals to criminal penalties for failure to report. Including the word "universal" in the heading of § 22E-1309 provides notice to all adults that they are obligated to report child sex crimes to the authorities.

3. USAO recommends that subsection (b) be modified to include the provision, "No legal privilege, except the privileges set forth in subsection (b), shall apply."

With USAO's changes, a new subsection (b)(4) would provide:

"(4) No legal privilege, except the privileges set forth in subsection (b), shall apply."

Although this is implied, USAO believes that this statement clarifies that other privileged relationships do not create an exemption from mandatory reporting. This provision is included in the current law at D.C. Code § 22-3020.52(c), and it is appropriate to include it in the RCC as well.

4. USAO recommends that subsection (b)(3) be modified to include the provision, "A confession or communication made under any other circumstances does not fall under this exemption."

   With USAO's changes, a new subsection (b)(3)(E) would provide:

   "(E) A confession or communications made under any circumstances does not fall under this exemption."

This language is currently codified in D.C. Code § 22-3020.52(c)(2)((B), and USAO believes it is appropriate to include it here to clarify the law.

VIII. Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

A. RCC § 22E-1401. Kidnapping.

1. USAO recommends, in subsections (a)(3)(C) and (b)(3)(C), changing the words "any felony" to the words "any criminal offense," and in subsections (a)(3)(E) and (b)(3)(E), changing the words "Commit a sexual offense defined in Chapter 13 of this title" to the words "Commit any criminal offense."

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

   "(C) Facilitate the commission of any ~~felony~~ criminal offense or flight thereafter;"

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

   "(E) Commit ~~a sexual offense defined in Chapter 13 of this title against the complainant~~ any criminal offense;"

As written, subsections (a)(3)(C) and (b)(3)(C) exclude circumstances where the actor substantially confines or moves the complainant for the purpose of committing a misdemeanor offense. There is no reason to limit this conduct to felony offenses. Likewise, subsections (a)(3)(E) and (b)(3)(E) limit the actor's intent to commit a crime to an intent to "commit a sexual offense." There is no reason to limit the conduct to sexual offenses either. For example, in *Gooch v. United States*, 297 U.S. 124, 128 (1936), the appellant confined law enforcement agents to prevent such agents from arresting appellant. *Id.* Such a restraint would not qualify as a kidnapping under § 22E-1401 if the actor's conduct is construed as misdemeanor resisting arrest. Accordingly, USAO recommends that these subsections be revised.

2. USAO recommends, in subsection (c), adding a provision to encompass the commission of sex offenses in addition to causing bodily injury.

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

"(c) *Exclusions to Liability for Close Relatives With Intent to Assume Responsibility for Minor.* A person does not commit aggravated kidnapping or kidnapping under subparagraphs (a)(3)(G) or (b)(3)(G), when the person is a close relative of the complainant, acted with intent to assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or commit a sex offense as defined in Chapter 13 of this Title against the complainant, or threaten to cause bodily injury or commit a sex offense as defined in Chapter 13 of this Title to the complainant."

As currently written, § 1401(c) fails to capture sexual offenses defined in Chapter 13 of this Title. Sex offenses may or may not result in physical injury (and frequently do not), so USAO recommends specifically including those offenses in this exception. Unfortunately, close relatives are frequently the ones who perpetrate sexual abuse on minors, and there is no reason to *per se* exempt them from liability for kidnapping. The purpose of this subsection is, presumably, to exempt close relatives who are caregivers from liability, assuming they do not hurt the child. Because sexual abuse is a different type of harm, it is important to include that limitation on the exemption as well.

3. USAO recommends that, in subsection (e)(2), the words "has been affirmed" be replaced with the words "becomes final."

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

"(2) The judgment appealed from ~~has been affirmed~~ becomes final."

Consistent with USAO's comments submitted on May 20, 2019 regarding § 22E-214, USAO believes that "becomes final" would more accurately define what USAO believes is the RCC's intended time when the appeal has ended.

IX. Chapter 15. Abuse and Neglect of Vulnerable Persons.

A. RCC § 22E-1501. Criminal Abuse of a Minor.

1. USAO recommends removing subsections (a)(1), (b)(1), and (c)(1).

Subsections (a)(1), (b)(1), and (c)(1) require a relationship between the defendant and complainant. This is a change from current law, and is not warranted. Under D.C. Code § 22-1101, the current Cruelty to Children offense, there is no requirement of a relationship between the parties. USAO relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. For example, if a stranger walks up to a child and tips over the child's strollers, or a neighbor hits a

child, this behavior is equally culpable as when a person with a relationship with the child engages in the same behavior.

Further, due to this change, USAO recommends that the RCC include elsewhere in the statute the requirement that the complainant be, in fact, under 18 years of age.

2. In the alternative, USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

3. USAO recommends, in subsection (c)(2)(A), including the words "assault, per RCC § 22E-1202; or kidnapping, per RCC § 22E-1401," and eliminating the words "first degree" from "first degree offensive physical contact."

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

   "(A) In fact, commits: assault, per RCC § 22E-1202; stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; kidnapping, per RCC § 22E-1401; criminal restraint, per RCC § 22E-1404; or ~~first degree~~ offensive physical contact, per RCC § 22E-1205~~(a)~~ against the complainant;"

Although assault is implicitly included in this definition in subsection (c)(2)(C), it should be expressly included in subsection (c)(2)(A) as well to eliminate confusion. Further, given that criminal restraint is included in this list, kidnapping should be as well. Moreover, it is appropriate to include liability for both First Degree and Second Degree Offensive Physical Contact in this statute. As discussed more extensively in the Assault comments, a primary distinction between Assault and Second Degree Offensive Physical Contact could be a factual question as to whether the complainant suffered "bodily injury." Particularly in the case of a child, who could be non-verbal, barely verbal, or reluctant to talk, cases prosecuted under this section may frequently involve third-party witnesses, rather than the testimony of the complainant. A third-party witness may not be able to either ascertain or testify beyond a reasonable doubt that a child was in "physical pain" as a result of the defendant's actions, so even what appears to be a clear assault on a child may only be prosecutable as a second degree offensive physical contact. For this reason, USAO believes that it is appropriate to include second degree offensive physical contact in this definition as well.

4. USAO recommends, in subsection (c)(2)(B), changing the word "Purposely" to "Knowingly" and removing the words "by confining."

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

   "(B) ~~Purposely~~ Knowingly causes significant emotional distress to ~~by confining~~ the complainant."

The appropriate standard is "knowingly," as "purposefully" creates a level of *mens rea* that is too high. Under the current child cruelty statute, the only *mens rea* requirements are intentionally, knowledge, or recklessness. D.C. Code § 22-1101(a), (b).

Further, it is unclear why confining the complainant is the only way to cause significant emotional distress under this statute. USAO believes that any time a defendant knowingly causes significant emotional distress to a child, whether by confinement or otherwise, that should constitute Criminal Abuse of a Minor.

5. USAO recommends, in subsection (c)(2)(C), adding the words, "or engages in conduct that creates a grave risk of causing bodily injury to the complainant."

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

   "(C) Recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant;"

This conduct is encompassed in the current Second Degree Child Cruelty statute at D.C. Code § 22-1101(b)(1) and should be included here. Consistent with current law, there should not be a requirement of an injury to satisfy this statute. The Commentary states that this could be prosecuted as an attempt, or as Criminal Neglect of a Minor (Commentary at 291), but with USAO's changes suggested above that would eliminate the need for a significant relationship in the Criminal Abuse of a Minor statute, these statutes justifiably no longer have the same overlap. Further, creating a "grave risk" of causing bodily injury is a different standard than coming "dangerously close" to causing bodily injury, so the attempt statute will not encompass every situation that would be covered under the current law.

B. RCC § 22E-1502. Criminal Neglect of a Minor.

1. USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

C. RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

1. USAO recommends removing subsections (a)(1), (b)(1), and (c)(1).

Subsections (a)(1), (b)(1), and (c)(1) require a relationship between the defendant and complainant. This is a change from current law, and is not warranted. Under D.C. Code § 22-933, the current Criminal Abuse of a Vulnerable Adult or Elderly Person offense, there is no requirement of a relationship between the parties. USAO relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. Alternatively, the relationship could be included as an enhancement to this provision.

Further, due to this change, USAO recommends that the RCC include elsewhere in the statute the requirement that the complainant be, in fact, a vulnerable adult or elderly person.

2. In the alternative, USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

> "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

3. USAO recommends, in subsection (c)(2)(A), including the words "assault, per RCC § 22E-1202; or kidnapping, per RCC § 22E-1401," and eliminating the words "first degree" from "first degree offensive physical contact."

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

> "(A) In fact, commits: assault, per RCC § 22E-1202; stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; kidnapping, per RCC § 22E-1401; criminal restraint, per RCC § 22E-1404; or ~~first degree~~ offensive physical contact, per RCC § 22E-1205~~(a)~~ against the complainant;"

Although assault is implicitly included in this definition in subsection (c)(2)(C), it should be expressly included in subsection (c)(2)(A) as well to eliminate confusion. Further, given that criminal restraint is included in this list, kidnapping should be as well. Moreover, for similar reasons as those discussed above in the Criminal Abuse of a Minor provision, it is important to have a provision for second degree offensive physical contact. Like young children, some elderly

or vulnerable adults may not be able to articulate whether or not they felt any "physical pain," and the government's case will have to rely on the testimony of third-party witnesses. Even if it is likely that the complainant suffered bodily injury, the government may not be able to prove it beyond a reasonable doubt, so USAO believes that it is appropriate to include this option for liability as well.

4. USAO recommends, in subsection (c)(2)(B), changing the word "Purposely" to "Knowingly" and removing the words "by confining."

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

   "(B) ~~Purposely~~ Knowingly causes significant emotional distress to ~~by confining~~ the complainant."

The appropriate standard is "knowingly," as "purposefully" creates a level of *mens rea* that is too high. Under the current abuse of a vulnerable adult, the only *mens rea* requirements are intentionally or knowledge. D.C. Code § 22-933.

Further, it is unclear why confining the complainant is the only way to cause significant emotional distress under this statute. USAO believes that any time a defendant knowingly causes significant emotional distress to a vulnerable adult or elderly person, whether by confinement or otherwise, that should constitute Criminal Abuse of a Vulnerable Adult or Elderly Person.

5. USAO recommends, in subsection (c)(2)(C), adding the words, "or engages in conduct that creates a grave risk of causing bodily injury to the complainant."

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

   "(C) Recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant;"

This language is consistent with USAO's proposed changes to the Criminal Abuse of a Minor statute, as discussed above. Moreover, the current statute includes "threaten[ing] to inflict physical pain or injury," D.C. Code § 22-933(1), which means that no infliction of bodily injury is required. Thus, USAO's proposed changes are consistent with current law.

D. RCC § 22E-1503. Criminal Neglect of a Vulnerable Adult or Elderly Person.

1. USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

X. Chapter 16. Human Trafficking.

A. RCC § 22E-1601. Forced Labor or Services; RCC § 22E-1602. Forced Commercial Sex.

1. USAO recommends that the RCC define "debt bondage" and "labor" in Chapter 7.

In § 22E-1601, the words "debt bondage" and "labor" are used, but their meaning is vague and open to substantial interpretation. "Debt bondage" and "labor" are not defined in RCC § 22E-701. "Services" is defined in RCC § 22E-701, but is partially defined as "Labor, whether professional or nonprofessional." Without the definition of "labor," it is hard to assess how "services" broadens or narrows "labor." USAO believes that defining those terms would clarify this section. USAO recommends that the RCC incorporate the definitions of those terms set forth in D.C. Code § 22-1831.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

With USAO's changes, subsection (c)(1) would provide:

"~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

3. USAO recommends, in subsection (c)(2), adding a comma after the words "provide services in RCC § 22E-1601, and adding a comma after the words "provide commercial sex acts" in RCC § 22E-1602.

With USAO's changes, subsection (c)(2) of RCC § 22E-1601 would provide:

"(2) The actor held the complainant, or caused the complainant to provide services, for a total of more than 180 days."

With USAO's changes, subsection (c)(2) of RCC § 22E-160 would provide:

"(2) The actor held the complainant, or caused the complainant to provide commercial sex acts, for more than 180 days."

Adding this comma clarifies that the enhancement applies either if the actor holds the complainant for more than 180 days, or causes the complainant to provide services for more than 180 days. Without the comma, it appears that only the second clause has the 180 days

requirement. USAO also recommends making this change throughout Chapter 16 to ensure consistency.

B. RCC § 22E-1603. Trafficking in Labor or Services.

1. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, a person;"

   These changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1). These additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

   With USAO's changes, subsection (c)(1) would provide:

   "~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

   USAO relies on the rationale set forth above in the General Comments to Chapter 13.

C. RCC § 22E-1604. Trafficking in Commercial Sex.

1. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, the complainant;"

   This change has the same rationale as the change suggested above.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

   With USAO's changes, subsection (c)(1) would provide:

   "~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

3. USAO recommends, in subsection (c), changing the words "Before applying" to "In addition to."

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

"(c) *Offense Penalty Enhancements.* ~~Before applying~~ In addition to any general penalty enhancements . . ."

USAO believes that this change is not substantive, but is intended to conform with the language of the other penalty enhancements in Chapter 16.

D. RCC § 22E-1605. Sex Trafficking of Minors

1. USAO recommends changing the heading of § 22E-1605 from "Sex Trafficking of Minors" to "Sex Trafficking of a Minor," and, in subsection (a), changing the word "minors" to the words "a minor."

With USAO's changes, § 22E-1605 would provide:

"**RCC § 22E-1605. Sex Trafficking of ~~Minors~~ a Minor.**
(a) *Offense.* An actor commits sex trafficking of ~~minors~~ a minor when that actor:"

This change is not intended to be substantive. This change clarifies that, to be liable for this offense, an actor must only traffic one minor, rather than multiple minors. This change is also consistent with the other headings in the RCC, including in Chapter 13, that discuss "a minor" instead of "minors."

2. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, the complainant;"

This change has the same rationale as the change suggested above.

3. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

With USAO's changes, subsection (c)(1) would provide:

"~~With recklessness as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13. Although under current law there is a requirement of recklessness as to whether the complainant is under 18, *see* D.C. Code § 22-1834(a), the government need not prove this recklessness if the defendant had a "reasonable opportunity to observe" the complainant, D.C. Code § 22-1834(b).

4. USAO recommends, in subsection (a)(2), omitting the words "with another person."

As set forth above, USAO is recommending including "masturbation" in the definition of "commercial sex act" in RCC § 22E-701. Because masturbation does not require "another person's" involvement, this phrase is unnecessary and could lead to confusion in this context.

E. RCC § 22E-1608. Commercial Sex with a Trafficked Person.

1. USAO recommends changing subsections (a)(3) and (b)(2)(B) to require strict liability instead of recklessness.

With USAO's changes, subsections (a)(3) and (b)(2)(B) would provide:

"~~With recklessness as to the fact that t~~The complainant was, in fact, under 18 years of age ~~or, in fact, the complainant was under 12 years of age~~."

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

F. RCC § 22E-1612. Limitations on Liabilities and Sentencing for Chapter 16 Offenses.

1. USAO recommends removing RCC § 22E-1612 in its entirety.

The RCC does not allow prosecution of prior trafficking victims as accomplices or co-conspirators to trafficking. This is a change from current law, and limits the ability to prosecute individuals who were previously trafficked but are currently perpetrating trafficking. Even someone who was trafficked for a short time can become an essential part of the criminal enterprise. But for that prior victim's involvement in the enterprise—now as an accomplice rather than as a victim—the primary trafficker would not be able to recruit new victims and continue to build a trafficking network. It is frequently the case that these accomplices are used as recruiting tools, or as enforcers in the enterprise who enforce the victims' compliance and allow the primary trafficker to appear sympathetic to these victims.

XI. Chapter 21. Theft.

A. RCC § 22E-2101. Theft

1. USAO recommends decreasing the number of gradations of theft.

§ 22E-2101 currently provides for five gradations of theft, separated primarily by dollar value of the property at issue. USAO believes, however, that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends removing subsection (b)(4)(B).

Subsection (b)(4)(B) provides: "The property is a motor vehicle, and has a value of $25,000 or more." Subsection (b)(4)(A) provides: "The property has a value of $25,000 or more." Because all motor vehicles with a value of $25,000 or more under (b)(4)(B) will necessarily also have a value of $25,000 or more under (b)(4)(A), subsection (b)(4)(B) is a superfluous provision.

3. Contingent upon the CCRC accepting USAO's recommendations in the Robbery statute, USAO recommends deleting subsection (c)(4)(C).

With USAO's changes, § 22E-2101(c) would provide:

"(c) Third Degree. A person commits third degree theft when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) Without the consent of an owner;
(3) With intent to deprive that owner of the property; and
(4) In fact:
(A)The property has a value of $2,500 or more; or
(B) The property is a motor vehicle~~; or~~
~~(C) The property is taken from a complainant who:~~
~~(i) Holds or carries the property on his or her person; or~~
~~(ii) Has the ability and desire to exercise control over the property and it is within his or her immediate physical control~~."

Unlike the other provisions of § 22E-2101, subsection (c)(4)(C) refers to the taking of property from a complainant's person or his or her immediate physical control. As such, the proposed third degree theft statute is akin to robbery, and USAO believes that this conduct should be included in the Robbery statute instead of the Theft statute. This distinction is important, given that a robbery accounts for the violation not only of property but also of one's person. Indeed, although the Commentary on RCC § 22E-2101 (Theft) does not directly address the inclusion of subsection (c)(4)(C), the Commentary on RCC § 22E-1201 (Robbery) acknowledges that so-called "pick-pocketing" can morph into robbery in at least some

circumstances (see Commentary at 193-94 & nn.1144-46). Therefore, contingent upon the CCRC adopting USAO's recommendation that the RCC Robbery statute track current law, USAO recommends removing this provision from the Theft statute. This theory of theft would accordingly be subsumed into Robbery.

B. RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

1. USAO recommends, in subsection (a)(1), changing the word "operates motor vehicle" to the words "operates or uses a motor vehicle, or causes to a motor vehicle to be operated or used."

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly operates or uses a motor vehicle, or causes a motor vehicle to be operated or used;"

USAO believes that, consistent with current law under D.C. Code § 22-3215(b), it is appropriate to include the word "use" in addition to "operate." Indeed, the title of the statute, "Unauthorized *Use* of a Motor Vehicle" (emphasis added), includes this term. Further, USAO believes that, consistent with D.C. Code § 22-3215(b), it is also appropriate to retain liability for someone who "causes" a motor vehicle to be operated or used.

2. USAO recommends that § 22E-2103, like the current statute, include a provision penalizing the use of a stolen vehicle in the commission of a crime of violence.

   With USAO's changes, § 22E-2103 would add the following language:

   "(a) A person convicted of unauthorized use of a motor vehicle under this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:
   (i) Fined not more than $[X], imprisoned for not more than [X] years, or both, consecutive to the penalty imposed for the crime of violence; and
   (ii) If serious bodily injury results, imprisoned for not less than [X] years, consecutive to the penalty imposed for the crime of violence."

This language is consistent with the current law in D.C. Code § 22-3215(d)(2)(A). Appendix J recognizes that at least some states prohibit the use of a motor vehicle during the commission of a felony. *See* RCC App. J at 367 & n.2020. USAO believes that including such a provision is important because the use of a vehicle in fleeing (or attempting to flee) from the scene of a crime is inherently dangerous, and increases the risk that innocent bystanders will be harmed on top of any harm caused by the crime of violence itself.

XII. Chapter 22. Fraud.

A. RCC § 22E-2201. Fraud.

1. USAO recommends decreasing the number of gradations of fraud.

§ 22E-2201 currently provides for five gradations of fraud, separated by dollar value of the property at issue, or the number of hours of services/labor. USAO believes, however, that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends replacing "that" with "an" in subparagraph 3 of each gradation of fraud.

With USAO's changes, each subsection of the fraud statute would read:

"*[X] Degree*. A person commits [X] degree fraud when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive ~~that~~ an owner of the property . . . ."[7]

As currently drafted, § 22E-2201 creates criminal liability for fraud only where a person has obtained property with the consent of *an owner* with the intent to deprive *that owner* of the property. Accordingly, the current language might fail to account for fraud on legal persons (e.g., businesses or corporations) or fraud perpetrated with respect to jointly owned property. Consider, for example, a jointly owned vehicle where one owner resides in the District of Columbia and frequently uses the vehicle, and another does not reside in the District of Columbia and never uses the vehicle. A defendant who obtains control over the vehicle by deceiving the non-DC owner does not necessarily deprive the non-DC owner of the use of the vehicle, because the vehicle is not being used by the non-DC owner. However, the defendant would effectively deprive the DC owner of use of the vehicle. USAO's proposed language addresses this gap.

B. RCC § 22E-2202. Payment Card Fraud.

1. USAO recommends decreasing the number of gradations of payment card fraud.

Section 22E-2202 currently provides for five gradations of payment card fraud, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Indeed, Appendix J acknowledges that only five jurisdictions nationwide have five gradations of payment card fraud. RCC App. J at 378-79. Of note, some other property provisions within the

[7] Of note, the current draft of RCC § 22E-2208(e)(1) (Financial Exploitation of a Vulnerable Adult or Elderly Person) follows the same form as the form that USAO proposes here.

RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

C. RCC § 22E-2203. Check Fraud.

1. USAO recommends that, in line with the majority of other jurisdictions and in addition to the conduct set forth in the revised check fraud statute, § 22E-2203 provide that a person commits check fraud when that person "draws" a check or "delivers" a check.

   With USAO's changes, § 22E-2203(a) would provide:

   "(a) *First Degree.* A person commits first degree check fraud when that person:
   (1) Knowingly:
   (A) obtains or pays for property by using a check; or
   (B) draws or delivers a check . . . ."
   . . . .

   (b) *Second Degree.* A person commits second degree check fraud when that person:
   (1) Knowingly:
   (A) obtains or pays for property by using a check; or
   (B) draws or delivers a check . . . ."

Appendix J acknowledges that "requiring for check fraud that the accused actually pays for or obtains property of another, appears to be a minority practice in other jurisdictions. RCC App. J at 380. Rather, it is sufficient in a majority of jurisdictions for a person to "issue" or "pass" a check (*id.*). Although the Commentary suggests that liability for *attempted* check fraud *might* cover conduct like drawing or delivering a check (Commentary at 58-59), USAO is concerned that eliminating clearly specified criminal liability for drawing or delivering checks will create a gap in the enforcement of financial crimes.

Moreover, including liability for drawing and delivering checks will bring the check fraud statute in line with the proposed forgery statute, RCC § 22E-2204. Under RCC § 22E-2204(c)(1)(C), one form of conduct that constitutes forgery is "transmitting or otherwise using" a forged document. But the statute requires only that the person "transmitting or otherwise using" the forged document *intends* to obtain property; no actual exchange of property need occur (*see* RCC § 22E-2204(c)(2)). Similarly, RCC § 22E-2205—the identity theft statute—does not require that a person actually obtain property to be criminally liable for identity theft. Rather, a person need only to *intend* to (among other possibilities) obtain property.

2. USAO recommends that, in line with the majority of jurisdictions, the $2,500 threshold be decreased to $1,000.

   With USAO's changes, § 22E-2203(a)(3) would provide:

   "(3) The amount of loss to the check holder is, in fact, ~~$2,500~~ $1,000 or more."

As acknowledged in Appendix J, "the minimum value threshold for felony check fraud is $1,000 *or less*." RCC App. J at 381 (emphasis added). Accordingly, USAO sees no reason to depart from the national trend. Doing so would result in a drastic difference in criminal liability between check fraud committed in the District of Columbia and other jurisdictions—including the neighboring jurisdictions of Maryland and Virginia (see Va. Code § 18.2-181 (setting $500 threshold for felony check fraud); Md. Code § 8-106 (same)).

D. RCC § 22E-2205. Identity Theft.

1. USAO recommends decreasing the number of gradations of payment card fraud.

§ 22E-2205 currently provides for five gradations of identity theft, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends that subsection (e)(3) include subparagraph (D)-(F) that reads, "(D) identify himself or herself at the time of his or her arrest; (E) facilitate or conceal his or her commission of a crime; or (F) avoid detection, apprehension, or prosecution for a crime"

With USAO's changes, § 22E-2205(e)(3) would provide:

"(3) With intent to use the personal identifying information to:
(A) Obtain property of another by deception;
(B) Avoid payment due for any property, fines, or fees by deception;
(C) Give, sell, or transfer . . . . ;
(D) Identify himself of herself at the time of his or her arrest;
(E) Facilitate or conceal his or her commission of a crime; or
(F) Avoid detection, apprehension, or prosecution for a crime."

USAO believes that the current wording of (e)(3) is under-inclusive, in that it focuses only on the financial harms potentially caused by identify theft, without accounting for other nefarious reasons for misappropriating another person's identity. Although the Commentary (at 71) suggests that the conduct in proposed subparagraphs (D)-(F) is criminalized under obstruction of justice and false statements offenses, none of these takes into account the harm caused to the person whose personal identifying information has been misappropriated. For example, where a defendant identifies himself as John Doe at the time of arrest, then John Doe's information will almost certainly enter police paperwork, court dockets, national databases, and the like. This will have an effect on the real "John Doe," who might suffer continuing harms during background checks for employment or housing. While RCC § 22E-2206 (Identity Theft Civil Provisions) provides some civil remedies for persons who are victims of identity theft, the provision reaches only "District of Columbia public records," which will not reach, for example, records that have already entered national databases, or private company records.

E. RCC § 22E-2206. Identity Theft Civil Provisions.

1. USAO recommends replacing each occurrence of "§ 22E-2206" with "§ 22E-2205".

Section 22E-2206 as currently drafted is self-referential; it appears that the references to 2206 are typographical errors, and should be updated to read "2205" (the immediately preceding provision dealing with criminal liability for identity theft).

F. RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

1. USAO recommends decreasing the number of gradations of Financial Exploitation of a Vulnerable Adult.

§ 22E-2208 currently provides for five gradations of Financial Exploitation of a Vulnerable Adult or Elderly Person ("FEVA"), separated by dollar value of the property at issue. The reliance on dollar value is of particular concern where the criminal conduct at issue is directed at individuals who are elderly or otherwise vulnerable. Indeed, by distinguishing the severity of the offense by the amount of property at issue, this proposed statute penalizes defendants less severely when they take advantage of elderly or vulnerable adults who are not wealthy. The focus should be on the fact that a defendant has taken advantage of someone who is potentially less able to fend for himself or herself – not on how much money the defendant managed to steal.

Moreover, as Appendix J acknowledges, "increasing the number of penalty gradations is not supported by national legal trends. Of the jurisdictions with analogous FEVA offenses, *a majority use either two or one penalty grades*." RCC App. J at 389-90 (emphasis added). Given the lack of support at the national level for including more than two gradations, as well as the practical effect of penalizing FEVA on the basis of the financial harm, USAO objects to including five gradations for this offense.

Finally, as a general matter, USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)[8]).

2. USAO recommends striking "theft, extortion, forgery, fraud, or identity theft" from RCC § 22E-2208(e)(2) and inserting the following language: "arson, check fraud, criminal damage to property, criminal graffiti, extortion, fraud, forgery, identity theft, payment card fraud, possession of stolen property, reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, or unauthorized use of property."

With USAO's changes, § 22E-2208(e)(2) would provide:

"(e)(2) Commits arson, check fraud, criminal damage to property, criminal graffiti, extortion, fraud, forgery, identity theft, payment card fraud, possession of stolen property,

[8] Indeed, forgery is cross-referenced in § 22E-2208(e)(2).

reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, or unauthorized use of property with recklessness that the complainant is a vulnerable adult or elderly person."

§ 22E-2208(e)(2) currently incorporates by reference only a small subset of property-related offenses; that is, offenses where there is some sort of financial loss to the complainant. The Commentary offers no justification for limiting FEVA to the current subset of crimes and excluding crimes that clearly are related (for example, the current FEVA includes fraud, but excludes payment card fraud and check fraud). USAO believes that its proposal provides consistency.

XIII. Chapter 23. Extortion.

A. RCC § 22E-2301. Extortion.

1. USAO recommends decreasing the number of gradations of extortion.

§ 22E-2301 currently provides for five gradations of extortion, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (*see* RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends replacing "that" with "an" in subparagraph 4 of each gradation of extortion.

With USAO's changes, each subsection of the extortion statute would read:

"(a) *[X] Degree*. A person commits [X] degree extortion when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner;
(3) The consent being obtained by coercive threat;
(4) Win intent to deprive an ~~that~~ owner of the property; . . . ."[9]

As currently drafted, § 22E-2301 creates criminal liability for extortion only where a person has obtained property with the consent of *an owner* with the intent to deprive *that owner* of the property. Accordingly, the current language might fail to account for, among other things, extortion of an employee of a legal person (*e.g.*, businesses or corporations). Consider, for example, an employee of a business who has access to, but does not own, certain monies. A defendant who threatens a person by saying, "give me access to Company X's credit card, or I'll tell Company X that you did Y" will not be liable for extortion under the current formulation of § 22E-2301. USAO's proposed language addresses this gap.

[9] Of note, the current draft of RCC § 22E-2208(e)(1) (Financial Exploitation of a Vulnerable Adult or Elderly Person) follows the same format that USAO proposes here.

3 USAO recommends further considering the Extortion statute at the same time as the Blackmail statute.

Subsection (1) of each degree of Extortion limits the charge to exercising control "over the property of another." USAO cannot fully comment on this provision without seeing the proposed Blackmail statute, § 22E-1403, which has not yet been drafted. It is important that there is a statute that includes causing another to do or refrain from doing an act, which is not currently encompassed by Extortion, but may be encompassed by the future Blackmail statute.

XIV. Chapter 24. Stolen Property.

A. RCC § 22E-2401. Possession of Stolen Property.

1. USAO recommends decreasing the number of gradations of Possession of Stolen Property.

§ 22E-2401 currently provides for five gradations of Possession of Stolen Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

B. RCC § 22E-2402. Trafficking of Stolen Property.

1. USAO recommends decreasing the number of gradations of Trafficking of Stolen Property.

§ 22E-2402 currently provides for five gradations of Trafficking of Stolen Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends, in subsection (4) of each gradation of Trafficking of Stolen Property, changing the word "property" to the words "total property trafficked."

With USAO's changes, each subsection (4) would provide:

"(4) The total property trafficked, in fact, has a value of . . ."

As currently written, the statue is unclear as to whether each occasions involving trafficked property must have the monetary value listed, or whether the *total* amount trafficked must have the monetary value listed. USAO believes that, because the purpose of the statute is to encompass multiple instances of buying or possessing stolen property, the total value of the

trafficked property is a more relevant number than each individual transaction. USAO's changes would clarify this provision.

XV. Chapter 25. Property Damage.

A. RCC § 22E-2501. Arson.

1. USAO recommends (1) striking references to "a person who is not a participant in the crime" from RCC § 22E-2501(a)-(b), and (2) amending "dwelling or building" to read "dwelling, building, or vehicle".

   With USAO's changes, § 22E-2501(a)-(b) would read:

   "(a) *First Degree*. A person commits first degree arson when that person:
   (1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling, ~~or~~ building, or vehicle;
   (2) Reckless as to the fact that a person ~~who is not a participant in the crime~~ is present in the dwelling, ~~or~~ building, or vehicle; and
   (3) The fire or explosion, in fact, causes death or serious bodily injury to any person
   (4) ~~Who is not a participant in the crime.~~
   (b) *Second Degree.* A person commits second degree arson when that person:
   (1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling, ~~or~~ building, or vehicle;
   (2) Reckless as to the fact that a person ~~who is not a participant in the crime~~ is present in the dwelling, building, or vehicle."

With respect to persons who are participants in the crime: As acknowledged in Appendix J, "There is limited support in the 50 states for including, with strict liability, that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation." RCC App. J at 408. The Commentary provides no justification for this departure, which serves only to treat the loss of some human life as more important than others. Absent a much clearer justification, USAO urges the Commission to amend the proposed arson statute as suggested above.

With respect to including vehicles as objects of arson: § 22E-2501 currently addresses only dwellings or buildings, presumably because fires in/on structures or property "that are not dwellings do not endanger human life the same way as fires in buildings or dwellings" (Commentary at 109). However, the Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings. By way of example, a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device would not be liable for arson under the current statute. USAO thus recommends the inclusion of vehicles in the arson statute to fully encompass the range of conduct that could put human life in danger.

2. USAO recommends that a protected person enhancement be added to this provision, consistent with the language proposed in the General Comments, above.

Under D.C. Code § 23-1331(4), arson is expressly included as a crime of violence. Of course, it can cause serious injury or death to a victim, so it is certainly a serious crime. Although it is included in the "Property Damage" chapter of the RCC, first degree arson requires the element of "death of serious bodily injury." When the victim of any arson is a protected person, that crime should be punished more severely. Thus, it is appropriate to include an enhancement for committing arson against a protected person.

B. RCC § 22E-2502. Reckless Burning.

1. USAO recommends renumbering the paragraphs of § 22E-2502.

Section 22E-2502 as currently drafted begins with paragraph (3), which appears to be a typographical error. USAO recommends renumbering the statute to begin with paragraph (1).

2. USAO recommends amending "dwelling or building" to read "dwelling, building, or vehicle" in § 22E-2502(a).

With USAO's changes, § 22E-2502(a) would read:

"(a) *Offense.* A person commits reckless burning when that person:
(1) Knowingly starts a fire or causes an explosion;
(2) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling, ~~or~~ building, or vehicle."

§ 22E-2502(a) currently addresses only dwellings or buildings, presumably because fires in/on structures or property "that are not dwellings do not endanger human life the same way as fires in buildings or dwellings" (Commentary at 116). However, the Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings. USAO thus recommends the inclusion of vehicles in the reckless burning statute to fully encompass the range of conduct that could put human life in danger.

C. RCC § 22E-2503. Criminal Damage to Property.

1. USAO recommends decreasing the number of gradations of Criminal Damage to Property.

§ 22E-2503 currently provides for five gradations of Criminal Damage to Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

XVI. Chapter 26. Trespass.

A. RCC § 22E-2601. Trespass.

1. USAO recommends, in subsections (a)(2), (b)(2), and (c)(2), removing the words "under civil law."

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

"(2) Without a privilege or license to do so ~~under civil law~~"

The requirement that a person be without a privilege or license "under civil law" is a confusing standard that could lead to inconsistent application of the law and require consultation with civil law in order to determine criminal liability under the statute. USAO believes that simply including the language "without a privilege or license to do so" is more clear and will be subject to less confusion.

The current standard under D.C. Code § 22-3302 is: "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof." In the alternative, USAO recommends retaining the current standard or revising the proposed standard to, "against the will of the lawful occupant, or being without lawful authority to remain."

2. USAO recommends narrowing the category of offenses entitled to a jury trial to those offenses which impact an individual's constitutional rights.

§ 22E-2601(f)(1) allows a defendant to demand a jury trial for any trespass or attempted trespass, in a location "owned or occupied by a government, government agency, or government-owned corporation." § 22E-2601(f)(2) allows a defendant charged with committing any trespass or any attempted trespass by violating a District of Columbia Housing Authority barring notice to demand a jury trial. In recognizing the right of a jury trial to all trespasses in public buildings, the D.C. Court of Appeals in *United States v. Frey*, 137 A.3d 1000, 1004 (D.C. 2016) commented that the language of the current trespass statute does not impose a temporal (when the building is closed to the public) or spatial limit (private sections closed to the public of an otherwise public building). The court commented that had the D.C. Council intended such restrictions, it would have specifically listed them in the statute. While USAO recognizes the constitutional issues involved, USAO recommends imposing a temporal and spatial limit to narrow the category of offenses entitled to a jury trial in order to streamline prosecutions under this section. USAO recommends removing trespasses in private areas of public buildings or trespasses in public buildings after they are closed to the public from the category of offenses entitled to a jury trial. USAO also recommends removing trespasses in violation of a DCHA baring notice from the category of offenses entitled to a jury trial. Because an individual does not have a right to access a private area of a public building or a public building after it is closed to the public, USAO's proposed revision should not impact an individual's constitutional rights.

DCHA often issues barring notices to individuals whose conduct fails to abide by the regulations or whose conduct endangers the safety and welfare of other occupants.

XVII. Chapter 27. Burglary.

1. USAO recommends adding a "while armed" penalty enhancement, consistent with the language proposed in the General Comments, above.

Although several RCC statutes, including Assault and Robbery, contain offense gradations that account for the use of a dangerous weapon, Burglary contains no such gradation. Thus, under the RCC, a defendant is equally culpable for an armed burglary and an unarmed burglary. There should be a distinction between these two offenses, and a defendant who commits an armed burglary should be subject to a higher penalty than a defendant who commits an unarmed burglary. In addition to the increased fear or injury that a burglary victim may experience if a defendant has a gun or other weapon, a defendant creates an increased risk of danger by introducing a weapon to an offense. A firearm could either intentionally or inadvertently discharge, and a complainant could suffer additional either intentional or inadvertent injury as a result of that weapon.

Further, USAO believes that it is more clear to include this provision as an enhancement, rather than as an offense gradation. The RCC Sexual Assault statute includes this provision as an enhancement, and the Burglary statute should as well. This is more clear to a member of the public reading the elements of these offenses, and to a member of the public when used to describe the name of the charge (for example, Second Degree Burglary While Armed, instead of a potential corollary offense of First Degree Burglary).

2. USAO recommends, in subsections (a)(3), (b)(1)(A), (b)(1)(B), (c)(1)(A), and (c)(2), removing the words "under civil law."

With USAO's changes, subsections (a)(3), (b)(1)(A), (b)(1)(B), (c)(1)(A), and (c)(2) would provide:

"[W]ithout a privilege or license to do so ~~under civil law~~"

The requirement that a person be without a privilege or license "under civil law" is a confusing standard that could lead to inconsistent application of the law and require consultation with civil law in order to determine criminal liability under the statute. USAO believes that simply including the language "without a privilege or license to do so" is more clear and will be subject to less confusion.

XVIII. Chapter 34. Government Custody.

A. RCC § 22E-3401. Escape from a Correctional Facility or Officer.

1. USAO recommends clarifying that all gradations of escape will remain felony offenses.

Subsections (a) through (c) divide the offense of Escape into three gradations. USAO has no objection to differentiating between different types of Escape. Because the RCC has not yet addressed penalties, the draft statute does not specify whether third degree Escape is a felony or a misdemeanor. The comments, however, seem to imply that it could be prosecuted as a misdemeanor. USAO believes that walking away from or failing to return to a Halfway House should remain a felony offense, as it currently is. This is especially true where the underlying offense for which a defendant was sent to the Halfway House is itself a felony.

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

With all of USAO's proposed edits and additions, this statute would provide:

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

(a) *Offense*. A person commits tampering with a detection device when that person:
(1) Knows he or she is required to wear a detection device while:
(A) Subject to a District of Columbia protection order;
(B) On pretrial release either:
(i) in a District of Columbia case; or
(ii) under the supervision of the Pretrial Services Agency for the District of Columbia;
(C) On presentence or predisposition release in a District of Columbia case;
(D) Committed to the Department of Youth Rehabilitation Services or incarcerated, in a District of Columbia case; or
(E) On supervised release, probation, or parole either:
(i) in a District of Columbia criminal case; or
(ii) under the supervision of the Court Services and Offender Supervision Agency for the District of Columbia; and
(2) ~~Purposely~~ Intentionally:
(A) Removes the detection device or allows an unauthorized person to do so; or
(B) Interferes with the operation of the detection device or allows an unauthorized person to do so.
(b) *Penalty*. Tampering with a detection device is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions.*
(1) The terms "knows" and "~~purposely~~ intentionally" have the meaning specified in RCC § 22E-206;

(2) The terms "detection device," and "protection order" have the meanings specified in RCC § 22E-701;
(3) The phrase "interferes with the operation of the detection device" applies to any form of interference with the emission or detection of the device's signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate.
(d) *Evidence of Guilt*. For purposes of adjudicating a defendant's guilt under this section, neither D.C. Code § 23-1303(d) nor any other provision of the D.C. Code shall be interpreted to preclude the admissibility of relevant evidence that is owned, possessed, or accessible by the Pretrial Services Agency for the District of Columbia.
(e) *Jurisdiction*. The offense of tampering with a detection device shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if, at the time of the offense, he or she is required to wear a detection device under any of the circumstances listed in subsections (a)(1)(A)-(E) of this section."

1. USAO recommends amending subsections (a)(1)(B) and (a)(1)(E) to cover defendants in non-D.C. criminal cases who are supervised by D.C. agencies.

With USAO's changes, subsection (a)(1)(B) would apply to those "either [o]n pretrial release (i) in a District of Columbia case, or (ii) under the supervision of the Pretrial Services Agency for the District of Columbia." Subsection (a)(1)(E) would apply to those "[o]n supervised release, probation, or parole (i) in a District of Columbia criminal case, or (ii) under the supervision of the Court Services and Offender Supervision Agency for the District of Columbia."

These modifications account for the fact that D.C. residents charged with crimes in other jurisdictions may return to D.C. and be placed under the supervision of a local agency. For example, under the Interstate Compact for the Supervision of Probationers and Parolees, the Court Services and Offender Supervision Agency (CSOSA) supervises offenders "whose originating offenses and sentencing occurred in other jurisdictions." CSOSA Supervision Services Operations Manual, Ch. XIII, p. 1, available at https://www.csosa .gov/wp-content/uploads/bsk-pdf-manager/2018/08/CSS-Operations-Manual.pdf. Similarly, the Pretrial Services Agency (PSA) has informed USAO that, in some cases, it will supervise individuals with pending criminal cases in other jurisdictions. As with all individuals they supervise, CSOSA and PSA have the discretion to order these offenders to wear a detection device as a condition of release. The offenders may also be ordered to wear a detection device by the judges presiding over their non-D.C. criminal cases.

The CCRC's proposed language limits the statute's reach to those on release in "District of Columbia" cases, which means the statute would not apply to those with non-D.C. criminal cases who are supervised by CSOSA or PSA. This change would deprive the government of a means by which it can deter certain offenders from violating their terms of release. Removing this tool could jeopardize the safety of the community, since the offenders assigned to GPS

monitoring are typically those accused or convicted of serious offenses and/or at high risk of violating their release conditions.

2. USAO recommends replacing the word "purposely" with the word "intentionally" in subsections (a)(2) and (c)(1).

USAO recommends making no change to the required *mens rea* of the offense, which currently criminalizes "intentionally" tampering with a detection device. Under RCC § 22E-206(c), "[a] person acts intentionally with respect to a result when the person believes that conduct is practically certain to cause the result." USAO opposes raising the required mental state to purposefulness, which RCC § 22E-206(a) defines as the "conscious[] desire[]" that one's actions bring about a certain result. This change would deprive the government of the ability to prosecute those who act with deliberate indifference to the fact that their detection device will stop functioning. Two hypothetical examples illustrate the types of cases the statute would no longer reach under a "purpose" standard:

Example 1: The defendant knows he must charge the device immediately if it is in "low battery mode," during which the device vibrates every ten minutes, or else the device will go dead. The defendant receives a low-battery warning but plans to leave home that night and does not wish to be bothered staying home to charge the device. He is indifferent to whether the device dies, but he goes out believing it is practically certain that the battery will run dead before he has a chance to charge again. Later that evening, the device goes dead. Under the RCC, the defendant's conduct would not satisfy a standard of purposefulness, because the defendant did not "desire" the device to go dead.

Example 2: The defendant knows, from the instructions he received and the contract he signed when his GPS device was installed, that he must not submerge the device in water, such as a bathtub, hot tub, or swimming pool. The defendant is invited to join some friends in a hot tub. He knows or believes it is practically certain that his GPS device will be damaged if he submerges it in water, but he is indifferent to whether this damage actually occurs. The defendant elects to sit in the hot tub for an hour, and his device stops working. Under the RCC, the defendant's conduct would not violate the tampering statute because he had not acted with a "desire" to hinder the device's operation.

USAO believes criminal liability should attach in cases where the government can prove the defendant knew his acts or omissions would cause his device to stop working and made a conscious decision to take or not take those actions. The intentionality *mens rea* will allow the government to continue deterring supervised offenders from allowing their detection devices to fail, while at the same time ensuring that offenders are not punished for unwittingly allowing their devices to stop working.

An intentionality *mens rea* is more consistent with national trends than one of purposefulness. The commission's commentary in Appendix J notes that of the 12 reform jurisdictions with similar GPS-tampering statutes, seven specify the requisite mental state and require either "knowing or intentional conduct." But of those seven, only two, Indiana and Tennessee, require a *mens rea* that is equivalent to purposefulness as defined under the RCC.

Those statutes, moreover, are narrower in scope, in that they do not criminalize all forms of interference, such as failures to charge the device's battery. *See* Ind. Code Ann. § 35-44.1-3-4(b) (criminalizing "intentionally remov[ing]" a GPS device); Tenn. Code Ann. § 40-39-304(a) (criminalizing "[i]ntentional tampering with, removal of, or vandalism to a device"). Of the remaining five states, four use "knowledge" or "intentionality" standards that are akin to the intentionality standard USAO proposes here. *See* Ark. Code Ann. § 12-12-923(e)(1) ("knowingly"); Colo. Rev. Stat. Ann. § 17-27.5-104(1)-(2) ("knowingly"); Wash. Rev. Code Ann. § 9A.76.130 (1)(b) ("knowingly"); Wis. Stat. Ann. § 946.465 ("intentionally," defined under Wisc. Stat. Ann. § 939.23(3) as the equivalent of "knowingly"). Missouri requires intentionality but does not define the term. Thus, of the jurisdictions whose GPS-tampering statutes can fairly be compared to the District's, the majority require a mental state akin to what USAO proposes here.

3. USAO recommends defining the phrase "interferes with the operation of the detection device" in the body of the statute rather than in the commentary.

USAO agrees with OAG that the term "interfere" goes to the heart of the offense and should therefore be defined in the statute rather than in the commentary. The CCRC's draft statute no longer explicitly criminalizes failures to charge the device's power, even though many of the prosecutions that USAO brings under the statute are for failures to charge. The definition section of the statute should therefore make clear that "the phrase 'interferes with the operation of the detection device' applies to any form of interference with the emission or detection of the device's signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate."

4. USAO recommends an additional provision clarifying that D.C. Code § 23-1303(d) has no impact on GPS-interference cases.

USAO recommends adding a separate subsection providing that "[f]or purposes of adjudicating a defendant's guilt under this section, neither D.C. Code § 23-1303(d) nor any other provision of the D.C. Code shall be interpreted to preclude the admissibility of relevant evidence that is owned, possessed, or accessible by the Pretrial Services Agency for the District of Columbia." This will clarify that no otherwise admissible evidence of pretrial GPS tampering should be excluded on account of § 23-1303(d), which provides that "any information contained in [PSA]'s files . . . shall not be admissible on the issue of guilt in any judicial proceeding . . .". First codified in 1966, § 23-1303(d), was meant to apply only to information collected by PSA during interviews with defendants, which were performed for the purpose of advising the court on pretrial release determinations. The statute long predates D.C. Code § 22-1211, the current GPS-tampering statute, which was first enacted in 2009 and expressly criminalizes GPS-tampering committed "while on pretrial release." *Id*. at § 22-1211(a)(1). The Council therefore clearly did not intend for § 23-1303(d) to affect the admissibility of evidence in GPS-tampering cases, which the statute should reflect.

5. USAO recommends an additional subsection providing that D.C. has jurisdiction when an offender interferes with a detection device across state lines.

USAO suggests additional language providing that "[t]he offense of tampering with a detection device shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if, at the time of the offense, he or she is required to wear a detection device under any of the circumstances listed in subsections (a)(1)(A)-(E) of this section."

The Council has enacted similar jurisdictional provisions in at least two other statutes. D.C. Code § 22-3227.06 states that in specified circumstances, "[t]he offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia." D.C. Code § 22-3224.01 uses identical language with respect to credit card fraud, specifically providing for jurisdiction whenever (1) the credit card holder is a resident of D.C., (2) the person defrauded is located in D.C. at the time of the fraud, or (3) the loss occurs in D.C. *Id*.

In any case where the defendant's GPS-monitoring requirement was imposed or enforced in the District of Columbia, the D.C. Superior Court should have jurisdiction. USAO has taken the position that under the current statute, jurisdiction exists in these cases regardless of where the tampering event takes place, because another element of the crime – the imposition of the requirement that the defendant wear the device – takes place in D.C. Still, a jurisdictional provision would provide much needed clarity. Without it, individuals intent on tampering with their detection devices may be incentivized to do so across jurisdictional lines in the hopes of evading criminal liability.

C. RCC § 22E-3403. Correctional Facility Contraband.

1. USAO opposes the removal of the consecutive sentencing requirement.

Under current law, all sentences for contraband offenses must be imposed consecutively either to the sentence being served or to the sentence imposed on the matter for which the defendant was pending trial. The RCC proposal removes this requirement, claiming that it unnecessarily impinges on judicial discretion. But other statutes, such as the proposed RCC Escape statute, RCC § 22E-3401(e)(4), and the current Bail Reform Act statute, D.C. Code § 23-1327(d), require consecutive sentences. USAO believes that allowing this crime to be punished by concurrent sentences would invalidate the deterrent effect of the statute, as it only applies to individuals who are already confined to a correctional facility.

XIX. Chapter 43. Group Misconduct.

A. RCC §§ 22E-4301. Rioting.

1. USAO recommends aligning the number of persons required to trigger liability for Rioting and Failure to Disperse.

§ 22E-4301(a)(2) currently provides for criminal liability for rioting where a person is "reckless to the fact that seven or more people . . ." are engaging in specified conduct, while § 22E-4302(a)(2) provides for criminal liability for failure to disperse where a person is "reckless to the fact that eight or more people . . ." are engaging in the specified conduct. Given that the two crimes are related, USAO believes that the number of persons required to trigger liability should be the same.

2. USAO recommends reincorporating liability for inciting a riot by revising § 22E-4301(a)(1) to include language covering person who "urge or incite other persons" to engage in rioting.

With USAO's changes, subsection (a)(1) would provide

"(1) Knowingly attempts to commit or commits, or urges or incites another person to commit, a District crime . . . ."

Current law prohibits both rioting and inciting or urging to riot. D.C. Code § 22-1322. As written, the RCC no longer includes criminal liability for inciting or urging others to riot. Although the Commentary (at 29-30) suggests that inciting others to riot might be accounted for pursuant to the general accomplice liability provisions, USAO believes that specific provisions are warranted. USAO is concerned that dispensing with specifically enumerated criminal liability for inciting others to riot will create gaps in the ability of law enforcement to address situations where a person or persons are actively encouraging others toward criminal behavior.

3. USAO recommends including both misdemeanor and felony gradations of rioting.

As written, the RCC includes a single gradation for rioting and, because the penalty provision has not yet been drafted, it is unclear whether that single gradation will make rioting a felony or a misdemeanor. Regardless, USAO believes there should be both misdemeanor and felony liability for rioting. Under current law, there are misdemeanor and felony gradations for rioting, based on the level of injury and property damage caused. D.C. Code § 22-1322. Further, as acknowledged in Appendix J, half of the reform jurisdictions include gradations for rioting. *See* RCC App. J at 446. USAO believes that, consistent with those jurisdictions, gradations are appropriate.

4. USAO opposes making all rioting offenses jury demandable.

Under current law, as stated above, there are misdemeanor and felony gradations of rioting. D.C. Code § 22-1322. Under current law, misdemeanor rioting is not jury demandable. *Id.* USAO recommends that the revised statute track current law.

B. RCC § 22E-4302. Failure to Disperse.

1. USAO recommends aligning the number of persons required to trigger liability for Rioting and Failure to Disperse

§ 22E-4301(a)(2) currently provides for criminal liability for rioting where a person is "reckless to the fact that seven or more people . . ." are engaging in specified conduct, while § 22E-4302(a)(2) provides for criminal liability for failure to disperse where a person is "reckless to the fact that eight or more people . . ." are engaging in the specified conduct. Given that the two crimes are related, USAO believes that the number of persons required to trigger liability should be the same.

2. USAO opposes making all failure to disperse offenses jury demandable.

Under current law, the equivalent offense for failure to disperse is subject only to a civil fine, which is not jury demandable. D.C.M.R. § 18-2000.2, 18-2000.9. USAO recommends that the revised statute track current law with respect to jury demandability.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 13, 2019

SUBJECT: First Draft of Report #37, Controlled Substance and Related Offenses and First Draft of Report #38, Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances.

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 #37, Controlled Substance and Related Offenses and First Draft of Report #38, Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances.[1]

COMMENTS ON THE DRAFT REPORT

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

Paragraph (a)(2) lists the drugs, the knowing possession of which, would constitute first degree possession of a controlled substance.[2] While the list includes many of the more popular abusive

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

[2] RCC § 48-904.01a (2) states:

(1) The controlled substance is, in fact:

(A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;

drugs, the Commentary does not explain the rational for choosing these drugs as opposed to other equally, or more, dangerous drugs. OAG proposes that rather than the Commission picking and explaining which Schedule I or Schedule II drugs be placed on the list,[3] that the Commission rely instead on the Schedules themselves. The law has already determined which drugs have the highest potential for abuse and which may lead to the most severe psychological or physical dependence (and, therefore, also deserve to be included in the list constituting the first degree offense).

D.C. Code § 48-902.03 states:

> The Mayor shall place a substance in Schedule I if the Mayor finds that the substance:
>
> (1) Has high potential for abuse; and
>
> (2) Has no accepted medical use in treatment in the United States or in the District of Columbia or lacks accepted safety for use in treatment under medical supervision.

D.C. Code § 48-902.05 states:

> The Mayor shall place a substance in Schedule II if the Mayor finds that:
>
> (1) The substance has high potential for abuse;
>
> (2) The substance has currently accepted medical use in treatment in the United States or the District of Columbia, or currently accepted medical use, with severe restrictions; and
>
> (3) The abuse of the substance may lead to severe psychological or physical dependence.

In conclusion, OAG proposes that § 48-904.01a (2) be redrafted to say, "the controlled substance is, in fact, a Schedule I or Schedule II drug under District law."

RCC § 48-904.01b. TRAFFICKING OF A CONTROLLED SUBSTANCE

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor.

[3] Many of the drugs listed in RCC § 48-904.01a (2) are, in fact, Schedule II drugs.

Paragraph (g)(6) states that "In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more" of a list of enhancements are present[4]. On page 17 of the Commentary it explains that this means that only one enhancement applies. This means that a person who plans on selling drugs at a school might as well take a gun with him because there will not be any additional penalty for carrying the firearm while distributing the controlled substance. OAG does not believe, however, that the choice should be between allowing for unfettered stacking of enhancements and only permitting one enhancement (no matter how many enhancements apply). Given the dangerousness of firearms, especially when possessed while distributing drugs, OAG suggests that this offense permit an enhancement for possession of a firearm and up to one additional enhancement when one or more of the remaining enhancements are present.

Paragraph (g)(6)(C)(i) establishes an enhancement for the trafficking of controlled substances "within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center" when there is signage. As the Commentary notes on page 14, the current law covers a wider number of locations and sets the footage at 1000 feet.

OAG has two suggestions relating to the distance portion of this provision. First, while OAG assumes that the phrase "within 100 feet of a school …" means within a 100 feet of the school's property line and not the building[5], the text of the provision should be clear on this issue. To improve the clarity of this provision, OAG suggests that the provision be amended to say, "within 100 feet of the property line of a school, college, university…" Second, while OAG does not oppose reducing the current 1000 foot distance from the designated facilities, 100 feet is too short. For example, the typical school bus is between 30 and 40 feet long. So, 100 feet

[4] The enhancements listed in RCC § 48-904.01b (g)(6) are:

(A) The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age;

(B) The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a controlled substance; or

(C) The actor commits an offense under this section when in a location that, in fact:

(i) Is within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center; and

(ii) Displays clear and conspicuous signage that indicates controlled substances are prohibited in the location or that the location is a drug free zone.

[5] To interpret the provision as meaning 100 feet from the school building would mean that the enhancement would not apply when a drug transaction was taking place in a school's basketball court or parking lot.

would be a bit longer than 2 or 3 school buses.[6] We believe that the enhancement should apply to someone trafficking in controlled substances a mere 3 school buses distance from a school. As a compromise, OAG suggests that the distance be set at a 100 yards (i.e., 300 feet). One hundred yards is the length of a football field and so is an easy distance for many people to visualize. Changing the distance in RCC § 48-904.01b (g)(6)(C)(i) to 300 feet would also make the distance consistent with the proposal to set 300 feet as the distance for which first degree carrying a dangerous weapon, under RCC § 22E-4102(a)(2)(C)(i), would apply. Using the same distance for an enhancement for trafficking in controlled substances as is used to establish first degree carrying a dangerous weapon will avoid confusion by citizens as to which distance applies.

Paragraph (h)(1) establishes a new defense. It states, "It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance."

While OAG generally agrees that a person should not be guilty of trafficking of a controlled substance for sharing their drugs with someone so that they can get high together, we disagree with a blanket defense that requires the government to prove – in all circumstances - that a controlled substance was ultimately exchanged for something of value or the future expectation of financial gain. Take the following example. An undercover officer sees an actor take out a bag with 400 grams (.88 lbs.) of cocaine.[7] The actor says to another person, "here's the stuff." The actor then hands over the drugs and walks away. The police then arrest the two people. Notwithstanding that 400 grams exceeds the amount of cocaine that one would possess for personal use (or even to share), because no money was exchanged or discussed, the defense would seem to apply. Rather than have a blanket defense, paragraph (h)(1) should be amended to apply to situations where the actor and the other person are about to use the drugs together or where the actor transfers to another person enough controlled substance for a single use.

RCC § 48-904.10. POSSESSION OF DRUG MANUFACTURING PARAPHERNALIA and RCC § 48-904.11. TRAFFICKING OF DRUG PARAPHERNALIA

RCC § 48-904.10 (a) states that "A person commits possession of drug manufacturing paraphernalia when that person knowingly possesses an object… [t]hat has been used to manufacture a controlled substance…" However, paragraph (b) excludes from liability an object "…[t]hat has been used to package or repackage a controlled substance for that person's own

[6] See https://www.google.com/search?q=how+long+is+a+school+bus&rlz=1C1NHXL_enUS708US708&oq=how+long+is+a+school+bus&aqs=chrome.0.0l6.5399j1j7&sourceid=chrome&ie=UTF-8.

[7] Pursuant to RCC § 48-904.01b (a)(2)(D) this amount cocaine, if proven, would make the distribution of the drug first degree trafficking of a controlled substance.

use…" It is unclear from the text and the Commentary how this provision should be applied if the paraphernalia is used both to manufacture a controlled substance and to package a controlled substance for own's own use. To clarify that objects that are used to manufacture a controlled substance are illegal despite the fact that they may also be used for personal use, OAG suggests that paragraph (b) be amended to read:

(b) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation:
  (1) If the object possessed is 50 years of age or older[8]; or
  (2) If a person possesses an object:
    (A) That has been used solely to package or repackage a controlled substance for that person's own use; or
    (B) With intent to use the object solely to package or repackage a controlled substance for that person's own use.

RCC § 48-904.10 limits liability for possession of drug paraphernalia to objects related to the manufacture of a controlled substance. As the Commentary points out on page 31, "The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use 'drug paraphernalia,' a defined term, to 'plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]'" [footnotes removed] RCC § 48-904.11, however, makes it an offense to traffic in objects that a person will use "to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance." It is unclear why the RCC takes the position that it should be illegal to traffic in these items when it is not illegal to possess them.

RCC PROPOSAL TO REPEAL D.C. CODE § 48-904.03a

In the First Draft of Report #38, the Commission proposes repealing D.C. Code § 48-904.03a. That provision states:

> (a) It shall be unlawful for any person to knowingly open or maintain any place to manufacture, distribute, or store for the purpose of manufacture or distribution a narcotic or abusive drug.
>
> (b) Any person who violates this section shall be imprisoned for not less than 5 years nor more than 25 years, fined not more than the amount set forth in § 22-3571.01, or both.

The Commentary, on pages 1 and 2, explain perceived ambiguities in this provision. It argues that under one interpretation the provision is not needed because:

[8] D.C. Code § 48-1101 currently states that the phrase "drug paraphernalia" "shall not include any article that is 50 years of age or older."

> Under RCC § 22E-210, a person is guilty as an accomplice if that person acts with the culpability required by the underlying offense, and purposely assists another person with the planning or commission of the conduct constituting the offense, or purposely encourages another person to engage in specific conduct constituting the offense.[9] The revised trafficking of a controlled substance statute requires that a person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a controlled substance. Consequently, a person who knowingly opens or maintains a place, with the *purpose* of assisting another person in distributing, manufacturing, or storing for the purposes of manufacturing or distributing a narcotic or abusive drug could be liable as an accomplice to trafficking of a controlled substance.

Instead of simply repealing D.C. Code § 48-904.03a, OAG suggests that the Commission draft a more targeted provision that only applies to the manufacture of methamphetamine. The internet is replete with news and videos of exploding methamphetamine labs and mobile labs and the injuries that they cause.[10] The community must be protected from such hazards.

As noted in a flyer produced by U.S. Department of Justice's National Drug Intelligence Center:

> The chemicals used to produce methamphetamine are extremely hazardous. Some are highly volatile and may ignite or explode if mixed or stored improperly. Fire and explosion pose risks not only to the individuals producing the drug but also to anyone in the surrounding area, including children, neighbors, and passersby. Even when fire or explosion does not occur, methamphetamine production is dangerous. Simply being exposed to the toxic chemicals used to produce the drug poses a variety of health risks, including intoxication, dizziness, nausea, disorientation, lack of coordination, pulmonary edema, serious respiratory problems, severe chemical burns, and damage to internal organs.[11]

Given the dangerousness associated with methamphetamine production, OAG suggests that the RCC contain a provision which makes it an offence for a person to knowingly use a building, vehicle, or watercraft with the intent to manufacture methamphetamine therein.

[9] The revised trafficking of a controlled substance statute specifies that the rules governing accomplice liability under RCC § 22E-210 apply to that offense.

[10] For example, see https://www.youtube.com/watch?v=U7MaaVtiGIQ, https://www.military.com/video/explosions/blast/meth-lab-explosion-almost-hits-cop/2034025445001, and https://www.complex.com/pop-culture/2011/12/the-25-scariest-meth-lab-explosion-photos/4.

[11] See https://www.justice.gov/archive/ndic/pubs7/7341/7341p.pdf.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	September 16, 2019
Re:	Comments on First Draft of Report No. 37, Controlled Substance and Related Offenses

The Public Defender Service makes the following comments on Report #37, Controlled Substance and Related Offenses.

1) PDS recommends the full decriminalization of simple possession of controlled substances. Incarcerating individuals for the possession of controlled substances is a failed criminal justice policy and the wrong approach to a public health problem. There are many reasons why decriminalization would be the right approach for the CCRC. It is well-documented that there is discriminatory enforcement of drug possession laws against African-Americans. Much of the reasoning behind the Council's decriminalization of marijuana stemmed from the discriminatory enforcement of laws prohibiting possession of marijuana. The continued criminalization of drug possession leads to negative police encounters, burdensome supervision requirements for individuals on probation, and potentially devastating consequences for non-citizens. The resources dedicated to arresting and detaining individuals for simple possession of controlled substances would be better employed through a public health approach that provides treatment for addiction and encourages safe drug use practices.

In the absence of full decriminalization of simple possession, PDS makes additional recommendations related to possession of controlled substances.

2) In appendix A, the CCRC provides a mark-up of D.C. Code § 48-904.01. Beyond re-numbering, the RCC does not address D.C. Code § 48-904.01(e)(1). PDS recommends that the RCC expand D.C. Code § 48-904.01(e)(1) to allow on more than a single occasion for judges to sentence individuals to probation and dismiss the proceedings after the successful completion of probation. Recovery from drug addiction is often a long process that includes periods of relapse and abuse. Individuals who successfully complete probation under D.C. Code § 48-904.01(e)(1) may briefly relapse and may be subject to arrest, particularly if they use drugs outside in streets or alleys. Given the negative impact of a criminal conviction and our collective understanding

that individuals may relapse over a period of time, judges should have the ability to use their discretion to discharge drug possession convictions on more than one occasion pursuant to D.C. Code § 48-904.01(e)(1).

3) PDS recommends that the RCC adopt within Title 48, the provisions of D.C. Code § 7-403 that stem from the "Good Samaritan Overdose Prevention Act of 2012." D.C. Code § 7-403 provides immunity from prosecution for some drug offenses under circumstances where an individual seeks assistance for himself or other individuals in the event of a suspected drug overdose. This law encourages life-saving action for individuals suffering from a drug overdose. Including this provision within the substantive drug offenses would increase knowledge of that provision and could improve public health.

4) The RCC drug provisions grade offenses with regard to weight. RCC drug offenses do not include any requirement with respect to drug purity. Rather liability attaches when the individual possesses or traffics a measurable amount of the controlled substance. PDS has concerns about how the use of weight would disproportionately impact the possession or trafficking of controlled substances that are contained within edible substances. For instance, an individual selling an opium tea may sell eight ounces of liquid tea mixed with a measureable amount of opium. The eight ounces of tea would be roughly equal to "200 grams of any compound or mixture containing opium."[1] The sale of eight ounces of opium tea, regardless of its low purity level and its intended use by a single individual, would qualify as first degree trafficking of a controlled substance. This will typically be the case whenever controlled substances are baked into brownies, cakes, or otherwise mixed with a large quantity of inert substances.

   PDS recommends that the RCC address the disproportionate criminalization of all edibles by creating a different rule for measuring controlled substances that are mixed with edibles and that are intended to be eaten. PDS recommends the following language:

   <u>For controlled substances that are contained within edible products and that are intended to be consumed as food, candy, or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the controlled substance.</u>[2]

[1] RCC § 48-904.01b(a)(2)(A).

[2] PDS spoke with Dr. Ian A. Blair, the A.N. Richards Professor of Systems Pharmacology and Translational Therapeutics at the University of Pennsylvania, about the complexity of testing edible items such as teas and cakes for the presence of controlled substances and about any difficulty in calculating a total weight for the controlled substance. Dr. Blair advised that testing for the level of concentration of a controlled substance in an edible items was possible; indeed, such testing would be easier than testing for controlled substances in tissues, serum, or blood, which are routine functions of toxicology labs. Dr. Blair further advised that calculating the total amount of the controlled substance when it is mixed with a large amount of tea, cake, or other

5) PDS supports the proposal discussed at the September 4, 2019 Public Meeting of the Commission that the weight for purposes of liability should exclude non-consumables, such as the containers used to transport the substance or the by-products of consuming the substance.

6) RCC § 48-904.10, possession of drug manufacturing paraphernalia prohibits the knowing possession of an object that "has been used to manufacture a controlled substance" or "with the intent to use the object to manufacture a controlled substance." PDS recommends eliminating liability in the first instance, when an individual knowingly possesses an object that has been used to manufacture a controlled substance. Many common items such as bowls, spoons, and pans are used to manufacture controlled substances. Individuals sharing homes with people who manufacture drugs may use the same bowls and pots for cooking and eating. In that sense, RCC §48-904.10 is too broad and will criminalize the possession of household items by individuals who did not use the items to manufacture controlled substances and who have no intent to use the items to manufacture controlled substances.

7) PDS has two concerns about RCC § 48-904.11, Trafficking of drug paraphernalia.

   First, while the exceptions for testing kits and needles delivered by community organizations tracks the current law, PDS believes the exception should go farther. The RCC should allow community-based harm reduction organizations the flexibility to distribute clean and safe drug use supplies to individuals who smoke drugs as well as to those who inject drugs. Sharing pipes and smoking with unsafe objects can cause cuts, burns, and the transmission of infectious diseases including hepatitis C.[3] The use of brillo pads rather than appropriately-sized screens can lead to brillo pads being inhaled by the user.

   Second, the RCC should allow the transfer or delivery of clean supplies from one user to another user. For example, if an individual cannot arrive at the needle exchange van during its hours of operation, a friend should be able to collect the supplies and transfer them. For public health reasons, including that the District has the nation's highest rate of HIV diagnosis[4], the acquisition and transfer of safe supplies should be encouraged.

   PDS recommends that the RCC use the following language:

   (a) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation of this section:

inert substance would involve multiplying the concentration of the controlled substance in the tea, cake, or other inert substance (example microgram/gram) by the total weight of the tea, cake, or other inert substance (example microgram/gram x total weight in grams).

[3] See, Crack Pipe Sharing Among Street-Involved Youth in a Canadian Setting, Tessa Cheng, Evan Wood, Paul Nguyen, Julio Montaner, Thomas Kerr, and Kora DeBeck, (2015). Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4305503/

[4] See: https://www.cdc.gov/hiv/statistics/overview/geographicdistribution.html.

(1) For a community-based organization to sell or deliver, or possess with intent to sell or deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance; or
(2) For a community-based organization to sell or deliver, or possess with intent to sell or deliver supplies such as pipes and screens for the safer ingestion of controlled substances by inhalation; or
(3) For person authorized by subsection (b) of 48-1103.01 to deliver any hypodermic syringe or needle distributed as part of the Needle Exchange Program authorized under D.C. Code § 48-1103.01; or
(4) For an individual who received materials described in (a)(1)-(3) to transfer or deliver those materials to another individual; or
(5) For a person to sell or deliver or possess with intent to sell or deliver an object that is 50 years of age or older.

8) The RCC creates a penalty enhancement when, "the actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age." This enhancement fails to include a mens rea element and thus would create an enhanced penalty even where the defendant reasonably believed that the individual to whom he or she sold controlled substances was over the age of 18. Imposing additional penalties without a scienter requirement diminishes the proportionality of punishment. For instance, two individuals who sold cocaine to two different people inside of an age 21 and up night club would be punished differently if one individual, who looked just as old as the other individual entered the club by using fake identification. Without further differences between the two defendants, one should not be subject to additional punishment under essentially the same facts. Rather, PDS recommends that the RCC include that the defendant was reckless as to the age of the individual to whom the defendant distributed the controlled substance.

   Further, PDS recommends adding language to the commentary to specify that the penalty enhancement should not apply in instances when a defendant distributes a controlled substance to one individual and that individual transfers the controlled substance to another individual who is under age 18. Unless the government proves that the defendant knew that the controlled substance would be transferred to a minor, the enhancement should not apply.

9) RCC § 48-904.01b and related provisions create a penalty enhancement under (g)(6)(C) when the actor commits an offense and is within "100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center." PDS recommends amending "public youth center" to read "public recreation center." The term "youth center" does not have a specific meaning within the District while recreation centers are well known and easily identifiable with signs that state "recreation center."

10) PDS recommends rewriting for clarity the language for one of the defenses to Trafficking of a Controlled Substance to read as follows:

It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or ~~future~~ expectation of future financial gain from distribution of a controlled substance.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #37 and #38	Date: September 16, 2019

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #37 and #38. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on Draft Reports #37 and #38

I. General Comment.

1. USAO recommends adding the words "a compound or mixture containing [a controlled substance]" to every gradation of controlled substance offenses.

This language already exists in RCC § 48-904.01b(a)(2) and (b)(2), and in RCC § 48-904.01c(a)(2) and (b)(2). USAO recommends its additional inclusion in RCC § 48-904.01a(a)(2) and (b); RCC § 48-904.01b(c)(2), (d), and (e); and RCC § 48-904.01c(c)(2), (d), and (e).

The draft RCC language lists each drug by name, instead of incorporating the schedules. Current law incorporates the drug schedules, which are set forth at D.C. Code § 48-902.03 *et seq.* Under these schedules, many substances require "any material, compound, mixture, or preparation which contains any quantity of" the enumerated substance. Of the drugs specifically listed in the RCC, this language exists under current law for: cocaine, D.C. Code § 48-902.06(1)(D); ecgonine, D.C. Code § 48-902.06(1)(D); methamphetamine, D.C. Code § 48-902.06(3)(B); phenmetrazine, D.C. Code § 48-902.06(3)(C); and phencyclidine and its immediate precursors, D.C. Code § 48-902.06(4)(E)–(F). This language does not exist for opium, D.C. Code § 48-902.06(1)(A), or for opium poppy and poppy straw, D.C. Code § 48-902.06(1)(C).

[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.

Requiring proof of the controlled substance, instead of requiring proof of *a compound or mixture containing* the controlled substance, would require purity testing. Purity testing is not required under current law, and it would create an additional, unnecessary burden to conduct purity testing in each case.

USAO recommends, to eliminate the need for unnecessary purity testing, including this language in each gradation relating to controlled substances.

II. RCC § 48-904.01a. Possession of a Controlled Substance.

1. USAO opposes eliminating a felony offense for possession of liquid PCP.

Under current law, possession of liquid PCP is a felony offense, punishable by not more than 3 years' imprisonment and a corresponding fine. D.C. Code § 48-904.01(d)(1). USAO believes that the CCRC's recommendations regarding liquid PCP should track current law.

The law creating this felony offense, the Liquid PCP Possession Amendment Act of 2009 (L18-0196), is a relatively new law that went into effect in 2010. The Committee Report to that law notes that "PCP use has decreased nationally since the 1970s; however, there are remaining pockets of abuse including in the District of Columbia." Committee on Public Safety and the Judiciary Report on Bill 18-0566 ("Committee Report") at 2. The Committee Report cites to the Metropolitan Police Department ("MPD")'s assessment of the "rebound in the use of PCP," and cites to data from MPD as "further evidence that PCP associates with a higher incidence of criminal (and violent) behavior than is the case with other drugs." Committee Report at 2. Although the Commentary notes that eliminating the separate penalty for liquid PCP is supported by national legal trends (Commentary at 5), as the Committee Report indicates, D.C. has a unique PCP problem. Therefore, other jurisdictions may not need to address this PCP problem, which creates public safety issues, in the same way that D.C. does. Further, as the CCRC cites (Commentary at 3 n.7), the purpose of this bill was not to punish users. This is consistent with the Committee Report's finding "[p]ossession of liquid PCP is rarely consistent with personal use." Committee Report at 5. Because of the unique PCP problems in the District, and because possession of liquid PCP is consistent with distribution of PCP, USAO opposes the CCRC's recommendation to eliminate a felony offense for possession of liquid PCP.

2. USAO recommends creating only one gradation of possession of a controlled substance, which would apply to any controlled substance.

USAO believes that creating multiple gradations for possession of a controlled substance is unnecessary and overly complicates simple possession. The CCRC notes that, of the 29 reformed jurisdictions, a slight minority creates gradations for possession (Commentary at 5). USAO recommends that the CCRC follow the majority of jurisdictions and create only one gradation of possession.

3. USAO recommends, in subsection (e), changing the words "RCC § 48-901.02" to "D.C. Code § 48.901.02."

   With USAO's changes, this subsection would provide:

   ". . . have the meanings specified in D.C. Code ~~RCC~~ § 48-901.02."

This change is not intended to be substantive. Given that there is no draft RCC § 48-901.02, USAO assumes that the CCRC intended to list the relevant D.C. Code provision.

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

1. USAO opposes creating an enhancement for possessing a firearm while committing the offense of trafficking of a controlled substances, instead of a stand-alone offense for the same.

Under current law, as part of the offense of Possession of a Firearm During Commission of Crime of Violence, an actor is prohibited from possessing a firearm "while committing a crime of violence or dangerous crime as defined in § 22-4501." D.C. Code § 22-4504(b). A "dangerous crime" is defined as "distribution of or possession with intent to distribute a controlled substance." D.C. Code § 22-4501(2). Under the RCC, however, the offense of Possession of a Dangerous Weapon During a Crime only applies to an offense against persons or burglary. RCC § 22E-4104. It would not apply to distribution or possession with intent to distribute a controlled substance.

USAO opposes this change in the law, which creates an enhancement for possession of a firearm while distributing or possessing with intent to distribute a controlled substance, instead of a stand-alone offense for this conduct. This change in law is inconsistent with both current D.C. law and comparable federal law to which the CCRC cites. 18 U.S.C. § 924(c)(1)(A) creates an enhanced punishment for possession of a firearm *either* during a crime of violence *or* during a drug trafficking crime. USAO recommends that the CCRC track both current law and comparable federal law in this respect.

2. To the extent that RCC § 48-904.01b(g)(6)(B) remains, USAO recommends removing the words "in furtherance of and."

   With USAO's changes, RCC § 48-904.01b(g)(6)(B) would provide:

   "The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon ~~in furtherance of and~~ while distributing, or possessing with intent to distribute, a controlled substance;"

The requirement that a firearm, imitation firearm, or dangerous weapon be used "in furtherance of and while" distributing or possessing with intent to distribute a controlled substance is a change from current law, which requires only that a person possess a firearm "while" distributing or possessing with intent to distribute a controlled substance. This change is

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

Further, the Commentary states that this language was taken from 18 U.S.C. § 924 (Commentary at 11). 18 U.S.C. § 924(c)(1)(A), however, provides for an increased punishment if the person "uses or carries a firearm, *or* who, in furtherance of any such crime, possesses a firearm" (emphasis added). The federal statute does not require that the firearm always be used in furtherance of a crime, but permits the firearm to be merely carried during an offense. Moreover, there is an enhancement in the federal statute for brandishing a firearm. 18 U.S.C. § 924(c)(1)(A)(ii). Presumably, for a firearm to be used "in furtherance" of a crime, it must, at a minimum, be brandished. Because the federal statute creates a penalty provision for cases in which the firearm was not brandished, *see* 18 U.S.C. § 924(c)(1)(A)(i), this statute is intended to punish both those who use the firearm in furtherance of a crime and those who possess the firearm, but do not necessarily use it in furtherance of a crime. Thus, the CCRC's reading of § 924(c)(1)(A) is too narrow, and does not include all of the permissible options under the statute.

Finally, the Commentary notes that "if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm" (Commentary at 11 n.28). In most circumstances, however, it would be difficult, if not impossible, to prove this intent beyond a reasonable doubt, unless the actor actually uses the firearm. Rather, the fact that an actor possesses a firearm while trafficking a controlled substance should lead to an inference that the actor may use the firearm at some point. This inference should be codified in the statute, and require only that a person possess the firearm while committing the offense.

3. <u>USAO recommends removing the defense in RCC § 48-901.01b(h)(1) that creates a defense for distribution or possession with intent to distribute where an actor does not do so in exchange for something of value or future expectation of financial gain.</u>

As the CCRC acknowledges, creating this defense represents a change from current law. This defense is problematic for prosecution. If a person possesses drugs with intent to distribute them, but there is no proof of distribution, it will often be impossible for the government to overcome this defense. For example, despite possessing a large quantity of drugs that a drug expert would opine is more consistent with intent to distribute than person use, a defendant could claim that he had no intention to distribute them in exchange for value. He could claim, instead, that he possessed such a large quantity for the purpose of distributing them with friends. It will be difficult for the government to overcome this claim beyond a reasonable doubt, even where it is not true. Thus, although the CCRC's intent in creating this defense was to create a limited defense for those who provide small gifts to others (Commentary at 13), in reality, it would allow

traffickers to rely on this defense to justify their possession of quantities that are not intended for mere small gifts. USAO accordingly believes that this defense is inappropriate. Notably, the CCRC acknowledges that this defense is not supported by national legal trends, and that only one of the 29 reformed code jurisdictions has adopted this defense (Commentary at 19). The CCRC should stay in line with current law and the overwhelming majority of other jurisdictions and remove this defense.

IV. RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

1. USAO reiterates the same objections here that it set out above for RCC § 48-904.01b.

V. RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

1. USAO opposes decriminalization of drug paraphernalia.

The RCC is essentially decriminalizing the offense of possession of drug paraphernalia (Commentary at 32 n.111). The RCC provides little support for this significant change, stating that "[t]his change improves the clarity and proportionality of the revised criminal code" (Commentary at 32).

Although there is no definition of "manufacturing" in the RCC, USAO assumes that the RCC term "manufacturing" relies on the definition at D.C. Code § 48-901.02(13). As the Commentary alludes to (Commentary at 32& n.115), this manufacturing definition likely would not include objects routinely used to distribute drugs, such as scales, zips, and other objects, because those objects were not necessarily "designed to" manufacture drugs. Thus, in addition to decriminalizing drug paraphernalia intended for personal use, the RCC has proposed decriminalizing drug paraphernalia intended for distribution as well.

The RCC notes that this change is not supported by national legal trends, stating that of the 29 reformed jurisdictions, none limit the scope of their statutes in a matter similar to the RCC's proposal, and that only two states have decriminalized drug paraphernalia in some way (Commentary at 34).

VI. Recommended Repeal of D.C. Code § 48-904.07. Enlistment of Minors.

1. USAO recommends incorporating the substance of D.C. Code § 48-904.07 into the enhancement set forth in RCC § 48.904.01b(g)(6)(A).

As proposed, RCC § 48-904.01b(g)(6)(A) provides an enhancement for trafficking of a controlled substance where: "The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age." USAO suggests supplementing this enhancement to also include an enhancement for an actor who "enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of" the actor. Thus, to the extent that the conduct prohibited by D.C. Code § 48-904.07 is prosecuted under an accomplice liability theory, as contemplated by the Commentary in Report # 38 (at 3–4), there would be an enhanced penalty available for

enlisting a minor to distribute a controlled substance. This enhancement is consistent with the rationale for an enhancement for distributing a controlled substance to a minor, as it would deter adults from involving minors in the use and distribution of controlled substances.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 27, 2019

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

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

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

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

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

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

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

issued under D.C. Code§ 7-2502.07 for a firearm of the same caliber; or
(2) One or more restricted pistol bullets.

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

[4] The First Degree offense could read "A person commits first degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition when that person:
(1) Commits third degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition; and
(2) the ammunition is, in fact, a restricted pistol bullet.

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

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

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

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

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

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

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

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

RCC § 7-2507.02. UNLAWFUL STORAGE OF A FIREARM

RCC § 7-2507.02 (a) states:

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

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

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

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

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

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

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

RCC § 22E-4102. CARRYING A DANGEROUS WEAPON

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

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

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

or federal law."[8]

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

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

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

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

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

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

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

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

RCC § 22E-4106. NEGLIGENT DISCHARGE OF FIREARM

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

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

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

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

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

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

RCC § 22E-4113 (a) states:

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

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

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

RCC § 22E-4114 (b)(3) states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 27, 2019

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

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

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

MEMORANDUM

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

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

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

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

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

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

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

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

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

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

Notwithstanding subsection (a):

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

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

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

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

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

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

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

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

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

Comments on Draft Reports #39 and #40

I. General Comments.

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

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

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

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

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

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

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

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

II. RCC Title 7; Chapter 25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. RCC § 22E-701. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 15, 2019

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

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

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The ranking of Burglary

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

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

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

- The ranking of Unlawful Creation or Possession of a Recording

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

- The ranking of Unlawful Labeling of a Recording

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

- The ranking of Alteration of Bicycle Identification Number

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

- The ranking of Disorderly Conduct

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

WHAT OFFENSES SHOULD BE JURY DEMANDABLE

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

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

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

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

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

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

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

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

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

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

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

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

(1) Knowingly obtains any financial benefit or property;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

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

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

From: Public Defender Service

Date: November 15, 2019

Re: Comments on First Draft of Report No. 41
Ordinal Ranking of Maximum
Imprisonment Penalties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] California Constitution Article 1 § 16.

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

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

[13] Maine Constitution Article 1 § 6.

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

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

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

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

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

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

Comments on Draft Report #41

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

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

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

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

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

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

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

> "Last year, the Council passed an amendment to D.C. Code § 16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases. Bill [10]-268 and Title V of Bill 10-98 would reduce the maximum penalty of most commonly charged misdemeanors from one year to 180 days and to a fine that does not exceed $1000, thereby eliminating the defendant's entitlement to a trial by jury.
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> "In 1992, the Superior Court disposed of 25,034 misdemeanor cases brought by the United States and the District of Columbia (including cases "no papered" and nolle prossed by the prosecutor). Our best estimate is that at least 20,000 of these cases were jury demandable misdemeanors, for which we have maintained six calendars, each presided over by an associate judge and with between 500 and 600 active cases at any given time. Since 1989, there has been a steady growth in U.S. misdemeanor filings: 13,515 cases were brought in 1989; 17,260 cases were brought in 1992. Given limited judicial resources in light of court-wide demands, it should be obvious that the pressure on these six calendars has become enormous and appears to be growing. As a practical matter, the actual number of misdemeanor jury trials is relatively small and the vast majority of cases is disposed of short of trial. However, carrying a case in which a jury demand has been made and readying it for trial by jury take[s] significantly longer than the comparable time for non jury matters.
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> "Enactment of the revised penalty structure would have little or no effect on the sentences actually imposed on misdemeanants. Notwithstanding one-year maximums now applicable to most misdemeanor offenses, first, even second, and, sometimes, third-time offenders are generally sentenced to probation or incarceration under 180 days.

> Thus, the reduction in sentence maximums is little more than a reflection of current realities. However, the proposed changes would have a significant impact on the Court's ability to manage these calendars and deploy its judicial resources. They would permit the Court to schedule more trials on earlier dates, given the elimination of lengthier jury trials; to reduce court-wide jury costs by nearly $200,000 a year; and, of course, to assign commissioners to some or all of these calendars, thereby freeing up judges to handle the more serious and complex felony cases.
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> "In the final analysis, it is, of course, a question of legislative policy whether persons charged with misdemeanor violations should be afforded a jury trial. Suffice it to note from the Court's point of view, the proposed downgrading of misdemeanor penalties and resultant elimination of jury trials would not adversely affect the quality of justice while, at the same time, it would significantly improve the Court's ability to deliver prompt justice in both misdemeanor and felony cases."

Letter from Fred B. Ugast, Chief Judge, Superior Court of the District of Columbia, to Councilmember James E. Nathanson, Chair, Judiciary Committee, Council of the District of Columbia, Re: Bill 10-98, "Omnibus Criminal Justice Reform Act of 1993"; Bill 10-268, "Misdemeanor Streamlining Amendment Act of 1993" (Sept. 20, 1993).

Likewise, regarding the Misdemeanor Jury Trial Act of 2001, B14-2, [2] Rufus G. King III, then-Chief Judge of the D.C. Superior Court, stated the following:

> "This bill would have a significant impact on a number of aspects of courthouse procedure and hence I felt it important to bring those to your attention.
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> "The U.S. Supreme Court and the D.C. Court of Appeals have both found that there is no constitutional right to a jury trial for misdemeanor offenses punishable by less than six months imprisonment, even when a case involves multiple misdemeanor charges such that the aggregate sentence may exceed six months. This bill would provide a right to a jury trial for those being prosecuted in the District of Columbia on multiple misdemeanor counts if the aggregate penalty exceeded 180 days. The majority of misdemeanants in D.C. are charged with a single count in which the penalty does not exceed 180 days. However more than 38% of the misdemeanor cases tried by the D.C. U.S. Attorney's Office involve multiple misdemeanor charges. While the bulk of these cases (well over 90%) involve only 2 or 3 misdemeanor counts, the majority would become 'jury demandable' because of the possibility of a sentence of more than 180 days.
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> "The Court's concern is the toll this would take on juror and judicial resources. The Court has recently begun implementation of a jury duty enforcement program, to achieve better compliance with its jury summonses and expand the number of available jurors. Over the past few years the Court has enhanced its jurors' lounge and added a 'quiet room' with modems for those who want to use their computers while awaiting jury

[2] As introduced, this bill proposed that, where a defendant is charged with more than one offense, and the cumulative maximum penalty is a fine of more than $1,000 or imprisonment for more than 180 days, the defendant may demand a jury trial. As enacted, this law limited jury demandability to cases where a defendant is charged with multiple misdemeanor offenses if the cumulative maximum penalty is a fine of more than $4,000 or imprisonment for more than two years.

service. Child care is available to all jurors free of charge, in the courthouse itself. In addition, the Court now uses not just voting rolls and lists from the Motor Vehicle Bureau, but also culls potential juror names and addresses from unemployment compensation and public assistance lists, as well as the Department of Revenue rolls. All these efforts have been made to ensure that more D.C. residents voluntarily participate in jury service, that all eligible residents share the responsibility of jury duty and thus that the Court can maintain its current rule requiring jury service no more than once every two years. The Court's assumption is that most defendants would opt for a jury trial if they had the right to demand one. Additional misdemeanor jury trials would put those cases in competition with felonies for available jurors. The Court estimates it would have to summon an additional 8,000 jurors per year to handle the additional misdemeanor jury trials. This increase could result in the Court having to summon jurors more frequently than every two years as provided in the current jury plan.

"This legislation would also result in significantly more judicial time spent on these multiple count misdemeanor cases. Jury trials for minor criminal matters take a day and a half to two days, sometimes longer. Bench trials—the current practice for multiple count misdemeanor cases—typically take between two and four hours. The legislation would dramatically increase the number of jury trials and thus mean each judge would be able to resolve many fewer cases per month. The result would be a longer time between arrest and trial and a realignment of Criminal Division resources from felonies to misdemeanors. To the extent that the 38% of misdemeanor cases prosecuted by the U.S. Attorney's Office become jury trials, there would be a need for more judges handling misdemeanor calendars. The Court estimates that there would be an additional 300 jury trials per year. The Court is currently working with Congress on a reform of its Family Division, and Congress has made clear that additional resources and judges are needed for that crucial work. This bill would result in a further depletion of the resources from other Divisions in order to handle the new jury trials in multiple count misdemeanor cases.

"The Court is currently involved in a major effort to establish a case management plan that would bring it into compliance with case processing guidelines concerning timeliness that have been established by the American Bar Association. An increase of 300 additional misdemeanor jury trials would have a significant impact on the Court's ability to meet the ABA's guideline of disposing of 90% of misdemeanor cases within 90 days and 100% within 100 days. These guidelines are a performance measure that the Court is committed to meeting; without additional judges (and jurors), it would be practically impossible to meet these goals with an increased number of misdemeanor jury trials.

"It is important to note that the vast majority—well over 90%—of multi-count misdemeanor cases involve just two or three counts, and thus the maximum possible penalty, which is rarely imposed, is less than eighteen months. Over 97% of those sentenced in 2000 received 180 days or less; less than a tenth of one percent of the defendants received a sentence of two years or more.

"Most of multi-count misdemeanor cases involve allegations of possession of two or more drugs, possession of drugs when committing another offense, or a domestic violence incident leading to charges of assault along with a weapons charge or a civil protection order. The Court is concerned that scarce judicial resources would be diverted

> from more serious felony trials or from Family Court to try misdemeanor jury trials where only 3% (fewer than 84 individuals) were sentenced to more than 180 days in jail."

Testimony of Chief Judge Rufus G. King III on Behalf of the D.C. Superior Court Before the Judiciary Committee of the D.C. Council (Oct. 12, 2001).

Roscoe C. Howard, Jr., then-U.S. Attorney for the District of Columbia stated that, as a result of the Omnibus Criminal Justice Reform Act of 1994,

> "[m]isdemeanor cases which used to languish up to a year or more are now set for trial within 2 to 3 months of arrest. Instead of taking a few days to try, they take a few hours. This means that a judge might be able to resolve several cases in the same amount of time that it would take a jury to decide one case. Moreover, the certainty of going to trial as scheduled spurs many pleas. The District of Columbia is better served by a more expeditious trial system, which enables victims to return to their lives, and defendants to either get on with their sentence (which usually does not entail jail time for misdemeanors) or, by an acquittal, to put the matter behind them."

Statement of United States Attorney Roscoe C. Howard, Jr. on Bill 14-2, the "Misdemeanor Jury Trial Act of 2001," Committee on the Judiciary, Council of the District of Columbia (Oct. 12, 2001).

The Committee Report to the Misdemeanor Jury Trial Act of 2001 stated:

> "As Councilmember Phil Mendelson noted at the Committee hearing on October 12, 2001, the 'right to trial by jury [is] a fundamental right. It is fundamental to the American scheme of justice, [and] it is so fundamental that this right appears in not one, but two places in the United States Constitution.' While the U.S. Supreme Court has held that it is permissible to aggregate misdemeanor penalties without violating the Sixth Amendment, the Committee has determined that, as a matter of public policy, there should be limits placed on the amount of time a person can be imprisoned without the right to a jury trial. The threshold for a jury demandable offense was set at two years in order to balance the interests of justice and fairness to the defendant with the efficiency of the judicial process."

Council for the District of Columbia, Committee on the Judiciary, Report on Bill 14-2, at 1–2 (Nov. 21, 2001).

As reflected in this Committee Report, the D.C. Council has already balanced the defendant's interests with the judicial process efficiency interests, and the RCC should remain consistent with this previously legislated balance.

2. USAO recommends, consistent with current law, a maximum sentence of life imprisonment for the offenses of enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor (both enhanced and unenhanced), and enhanced 2nd degree sexual abuse of a minor.[3]

Under current law, 1st degree murder and 1st degree murder while armed are subject to a 60-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-2104(a); 24-403.01(b-2)(1)–(2). 2nd degree murder and 2nd degree murder while armed are subject to a 40-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-2014(c); 24-403.01(b-2)(1)–(2). 1st degree sexual abuse and 1st degree sexual abuse while armed are subject to a 30-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-3002; 22-3020; 24-403.01(b-2)(1)–(2). 1st degree child sexual abuse and 1st degree child sexual abuse while armed are also subject to a 30-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-3008; 22-3030; 24-403.01(b-2)(1)–(2).

A statutory maximum of life imprisonment never requires a judge to sentence a defendant to life imprisonment. Rather, it recognizes that murder, vaginal, anal, or oral sexual assault involving force or children can be particularly horrific, heinous, and/or gruesome offenses. A statutory maximum of life imprisonment allows the judge the possibility of sentencing a defendant to life imprisonment in the particularly brutal cases in which that is an appropriate sentence. A statutory maximum should reflect the worst possible version of that offense, and allow the judge discretion to impose an appropriate sentence. D.C. Superior Court data provided by the CCRC shows that, between 2009 and 2019, judges have imposed 6 life sentences for 1st degree child sexual abuse, 9 life sentences for 1st degree murder (felony murder), and 22 life sentences for 1st degree murder (other than felony murder). Advisory Group Memo #28, App. C at 1. There are no cases listed in which a charge of 1st degree sexual abuse resulted in a life sentence, but USAO is aware of at least one case in which the judge imposed a life sentence for 1st degree sexual abuse while armed, having been found guilty of committing sex offenses against 2 or more victims (along with sentences for other charges).[4] This data shows that, although life sentences are imposed infrequently, there are some rare cases in which D.C. Superior Court judges have found it appropriate to impose these sentences in recent years.

The RCC has proposed categorizing felony murder as 2nd degree homicide instead of 1st degree homicide. USAO strongly opposed this change in its July 8, 2019 comments on Report #36 (at 16). If the RCC adopts USAO's recommendation, and categorizes felony murder as 1st degree homicide, then USAO no longer believes that a statutory maximum of life imprisonment is necessary for enhanced 2nd degree homicide. Rather, a statutory maximum of 60 years (Class

[3] As discussed in its July 8, 2019 comments on Report #36 (at p. 45), USAO recommends applying the Offense Penalty Enhancements in RCC § 22E-1301(g) to all offenses in RCC §§ 1301–1307. Applying these enhancements to all sex offenses is crucial, and protects important interests. Among other offenses, this would create an enhanced penalty for sexual abuse of a minor.

[4] This case is Demetrius Banks, 2015 CF1 12148.

2) for enhanced 2nd degree homicide, and a statutory maximum of 40 years (Class 3) would be appropriate for 2nd degree homicide. If the RCC does not accepts USAO's recommendation, then USAO believes it is appropriate for enhanced 2nd degree homicide to have a statutory maximum of life imprisonment (Class 1), and 2nd degree homicide to have a statutory maximum of 40 years (Class 3).

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

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

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

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

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

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

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

4. USAO recommends increasing the proposed penalties for Burglary.

Under current law, 1st Degree Burglary has a 30-year statutory maximum, and 2nd Degree Burglary has a 15-year statutory maximum. D.C. Code § 22-801. 1st Degree Burglary is currently ranked as a Category 5 offense in the D.C. Sentencing Guidelines, with a low-end guideline of 3 years' incarceration for a person with a Class A criminal history. The RCC has proposed ranking 1st Degree Burglary as a Class 8 felony, with a 5-year statutory maximum, 2nd Degree Burglary as a Class 9 felony, with a 3-year maximum, and 3rd Degree Burglary as a Class A misdemeanor, with a 1-year maximum. USAO recommends increasing these rankings, as they understate the serious nature of burglaries.

With the proposed statutory maximum of 5 years' incarceration under the RCC for 1st Degree Burglary, a defendant could only effectively receive a sentence of 3 years' incarceration due to the requirement that back-up time be reserved. *See* D.C. Code § 24-403.01(b-1). Thus, the RCC has proposed that the new statutory maximum essentially be the same period as the current minimum sentencing guideline for a person with no criminal history. This is inappropriate.

[5] USAO recognizes that the CCRC is not at this time recommending specific penalties, but rather assessing relative severity of offenses. Because the specific penalties proposed, however, are a useful tool to help assess USAO's view of the relative severity of offenses, USAO will rely on the proposed penalties in its analysis. Because Model 1 is a closer corollary to the penalties under current law, and because it creates higher penalties , USAO will rely on Model 1 proposals in this discussion.

A statutory maximum should not represent the minimum that the legislature believes a crime should be punished, or even the average amount that the legislature believes a crime should be punished. Rather, a statutory maximum should reflect the legislature's belief as to what a person should be sentenced to for the worst possible version of that offense. It would not be appropriate for every defendant sentenced for that offense to receive the maximum penalty, but that sentence should be available for those who merit it. Although some burglaries are accompanied by offenses that carry higher maximum sentences (for example, if a defendant murdered, violently assaulted, or raped someone in the course of a burglary), many burglaries are not. If, for example, a defendant entered a victim's home while the victim and the victim's young children were asleep, and the victim woke up to the defendant punching the victim (6th Degree Assault), threatening to rape the victim's young children (1st Degree Threats), or even threatening to rape the victim at gunpoint (1st Degree Menacing), that defendant has engaged in serious conduct through the burglary and related offenses that has traumatized that victim and should be punished accordingly. Burglaries are a unique invasion of privacy that can destroy a person's feelings of safety and security in their own home. That feeling of an invasion of privacy could even exist more prominently for a burglary than, for example, if a person was robbed at gunpoint on a street. A home should be a place where a person can be secure, and a defendant who invades that space with the purpose of committing a crime should be punished accordingly.[6] USAO therefore recommends ranking 1st, 2nd, and 3rd Degree Burglary as Class 4, Class 6, and Class 7 offenses, respectively.

5. USAO opposes decreasing penalties for firearms offenses from those in current law.

In a time of increased gun violence, an increase in homicides in the District, and a need to reduce the number of guns in the District, the RCC should not lower penalties for firearms offenses. Firearm violence is a critical public safety issue, and the firearms that lead to that violence should not be treated lightly. Indeed, the D.C. Council recently increased the penalty for possessing a large capacity ammunition feeding device from 1 year's imprisonment to 3 years' imprisonment. Firearms Safety Omnibus Amendment Act of 2018, D.C. Law 22-314 (eff. May 10, 2019). In support of that amendment, the Committee on the Judiciary and Public Safety cited to recent mass shootings that involved these high-capacity magazines. Council for the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 22-588, at 3–5 (Nov. 28, 2018). The Committee Report also cited to the homicide rate in the District, including the fact that the majority of homicides were committed with a firearm. *Id.* at 5. In increasing this penalty, the Committee found "that the increased lethality of a weapon using a large capacity ammunition feeding device—accomplished through its ability to fire more rounds without reloading—and the resulting threat to the public and law enforcement, warrants a more stringent prohibition on their possession. Court records related to the shooting of Makiyah Wilson revealed that a large capacity ammunition magazine was likely used in the incident. . . . The Committee, therefore, adopts an incremental response on this issue commensurate with the prevalence of the problem in the District and the increased lethality of the devices." *Id.* at 18.

[6] Further, USAO proposed adding a "while armed" enhancement to burglary in its July 8, 2019 comments on Report #36 (at 83), and that recommendation is pending. If that recommendation is not accepted, however, it would mean that an armed burglary is subject only to a 5-year maximum sentence, which is wholly insufficient.

6. USAO recommends increasing the proposed penalties for Carrying a Dangerous Weapon.

2nd Degree Carrying a Dangerous Weapon is the equivalent of the current Carrying a Pistol Without a License ("CPWL") statute. Under current law, CPWL is subject to a 5-year statutory maximum, or a 10-year statutory maximum if the defendant has a previous conviction for CPWL or another felony. D.C. Code § 22-4504(a). The RCC has proposed making 2nd Degree Carrying a Dangerous Weapon a Class 9 felony, subject to a 3-year statutory maximum. This would lower the applicable penalty for CPWL, and is inconsistent with CPWL's ranking as a Group 8 offense in the D.C. Sentencing Guidelines. As discussed above, the RCC should not lower penalties for firearms offenses. USAO recommends ranking 1st and 2nd degree Carrying a Dangerous Weapon as Class 7 and 8 felonies, respectively.

7. USAO recommends increasing the proposed penalties for Possession of a Firearm by an Unauthorized Person.

The RCC has proposed ranking 1st Degree Possession of a Firearm by an Unauthorized Person as a Class 9 felony, with a 3-year statutory maximum, and 2nd Degree Possession of a Firearm by an Unauthorized Person as a Class A misdemeanor, with a 1-year statutory maximum. This is a steep drop from current penalties, and is inappropriate. The RCC has essentially proposed that the new statutory maximums be equal to the mandatory minimums under current law. *See* D.C. Code § 22-4503. Due to requirements regarding back-up time, *see* D.C. Code § 24-403.01(b-1), that means that the current mandatory minimum would not even be a permissible sentence for 1st Degree Possession of a Firearm by an Unauthorized Person. Under current law, a person who has been previously convicted of a felony or is subject to other limitations on firearm possession is subject to a 10-year statutory maximum, and a person who has been previously convicted of a crime of violence is subject to a 15-year statutory maximum. D.C. Code § 22-4503(b)(1). USAO recommends ranking 1st Degree and 2nd Degree Possession of a Firearm by an Unauthorized Person as Class 6 and Class 7 felonies, respectively.

Crucially, persons convicted of this offense not only carried a firearm, but also had been previously convicted of a felony or crime of domestic violence, or a prior crime of violence. Persons previously convicted of these offenses should not be permitted to carry firearms, and should be subject to penalties commensurate with their actions.

Further, it is incongruous that the penalty for 2nd Degree Carrying a Dangerous Weapon is the same penalty as 1st Degree Possession of a Firearm by an Unauthorized Person who has a prior conviction for a crime of violence (Class 9 felony), and is punished more severely than 2nd Degree Possession of a Firearm by an Unauthorized Person. It should be a more serious offense to possess a weapon after having been convicted of a crime than to possess a weapon generally.

8. USAO recommends increasing the proposed penalties for Possession of a Dangerous Weapon During a Crime.

The RCC has similarly proposed ranking 1st Degree Possession of a Dangerous Weapon During a Crime as a Class 9 felony, with a 3-year statutory maximum, and 2nd Degree Possession of a Dangerous Weapon During a Crime as a Class A misdemeanor, with a 1-year statutory

maximum. This also represents a steep drop from current penalties, and is also inappropriate. The RCC has essentially proposed that the new statutory maximum for this offense be substantially *lower* than the mandatory minimum under current law. *See* D.C. Code § 22-4504(b). Under current law, a person convicted of Possession of Weapons During Commission of a Crime of Violence is subject to a 15-year statutory maximum. *Id.* As detailed in its September 30, 2019 comments to Reports #39 and 40 (at 6), USAO opposes creating different gradations of this offense for firearms and imitation firearms, as it is frequently impossible to prove where a firearm is real or imitation. Assuming that the CCRC accepts USAO's recommendation and includes imitation firearms in 1st Degree, USAO recommends ranking 1st Degree Possession of a Dangerous Weapon During a Crime as a Class 6 felony, and ranking 2nd Degree Possession of a Dangerous Weapon During a Crime as a felony. If the CCRC does not accept USAO's recommendation regarding imitation firearms, USAO recommends ranking both 1st Degree and 2nd Degree as Class 6 felonies.

As stated above, USAO opposes reducing maximum penalties for firearms offenses at a time when firearms violence is a threat to the public safety of the community. This offense involves not just possession of firearms, but possession of firearms when the firearms are being used to commit offenses against others. This proposal does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others. USAO therefore recommends that the penalties for this offense track current law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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: January 23, 2020

SUBJECT: First Draft of Report #42, Obscenity, Privacy, and Related Offenses

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 #42, Obscenity, Privacy, and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-701. DEFINITIONS

On page 3 of the Report it defines "Live performance." It states, "'Live performance' means a play, dance, or other visual presentation or exhibition for an audience." In the Explanatory Note it states "The RCC definition of "live performance" is used in the revised offenses of unlawful creation or possession of a recording, arranging a live sexual performance of a minor, and attending or viewing a live sexual performance of a minor." While OAG agrees that the definition works in most cases, it does present an issue of applicability when applied to some of these offenses.

[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.

For example, the elements of First Degree Attending or Viewing a Live Sexual Performance of a Minor, pursuant to RCC § 22E-1810, is:

(a) … [A]n actor commits attending or viewing a live sexual performance of a minor when that actor:
    (1) Knowingly attends or views a live performance or views a live broadcast;
    (2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
        (A) A sexual act or simulated sexual act;
        (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
        (C) Masturbation or simulated masturbation; or
        (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

Plugging in the definition of "live performance" to RCC § 22E-1810(a)(1) we get "Knowingly attends or views a play, dance, or other visual presentation or exhibition for an audience or views a live broadcast. The issue is whether a person who arranges a live sexual performance of a minor for the viewing pleasure of a single person and the single person viewing the live sexual performance are guilty of an offense. The RCC does not define the word "audience." Merriam-Webster defines "audience" as "a group of listeners or spectators."[2] To resolve this issue, OAG suggests that the definition of "Live performance" be amended to say that it "means a play, dance, or other visual presentation or exhibition for an audience, including an audience of one."

RCC § 22E-1803. VOYEURISM

RCC § 22E-1803 (a) states that a person commits first degree voyeurism when they:

(1) Knowingly:
    (A) Creates an image, other than a derivative image, of the complainant's nude or undergarment-clad genitals, pubic area, anus, buttocks, or developed female breast below the top of the areola; or
    (B) Creates an image or audio recording, other than a derivative image or audio recording, of the complainant engaging in or submitting to a sexual act or masturbation;
(2) Without the complainant's effective consent; and
(3) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

The improper creation of an image under subparagraph (A) can happen in two scenarios, 1) where the complainant approves of the person seeing them fully or partially nude but does not

[2] See https://www.merriam-webster.com/dictionary/audience.

give effective consent for the creation of an image and 2) where the complainant is unaware that the person is viewing them or creating the image. Because this can happen in the two scenarios, there is a question about what is meant by "without the complainant's effective consent." Does it apply to creation of the image alone or does it apply to the actual viewing of the nude complainant?[3] To clarify the scope of the effective consent, OAG recommends that subparagraph (a)(2) be redrafted to say, Without the complainant's effective consent to being observed and for the creation of an image."[4]

RCC § 22E-1803(c)(3) provides for the penalty enhancements for the offense of Voyeurism. In addition to the general penalty enhancements that apply, "the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, it is proven that the actor knew the complainant was under 18 years of age." [emphasis added] The Commentary does not explain why the penalty enhancement is limited to situations where the actor "knew" the complainant was under 18. OAG would note that the following offenses and/or their enhancements apply when the complainant is in fact a minor or the actor is negligent as to the fact that the complainant is under 18 years of age (or in some cases a lower age): RCC § 22E-1302, Sexual Abuse of a Minor; RCC § 22E-1304, Sexually Suggestive Conduct with a Minor; RCC § 22E-1305, Enticing a Minor into Sexual Conduct; RCC § 22E-1306, Arranging for Sexual Conduct with a Minor; RCC § 22E-1605, Sex Trafficking of Minors; RCC § 22E-1806, Distribution of an Obscene Image to a Minor; RCC § 22E-1807, Trafficking an Obscene Image of a Minor; RCC § 22E-1808, Possession of an Obscene Image of a Minor; RCC § 22E-1809, Arranging a Live Sexual Performance of a Minor; and RCC § 22E-1810, Attending or Viewing a Live Sexual Performance of a Minor. As the offense of Voyeurism, the creation of a sexual image, is closely related to some of the foregoing offenses when the complainant is a minor and because none of those offenses require that an actor knew the complainant was under a specific age, OAG recommends that RCC § 22E-1803(c)(3) be redrafted to apply when the actor was reckless as to the fact that the complainant was under 18 years of age..

RCC § 22E-1804. UNAUTHORIZED DISCLOSURE OF SEXUAL RECORDINGS

RCC § 22E-1804 (c) provides for an affirmative defense. Subparagraph (2) provides the burden of proof. It states, "The defendant has the burden of proof for an affirmative defense by a preponderance of the evidence." OAG recommends that this provision be redrafted to clarify that defendant has both the he "burden of production" and the "burden of persuasion" (i.e.,Proof by preponderance of the evidence

RCC § 22E-1805. DISTRIBUTION OF AN OBSCENE IMAGE

[3] The same analysis applies to RCC § 22E-1803 (a)(1)(B).
[4] To make the effective consent provision in second degree voyeurism parallel, OAG also suggests that (b)(2) be amended to read "Without the complainant's effective consent to be observed."

The first element of this offense includes when the actor "Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated… Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering…"[5] This provision is clear in situations where the complainant is engaging in behavior that is sexual (or sexualized) in nature. However, through the use of electronic equipment a person can focus in on the complainant in such a way, or edit otherwise non-sexual behavior, to make it appear sexual (or sexualized). While OAG believes that this offense would cover such manipulated images, to avoid any ambiguity, OAG suggests that this provision be redrafted to make clear that the language pertaining to sexual or sexualized image pertains to the image that is eventually distributed, not what the person who was filmed was actually doing.

Paragraph (2) requires that the person act without the complainant's effective consent. To explain this in the context of "Relation to Current District Law, the Commentary, states, ".,.the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted." However, these two statements are not coextensive because lack of effective consent can occur in more situations than where materials are distributed "unsolicited, unwelcome, and wanted. To clarify the Commentary, OAG suggests that this phrase be redrafted to state "the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted, and in other situations were effective consent has not been given."

RCC § 22E-1806. DISTRIBUTION OF AN OBSCENE IMAGE TO A MINOR

RCC § 22E-1806 decriminalizes the distribution of obscene images to a minor by a person under the age of 18 to a complainant who is under 16 years of age. Paragraph (a)(3) states that the offense only applies when "[I]n fact, the actor is 18 years of age or older and at least 4 years older than the complainant. However, the Commentary does not explain why it should not be an offense for a teenager to show obscene images to a young child. Showing obscene imagines to a child is frequently done as part of grooming the child for sexual relations. OAG has prosecuted teenagers aged 14 to 17 for child sexual assault of children between the ages of 4 and 8 in

[5] The full text of RCC § 22E-1805 is:

(a) An actor commits distribution of an obscene image when that actor:
  (1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
    (A) Sexual act;
    (B) Sadomasochistic abuse;
    (C) Masturbation;
    (D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
    (E) Sexual contact; or
    (F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;
  (2) Without the complainant's effective consent; and
  (3) Reckless as to the fact that the image is obscene.

situations where prior to the sexual assaults the teenager showed the younger child pornography on numerous occasions. The goal of the juvenile justice system is to rehabilitate youth so that they do not commit offenses when they become adults. By failing to treat a teenager who grooms younger children by showing them sexually explicit movies, we are not only failing to treat the teenager, and thus rehabilitate them, prior to them committing sexual offenses as adults for the same behavior, but we are failing to address the victimization of those future younger children who need not have been groomed or assaulted. This is not to say that OAG believes that this offense should apply when a child distributes or displays such an image to a friend of similar age. To address this problem, OAG suggests that paragraph (a)(3) be redrafted to say, "I]n fact, the actor is at least 4 years older than the complainant."

RCC § 22E-1806 (c) creates an affirmative defense for a defendant who "(A) Is an employee of a school, museum, library, or movie theater (B) is acting in within the reasonable scope of that role; and (C) Has no control over the selection of the image." As these individuals do not have a choice concerning what films their employers show, OAG agrees that these individuals should be able to avail themselves of this affirmative defense. However, there are other venues that also show movies and the employees of those venues should be able to avail themselves of this affirmative defense as well. For example, movies in the District are shown at the convention centers, RFK Stadium Armory, Gateway DC, and at outdoor venues. Rather than litigate whether these facilities are movie theaters, OAG recommends that RCC § 22E-1806 (c)(A) be amended to include a catchall provision as follows, "Is an employee of a school, museum, library, movie theater, or other venue."[6]

RCC § 22E-1807. TRAFFICKING AN OBSCENE IMAGE OF A MINOR[7]

RCC § 22E-1807 presents a similar issue as the decriminalization of distribution of obscene images to a minor explained above. Paragraph (c)(4)(B) excludes from liability an actor who is under 18 years of age and who "[a]cted with the effective consent of every person under 18 years of age who is, or who will be, depicted in the image, or reasonably believed that every person under 18 years of age who is, or who will be, depicted in the image gave effective consent." An example may be helpful to highlight the issue. Say a 17 year old knowingly makes an image of an 8 year old, whom they have groomed, engaging in a sexual act accessible to an audience on an electric platform. The 17 year old would not be guilty of this offense if the 8 year old gave effective consent. Because the 8 year old was groomed, the 8 year old gave consent that was not "induced by physical force, a coercive threat, or deception."[8] In addition to the arguments that OAG made concerning the decriminalization of distribution of obscene images to a minor explained above, OAG does not believe that young children are capable of giving effective consent to the distribution of their sexual images. To resolve these issues OAG proposes that

[6] OAG suggests that this language also be incorporated into the other offenses in Report #42 that have the same affirmative defense.

[7] The same comment, analysis, and suggestion should be applied to paragraph (c)(4)(B) of RCC § 22E-1808, Possession of an Obscene Image of a Minor and paragraph (c)(2)(B) of RCC § 22E-1809, Arranging a Live Sexual Performance of a Minor."

[8] RCC § 22E-701 states that "'Effective consent' means consent other than consent induced by physical force, a coercive threat, or deception."

paragraph (c)(4)(B) add a sentence that says, "However, this exclusion does not apply if the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger."

RCC § 22E-1810. ATTENDING OR VIEWING A LIVE SEXUAL PERFORMANCE OF A MINOR

The Commentary states, "Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer." [emphasis added]. It is not clear, however, what is meant by the terms "unnatural" and "unusual" in this context. For example, if the performance included a 15 year old boy viewing erotica with an exposed erect penis, would the focus on the relevant body part be a "natural" or "unnatural", "usual" or "unusual" display? We recommend that the Commentary explain or give examples of what a "natural", "unnatural", "usual", and "unusual" focus on the relevant minor's body parts would be.

RCC § 22E-4206. INDECENT EXPOSURE

Both First and Second Degree Indecent Exposure requires that the exposure be made "without the complainant's effective consent." See RCC § 22E-1810 (a)(2)(B) and (b)(3)(B). However, there is no exception for when the complainant is a young child. Similar to what OAG noted regarding RCC § 22E-1807, Trafficking an Obscene Image of a Minor, OAG does not believe that young children are capable of giving effective consent to indecent exposure. This position is consistent with the Court's finding in *Parnigoni v. District of Columbia*, 933 A.2d 823 (DC 2007). In that case the defendant was convicted of exposing himself to an eleven-year-old and the child's father. The facts of the case are as follows:

> On the day of the events at issue here, the then--thirty-three-year-old Parnigoni spent the day with the then eleven-year-old O.J. That afternoon, the two were alone in O.J.'s home when Parnigoni suggested that they play a game of ping-pong. O.J. agreed, and they went into the basement where there was a ping-pong table. Parnigoni suggested an additional rule for this particular game of ping-pong: that whoever lost a game would have to play the next game naked. O.J. agreed to play according to that rule and proceeded to beat Parnigoni at the first game they played. Parnigoni then took off all of his clothes and began to play the next match naked. O.J. testified that he was able to see Parnigoni's "whole body except for his legs down," including his "private parts." *Parnigoni,* at 825.

Though the defendant argued that the eleven-year-old had consented to the indecent exposure, the Court held that, under the indecent exposure statute in affect at the time, a child under the age of 16 was incapable of giving consent. OAG suggests that language similar to what it proposed to amend RCC § 22E-1807, Trafficking an Obscene Image of a Minor, also be included for this offense. That language is "The element of lack of effective consent does not apply if the complainant is under 16 years of age and the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger."

One of the elements of Second Degree Indecent Exposure is that the actor is "Reckless as to the fact that the conduct… Alarms or sexually abuses, humiliates, harasses, or degrades any person."[9] The current indecent exposure statute does not require this element and the Commentary does not explain why it should be added.[10] The following example may be helpful. As a crossing guard is approaching the intersection where she assists children in safely crossing the street, she sees a man sitting on a METRO bus bench masturbating. Though the crossing guard does not feel alarmed, sexually abused, humiliated, harassed or degraded, she is concerned that the children coming home from school will soon be walking by and will see the man. As written, the man would not be committing a crime until the children see him. There is no reason to add this limitation. OAG recommends amending this offense to remove this requirement.

RCC § 22E-1809. ARRANGING A LIVE SEXUAL PERFORMANCE OF A MINOR

An element of both degrees of this offense is that the actor knowingly "Creates, produces, or directs a live performance.[11] An affirmative defense, under subparagraph (d)(3), applies when the actor:

(A) Is an employee of a school, museum, library, or movie theater;
(B) Is acting within the reasonable scope of that role;
(C) Has no control over the creation or selection of the live performance; and
(D) Does not record, photograph, or film the live performance.

Because a person who "creates, produces, or directs" a live performance must have some level of "control" over its creation, OAG believes that either the employee will never be able to meet the requirements of (d)(3)(C) or a court will consider this improper burden shifting. In addition, OAG questions whether an employee of a school, museum, library, or movie theater should have this affirmative offense. Unlike the affirmative defenses contained in the offenses pertaining to obscene images, in this offense there is an actual child engaging in sexual acts in the actor's presence.[12]

[9] See RCC § 22E-4206 (b)(3).
[10] D.C. Code § 22–1312, Lewd, indecent, or obscene acts; sexual proposal to a minor, states in relevant part, "It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus, to engage in masturbation, or to engage in a sexual act as defined in § 22-3001(8)."
[11] See RCC § 22E-1809 (a)(1)(A) and (b)(1)(A).
[12] The affirmative defenses pertaining to possession or transfer of obscene images can be found in RCC §§ 1805 (c), 1806 (c), 1807(d)(2), and 1808 (d)(2).

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: January 23, 2020

SUBJECT: First Draft of Report #43, Blackmail

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 #43, Blackmail.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E- XXXX. BLACKMAIL

RCC § 22E-XXXX (a) states the elements for offense of blackmail. It says:

A person commits blackmail when that person:
(1) Purposely causes another person to do or refrain from doing any act,
(2) By threatening that any person will:
(A) Engage in conduct that, in fact, constitutes:
(i) An offense against persons as defined in subtitle II of Title 22E; or
(ii) A property offense as defined in subtitle III of Title 22E;
(B) Take or withhold action as an official, or cause an official to take or withhold action;
(C) Accuse another person of a crime;

[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.

(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:
  (i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
  (ii) Significant injury to credit or business reputation;
(E) Impair the reputation of a deceased person;
(F) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(G) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns.

OAG is concerned that this language appears overly broad. We suggest narrowing it to limit any risk of legal challenge. Much of the conduct this language would forbid – for example, saying, as someone who opposes a business's editorial practices, that I will publicize those practices in newspaper editorials until those practices change, or saying that I will run ads against an elected official so long as he or she continues holding a stance I oppose – is protected by the First Amendment. See *NAACP V. Claiborne Hardware Co*., 458 U.S. 886 (1982); *Organization for a Better Austin v. O'Keefe,* 402 U.S. 415 (1971). It thus risks legal challenge. See, e.g., *Gerhart v. State,* 360 P.3d 1194 (Okla. Crim. App. 2015) (successful as-applied challenge to a state law that reached "caustic," yet protected, political speech). The equivalent federal law avoids such challenges because it applies only when a person acts with "intent to extort," a requirement federal courts have read to limit the statute to wrongful (i.e., malicious) threats.[2] See *United States v. Coss*, 677 F.3d 278, 284 (6th Cir. 2012) (federal law applies only to wrongful threats); *State v. Weinstein*, 898 P.2d 513 (Ariz. Ct. App. 1995) (successful overbreadth challenge to a law that lacked a wrongfulness requirement). The proposed Code language moves in this direction, with exclusions and defenses that shield certain threats[3], but those limited exclusions and defenses fall short of protecting the wide range of constitutionally protected threats. To ensure First Amendment speech is fully protected, we recommend incorporating into this offense a wrongfulness requirement similar to that in federal law. We, therefore, recommend stating that, to commit the offense, the actor must act "with the purpose to extort" (borrowing the federal language noted in footnote 3 and adapting it to the Revised Code's mens rea categories).

[2] 18 USCS § 875(d) provides "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both." [emphasis added]

[3] See RCC § 22E-XXXX(b) and (c).

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: December 18, 2019

SUBJECT: First Draft of Report #44, Trademark Counterfeiting

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 #44, Trademark Counterfeiting.[1]

COMMENTS ON THE DRAFT REPORT

Both first and second degree trademark counterfeiting include as an element that the person "[k]nowingly manufactures for commercial sale, possesses with intent to sell, or offers to sell, property bearing or identified by a counterfeit mark." [emphasis added] See RCC § 22E-2210 (a)(1) and (b)(1). It is unclear why the proposal includes the word "commercial." The term is not defined, and its inclusion may cause unnecessary litigation. While a primary definition of commercial is "of or relating to commerce", a secondary definition is "viewed with regard to profit."[2] There should be no question that the government does not have to prove that the manufacturer of counterfeit products turned a profit on its production or sale. OAG believes that this offense should clearly state that it applies to anyone who "knowingly manufactures for sale…" such property. In addition, it should be clear that the term "sale" in this context includes the transfer of the property to a third party for anything of value – and not merely for money. This would also help clarify the portion of the Commentary that states, "By contrast, the revised

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] See https://www.merriam-webster.com/dictionary/commercial.

statute clarifies that merely using a counterfeit mark, without intent to sell property bearing or identified by a counterfeit mark, is not criminalized." Finally, to make this clear and for consistency throughout the RCC, OAG proposes that the term "sale" be defined in § 22E-701 to include transfers to third parties for anything of value.[3]

Paragraph (c) contains the exclusion from liability. It states, "Nothing in this section shall be construed to prohibit uses of trademarks that are legal under civil law." The term "civil law" is not defined in either the text of the offense or in the Commentary. It is unclear if what is meant is that "civil law" means anything that is not "criminal law" or if it carries a narrower meaning (e.g. that this provision is meant to exempt only what is legal under trademark law. To clarify this provision, OAG suggests that it be redrafted to say, "Nothing in this section shall be construed to prohibit the legal uses of trademarks."

In the Commentary it states, "Use of wrappers, bottles, or packaging may be covered by the revised statute only if they constitute a "counterfeit mark." To avoid confusion, OAG suggests that the Commentary clarify that while wrappers, bottles and packaging may constitute a counterfeit mark, for purposes of determining whether "the property, in fact, has a total retail value of $5,000 or more" that the value of the property that is contained in the wrapper, bottle, or package is included in the valuation – and not merely the value of the container that bears the counterfeit mark.[4]

[3]RCC § 22E-701 does not currently define the term "sale."
[4] One way to commit first degree Trademark Counterfeiting, pursuant to RCC § 22E-2210 (a)(2), is for the property to, in fact, have a total retail value of $5,000 or more.

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: January 23, 2020

SUBJECT: First Draft of Report #46, Possession of an Open Container of Alcohol

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 #46, Possession of an Open Container of Alcohol.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 25-1001. POSSESSION OF AN OPEN CONTAINER OR CONSUMPTION OF ALCOHOL IN A MOTOR VEHICLE

RCC § 25-1001 (a) (2) makes it illegal to possess or consume an alcoholic beverage: "In the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway." The term "public highway is defined in RCC §22E-701 by referencing 23 U.S.C .§ 101(a).

Subparagraph (11) of the federal law states:

> The term "highway" includes—
> **(A)** a road, street, and parkway;

[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.

> **(B)** a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure including public roads on dams, sign, guardrail, and protective structure, in connection with a highway; and
>
> **(C)** a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

There is no reason, however, to incorporate federal law into a provision dealing with alcohol in a motor vehicle when District law already has defined "highway" in our driving while impaired statutes. Having two definitions of "highway" when dealing with a person operating a motor vehicle with an open container or while consuming alcohol, is unnecessary and adversely affects the clarity of District law. D.C. Code § 50-1901 (6) states:

> "Highway" means any street, road, or public thoroughfare, or the entire width between the boundary lines of every publicly or privately maintained way, when any part thereof is open to the use of the public for purposes of vehicular or pedestrian travel.

The following example highlights this issue. A person is drinking alcohol in her car in a McDonalds parking lot. Drinking vodka in a car in a McDonald's parking lot is just as dangerous as drinking on a street. It is unclear from the text of 23 U.S.C .§ 101(a) whether the parking lot is a highway.[2] However, under District law it is clear that such behavior is prohibited as the parking lot is a privately maintained way that is open to the use by the public for purposes of vehicular or pedestrian travel. Therefore, OAG recommends that the definition of "highway" in RCC §22E-701 be amended to reference D.C. Code § 50-1901(6).

RCC § 25-1001 (b) contains exclusions from liability. It states:

> (1) A person shall not be subject to prosecution under this section for conduct in a vehicle that operates on rails.
> (2) A person shall not be subject to prosecution under this section if that person is:
> (A) Located in:
> (i) The passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation; or
> (ii) The living quarters of a house coach or house trailer; and
> (B) Not operating the motor vehicle.

[2] It is unclear because, though the federal statute does not specifically mention a privately maintained way that is open to vehicular traffic, it utilizes the word "includes."

RCC § 25-1001 (b)(1) categorically excludes from prosecution anyone who is in a vehicle that operates on rails. While OAG does not oppose that exclusion when it comes to passengers, we do not believe that it should reach people who operate or are in physical control of trains, including METRO trains. Person's who operate, or who are in physical custody of trains, should be subject to the offense like people who operate, or who are in physical control of, a motor vehicle.

RCC § 25-1001 (b)(1)(B) excludes from prosecution someone who is not operating a motor vehicle. While it is certainly a safety matter that a person who is operating a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage, it is equally a safety matter that a person who is in physical control of a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage. That's why D.C. Code § 50-2206.11, the DUI statute provides:

> No person shall operate or be in physical control of any vehicle in the District:
> (1) While the person is intoxicated; or
> (2) While the person is under the influence of alcohol or any drug or any combination thereof. [emphasis added]

In light of the DUI statute and the safety issues involved with alcohol use in cars, OAG recommends that the exclusion found in (a)(2) (B) be amended to state "Not operating or being in physical control of the motor vehicle."

While OAG does not oppose the Commission's proposals to decriminalize open container of alcohol outside of a vehicle and public intoxication due to alcohol, we would note that this runs counter to the Council's apparent desire to treat marijuana use the same as alcohol. Therefore, should Congress lift the restrictions that it has placed on the ability of the District to further decriminalize marijuana, OAG suggests that the Council consider whether the laws prohibiting the public consumption of marijuana and public intoxication due to marijuana be decriminalized to the same extent recommended in this proposal.

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: January 23, 2020

SUBJECT: First Draft of Report #49 - Parental Kidnapping and Related Statutes

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 49, Parental Kidnapping and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 16-1022. PARENTAL KIDNAPPING CRIMINAL OFFENSE

RCC § 16-1022 (d) describes fourth degree parental kidnapping. This offense is incorporated in all of the higher degrees. Paragraph (d) states:

> A person commits the offense of fourth degree parental kidnapping when that person:
> (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;
> (2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
> (3) The complainant is, in fact, under the age of 16; and

[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.

(4) The actor is, in fact, a relative of the complainant, or a person acting pursuant to the direction of a relative of the complainant.

The use of the word "complainant" in subparagraph (d)(3) may be ambiguous. Because the offense requires the taking, concealment, or detention of a child by another lawful custodian, one would assume that the complainant is the custodian who is being denied access to their child. However, because the offense is limited to situations where "[t]he complainant is, in fact, under the age of 16", OAG interprets this phrase to refer to the child. The Commentary does not address who the term "complainant" was meant to refer to. For clarity, OAG suggests that this phrase be redrafted to make clear that it refers to the child. One way that this can be done is to amend subparagraph (d)(3) to say, "The person taken, concealed, or detained is, in fact, under the age of 16.[2]

Paragraph (h) designates OAG as the prosecutorial authority. This proposal retains the jurisdiction granted by the Council in 1986. See D.C. Code 16-1025. However, that designation predates the case of *In re Crawley, 978 A.2d 608 (D.C. 2009).* As the Court of Appeals explained, D.C. Code § 23-101 "bifurcates the prosecuting authority for crimes committed in the District*." In re Crawley*, at 609 (internal quotation marks and alteration omitted). OAG may prosecute "violations of all police or municipal ordinances or regulations," "violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year," and certain other offenses not relevant here. D.C. Code § 23-101(a)-(b). "All other criminal prosecutions shall be conducted" by and in the name of the USAO. *Id.* § 23-101(c). Thus, unless the offense of parental kidnapping fits into either of Section 23-101(a)'s prongs, it is an offense properly prosecuted by the USAO.

For subsequent cases where the Court of Appeals recognized OAG's authority to prosecute cases, see *In re Hall*, 31 A.3d 453, 456 (D.C. 2011) and *In re Prosecution of Nicco Settles*, 218 A.3d 235 (D.C. 2019). None of the distinctions made in those cases for why the Council had authority to designate OAG as the prosecutorial agency apply to parental kidnapping. Because parental kidnapping does not fall into one of the exceptions noted in *Crawely*, or any other exception subsequently recognized by the Court of Appeals, the Council is without authority to designate OAG as agency to prosecute this offense.

The penalties provision authorizes the reimbursement of expenses to the District and to the parent whose rights were violated. Subparagraph (i)(5) states "Any expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this section. Those expenses and costs reasonably incurred by the lawful custodian

[2] If this suggestion is adopted, the Commission may want to consider substituting the word "actor" for the word "person" in each instance where the use of that term refers to the person who is concealing the child.

and child victim as a result of a violation of this section shall be assessed by the court against any person convicted of the violation." As both the District and the lawful custodian of the child victim are entitled to reimbursement of expenses, it is unclear why the two sentences in the restitution provision are not drafted in parallel. In both cases the requesting party has to request reimbursement and the court has to order that reimbursement. In addition, as to the lawful custodian, it is unclear what the difference is between an "expense" and a "cost." The Commentary does not address these issues. For the foregoing reasons, and for clarity, OAG suggests that paragraph (i)(5) be redrafted to say "Any expenses incurred by the District in returning the child shall be assessed by the court against any person convicted of the violation and reimbursed to the District. Those expenses reasonably incurred by the lawful custodian and child victim as a result of a violation of this section shall be assessed by the court against any person convicted of the violation and reimbursed to the lawful custodian."

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	January 24, 2020
Re:	Comments on First Draft of Report Nos. 42, 43, 44, 45, 46, 47, 48, and 49

The Public Defender Service makes the following comments on reports 42, 43, 44, 45, 46, 47, 48, and 49.

1) RCC § 22E-1802, electronic stalking, prohibits engaging in a particular course of conduct directed at a complaint with either the "intent to cause the complainant to fear for the complainant's safety or the safety of another person; or negligently causing the complainant to fear for the complainant's safety or the safety of another person; or suffer significant emotional distress." (emphasis added) Negligently causing a complainant to fear for his or her safety or to feel emotional distress is substantially less culpable conduct than intentional action meant to provoke distress and fear. An actor who unintentionally caused distress should not be held responsible to the same degree as an actor who had the intent to harm.

   To appropriately differentiate between harm that is intentionally caused and harm that is negligently caused, PDS recommends creating two degrees of electronic stalking,

2) RCC § 22E-1802, RCC § 22E-1803, and RCC § 22E-1807 include the term "derivative image." While there are examples of derivative images given in the commentary and footnotes, PDS recommends incorporating a definition of derivative image into the statute. Whether an individual's conduct is criminalized will depend in some instances on whether an image or recording is "derivative." Since the term is central to culpability, in order to provide notice to individuals and clarity in the application of the law, the CCRC should define the term.

3) RCC § 22E-1804, unauthorized disclosure of sexual recordings, provides that it is an affirmative defense to a prosecution under this section that the defendant: "(A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation

of the image; (B) with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney."

PDS understands that the purpose of this defense is to exclude from liability individuals who, in good faith, disclose the image in order to prevent its further dissemination or to seek legal counsel on its legality. In order to properly limit liability consistent with this purpose, the defense should be applicable where an individual discloses the image to someone who he or she believes has a responsibility under District civil law for the person depicted in the image even if it turns out that no such legal responsibility exists. For instance, if an individual discloses an image to a child's grandparent as a result of a mistaken belief that the grandparent has assumed full custody of the child, the individual should not be barred from asserting this defense if it turns out that the grandparent's role is limited to driving the child to school.

PDS also recommends expanding the individuals to whom someone can disclose to include teachers and counselors since they may be a more direct point of contact for adults who interact with school systems.

PDS therefore recommends the following amendments:

> "(A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, teacher, or counselor, or a person who he or she reasonably believed had ~~with~~ a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation of the image; (B) with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney."

PDS recommends that the language above also be amended in RCC § 22E-1807 and RCC § 22E-1808.

4) PDS recommends modifying RCC § 22E-1807, trafficking an obscene image of a minor. RCC § 22E-1807 provides five ways for an individual to commit the offense of trafficking an obscene image of a minor. The first way is when an individual knowingly "(A) creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image." This first category of action is dissimilar and typically less severe than the other actions encompassed by this offense which include giving consent for recording or photographing a minor over whom the individual has a responsibility under District civil law, displaying, distributing, or manufacturing with intent to distribute an image, making an image accessible to another user on an electronic platform, or selling or advertising the image. In each of these other instances, the minor complainant's privacy is further violated by the transfer of the image to others, the intent to transfer, or a violation of trust that may lead to the exposure of the image to the adult with a responsibility over the complainant as well as to the individual creating the image. In light of these differences, PDS recommends separating the conduct defined in (A) into a lesser included offense. The excised conduct would include creating an image or recording or directing another to create an image in instances where the defendant

directs the complainant to create the image and no other individuals are involved in the creation of the image.

PDS also recommends expanding the affirmative defenses for RCC § 22E-1807. As currently drafted, the statute would hold criminally liable a 25 year old who during the course of a consensual relationship with a 17 year old creates a sexually explicit image at the request of the 17 year old. The 25 year old would be criminally liable for trafficking in an obscene image of a minor despite the fact that the 25 year old created the image at the request of the minor and did not share the image with anyone. The 17 year old would have reached the age of consent, so there would be nothing illegal about the 25 year old having sex with the 17 year old. Instead, the criminal action would be the creation, with the 17 year old's consent, of for example, "a sexualized display of the breast below the top of the areola."

Since the current code[1] and the RCC[2] deem 16 year olds capable of consenting to sexual activity, the RCC should similarly deem that an individual who has reached the age of consent for sexual activity can consent to the creation of explicit images that are not shared with any other individuals without his or her separate consent. The RCC should only criminalize the consensual creation or exchange of explicit images between a consenting 16 year old and an adult who is more than 4 years older than the 16 year old when the adult is in a position of trust or authority over the minor.[3]

PDS also recommends expanding the affirmative defense in (d)(4). The affirmative defense currently includes a narrow list of civic institutions and commercial establishments that may come in contact with artistic images. PDS recommends the following addition:

> It is an affirmative defense to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E) of this section that the actor:
>
> (A) Is an employee of a school, museum, library, ~~or~~ movie theater, or <u>other cultural institution</u>;
>
> (B) Is acting within the reasonable scope of that role; and
>
> (C) Has no control over the creation or selection of the image.

5) PDS recommends that the CCRC make the two changes above to the affirmative defenses in RCC § 22E-1808, possession of an obscene image of a minor. Since RCC § 22E-1808 prohibits the mere possession of an obscene sexual image, without PDS's proposed changes, a 25 year old would be criminally liable for possessing a sexually explicit image of his17 year old girlfriend that she created in the context of their legal, consensual relationship. Criminal liability in this

[1] D.C. Code § 22-3001 defines child, for the purposes of the sexual abuse chapter, as an individual who has not yet reached the age of 16.

[2] See RCC § 22E-1301(e) sexual assault.

[3] PDS's proposed modification would be consistent with RCC § 22E-1302, third degree sexual abuse, which prohibits otherwise consensual sexual contact between a minor under the age of 18 and an adult who is in a position of trust or authority over the minor.

instance makes little sense and does nothing to protect the minor who has been deemed sufficiently mature to consent to the relationship.

6) RCC § 22E-1811 provides that a person under the age of 12 is not subject to prosecution for offenses in that subchapter. PDS recommends raising this exemption to age 14. By raising the age to 14, children will not typically be subject to prosecution until they have reached 8th grade. By 8th grade children frequently have had some exposure to sex education classes and to the concept of affirmative consent which is now being taught in more jurisdictions.[4]

7) PDS recommends that the age of prosecution for RCC § 22E-4206, indecent exposure, be raised to age 14. For the reasons listed above, children age 12 and 13 may have limited understanding of masturbation and inappropriate public sexual behavior. Their conduct should be addressed outside of the confines of juvenile court where they could be subject to detention, separation from their families, and the trauma of arrest.

8) PDS recommends decriminalizing the crime of incest as proposed in RCC § 22E-1312. Consensual sexual conduct where the complainant is under 18, the defendant is more than four years older than the complainant and the defendant is in a position of trust or authority with respect to the complainant is already criminalized in RCC § 22E-1302, third degree sexual abuse of a minor. Incest criminalizes consensual sexual contact between adults. This sexual conduct may be viewed as socially or morally repugnant, but there is no clear justification for criminalizing consensual conduct between adults. For example, the crime of incest would criminalize a consensual sexual relationship between a similarly aged niece and an uncle by marriage. In such an instance, both actors would be subject to prosecution. While it may be morally reprehensible for a niece to have an affair with the husband of her aunt, the conduct should not be a crime.

   As a result of large families, the passage of years between the birth of sibling, marriages between people with wide age differences, and varied decisions about when to have children, it is impossible to assume that a niece and an uncle or a step-grandchild and a step-grandparent would be far apart in age or share other qualities that may create a coercive power dynamic. Similarly, an adopted teenage sibling may never share the same house as his or her brother or sister who left home at age 18. Rather than allowing prosecutions in myriad situations that should be outside the scope of the court system, the RCC should decriminalize this conduct.

   If the CCRC does not decriminalize incest, PDS urges the CCRC to drop the terms "legitimately or illegitimately" from the statute. The current statute prohibits knowingly engaging in a sexual act with a person who is "related, either legitimately or illegitimately." The state of being related to someone legitimately or illegitimately is not defined in the RCC. The terms are most closely associated with prejudice and racism that is deeply embedded in the American legal system as

[4] Samantha Schmidt, "*Middle Schools Enter a new era in sex ed — Teaching 13-year-olds About Consent*," Washington Post, January 14, 2020. Available at:

https://www.washingtonpost.com/local/social-issues/middle-schools-enter-a-new-era-in-sex-ed--teaching-13-year-olds-about-consent/2020/01/14/27c17c80-35ad-11ea-bf30-ad313e4ec754_story.html

seen in the prohibition of interracial marriage, gay marriage, and the adoption of children by gay or single parents. The terms also have been used to define and demean children who were born to parents who were not married, or to mothers who did not include an acknowledgement of paternity on a birth certificate. If the CCRC continues to criminalize incest, it should define the prohibited relationships without the use of racist and pejorative terms.

In addition, PDS recommends using the terms "sibling," "half-sibling," and "step-sibling," rather than the binary gendered terms of "brother" and "sister." Similarly, in place of "aunt, uncle, nephew or niece," PDS recommends CCRC use "a parent's sibling or sibling's child."

9) With respect to RCC § 16-1022, parental kidnapping, PDS recommends clarifying the element "knowingly takes, conceals, or detains the child outside of the District" which appears in first, second, and third degree parental kidnapping. Taking the child out of the District should only increase the severity of the offense when the purpose of taking the child out of the District is to further the kidnapping by keeping the child hidden from view or evading detection in the District. As drafted, knowingly taking a child to Maryland for a trip to the grocery store and then returning to the District would increase the severity of the offense in the same manner as renting an apartment in Maryland in order to avoid authorities who are likely to check a District address. To address the harmful conduct rather than incidental contact with neighboring jurisdictions, PDS recommends the following language:

(a) *First Degree*. A person commits the offense of first degree parental kidnapping when that person:
    (1) Commits fourth degree parental kidnapping; and
    (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>; and
    (3) The child is, in fact, outside the custody of the lawful custodian for more than 30 days.

(b) *Second Degree*. A person commits the offense of second degree parental kidnapping when that person:
    (1) Commits fourth degree parental kidnapping; and
    (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>; and
    (3) Fails to release the child without injury in a safe place prior to arrest.

(c) *Third Degree*. A person commits the offense of third degree parental kidnapping when that person:
    (1) Commits fourth degree parental kidnapping;
    (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>;

(d) *Fourth Degree*. A person commits the offense of fourth degree parental kidnapping when that person:
    (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;

(2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
(3) The complainant is, in fact, under the age of 16; and
(4) The actor is, in fact, a relative of the complainant, or a person acting pursuant to the direction of a relative of the complainant.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #42–49	Date: January 24, 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 Reports #42–49. USAO reviewed these documents and makes the recommendations noted below.[1]

Comments on Draft Report #42—Obscenity, Privacy, and Related Offenses

A. RCC § 22E-701. Generally Applicable Definitions.

1. USAO recommends that the definition of "image" be modified to include other possible formats.

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

   " 'Image' means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram, whether in print, electronic, magnetic, ~~or~~ digital, or other format."

This would allow for the possibility of future technology to fall under this definition as well.

2. USAO recommends that the definitions of "live performance" and "live broadcast" clarify the definition of "audience."

USAO recommends that, within the definitions of "live performance" and "live broadcast," the RCC clarify that an "audience" can consist of one or more people, and that the defendant alone can qualify as an "audience." This is particularly relevant as applied to RCC § 22E-1809 and RCC § 22E-1810, to clarify that an audience of one person qualifies as an

[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.

"audience," and to eliminate any potential confusion as to whether there must be multiple people present to constitute an "audience."

3. USAO recommends that the definition of "obscene" be modified to remove the words "in sex."

   With USAO's changes, subsection (A) of the definition of "obscene" would provide:

   "(A) Appealing to a prurient interest ~~in sex~~ . . ."

"Prurient interest" is defined in the Commentary (at 5 n.33) as "a morbid, degrading, or unhealthy interest in sex." Thus, it is redundant to state "a prurient interest in sex." This is not a substantive change.

4. Consistent with USAO's previous comments, USAO recommends that the definitions of "sexual act" and "sexual contact" be modified to remove the additional requirement that the intent be "sexual" in nature.

   With USAO's changes, subsection (C) of the definition of "sexual act" would provide:

   "(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the desire to ~~sexually~~ abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire;"

   With USAO's changes, subsection (B)(ii) of the definition of "sexual contact" would provide:

   "(ii) With the desire to ~~sexually~~ abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire."

In its July 8, 2019 comments on Report #36 (at 13), USAO provided an example of a case in which a defendant grabbed the buttocks of a stranger, causing the victim to feel sexually violated. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure, however, the government may not be able to prove that the defendant's actions were sexually motivated. The government would be able to prove at a minimum, however, that the defendant intended to humiliate or harass the victim. The Commentary (at 10 n.80) states that hitting someone on their buttocks while commenting on their sexual attractiveness would constitute a sexual assault. But if the defendant made no such statement to the complainant about the complainant's sexual attractiveness, then the fact that a defendant hit a complainant on their buttocks may not as easily satisfy the sexual motivation requirement.

Moreover, the Commentary (at 10 n.80) states that "there can be virtually no penetration or oral contact that satisfied the definition of 'sexual act' that is not sexual in nature." That is not necessarily the case, however, where there is penetration with an object. For example, if, at a fraternity hazing, a defendant anally penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse,

humiliate, harass, or degrade the complainant. This would and should constitute a sexual offense. Likewise, when committing a sexual offense, including a rape, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused.

B. RCC § 22E-1802. Electronic Stalking.[2]

1. USAO recommends, to eliminate confusion, defining "course of conduct" as "2 or more occasions."

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Purposely[3], ~~on 2 or more separate occasions,~~ engages in a course of conduct directed at a complainant that consists of:"

   A new subsection (f)(3) would provide:

   "(3) In this section, the term 'course of conduct' means actions taken on 2 or more occasions."

As subsection (a)(1) is currently drafted, it could be interpreted that a defendant must engage in a course of conduct on 2 or more occasions—that is, that the full course of conduct must take place on 2 or more occasions. Rather, the opposite is true—that is, a course of conduct *consists of* actions on 2 or more occasions. Under current law, a "course of conduct" is defined in relevant part to include actions taken "on 2 or more occasions." D.C. Code § 22-3132(8). USAO recommends this change to eliminate potential confusion on this point.

2. USAO requests that the RCC clarify the exclusion in subsection (b)(2)(A).

Subsection (b)(2)(A) provides that a person is not subject to prosecution under subsection (a)(1)(A) if that person is "a party to the communication." It is unclear what this exclusion would cover. For example, if a defendant took numerous photos of the complainant, but took a photo in "selfie" mode and included himself in that photo, it is unclear if this exclusion would means that the defendant was not liable for stalking.

3. USAO recommends that the Commentary be rephrased for clarification.

   With USAO's changes, the Commentary on page 19 would provide:

   "Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. As applied here, "purposely," a term defined in RCC § 22E-206, requires a conscious desire to ~~cause~~ engage in a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must

[2] USAO recommends consistent changes to Stalking, RCC § 22E-1206, as appropriate.

[3] In its July 8, 2019 comments on Report #36 (at 39), USAO recommended changing the culpability standard in this provision from "purposely" to "knowingly." USAO reiterates that comment here.

share a~~n uninterrupted~~ purpose and must consist of one or both of the activities listed in subparagraphs (a)(1)(A) and (a)(1)(B). The behavior must be directed at a specific person, not merely surveilling the general public."

The requirements of this offense are more appropriately characterized as "engaging" in a pattern of misconduct than "causing" a pattern of misconduct. Moreover, there should not be a requirement that the purpose be "uninterrupted." Stalking behavior may be interrupted, as a defendant engaging in stalking will engage in activities other than stalking during the course of the stalking.

4. USAO reiterates several of its July 8, 2019 comments on Report #36 (at 40-41) that related to Stalking, RCC § 22E-1206.

Specifically, USAO reiterates its comment #5 regarding jury trials; comment #6 regarding violation of a court order prohibiting stalking, harassing, assaulting, or threatening the complainant; comment #7 regarding an enhancement for one "or more" previous convictions for stalking; and comment #8 regarding the defendant's reckless disregard for the complainant's age.

5. USAO recommends that the jurisdictional limitations of this offense be clarified.

The Commentary discusses the jurisdictional limitations of this offense. (Commentary at 28-29.) Although, under the RCC's proposal, there would not be jurisdiction based *solely* on the victim's residence in the District, the RCC should clarify that, if the victim suffers any harm in the District stemming from the defendant's actions, then there would be jurisdiction to prosecute this offense in the District.

C. RCC § 22E-1803. Voyeurism.

1. USAO recommends, in subsections (a)(1)(A) and (b)(1)(A) removing the word "developed" from the words "developed female breast," requiring only a "female breast."

The RCC acknowledges that this is a change from current law, *see* D.C. Code § 22-3531(a)(1), which includes the words "female breast." Adding the word "developed" limits this definition too far. If a girl is going through puberty, and is in the process of developing, she may not have "developed." A girl who has not yet begun puberty, and thus does not even have a "developing" female breast, may still have an interest in privacy in her breast. Likewise, if an adult woman undergoes a mastectomy, there could be a question as to whether her breast is "developed." Therefore, USAO believes that, consistent with current law, it is appropriate to require only a "female breast," not a "developed female breast."

2. USAO opposes removal of observing someone using a restroom or bathroom as a basis for voyeurism liability.

Under current law, a person is liable for voyeurism if they observe or record another person "using a bathroom or rest room." D.C. Code § 22-3531(b)(1), (c)(1)(A). The Commentary provides that capturing an image of a person urinating or defecating that does not show that

person's private areas could constitute attempted voyeurism. (Commentary at 43 n. 266.) But liability for only attempted voyeurism understates the privacy interests that individuals hold in using the bathroom, as it is a very intimate and private experience. In eliminating this as a basis for liability, the RCC Commentary is concerned that it may inadvertently criminalize, for example, a bathroom selfie showing a stranger in the background applying makeup. (Commentary at 42 n.265.) To alleviate these concerns, and to protect the privacy interests of individuals using a toilet or urinal, USAO proposes that liability attach for voyeurism if a defendant either observes or creates an image or audio recording of a person "using a toilet or a urinal."

3. USAO recommends that liability attach for a defendant observing or creating an image of another person engaging in or submitting to a sexual contact.

   With USAO's changes, subsections (a)(1)(B) and (b)(1)(B) would provide:

   " . . . the complainant engaging in or submitting to a sexual act, sexual contact, or masturbation."

Under current law, a person is liable for voyeurism if they observe or record another person "engaged in sexual activity." D.C. Code § 22-3531(b)(3), (c)(1)(C). The Commentary is concerned that the term "sexual activity" could be too broadly construed. (Commentary at 43.) The RCC therefore only includes "sexual act or masturbation" as a basis for liability in subsections (a)(1)(B) and (b)(1)(B). USAO proposes that liability also attach where the defendant observes or creates an image of the complainant engaging in or submitting to a sexual contact. A sexual contact can be a private and intimate experience, even where the parties remain clothed. For example, if a person is touching another person's genitalia underneath the clothing, even though they may be clothed, that is a private experience in which they have an expectation of privacy. It would create a strange dichotomy if voyeurism liability attached for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attached for a defendant creating an image of someone else touching that person's genitalia (sexual contact). A defendant should be liable for voyeurism for observing or creating an image of that intimacy.

4. USAO recommends that the *mens rea* required under subsection (c)(3) be modified from requiring that the actor "knew" the complainant was under 18 years of age to requiring that the actor "recklessly disregarded" that the complainant was under 18 years of age.

Throughout the RCC, this enhancement applies when the actor recklessly disregarded that the complainant was under 18 years of age. It is unclear why the enhancement for voyeurism would require knowledge. USAO recommends that this *mens rea* be modified to be consistent with the same enhancement throughout the RCC.

5. USAO recommends that the RCC clarify that "upskirting" is expressly criminalized under the voyeurism statute.

The Commentary is unclear as to whether "upskirting" would be criminalized under the voyeurism statute. The Commentary notes that, "[f]or example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be photographed." (Commentary at 36 n.223.) The Commentary then goes on to say that "the revised statute criminalizes all upskirting behavior that violated a reasonable expectation of privacy, even if the accused does not produce a recorded image." (Commentary at 37-38.) USAO recommends that the RCC clarify these provisions, and expressly codify upskirting as a basis for voyeurism liability.

The Commentary also seems to suggest that the onus is on a complainant to ensure that they are properly covered at all times to ensure they are not "upskirted," stating that "[t]he more public the place and the more likely it is that people will take photographs there, the more conscientious and personally responsible one must be about what they do and do not expose." (Commentary at 36 n.223.) But this ignores the frequent reality of upskirting, and the often stealthy nature of upskirting actions. Upskirting can take place when a woman is sitting on the steps of the Lincoln Memorial, but if she does not see a nearby camera, she would not expect to be photographed. Rather, a zoom lens could be used to stealthily photograph up her skirt from far away. Likewise, if a woman is sitting in a seat on the metro with her legs slightly ajar (a frequent posture), she should not have to be conscientious about ensuring that someone is not using a cell phone camera across from her to take photos up her skirt. Finally, if a woman is on an escalator, she should not have to be conscientious of a person standing just below her with a stealthy cell phone camera to take photos up her skirt. USAO recommends that the RCC expressly clarify that "upskirting" activity (where the complainant has not provided effective consent) constitutes voyeurism.

Finally, the Commentary states that "[c]hasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202." (Commentary at 38 n.236.) However, because the RCC definition of "assault" requires bodily injury to the complainant, it is unclear how this could constitute an assault.

D. RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

1. USAO recommends changing the name of this offense from "Unauthorized Disclosure of Sexual Recordings" to "Unauthorized Disclosure of a Sexual Recording."

USAO recommends that the title of this offense be modified to clarify that an actor must only disclose one sexual recording to be liable for this offense, and that there is no requirement that an actor disclose multiple sexual recordings to be liable for this offense. This is not a substantive change, and aligns the title of the offense with the elements.

2. USAO recommends, in subsection (a)(1), adding the words "or causes to be distributed or displayed to a person other than the complainant" and "causes to be made accessible."

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly distributes or displays, or causes to be distributed or displayed, to a person other than the complainant, or makes accessible, or causes to be made accessible, on an electronic platform to a user other than the complainant or actor:"

The RCC proposed eliminating language currently codified in D.C. Code § 22-3531(f)(2) that provides liability for distributing images "directly or indirectly, by any means," on the ground that the language is surplusage. (Commentary at 56 & n.334.) USAO does not believe that this language is necessarily surplusage, but believes that it can be rephrased to clarify its applicability. If a defendant asks another person to distribute a sexual recording—that is, distributes an image indirectly—the statute should clarify that the defendant should be liable for this offense on the basis that the defendant caused the recording to be distributed.

3. USAO recommends, in subsection (a)(1)(A)(ii), removing the word "developed" from the words "developed female breast," requiring only a "female breast."

USAO relies on the same rationale as set forth above for the Voyeurism statute. USAO also recommends that this statute contain a footnote similar to footnote 216 in the Voyeurism statute (Commentary at 35 n.216) clarifying that a "female breast" means the breast of both a cisgender and a transfeminine woman.

4. USAO recommends, in subsection (a)(1)(B), including a "sexual contact."

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) An image or an audio recording of the complainant engaging in or submitting to a sexual act, a sexual contact, masturbation, or sadomasochistic abuse;"

As discussed above with respect to the Voyeurism statute, a sexual contact can be an intimate, private experience that a complainant has an interest in keeping private. This could be true even if nude genitalia are not visible. USAO recommends that, to protect this privacy interest, "sexual contact" be added to this subsection.

5. USAO recommends that, in subsection (a)(4)(A), the statute clarify that an agreement or understanding can be either explicit or implicit.

With USAO's changes, subsection (a)(4)(A) would provide:

"(A) After reaching an agreement or understanding, whether explicit or implicit, with the complainant that the image or audio recording will not be distributed or displayed, . . ."

This is alluded to in the Commentary (at 47 n.280), but USAO recommends that it be codified in the plain language of the statute to eliminate any potential confusion. Most agreements and understandings are implicit. For example, if a married couple exchanges nude photos of themselves via text message, there is an implicit agreement that neither party will share the photos. But if one of the parties later discloses the photos to another person, they have

violated that implicit agreement or understanding, even if there was no explicit agreement or understanding in place.

6. USAO recommends that, in subsection (a)(4)(A)(i), the word "sexually" be removed.

With USAO's changes, subsection (a)(4)(A)(i) would provide:

"(i) Alarm or ~~sexually~~ abuse, humiliate, harass, or degrade the complainant;"

At the time that the defendant is distributing these photos, the defendant's intent is often not sexual. Rather, their intent is frequently to harass or humiliate the complainant, or to seek revenge. They often do not obtain sexual gratification from disclosure of the image. Although the underlying material is sexual, there should be no requirement that the defendant have a sexual intent when the defendant discloses the material.

7. USAO recommends that subsections (c)(1)(A) and (c)(2)(B) be joined by the word "and."

This is not a substantive change, and clarifies that a defendant must meet the elements in both subsections to claim this defense.

8. USAO recommends that the jurisdictional limitations of this offense be clarified.

USAO relies on the same rationale set forth above with respect to the offense of Electronic Stalking.

E. RCC § 22E-1807. Trafficking an Obscene Image of a Minor.

1. USAO recommends renaming this offense.

The title of this offense is "trafficking," but not all conduct that falls within the offense constitutes "trafficking." "Trafficking" implies some level of distribution. For example, for liability to attach under subsection (a)(1)(A), a person must create an image of a minor engaging in certain activity. There is no requirement under that subsection that the defendant distribute the image or "traffic" it in any way. Thus, to eliminate potential future confusion that all subsections of the offense may require "trafficking" of some sort, USAO recommends renaming this offense.

2. USAO recommends restructuring the gradations of this offense.

USAO recommends that there be gradations of this offense based on the defendant's role in creating and distributing the image. USAO recommends that the most serious gradation be for creating an image (production), then for advertising an image, then for distributing an image, then for possessing an image. This is consistent with the gradations for child pornography under federal law pursuant to 18 U.S.C. §§ 2251 and 2252. A defendant should be penalized more severely for creating an image than for distributing an image.

USAO does not oppose also creating gradations of this offense based on the type of sexual conduct depicted in the image (that is, images of the complainant engaging in or submitting to a sexual act versus sexual contact, etc.).

3. USAO recommends changing the word "obscene" to "sexually explicit" in both § 22E-1807 and § 22E-1808, and removing the affirmative defense in subsection (d)(1)

"Obscene" can be a vague standard, and is famously described as, "I know it when I see it." It is unclear whether certain images that would constitute child pornography would qualify as "obscene." USAO recommends that, instead of using the word "obscene," the RCC use the words "sexually explicit." Federal child pornography law uses the words "sexually explicit," rather than "obscene." *See* 18 U.S.C. § 2251. In addition to creating an analogue with federal law for criminalization of child pornography, this offense could draw on the case law regarding the definition of "sexually explicit" that would help guide interpretations of this statute.

Likewise, USAO recommends removing the affirmative defense in subsection (d)(1). That definition relates to the obscenity definition, and it is hard to imagine an instance in which a sexually explicit image of a minor could have serious literary, artistic, political, or scientific value.

4. USAO recommends that the RCC codify a definition of "derivative image."

Although the words "derivative image" are used throughout these provisions, and are referenced in the Commentary to the definition of "image," USAO believes that it would be helpful to have a separate definition of "derivative image" to limit potential future confusion.

5. In subsections (a)(1)(C) and (b)(1)(C), USAO recommends changing the word "manufactures" to "produces."

It is unclear what the difference is between "manufacturing" and "producing," and both terms are used in this statute. Federal law, by contrast, uses the word "producing." 18 U.S.C. § 2251. This creates consistency within the statute, aligns the statutory wording with federal child pornography law, and allows this offense to draw on the case law regarding "production" to help guide interpretations of this statute.

6. In subsections (a)(1)(E) and (b)(1)(E), USAO recommends changing "Sells or advertises an image" to "Makes, prints, or publishes, or causes to be made, printed or published, any notice or advertisement seeking or offering to receive, exchange, or buy an image of a minor."

This wording is consistent with federal child pornography law. *See* 18 U.S.C. § 2251(d)(1). As described above, it is useful to track federal statutory language in this respect.

7. USAO recommends that the affirmative defense in subsection (d)(3) contain a limit on the number of images that would qualify for this defense.

Under current law, there is a limit of 6 still photographs or 1 motion picture that allow a defendant to invoke this defense. D.C. Code § 22-3104(c). USAO suggests that there be some limit on the amount of images that a person may have to invoke this defense.

F. RCC § 22E-1808. Possession of an Obscene Image of a Minor.

1. USAO recommends changes consistent with the changes suggested for RCC § 22E-1807, Trafficking of an Obscene Image of a Minor.

G. RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

1. USAO recommends that subsections (a)(1)(A) and (b)(1)(A) apply to a "live broadcast" in addition to a "live performance."

"Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience."[4] "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by an audience." It is equally culpable for a person to arrange a live performance as to arrange a live broadcast. If, for example, a defendant creates a chatroom, and livestreams to that chatroom a video of a child engaging in a sexual act, that defendant should be held liable for the more serious offense of arranging a live sexual performance of a minor. The other individuals in the chatroom who watch the video would be held liable for attending or viewing a live sexual performance of a minor.

2. USAO recommends changing the word "obscene" to "sexually explicit" in both § 22E-1809 and § 22E-1810, and removing the affirmative defense in subsection (d)(1)

USAO relies on the same rationale as set forth above.

H. RCC § 22E-4206. Indecent Exposure.

1. USAO recommends, in subsection (a)(2)(C), removing the word "sexually."

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

"(C) Is with the purpose of alarming or ~~sexually~~ abusing, humiliating, harassing or degrading the complainant."

This is consistent with USAO's recommendations above regarding the definition of "sexual act" and "sexual contact."

2. USAO recommends removing subsection (b)(3).

Liability for indecent exposure should not turn on what the complainant actually observed, or how the defendant's actions affected the complainant. It should turn on what actions the defendant engaged in. This is true for both theoretical and practical reasons. As a theoretical

[4] USAO suggested above clarifications to the definition of "audience."

matter, it is the defendant's actions, rather than the impact of the defendant's actions, that should create liability for this offense. As a practical matter, it may be impossible for the government to prove that the conduct was visible to a complainant, that the complainant did not consent the conduct, and/or that the complainant was alarmed or humiliated, etc. For example, if a defendant exposed his genitalia in the middle of a metro car to multiple people, multiple people could have been alarmed or humiliated. But if this incident happened during rush hour when people were rushing to work, it is possible that no one will report this to law enforcement, or that an individual will make an anonymous report to law enforcement, or that an individual will make a report with law enforcement but neglect to provide accurate contact information for follow-up investigation. In that case, law enforcement will have no complainant to speak with about whether they actually observed this behavior or how it made them feel. Rather, surveillance video from the metro could show the defendant's actions. As currently drafted, with only this surveillance video clearly showing the defendant exposing his genitals in a public conveyance, the government would be unable to prove that the defendant engaged in an indecent exposure. USAO therefore recommends removing this provision from the statute.

Comments on Draft Report #43—Blackmail

1. USAO recommends that, consistent with current law, liability attach if a person purposely causes *or intends to cause* another person to do or refrain from doing any act.

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Purposely causes or intends to cause another person to do or refrain from doing any act."

Under current law, a defendant is liable for blackmail if the defendant makes a specified threat, intending to cause another to do or refrain from doing any act. D.C Code § 22-3252. The RCC's rationale for a change from current law is that it improves the proportionality of the RCC and is consistent with the RCC extortion offense. (Commentary at 6.) The RCC provides that attempt liability "may apply depending on the specific facts of the case" if "the accused fails to compel the other person to act or refrain from acting." (Commentary at 6 n.34.) The focus, however, should be on the defendant's intent and actions, rather than what those actions actually cause a complainant to do. Take, for example, a case in which a defendant threatens a complainant not to call the police following the defendant assaulting the complainant, threatening that the defendant will distribute photos of the complainant engaged in an affair. If, following the threat, the complainant were to refrain entirely from calling the police, then that would clearly constitute blackmail under the RCC proposal. But what if the complainant were to hesitate for just a moment as a result of the defendant's threat, and then call police, or if the complainant were to wait an hour or a day to call police as a result of the defendant's actions. Those would all constitute the defendant causing the complainant to "refrain" from doing an act due to a threat. It would not be proportionate for blackmail liability to attach if the defendant's threat caused the complainant to hesitate for a moment before calling police, and for only attempted blackmail liability to attach if the defendant's threat did not cause the complainant to hesitate before calling police. Rather, the defendant's intent in making the threat should be the guiding factor in whether blackmail liability attaches.

2. USAO recommends that subsection (a)(2)(E) be modified to include non-deceased persons.

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

   "Impair the reputation of another person, including a deceased person;"

Under current law, a person is liable for blackmail if, among other things, they threaten to "[i]mpair the reputation of another person, including a deceased person." D.C. Code § 22-3252(a)(3). It is unclear why this change was made, and USAO believes that it is appropriate for liability to attach when a person threatens to impair the reputation of any other person, whether alive or deceased.

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]

[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, is 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, was 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:

[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 the decedent 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

[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 similarly 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 otherwise 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]

[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

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

[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 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

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

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 <u>not</u> 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.*

[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.

Felony Murders Involving Robberies

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.

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.

RCC § 22E-1401. Kidnapping.

1. 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."

   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*.

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

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

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.

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: May 14, 2020

SUBJECT: OAG Comments to First Draft of Report First Draft of Report #51, Jury Demandable Offenses

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 First Draft of Report #51, Jury Demandable Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 16-705. JURY TRIAL; TRIAL BY COURT

The revised statute replaces D.C. Code § 16-705(b)(1). It states:

> (b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:
>
> (1) (A) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

[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.

(B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(D) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year; and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

OAG recognizes that the structure used above was modeled on D.C. Code § 16-705(b)(1), however we believe that the revised statute can be reworded so that each concept is in a separate subparagraph. This should make it more understandable to a lay person and easier for attorneys to argue in court when they have to refer to a specific provision. We suggest that this statute be reconfigured as follows:

(b)(1) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury.

(2) Notwithstanding paragraph (1) of this subsection, the trial shall be by jury:

(A) If:

(i) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

(ii) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(iii) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(iv) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(v) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(vi) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year.

(B) Unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto.

(3) In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

RCC § 16-705 (1)(A) grants a jury right when the "defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days…"[2] This provision, however, would result in organizational defendants, who by definition cannot be imprisoned, having a right to a jury trial for committing offenses that a person committing the same offense would not. The reason for this anomaly is that pursuant to the First Draft of Report #52, RCC § 22E-604 (b)(2), organizational defendants have alternative fines of "[u]p to three times the amount otherwise provided by statute…"[3] RCC § 22E-604 (a)(12) and (13) provide for authorized fines of $1,000 for a Class C misdemeanor and $500 for a Class D misdemeanor. As the fine for those offenses are not more than $1,000, an individual who commits either of them would not be entitled to a jury trial. However, an organizational defendant who commits these same offenses would be subject to a fine of $3,000 or $1,500, respectively, and would, therefore, be entitled to a jury trial.

To ensure that organizational defendants do not have a right to a jury trial for committing an offense that an individual would not, OAG recommends that RCC § 16-705 (b)(1)(A) be redrafted to say, "The defendant is charged with (i) a Class B misdemeanor, or (ii) an offense that is punishable by more than six months in the case of contempt of court."

[2] Notwithstanding that the Commentary states, " Subparagraph (b)(1)(A) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by imprisonment for more than 90 days", OAG reads the subparagraph in the revised statute as requiring a jury trial when there is "a fine or penalty of more than $1,000."

[3] OAG does not oppose organizational defendants having the proposed expanded fine exposure.

RCC § 16-705 (1)(C) grants a jury right to a defendant when "the person who is alleged to have been subjected to the criminal offense is a 'law enforcement officer'…"[4] This provision does not address situations where the victim's status as a law enforcement officer is in dispute. In other words, whose burden it is to establish if a person was or was not a law enforcement officer, at the time they were victimized and what standard of proof is required for that determination. For example, was the victim of the offense a licensed special police officer or was he or she not licensed or was the person an employee of a probation department or was that person an independent contractor or a consultant? As the right to a jury trial hangs on these determinations, this provision should clearly state how that determination should be made. As the Commission has not addressed these issues and OAG believes that the other members of the Advisory Group should weigh in before a determination is made, OAG is not making a recommendation at this time.[5]

RCC § 16-705 greatly expands the right to a jury trial in the District. See D.C. Code § 16-705. It does this in a number of ways. First, it triggers a right to a jury trial when the offense is punishable by imprisonment for more than 90 days, as opposed to the current trigger of 6 months. Second, no matter what the jail exposure is there is a right to a jury trial when a person is charged with attempt, conspiracy, or solicitation for an offense that, had it been completed, would have jail exposure of more than 90 days. Third, no matter what the jail exposure is, it

[4] RCC § 22E-701 states:
"Law enforcement officer" means:

(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), (B), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

[5] OAG recommends that these issues be made an agenda item for the next Commission meeting.

triggers a jury trial when a defendant is charged with Chapter 12 offenses (i.e., robbery, assault, and threats) when the victim is a law enforcement officer.

As OAG noted in our Memo regarding the First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties, we support the RCC retaining the statutory expansion of the Constitutional right to a jury trial to offenses that carry a maximum penalty of more than six months. We do not support the Report's recommendation that specified completed and inchoate offenses that carry incarceration exposure of 90 days or less be made jury demandable. In fact, under this proposal, a person who is charged with the attempt of an offense that would have carried jail exposure of 180 days will get a jury trial even though they face exposure of only 90 days of incarceration – an amount of jail exposure that would not get someone a jury trial if the offense itself carried the potential of 90 days in jail. A corollary to the Commission's directive, under D.C. Code § 3–152 (6) that the Commission "Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties" is that defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.

If the Commission is not going to adopt OAG's overarching recommendation, then OAG has a specific recommendation pertaining subparagraph (b)(1)(C). That subparagraph states, "The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701. [brackets in original] This provision does not distinguish between when an officer is on duty or off duty or whether the officer is in uniform or not. For example, say a law enforcement officer from New York brings her family to the District to view the monuments and the Smithsonian. While on vacation, she is the victim of an assault that would trigger subparagraph (b)(1)(C). There is no reason that the perpetrator should get a jury trial for assaulting this off duty police officer (who is not wearing a uniform), when the perpetrator would not get a jury trial if, instead, the police officer's husband had been the victim of the assault. This same objection applies equally to other people who are deemed law enforcement under 22E-701.[6]

To address this issue, OAG recommends that subparagraph (b)(1)(C) be redrafted to state, "The defendant is charged with an offense under Chapter 12 of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer", as defined in D.C. Code § 22E-701, who is either working a tour of duty or in uniform."[7]

RCC § 16-705 (b)(1)(F) grants the right to a jury trial when "The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year..." Although this recommendation grants

[6]In paragraph (F) of the definition of a "law enforcement officer", in RCC 22E-701, (see footnote 2) it lists a District employee who supervises confined juveniles. There is no reason why a person who randomly assaults that off duty employee in the District should get a jury trial just because the employee happens to work with youth at New Beginnings in Maryland.

[7] OAG's recommendation employs the phrase "working a tour of duty" instead of "on duty" because an MPD police officer is deemed to always be on duty although relieved of routine performance. See 6 DCMR A200.4.

a right to a jury trial when a defendant faces a lower amount of jail exposure than under current law,[8] OAG does not believe that this recommendation goes far enough. Under RCC § 16-705 (b)(1)(A) a defendant would be entitled to a jury trial when they are charged with an offense that has a penalty of "imprisonment for more than 90 days." To a defendant who is sentenced to more than 90 days, it does not matter if that sentence was imposed because they were convicted of a single count or of multiple counts and, therefore, their desire for a jury trial would be as great for the later as for the former. In consideration of that fact, OAG recommends that RCC § 16-705 (b)(1)(F) be redrafted to grant the right to a jury trial when "The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 90 days…"

[8] Under current law, D.C. Code § 16-705 (B) grants the right to a jury trial when "The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years."

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: May 15, 2020

SUBJECT: First Draft of Report #52, Cumulative Update to the Revised Criminal Code 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 #52, Cumulative Update to the Revised Criminal Code Chapter 6.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-601. OFFENSE CLASSIFICATIONS

RCC § 22E-601 breaks down all offenses into 14 felony and misdemeanor classes. Paragraph (b) states, "*Definitions.* The terms 'felony' and 'misdemeanor have the meanings specified in RCC § 22E-701.[2] The Commentary notes that "Subsection (b) cross-references definitions of "felony" and "misdemeanor" in RCC § 22E-701." However, subparagraph (h)(6) of RCC § 16-1022, Parental Kidnapping Criminal Offense, states, "*First and Second Degree Parental*

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

[2] The definitions are that the term "Felony" means an offense with an authorized term of imprisonment that is more than 1 year or, in other jurisdictions, death and term "Misdemeanor" means an offense with an authorized term of imprisonment that is 1 year or less.

Kidnapping Designated as Felonies. Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563." For clarity, OAG recommends that the Commentary to RCC § 22E-601(b) have a footnote that states that variance.

RCC § 22E-602. AUTHORIZED DISPOSITIONS

The Commentary notes that "To the extent that prosecutorial authority of the Attorney General for the District of Columbia may currently turns on this limitation, the revised statute preserves this limitation and the designation of prosecutorial authority." [sic][footnote omitted] To be clear, OAG recommends that at the conclusion of these sentences the Commentary state, "No substantive change in District law is intended."

RCC § 22E-604. AUTHORIZED FINES

As the Commentary points out, D.C. Code 22-3571.02(a), unlike the RCC, provides that specific offenses may state that they are exempt from the Fine Proportionality Act and state a different penalty. Notwithstanding that the RCC does not propose that any offenses have fines that vary from this provision, we should not assume that the Council will not enact any offenses that designate a different fine amount. Therefore, OAG suggests that a new paragraph (d) entitled "*Alternative fines when specified by law"* be added. It should say, "The authorized fines established in this section shall not apply when a law enacted after this Act creates or modifies an offense and such law, by specific reference, exempts the offense from the fines established in this section."[3]

RCC § 22E-606. REPEAT OFFENDER PENALTY ENHANCEMENT

OAG has two recommendations concerning paragraph (a). Paragraph (a) states:

> *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense and at the time has:
>
> (1) One or more prior convictions for a felony offense under Subtitle II of this title[4], or a comparable offense, not committed on the same occasion; or
>
> (2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
>
> (A) Committed within 10 years; and

[3]This proposal is based on provisions of the Fine Proportionality Act codified at D.C. Code § 22-3571.02(a). If the CCRC adopts this proposal then the definitions provision currently designated as paragraph (d) would have to be redesignated as paragraph (e).

[4] RCC § 22E-606 (a)(1) actually refers to Subtitle I. However, because Subtitle I is the General Part and Subtitle II is Offenses Against Persons, for purposes of this recommendation, OAG assumes that the Commission meant to reference Subtitle II in this subparagraph.

(B) Not committed on the same occasion. [emphasis added]

The first recommendation clarifies that a conviction for a felony offense under subparagraph (a)(2) does not include a conviction for a felony offense under (a)(1). The second is that the phrase "on the same occasion" appears to have different meanings in subparagraphs (a)(1) and (2). OAG, therefore, recommends that paragraph (a) be amended to say:

(1) One or more prior convictions for a felony offense under Subtitle II of this title, or a comparable offense, not committed on the same occasion as the offense for which the enhancement would apply; or
(2) Two or more prior convictions for any felony offenses under any other Subtitle of this title, or comparable offenses that were:
    (C) Committed within 10 years; and
    (D) Not committed on the same occasion as one another…[5] [emphasis added]

RCC § 22E-701. GENERALLY APPLICABLE DEFINITIONS

This provision defines "felony." While it lists the general definition for the term "felony", it does not provide for the special definition of the term in subparagraph (h) (6) of RCC § 16-1022, the Parental Kidnapping Criminal Offense.[6] RCC § 22E-701 states, "Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year; or
(B) In other jurisdictions, an offense punishable by death."

To account for the offense of Parental Kidnapping, OAG recommends that the following subparagraph be added to the definition above, "(C) First or Second Degree Parental Kidnapping pursuant to RCC § 16-1022 (h)(6).

[5] OAG recommends that this amendment also apply to the misdemeanor repeat offender penalty enhancement in subparagraph (b)(3).
[6] This subparagraph reads (h)(6) states, "First and Second Degree Parental Kidnapping Designated as Felonies. Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563."

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	May 15, 2020
Re:	Comments on First Draft of Report No. 51, Jury Demandable Offenses and First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements.

The Public Defender Service makes the following comments on the first drafts of Report No. 51 and Report No. 52.

Report No. 51

1. As PDS wrote in its comments of November 15, 2019, PDS believes that all offenses that permit a punishment that includes incarceration should be jury demandable. While the Court of Appeals held in *Bado v. United States*[1] that a defendant who faced a possible sentence of 180 days and deportation had a right to a jury trial, former Chief Judge Eric Washington provided compelling reasons why the right to a jury trial should be available in all instances when a defendant faces incarceration. [2] If the RCC does not provide a jury trial in each instance that a defendant faces incarceration, PDS submits the additional amendments to RCC § 16-705.

2. RCC § 16-705(b)(1)(D) would provide jury trials where the defendant is charged with a registration offense as defined in D.C. Code § 22-4001(8). Under D.C. Code § 22-4001(8), registration offenses are defined as sex offenses or offenses that involve sexual abuse, although non-sex offenses are charged. PDS recommends expanding this jury trial right to any charge that would subject the defendant to a registration requirement pursuant to either the laws of the District of Columbia or the United States. Currently, this would expand this provision to include gun offenses that require a convicted defendant to register as a gun offender.[3] The requirement of registration adds stigma, may foreclose employment and housing opportunities and could lead to future convictions for failing to register. Given the seriousness of the collateral consequences, jury trials should be afforded for all offenses that require registration, not just those offenses that

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

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

[3] D.C. Code § 7–2508.02.

require registration as a sex offender and not just those registration schemes in existence at the time of this writing. Rather than propose a true catch-all that would require a jury trial for an offense that could require a defendant to register in any jurisdiction, PDS is limiting its proposal to registries that could, in the event of a conviction, require the defendant to register while residing in the District of Columbia, that is to registries established by a law of the District of Columbia or of the United States.

PDS proposes the following language:

> The defendant is charged with an offense that, if the defendant were convicted of the offense, would subject the defendant to a requirement to register with a government entity pursuant to the laws of the District of Columbia or of the United States, including pursuant to ~~"registration offense" as defined in~~ D.C. Code § 22-4001 and pursuant to D.C. Code § 2508.01.

3. RCC § 16-705(b)(1)(E) provides the right to a jury trial if the offense, regardless of the defendant's immigration status, could result in the defendant's deportation. Granting a jury trial in these instances, based on the offense and without regard to the defendant's personal immigration status, is consistent with the District's decision to uphold sanctuary values[4], and addresses the concerns of former Chief Judge Eric Washington in *Bado*[5] about only granting jury trials to a subset of individuals charged with the same offense.

   PDS recommends an expansion of this language to include denial of naturalization in addition to deportation. There are offenses that may not result in deportation but that could result in a denial of naturalization for individuals who apply to become citizens. Individuals must demonstrate "good moral character" in order to become U.S. citizens. For example, engaging in prostitution or convictions for two or more gambling offenses would be a conditional bar to demonstrating good moral character.[6] On the other hand, an individual will be deportable for a range of offenses such as aggravated felonies and crimes of moral turpitude. "Crimes of moral turpitude" continues to be defined through case law and in some instances will not include offenses that would preclude a finding of good moral character required for naturalization. Citizenship is essential for family reunification, some employment, the freedom to travel outside of the country, voting, and access to critically important supports for older individuals and individuals with disabilities. Since both deportation and the denial of naturalization have devastating consequences, both standards should be used in determining when a defendant has a right to trial by jury.

   PDS proposes the following language:

[4] Sanctuary Values Emergency Declaration Resolution of 2019, available at: http://lims.dccouncil.us/downloads/LIMS/43362/Meeting1/Enrollment/PR23-0501-Enrollment.pdf

[5] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018).

[6] https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5

> The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States or denial of naturalization under federal immigration law;

4. RCC § 16-705(b)(1)(F) grants the defendant the right to a jury trial if the defendant is charged with 2 or more offenses that are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year. PDS recommends eliminating the disparity between cumulative sentences for multiple offenses and statutory maxima for a single offense.

   PDS objects to having a higher threshold for a jury trial when the defendant is charged with multiple offenses that each carry less than 90 days or fines of less than $1,000. PDS recommends setting the threshold at 90 days and $1,000 regardless of whether the 90-day mark is reached through a single offense or by adding the statutory maxima of multiple offenses. A defendant who reaches a cumulative maximum short of 1 year may do so after being charged in a joint trial with a variety of offenses that occurred on different days. That defendant may be subject to consecutive sentences for those offenses and could be incarcerated for significantly longer than an individual who faces a single, more serious charge that carries more than 90 days. Defendants in both of these instances should be afforded a jury trial.

   PDS recommends the following language:

   > The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than ~~$4,000~~ $1,000 or a cumulative term of imprisonment of more than ~~1 year~~ 90 days.

Report No. 52

1. PDS proposes lowering the statutory maximum for Class 1 offenses to 30 years, Class 2 to a statutory maximum of 28 years, and Class 3 to a statutory maximum of 26 years. Classes 4-9 would remain unchanged pursuant to this recommendation. The RCC proposes a statutory maximum of 60 years, 48 years, and 36 years for Classes 1, 2, and 3 respectively. The sentences proposed in the RCC are simply too long. They will perpetuate the mass incarceration that has caused the United States to have the highest incarceration rate in the world.[7] In the District, it will further an incredible racial disparity in incarceration, given that in 2019, 93% of all individuals sentenced on a felony offenses in the District were Black.[8] Decades-long sentences

[7] Equal Justice Initiative, The United States Still Has the Highest Rates of Incarceration in the World, April 26, 2019. Available at: https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/

[8] D.C. Sentencing Commission, Annual Report 2019. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/page_content/attachments/Final%202019%20Annual%20Report.pdf. In 2018, 96% of all individuals sentenced on felonies were Black. Annual Report 2018. Available at:

for violent offenses are in part to blame for mass incarceration in the United States. While reducing sentences for non-violent offenses is an important step in ending the cruelty of mass incarceration, it cannot be undone without reducing sentences for violent offenses.[9]

Multi-decade sentences devastate not only the individual serving the sentence but the communities and families of incarcerated individuals. Nationally, 54 percent of incarcerated people are parents. Nationwide, one in nine African-American children have an incarcerated parent – a number that may be higher in the District. A child's prospects for economic mobility, graduating high school, attending college, and securing meaningful employment are all negatively impacted by the incarceration of a parent.[10] The incarceration of a parent will also exact a heavy emotional toll and an immediate toll in terms of household stability and income.

Sentences that last more than 30 years cannot be justified from a public safety perspective. A 20 year old who is sentenced to 30 years of incarceration would be close to 50 years old at the time of release. It is now uncontroverted that individuals age out of crime. [11] Crimes are predominately committed by young people and as people age, they steadily become at lower risk for committing future crime. A 60-year sentence as permitted by the RCC would effectively be a life sentence even for a young person who committed a crime.

As the District advocates for statehood and moves toward it, it also should consider the wisdom of a criminal code that would have it bear the direct financial cost of incarcerating individuals who are nearly senior citizens and who pose minimal risk to public safety. By incarcerating individuals who are well into their 50s and who do not pose a risk to public safety, the District would in fact decrease public safety by diverting funds that could be spent on education and public health to instead funding the care of individuals aging in prison. The incarceration of middle aged and elderly individuals who pose limited risk to the community would come at the

https://scdc.dc.gov/sites/default/files/dc/sites/scdc/page_content/attachments/Sentencing%20Commission%202018%20Annual%20Report.pdf

[9] *See generally*, James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America, epilogue (2018).

[10] See, e.g., The Pew Charitable Trusts, Collateral Costs: Incarceration's Effect on Economic Mobility (Washington, DC: Pew Charitable Trusts, 2010), https://perma.cc/XHL8-KHVA

[11] Laurence Steinberg, Elizabeth Cauffman, and Kathryn C. Monahan, *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, JUVENILE JUSTICE BULLETIN 8 (2015) ("Age-based desistence is intrinsically linked to brain development. The essential brain development that occurs in late teens and early twenties affects criminal activity because "[b]etween ages 14 and 25, youth continue to develop an increasing ability to control impulses, suppress aggression, consider the impact of their behavior on others, consider the future consequences of their behavior, take personal responsibility for their actions, and resist the influence of peers."); Michael Rocque, Chad Posick, & Justin Hoyle, *Age and Crime, in* THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT, 1 (Wesley G. Jennings ed., John Wiley & Sons, Inc., 1st ed., 2016) (the peak and then decline of crime that follows aging "has been termed the 'age-crime curve,'[and] is not questioned by scholars.").

expense of programs that could have an impact in reducing crime and empowering parents and communities such as nurse-family partnerships, school-based programs, mental health services, substance abuse treatment, job training, and affordable housing. Further, sentences of the length proposed in the RCC are not universally supported by victims. A comprehensive national survey on crime victims' views found that "the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration and strongly prefer investments in prevention and treatment to more spending on prisons and jail."[12]

There is also no evidence that statutory maxima of 60 years as opposed to 30 years or 28 years would provide any meaningful additional deterrent effect. Many individuals who commit crimes are under the influence of drugs or alcohol, or are young and have yet to develop the reasoning skills, impulse inhibition, and resistance to peer influence to contemplate the precise length of a sentence in deciding whether to commit a crime. The "limited impact of extending sentence length becomes even more attenuated for long-term incarceration." If the penalty for murder is increased from 30 years to 60 years, few individuals would be undeterred by a sentence of "only" 30 years, but deterred by a sentence of 60 years.[13]

2. PDS opposes enhancements based on prior offenses.[14] Individuals who have previously been convicted of offenses received sentences for those prior offenses and served the sentence deemed appropriate by the judge. The prior conviction will also be scored on the Sentencing Guidelines and used to increase the severity of the sentence for the new offense. While the RCC has tried to avoid instances of double counting and overlap, sentencing enhancements create triple counting of a prior offense. Nationally, repeat conviction enhancements have created injustices like the sentencing of an individual to 25 years to life for the non-violent theft of golf clubs.[15] Reform in the District should mean jettisoning these enhancements.

3. If the RCC retains RCC § 22E-606, the Repeat Offender Penalty Enhancement, PDS recommends a substantial narrowing of the provision. As currently drafted, an individual will be subject to an enhancement every time the individual commits a felony offense and has any prior offense against persons. Therefore, an individual who is convicted of felony drug distribution who has a prior felony offense for robbery would be subject to an enhancement. The enhancement would apply despite the lack of connection between the two crimes. If the reason for the enhancement is the belief that there is additional culpability when an individual commits the same offense or harms the same persons or community, then the RCC's proposal is

[12] Alliance for Safety and Justice, Report: Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice (2016). Available at: https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report-1.pdf

[13] See Marc Mauer, Long-Term Sentences: Time to Reconsider the Scale of Punishment, UMKC Law Review, Vol. 87:1. (2018). Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/

[14] PDS also detailed its objections to sentencing enhancements for individuals previously convicted of crimes in its comments on First Draft of Report No. 6: Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements, submitted to CCRC on July 18, 2017.

[15] *Ewing v. California*, 538 U.S. 11 (2003).

unmoored from that justification. As currently drafted, the enhancement simply punishes the person again for the prior offense – the exact thing the Sentencing Guidelines already do and what the judge in the prior case already did.

To narrow this provision, PDS recommends the changes below:

RCC § 22E-606. Repeat Offender Penalty Enhancement

(a) Felony repeat offender penalty enhancement. A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense under Subtitle II[16] of this title and at the time has:

(1) One or more prior convictions for the same or comparable felony offense as the instant offense ~~a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or~~

~~(2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:~~

(A) Committed within the prior10 years; and

(B) Not committed on the same occasion.

(b) *Misdemeanor repeat offender penalty enhancement.* A misdemeanor repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a misdemeanor offense under Subtitle II of this title and at the time has:

(1) Two or more prior convictions for the same or comparable misdemeanor offense as the instant offense ~~a misdemeanor offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion;~~

~~(2) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or~~

~~(3) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:~~

(A) Committed within the prior ten years; and

(B) Not committed on the same occasion.

4. PDS recommends lowering the penalties in §22E-606. As argued above, the repeat offender penalty enhancement when combined with the District's sentencing guidelines under which a prior conviction will increase both the minimum and maximum guidelines recommended prison sentence, results in a triple punishment for a prior conviction. If the CCRC carries forward this unfair system into the reform code, it should reduce the impact of the unfairness by reducing the penalty enhancement. PDS recommends the following:

[16] There is a typo in the statutory test in that it lists Subtitle I, but should read Subtitle II.

(1) For the felony repeat offender penalty -

(A) For a Class 1 or Class 2 felony, 5 years;

(B) For a Class 3 or Class 4 felony, 3 years;

(C) For a Class 5 or Class 6 felony, 2 years;

(D) For a Class 7 or Class 8 felony, 1 year; and

(E) For a Class 9 felony, 180 days.

(2) For the misdemeanor repeat offender penalty –

(A) For a Class A or Class B misdemeanor, 60 days; and

(B) For a Class C, Class D, or Class E misdemeanor, 10 days.

5. PDS opposes the inclusion of offenses committed while on release or a pretrial release penalty enhancement in the RCC. The offense of failing to follow a judicial order is already punishable as contempt. Beyond the potential act of being in contempt of a court order, it is not clear why an offense committed while on release should be subject to any greater penalty. Individuals charged with offenses are presumed innocent. Further, pretrial release is the statutory presumption under D.C. Code § 23-1321. Thus a defendant, who is arrested upon a mere showing of probable cause, and who is released based on the presumption of release in D.C. Code § 23-1321, and then constitutionally presumed to be innocent of the first offense, should not face an additional penalty when convicted of an second-in-time accusation. The RCC does not require conviction of the first-in-time offense for conviction of the enhancement. The enhancement amounts to punishing individuals for arrests, a process that has been shown to be at times infected with bias and where the lowest standard of proof in the criminal system allows a case to proceed.

   Further, there could be little deterrence value in this enhancement since the possibility of contempt or revocation of release conditions under D.C. Code § 23-1329 provide the same general deterrent effect.

6. The RCC doubles the statutory maximum from the current offense of offenses committed while on release.[17] This doubling does not reflect any additional harm caused by the act of committing a homicide while on release for unlawful use of a vehicle that is not present for the same homicide committed by someone on probation, or supervised release, or who has no prior police contacts. If the RCC retains this enhancement, PDS recommends reducing the associated penalties. The enhancement should be graded much closer to the contempt penalty at D.C. Code § 23-1329(c), which punishes the same conduct and serves the same purpose as this enhancement. PDS recommends punishing offenses committed while on release with a maximum penalty of 10 days of incarceration if the crime is committed while on release in a misdemeanor and 1 year if the crime committed while on release is a felony.

[17] D.C. Code § 23-1328, penalties for offenses committed while on release.

Memorandum

Timothy J. Shea
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #51–52, and Second Draft of Report #41	Date: May 15, 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 Reports #51–52, and the CCRC's Second Draft of Report #41. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #51—Jury Demandable Offenses

1. USAO recommends that, under subsections (b)(1)(A), (b)(1)(B), and (b)(1)(F), consistent with current law, offenses be jury demandable only when they are punishable by more than 180 days' imprisonment, or when a defendant is charged with 2 or more offenses that are punishable by a cumulative term of more than 2 years' imprisonment.[2]

As the CCRC states, the Supreme Court has held that "offenses involving penalties of more than six months are subject to a Sixth Amendment right to a jury trial, whereas offenses with lesser penalties generally are not." (Commentary to Report #52 at 6 & n.11 (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989)).) The CCRC notes that "nothing prevents a jurisdiction from voluntarily extending jury trial right to offenses subject to penalties of six months or less." (Commentary to Report #52 at 6.) As USAO recommended in its previous submission, however, the CCRC should follow the balance previously legislated by the D.C. Council.

The Commentary notes that "[t]he rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District." (Commentary at 4.) Many concerns that relate to judicial efficiency, however, remain

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

[2] Under the RCC's proposal, Class B misdemeanors, punishable by 180 days' imprisonment, are subject to a $2,500 fine. This contrasts with fines under current law, where offenses that are punishable by 180 days' imprisonment are subject to a $1,000 fine. USAO recommends that the fines align with USAO's recommendations so that a fine, in itself, would not trigger jury demandability.

in place. In 2009, Chief Judge Satterfield sent a letter to Vincent Gray, then the Chairman of the D.C. Council, regarding Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. The provisions discussed in that letter were ultimately incorporated in Bill 18-151 (Law 18-88), the Public Safety and Justice Amendments Act of 2009, which made the offense of unlawful entry onto private property non-jury demandable. In his letter, Chief Judge Satterfield wrote the following:

> I am writing to alert you about the impact on judicial administration of Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. Section 204(b) of the Act amends the penalty for the crime of unlawful entry by providing for imprisonment of not more than 180 days for unlawful entry on private property, while retaining the penalty of up to six months imprisonment for unlawful entry on public property.
>
> Treating every unlawful entry as a 180 days offense would decrease the burden of these cases on the already beleaguered jury pool in the District of Columbia. The current yield to juror summonses in the District of Columbia is approximately twenty-two percent of all the summonses sent. Although improvements have been taken and are being sought to increase that yield, it is still a fairly small number of citizens who are available to serve. As a result, citizens who respond to this civic duty are routinely called to serve every two years. Figures provided by the Jury Office show that in the last two years, a majority of jurors were summoned as soon as two years had lapsed from their last summons date. Judges in the Superior Court commonly hear complaints from residents that calls to District jury service are far more frequent than those from other jurisdictions. Further, our jurisdiction is unique in the jury service burdens it puts on its citizens, since the federal court draws its jury pool from the same municipal pool of citizens as the Superior Court. Drawing jurors from this limited pool for six month offenses makes it more difficult for the Court to maintain the necessary supply of jurors for the serious felony cases.

Letter from Lee F. Satterfield, Chief Judge, Superior Court of the District of Columbia, to Vincent Gray, Chairman, Council of the District of Columbia, Re: Bill 18-138, "Omnibus Anti-Crime Amendment Act of 2009" (March 18, 2009).[3]

Further, in the Commentary, the CCRC focuses on the number of jury trials that would actually take place under its proposal, noting that "[t]here is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials." (Commentary at 7.) But the CCRC's proposal would have an impact on many other cases that are jury demandable, regardless of whether they actually go to trial. Even though most cases resolve with guilty pleas instead of trials, many cases that

[3] Chief Judge Satterfield wrote a similar letter on March 18, 2009, to Phil Mendelson, then the Chairman of the Committee on Public Safety and the Judiciary, discussing the impact on judicial administration of Bill 18-151, the Public Safety and Justice Amendments Act of 2009. That letter discussed concerns regarding the proposal to make disorderly conduct punishable by 6 months' imprisonment, rather than 180 days' imprisonment, which would create a similar burden on the jury pool in the District.

ultimately resolve with a guilty plea do not resolve with a guilty plea early in the case. Rather, many cases are initially scheduled for trial, and resolve with a guilty plea after the trial date has been set. Thus, even though the cases do not ultimately go to trial, scheduled trial dates must account for all of these cases. Because there are more jury trials on the docket, this will result in jury trials being set further out, which may result in delayed justice. There will also be significant fiscal impacts with more jury trials, including additional costs for court personnel, attorneys, juror fees, and MPD court-related overtime.

USAO also recommends that subsection (b)(1)(B) be deleted. In assessing jury demandability, the CCRC's recommendations in subsections (b)(1)(A) and (b)(1)(F) focus on the potential length of incarceration that a defendant faces as a result of a conviction for a given offense. These subsections do not focus on the type of conduct, but rather on the maximum penalty. Because a conviction for an attempt, conspiracy, or solicitation to commit an offense reduces the maximum penalty for that offense, offenses involving exposure to less incarceration should not be jury demandable.

2. USAO recommends that subsection (b)(1)(E) be limited to align with the D.C. Court of Appeals' holding in *Bado v. United States*.

   With USAO's changes, subsection (b)(1)(E) would provide:

   "The defendant is charged with an offense that, if the defendant ~~were a non-citizen and~~ were convicted of the offense, could result in ~~the~~ that defendant's deportation from the United States under federal immigration law;"

USAO recommends that the CCRC's proposal be limited to align with the holding and rationale of the D.C. Court of Appeals in *Bado v. United States*, 186 A.2d 1243 (D.C. 2018) (*en banc*)—that is, defendants who actually face the penalty of deportation as a result of a conviction for that offense have a right to demand a jury, but defendants who do not actually face such a penalty do not have an independent right to demand a jury.

In *Bado*, the *en banc* D.C. Court of Appeals addressed the question of "whether the Sixth Amendment guarantees a right to a jury trial to an accused who faces the penalty of removal/deportation as a result of a criminal conviction for an offense that is punishable by incarceration for up to 180 days," holding that "the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury." 186 A.2d at 1246–47. In so holding, the court focused on the harms incurred by someone who is actually facing the possibility of deportation or is deported. *See id.* at 1250–51. The logic of the majority opinion, finding that this offense is not "petty" for purposes of the Sixth Amendment, would not extend to someone who would *not* face the possibility of deportation or actually be deported as a result of a conviction for that offense. *See id.* The court distinguished the situation of a defendant who would face deportation from the situation of a defendant who would not face deportation. *See id.* at 1250 ("Once the actual sentence is served (which could be for a term less than the six-month maximum, or even probation), a U.S. citizen can return home to family and community and take steps to resume and possibly, redirect his life. But when a person faces

deportation, serving the sentence is only the first step following conviction; once the sentence is completed, the person faces the burdens and anxiety that attend detention pending removal proceedings. . . . As the [Supreme] Court has recognized, removal is considered by many immigrants to be worse than incarceration, such that preserving the right to remain in the United States may be more important than any potential sentence." (internal citations omitted)). Both the holding and the rationale underlying the majority opinion in *Bado*, therefore, would only apply to those actually facing the possibility of deportation—not to all defendants, regardless of their citizenship status.

The Commentary cites to Judge Washington's concurring opinion in *Bado* as support for expanding the *Bado* holding to all defendants, regardless of citizenship status. (Commentary at 12.) *Bado*, however, was an *en banc* decision, and no other judge joined Judge Washington's concurrence in support of expanding *Bado*.

Further, the expansion proposed by the CCRC still leaves the difficult task of determining what offenses carry immigration consequences, and does not address the difference in the list of deportable offenses for those who were admitted to the United States and those who were not. *Compare* 8 U.S.C. § 1182 *with* 8 U.S.C. § 1229. For example, although possession of a controlled substance is not inherently jury demandable under the RCC's proposal—as it is either a Class C or Class D misdemeanor, depending on the type of controlled substance—it is one of the offenses that is deportable regardless of immigration status, and therefore would be jury demandable for all under the RCC's proposed expansion of *Bado*. As the D.C. Court of Appeals noted in *Bado*:

> A person who is deportable as a result of conviction for any crime identified in 8 U.S.C. § 1227 (a)(2) will be placed in removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1229a (a)(1) & (2) (2012). Those convicted of an aggravated felony who were removed under 8 U.S.C. § 1229a are rendered ineligible for readmission to the United States, meaning they are forever barred from entering the country unless the Attorney General consents to the application for admission. *Id.* § 1182 (a)(9)(A)(ii)(II) (2012). Those convicted of a crime involving moral turpitude or a crime related to a controlled substance are similarly permanently inadmissible and deportable. *Id.* §§ 1182 (a)(2)(A), 1227 (a)(2)(A)(i), & 1227 (a)(2)(B)(i) (2012). Those who were removed for other grounds are eligible to apply for readmission after ten years (following a first order of removal) and twenty years (following a second order of removal). *Id.* § 1182 (a)(9)(A)(ii) (2012).

186 A.3d at 1251 n.14. As the RCC Commentary notes, "[t]he application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes." (Commentary at 2 n.2.) Due to the noted complex nature of federal immigration law, however, the question of whether an offense is jury demandable will be the subject of extensive litigation in misdemeanor cases.

3. USAO recommends that subsection (b)(1)(D) be removed.

As the Commentary states, "[t]he DCCA has previously held that, as a matter of law, a right to a jury does not exists for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008)." (Commentary at 12 n.72.) The court in *Thomas* held that, under controlling Supreme Court case law, an offense is deemed "petty" if punishable by a sentence of no more than 180 days incarceration, and a jury trial is only demandable if a defendant can show that any additional penalties "are so severe that they clearly reflect a legislative determination that the offense in question is a serious one." *Thomas*, 942 A.2d at 1186 (citing to *Blanton*, 489 U.S. at 541; *Smith v. United States*, 768 A.2d 577, 579 (D.C. 2001); *Foote v. United States*, 670 A.2d 366, 371 (D.C. 1996)). In holding that a right to a jury does not exist for misdemeanor child sexual abuse, the *Thomas* court analyzed the legislative intent of the D.C. Council in enacting the current misdemeanor child sexual abuse law, which, certainly, the D.C. Council could supersede with enactment of the RCC. However, the discussion of sex offender registration in *Thomas* is a relevant prudential consideration in ascertaining whether to create this new right to a jury trial for defendants convicted of offenses that require sex offender registration pursuant to D.C. Code § 22-4001(8). The court in *Thomas* held that "SORA is a remedial regulatory enactment, not a penal law, that was adopted to protect the community, especially minors, from the threat of recidivism posed by sex offenders who have been released into the community. Because registration with SORA is an administrative requirement and not penal in nature, we conclude that the Sixth Amendment does not require that we divert in this case from the statute that calls for jury trial in only these cases where the maximum penalty exceeds 180 days." 942 A.2d at 1186 (citation omitted). USAO recommends that the CCRC follow the prudential considerations of the *Thomas* court, and remove the provision that an offense is inherently jury demandable if it is a registration offense as defined in D.C. Code § 22-4001(8).

Moreover, the language proposed in subsection (b)(1)(D) was considered by the D.C. Council in the Omnibus Public Safety Act of 2005 (Law 16-306) and ultimately rejected. As USAO wrote in a letter during the Committee's consideration of the bill:

> If enacted, this provision would apply only in cases where a child or minor is the victim of a misdemeanor sex offense because sex offender registration is not required in misdemeanor sexual abuse cases where the victim is an adult. D.C. Code § 22-4016(b)(3). In some cases, this Office charges a misdemeanor even though the conduct would support a felony charge because we believe that a particular child victim would be unduly traumatized by testifying in front of a jury. Under the draft Committee Print, we may elect not to proceed with prosecutions because the prospective damage to the child will be too great; and in those cases where we do proceed, the child may be emotionally harmed. Furthermore, if we proceed with a case, it is likely that we would bring the most significant felony charges available. A defendant who is entitled to a jury trial for a misdemeanor under the Committee's proposed amendment thus would risk being convicted of a felony instead.

> The conduct prohibited under the new offense of Misdemeanor Sexual Abuse of a Child or Minor would not support a felony charge, but there is an equally important reason for retaining these cases on a non-jury calendar: non-jury calendars move at a much faster pace than jury calendars. This means that a resolution of a sex offense can be obtained in a few weeks rather than several months, or longer. Particularly when children or minors are involved, an expeditious disposition of their cases spares them the on-going trauma that the prospect of testifying entails and guards against the loss of memory that could impair their ability to testify fully about what happened to them.

Letter from Patricia A. Riley, Special Counsel to the U.S. Attorney, U.S. Attorney's Office for the District of Columbia, to Phil Mendelson, Chairman, Committee on the Judiciary, Re: Bill 16-247, "Omnibus Public Safety Act of 2005" (April 18, 2006).[4]

First Draft of Report #52—Cumulative Update to the Revised Criminal Code Chapter 6

RCC § 22E-603. Authorized Terms of Imprisonment.

1. USAO recommends that a Class 7 felony be punishable by a maximum of 10 years' incarceration.

Under the RCC's proposal, a Class 7 felony is punishable by a maximum of 8 years' incarceration. As currently drafted, Class 7 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- 3rd Degree Robbery (comparable to Armed Robbery under D.C. Code §§ 22-2801, -4502, which has a maximum of 30 years' incarceration, where bodily injury results from a dangerous weapon or to a protected person; and Armed Carjacking under D.C. Code § 22-2803, which has a maximum of 30 years' incarceration, unless certain conditions are met that could increase the maximum)[5]
- 2nd Degree Assault (comparable to Aggravated Assault under D.C. Code § 22-404.01, which has a maximum of 10 years' incarceration; and Assault with Significant Bodily Injury While Armed under D.C. Code §§ 22-404(a)(2), -4502, which has a maximum of 30 years' incarceration)
- 5th Degree Sexual Abuse of a Minor (comparable to 2nd Degree Child Sexual Abuse where the child is over 12 years old under D.C. Code § 22-3009, which has a maximum of 10 years' incarceration)
- 1st Degree Sexual Exploitation of an Adult (comparable to 1st Degree Sexual Abuse of a Secondary Education Student under D.C. Code § 22-3009.03, which has a maximum of 10 years' incarceration; 1st Degree Sexual Abuse of a Ward, Patient, Client, or Prisoner under D.C. Code § 22-3013, which has a maximum of

[4] USAO also continues to recommend that a version of Nonconsensual Sexual Conduct and Sexually Suggestive Conduct with a Minor not be jury demandable. The rationale set forth here applies to that recommendation as well.

[5] USAO previously recommended that each gradation of Robbery be increased, and that Carjacking be an independent offense. USAO reiterates those recommendations here.

10 years' incarceration; and 1st Degree Sexual Abuse of a Patient or Client under D.C. Code § 22-3015, which has a maximum of 10 years' incarceration)

- 1st Degree Arranging a Live Performance of a Minor (comparable to Sexual Performance Using Minors under D.C. Code § 22-3101 *et seq.*, which has a maximum of 10 years' incarceration)
- Enhanced 1st Degree Burglary (comparable to 1st Degree Burglary While Armed under D.C. Code §§ 22-801, -4502, which has a maximum of 30 years' incarceration)[6]
- 2nd Degree Arson (comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years' incarceration, where a person is present)
- Involuntary Manslaughter (comparable to Manslaughter under D.C. Code § 22-2105, which has a maximum of 30 years' incarceration)[7]

Many of the comparable offenses under current law have a maximum of 10 years' incarceration. The CCRC's proposal would therefore have the effect of lowering the maximum penalties for many serious offenses—including child sexual abuse; sexual abuse of a secondary education student; sexual abuse of a ward, patient, or prisoner; sexual abuse of a patient or client; arson; and aggravated assault—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered from 10 years' incarceration to 8 years' incarceration, and recommends that Class 7 felonies have a maximum of 10 years' incarceration.

2. <u>USAO recommends that a Class 6 felony be punishable by a maximum of 15 years' incarceration.</u>

Under the RCC's proposal, a Class 6 felony is punishable by a maximum of 10 years' incarceration. As currently drafted, Class 6 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- 1st Degree Assault (comparable to Aggravated Assault While Armed under D.C. Code §§ 22-404.01, -4502, which has a maximum of 30 years' incarceration, and Aggravated Assault with other enhancements)
- 3rd Degree Sexual Abuse of a Minor (comparable to 1st Degree Sexual Abuse of a Minor under D.C. Code § 22-3009.01, which has a maximum of 15 years' incarceration)
- 4th Degree Sexual Abuse of a Minor (comparable to 2nd Degree Sexual Abuse of a Child under D.C. Code §§ 3009, -3020 where the child is under 12 years old, which has a maximum of 15 years' incarceration)
- 1st Degree Criminal Abuse of a Minor (comparable to 1st Degree Child Cruelty under D.C. Code § 22-1101, which has a maximum of 15 years' incarceration)
- Enhanced Involuntary Manslaughter (comparable to Manslaughter under D.C. Code §§ 22-2105, which has a maximum of 30 years' incarceration, with certain enhancements)

[6] As discussed below, USAO continues to recommend that the penalty for Burglary be increased.

[7] USAO previously recommended—and continues to recommend—that Involuntary Manslaughter be categorized as a Class 5 felony with a maximum of 20 years' incarceration.

Many of the comparable offenses under current law have a maximum of 15 years' incarceration. The CCRC's proposal would therefore have the effect of lowering the maximum penalties for many serious offenses—including child sexual abuse, child physical abuse, and aggravated assault while armed—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered from 15 years' incarceration to 10 years' incarceration, and recommends that Class 6 felonies have a maximum of 15 years' incarceration.

3. USAO recommends that a Class 5 felony be punishable by a maximum of 20 years' incarceration.

Under the RCC's proposal, a Class 5 felony is punishable by a maximum of 18 years' incarceration. As currently drafted, Class 5 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- 2nd Degree Sexual Assault (comparable to 2nd Degree Sexual Abuse under D.C. Code § 22-3003, which has a maximum of 20 years' incarceration)
- 2nd Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is over 12 years old under D.C. Code § 22-3008, which has a maximum of 30 years' incarceration)
- Kidnapping (comparable to Kidnapping under D.C. Code § 22-2001, which has a maximum of 30 years' incarceration)
- 1st Degree Arson (comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years' incarceration, with the added requirement of causing death or serious bodily injury)
- Voluntary Manslaughter (comparable to Manslaughter under D.C. Code § 22-2105, which has a maximum of 30 years' incarceration[8])

The CCRC's proposal would have the effect of lowering the maximum penalties for many serious offenses—including 2nd degree sexual abuse and 1st degree child sexual abuse of a child over 12 years old—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered to 15 years' incarceration, and recommends that Class 5 felonies have a maximum of 20 years' incarceration.

4. USAO recommends that a Class 4 felony be punishable by a maximum of 30 years' incarceration.

Under the RCC's proposal, a Class 4 felony is punishable by a maximum of 24 years' incarceration. As currently drafted, Class 4 felonies include the following offenses, among others, which have the following maximum penalties under current law:

[8] USAO previously recommended—and continues to recommend—that Voluntary Manslaughter be categorized as a Class 4 felony with a maximum of 30 years' incarceration. USAO reiterates its other previous recommendations as well.

- 1st Degree Sexual Assault (comparable to 1st Degree Sexual Abuse under D.C. Code § 22-3002, which has a maximum of 30 years' incarceration, unless certain conditions are met that could increase the maximum)
- Enhanced 2nd Degree Sexual Assault (comparable to 2nd Degree Sexual Abuse with enhancements under D.C. Code §§ 22-3003, -3020, which has a maximum of 30 years' incarceration)
- 1st Degree Sexual Abuse of a Minor (comparable to comparable to 1st Degree Child Sexual Abuse where the child is under 12 years old under D.C. Code §§ 22-3008, -3020, which has a maximum of life imprisonment)
- Enhanced 2nd Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is over 12 years old, with enhancements, under D.C. Code §§ 22-3008, -3020, which has a maximum of life imprisonment)[9]
- 2nd Degree Murder (comparable to 2nd Degree Murder under D.C. Code §§ 22-2103, -2104, which has a maximum of 40 years' incarceration, unless certain conditions are met that could increase the maximum; and to 1st Degree Murder with respect to felony murder under D.C. Code §§ 22-2101, -2014, which has a maximum of 60 years' incarceration, unless certain conditions are met that could increase the maximum)
- Enhanced Voluntary Manslaughter (comparable to Manslaughter under D.C. Code §§ 22-2105, which has a maximum of 30 years' incarceration, with certain enhancements)

The CCRC's proposal would have the effect of lowering the maximum penalties for many serious offenses—including 1st degree sexual abuse, 1st degree sexual abuse of a minor, and murder—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered to 24 years' incarceration, and recommends that Class 4 felonies have a maximum of 30 years' incarceration.

5. <u>USAO recommends that a Class 3 felony be punishable by a maximum of 40 years' incarceration.</u>

Under the RCC's proposal, a Class 3 felony is punishable by a maximum of 36 years' incarceration. As currently drafted, Class 3 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- Enhanced 1st Degree Sexual Assault (comparable to 1st Degree Sexual Abuse with enhancements under D.C. Code §§ 22-3002, -3020, which has a maximum of life imprisonment)
- Enhanced 1st Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is under 12 years old, with enhancements, under D.C. Code §§ 22-3008, -3020, which has a maximum of life imprisonment)
- Enhanced 2nd Degree Murder (comparable to enhanced 2nd Degree Murder under D.C. Code §§ 22-2103, -2104; D.C. Code § 24-403.01(b-2), which has a

[9] As set forth below, USAO also recommends that Enhanced 2nd Degree Sexual Abuse of a Minor be increased in class.

maximum of life imprisonment; and to enhanced 1st Degree Murder with respect to felony murder under D.C. Code §§ 22-2101, -2014; D.C. Code § 24-403.01(b-2), which has a maximum of life imprisonment)

The CCRC's proposal would have the effect of lowering the maximum penalties for many serious offenses—including 1st degree sexual abuse with enhancements and 1st degree sexual abuse of a child with enhancements—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered to 36 years' incarceration, and recommends that Class 4 felonies have a maximum of 40 years' incarceration.

6. USAO recommends that the Commentary to the CCRC codify the CCRC's intent to have an increased reliance on consecutive sentences, rather than concurrent sentences.

At the CCRC Advisory Group meeting on May 6, 2020, there was discussion between Advisory Group members and the CCRC about the intent to have increased reliance on consecutive sentences, rather than concurrent sentences. As noted in the minutes from that meeting, the purpose of this is to capture the full scope of a defendant's conduct, to ensure that one offense is not doing all of the work, and to evaluate each type of criminal behavior involved in the situation. USAO recommends that this intent be codified in the Commentary so that attorneys and judges can understand the CCRC's intent in this respect when sentencing defendants under the RCC.

7. USAO recommends maintaining the thirty-year minimum sentence for First Degree Murder.

The CCRC's proposals do not include a minimum sentence for first degree murder. District law has long provided for a thirty-year minimum sentence for that offense. *See* 22 D.C. Code § 2104. A minimum sentence is especially appropriate for premeditated first degree murder, which has been described by the DCCA—and in turn viewed by lawmakers—as the most serious of offenses. *See Butler v. United States*, 481 A.2d 431, 448–49 (D.C. 1984).

The lack of a minimum sentence for First Degree Murder would be unprecedented. Every other state imposes at least a minimum term of imprisonment. 32 states impose a minimum sentence of life or life without parole. Of the remaining states, the vast majority impose a very substantial minimum sentence. Only a few states impose a smaller minimum sentence (Texas imposes a five-year minimum, Alabama, Arkansas, and Montana impose a ten-year minimum). But no state (including the many states that have adopted part or all of the Model Penal Code) imposes no minimum sentence for first degree murder, as shown in the table below.

State	Minimum Sentence	Source
Alabama	10 years	Ala. Code §§ 13A-5-6, 13A-6-2(c)
Alaska	30 years	AS §§ 12.55.125(a), 11.41.100(b)
Arizona	Life	AZ ST § 13-1105(D)
Arkansas	10 years	A.C.A. §§ 5-4-401(a)(1), 5-10-102(c)(1)
California	25 years	Cal. Penal Code § 190(a)
Colorado	Life	C.R.S.A. §§ 18-1.3-401, 18-3-102(3)

Connecticut	25 years	C.G.S.A. §§ 53a-35a, 53a-54a
Delaware	Life without release	11 Del.C. §§ 636, 4209(a)
Florida	Life without parole	F.S.A. §§ 775.082, 782.04(1)(a)
Georgia	Life	Ga. Code Ann. § 16-5-1(e)(1)
Hawaii	Life without parole	HRS §§ 706-656(1), 707-701(2)
Idaho	Life (eligible for parole after 10 years)	I.C. § 18-4004
Illinois	20 years	720 ILCS 5/5-4.5-20(a), 5/9-1(g)
Indiana	45 years	IC 35-50-2-3
Iowa	Life without parole	I.C.A. §§ 707.2(2), 902.1(1)
Kansas	Life (eligible for parole after 25 years)	K.S.A. 21-6620(c)(2)(A)
Kentucky	20 years	KRS §§ 507.020(2), 532.030(1)
Louisiana	Life without parole	LSA-R.S. 14:30(C)(2)
Maine	25 years	17-A M.R.S.A. § 1603(1)
Maryland	Life	MD Code, Criminal Law, § 2-304
Massachusetts	Life without parole	M.G.L.A. 265 § 2(a)
Michigan	Life without parole	M.C.L.A. 750.316(1)
Minnesota	Life	M.S.A. § 609.185(a)
Mississippi	Life	Miss. Code Ann. § 97-3-21(1)
Missouri	Life without parole	V.A.M.S. 565.020(1)
Montana	10 years	MCA 45-5-102(2)
Nebraska	Life	Neb.Rev.St. §§ 28-303, 29-2522
Nevada	50 years (eligible for parole after 20 years)	N.R.S. 200.030(4)(b)(3)
New Hampshire	Life without parole	N.H. Rev. Stat. § 630:1-a(III)
New Jersey	30 years	N.J.S.A 2C:11-3(b)(1)
New Mexico	Life	N.M.S.A. §§ 30-2-1(A), 31-18-14
New York*	15 years	McKinney's Penal Law §§ 70.00(3)(a)(i), 125.25
North Carolina	Life without parole	N.C.G.S.A. § 14-17
North Dakota	Life	NDCC, 12.1-16-01(1), 12.1-32-01(1)
Ohio	Life	R.C. §§ 2903.01(G), 2929.02
Oklahoma	Life	21 Okl.St.Ann. § 701.9(A)
Oregon	Life	O.R.S. § 163.115(5)(a)
Pennsylvania	Life	42 Pa.C.S.A. § 9711
Rhode Island	Life	Gen.Laws 1956, § 11-23-2
South Carolina	30 years	Code 1976 § 16-3-20
South Dakota	Life	SDCL §§ 22-6-1(1), 22-16-12
Tennessee	Life	T.C.A. § 39-13-202(c)(3)
Texas	5 years	V.T.C.A., Penal Code §§ 12.32(a), 19.02(c)
Utah	15 years	U.C.A. 1953 § 76-5-203(3)(b)
Vermont	35 years	13 V.S.A. § 2303(a)(1)(A)
Virginia	20 years	VA Code Ann. §§ 18.2-10(b), 18.2-32
Washington	Life	West's RCWA 9A.32.040

West Virginia	Life	W. Va. Code, § 61-2-2
Wisconsin	Life	W.S.A. 939.50(3)(a), 940.01(1)(a)
Wyoming	Life	W.S.1977 § 6-2-101

*New York's Second Degree Murder Statute is most analogous to the District's First Degree Murder Statute

The District's existing 30-year minimum sentence for first degree murder is thus very much in the mainstream when compared to the other states (including states that have adopted the Model Penal Code) and should be retained.

CCRC cites to recommendations from the Judicial Conference of the United States, the American Law Institute, and the American Bar Association, which all oppose mandatory minimum sentencing schemes. (*See* Advisory Group Memo 32, App. D2 at 4.) However, the Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* makes no reference to homicide offenses. American Bar Association Resolution 10(b) also gives no indication that minimum sentences for homicide offense were considered. Perhaps most tellingly, the American Law Institute has previously reported sharp criticism of mandatory minimum sentences by a federal judge *because they required the judge to impose a sentence greater than the judge would give to a murderer*. *See* American Law Institute, Model Penal Code: Sentencing § 6.06, Proposed Final Draft (April 10, 2017), Comment m. As detailed therein:

> [R]ecently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison—the maximum suggested by the [U.S.] Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

Id. The other comments from the ALI suggest that perhaps the most salient criticism of mandatory minimum sentencing schemes is that they adversely impact proportionality: "Mandatory-minimum-penalty laws are at war with the Code's tenets of proportionality in punishment." *Id.* But this concern does not apply to first degree murder, which already is the most serious criminal offense contemplated by the criminal code. Mandatory minimum sentencing has remained a topic of debate in recent years, but the criticism has not focused on minimum sentencing schemes for adults convicted of first degree murder. A minimum sentence of 30 years for premeditated first degree murder appropriately signals society's abiding belief in the inherent value of human life and should be maintained.

8. USAO opposes the elimination of other mandatory minimums.

In addition to the elimination of a mandatory minimum for First Degree Murder, the CCRC proposes eliminating mandatory minimums for all other offenses, including Unlawful Possession of a Firearm under D.C. Code § 22-4503, Possession of Weapons During Commission of a Crime of Violence under D.C. Code § 22-4504(b), Carjacking under D.C. Code § 22-2803; and the Additional Penalty for Committing Crime when Armed under D.C. Code § 22-4502, as well as other "soft" minimums throughout the D.C. Code, *see, e.g.*, D.C. Code § 22-801 (Burglary); D.C. Code § 23-1327 (Failure to Appear). Under federal law, many firearms offenses are subject to a mandatory minimum. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A)(i) (5-year minimum for using or carrying a firearm during a crime of violence); 18 U.S.C. § 924(c)(1)(A)(ii) (7-year minimum for brandishing a firearm during a crime of violence); 18 U.S.C. § 924(e) (15-year minimum for possessing a firearm after 3 convictions for violent felonies or drug offenses).

In its comments on the First Draft of Report #41, USAO noted that, in a time of increased gun violence,[10] an increase in homicides in the District, and a need to reduce the number of guns in the District, the RCC should not lower penalties for firearms offenses—USAO reiterates those concerns here. Firearm violence is a critical public safety issue, and the firearms that lead to that violence should not be treated lightly. As USAO noted in its comments regarding the proposed maximum penalties for Possession of a Firearm by an Unauthorized Person, crucially, persons convicted of this offense not only carried a firearm, but also had been previously convicted of a felony or crime of domestic violence, or a prior crime of violence. Persons previously convicted of these offenses should not be permitted to carry firearms, and should be subject to penalties commensurate with their actions. As USAO noted in its comments regarding the proposed maximum penalties for Possession of a Dangerous Weapon During a Crime, this offense involves not just possession of firearms, but possession of firearms when the firearms are being used to commit offenses against others. The RCC's proposal does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others.

RCC § 22E-606. Repeat Offender Penalty Enhancement.

1. USAO recommends that, in subsections (a)(1) and (b)(2), the CCRC add Burglary and Arson.

   With USAO's changes, subsections (a)(1) and (b)(2) would provide:

   "One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion, or a conviction for Burglary under RCC § 22E-2701 or Arson under RCC § 2501, or a comparable offense, not committed on the same occasion; or"

As the Commentary acknowledges, "[f]elony offenses in Subtitle I of Title 22E include offenses that are comparable to those currently deemed a 'crime of violence' as defined in D.C. Code § 23-1331(4), except for property crimes of arson and burglary, which are not in Subtitle

[10] https://cdn.americanprogress.org/content/uploads/2019/11/18070707/WashingtonDCGunViolence-Factsheet.pdf

I." (Commentary at 16 n.39.) USAO recommends that the RCC treat all offenses that are currently categorized as crimes of violence under D.C. Code § 22-1331(4) the same under this enhancements. USAO therefore recommends that the CCRC include Burglary (RCC § 22E-2701) and Arson (RCC § 22E-2501) in the list of offenses that require only one prior conviction for the enhancement to apply. Burglary and Arson are both serious offenses that can involve serious harms, and should be treated the same as other offenses listed in this subsection.

2. <u>USAO recommends that the Commentary be revised to state that a conviction under current District law is a "comparable offense."</u>

In its discussion of "comparable offenses" under this enhancement, the Commentary states: "The determination of whether another jurisdiction's statute *(or an older District statute)* is equivalent to a current District offense is a question of law." (Commentary at 16 (emphasis added).) RCC statutes will inherently have different elements from statutes under current law, so the current versions of those offenses will, in many cases, not have "elements that would necessarily prove the elements of a corresponding" RCC crime. *See* RCC § 22E-701 (definition of "comparable offense"). The Commentary notes that this is a change in law but, in its discussion, focuses only on conduct in another jurisdiction that may not translate into a comparable offense in the District. (Commentary at 21.) The Commentary does not further discuss how this would impact prior convictions under current law in the District.

USAO wants to ensure that convictions under the current D.C. Code could be used as prior convictions for purpose of this enhancement (or for purposes of liability for offenses such as Possession of a Firearm by an Unauthorized Person under RCC § 22E-4105). For example, the elements of robbery under current law are different from the elements of robbery under the RCC. If a defendant perpetrated an armed robbery under current law, that defendant's conviction would not "necessarily prove the elements" of the RCC armed robbery offense, even if the defendant's actual conduct for which he was convicted would be subject to liability under the comparable RCC offense. *Compare* D.C. Code §§ 22-2801, -4502 *with* RCC § 22E-1201(d)(2)(A)(ii). This is similarly true for other offenses, as the RCC has elementized each offense in more detail, and added elements to many offenses that may not exist in current law. This Commentary therefore creates a gap in liability, as many defendants who should be eligible for this enhancement—and held liable for offenses that rely on a prior conviction or "comparable offense"—will not be held accountable for those enhancements and offenses.

To address this concern, the Commentary could indicate that, unless otherwise specified, the predecessor offense under current law is a "comparable offense" to the RCC version of that offense.

<u>RCC § 22E-608. Hate Crime Penalty Enhancement.</u>

USAO proposes the following changes:

"(a) *Hate crime penalty enhancement.* A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of ~~intimidating, physically harming, damaging the property of, or causing a pecuniary loss~~

~~to any person or group of persons~~ committing the offense ~~because of~~ motivated by prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, ~~or~~ political affiliation, marital status, personal appearance, family responsibility, or matriculation of a person or a group of persons."

1. USAO recommends changing the words "because of" to "motivated by."

Changing the standard to "because of" would represent a change from current law. The Commentary acknowledges that this may constitute a substantive change of law. (Commentary at 31.) The CCRC should not incorporate any change from current law that could limit liability under this enhancement.

The most natural reading of the current statute at D.C. Code § 22-3701(1), as the text and legislative history indicate, is that an act "demonstrates an accused's prejudice" if the accused's prejudice is a "contributing cause" of the crime or, put another way, if the crime was motivated by the accused's prejudice. The statutory language requires that the criminal act itself "demonstrate" the defendant's prejudice, which conveys the need for a causal nexus between the crime and the defendant's prejudice. *See Shepherd v. United States*, 905 A.2d 260, 262–63 (D.C. 2006) (finding that the court need not "definitively" review the constitutionality of § 22-3701 because "[t]he trial court implicitly applied the statute as requiring a clear nexus between the bias identified in the statute and the assault" such that "it was appellant's assaultive conduct motivated by bias, not his homophobic prejudice as such, that was subject to criminal sanction"). Indeed, the legislative history for the current hate crimes statute demonstrates that the statute was enacted as a response "to an alarming increase in crimes *motivated by* bigotry and prejudice in the District." Report from the Committee on the Judiciary, Bill 8-168, the "Bias-Related Crimes Act of 1989" at 2 (Oct. 18, 1989) (emphasis added). Notably, the question of whether the current statute requires that the defendant's prejudice be a "contributing cause" of the offense or a "but-for cause" of the offense is pending before the D.C. Court of Appeals.

2. USAO opposes removal of marital status, personal appearance, family responsibility, and matriculation as potential bases for a hate crime penalty enhancement.

USAO wants to ensure that the hate crime penalty enhancement is robust and can be applied in all appropriate situations. The CCRC notes that MPD has no record of these crimes in recent years, and that criminal cases involving this conduct may be rare. (Commentary at 30 & n.78.) This does not, however, foreclose the possibility that, in the future, an individual could commit an offense while motivated by one of these factors, and should be held accountable for that behavior as a hate crime. The CCRC also notes that prejudice based on those characteristics may "be difficult to distinguish from individual dislikes and hatred (as compared to a categorical prejudice against an identifiable class)." (Commentary at 30.) This concern, however, goes to the government's ability to prove this enhancement beyond a reasonable doubt, rather than to whether the possibility of this enhancement should exist in the law.

3. USAO recommends changing the words "intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons" to "committing the offense."

Although the words "pecuniary loss" and "property" are defined in RCC § 22E-701, the words "intimating," "physically harming," and "damaging the property of" are not defined in the RCC. This will lead to unnecessary confusion about what these terms mean, and whether certain offenses are included within these terms. Rather, consistent with the DCCA's ruling in *Aboye v. United States*, 121 A.3d 1245 (D.C. 2015), it is appropriate to apply a hate crime to *any* offense. Although the CCRC notes in the Commentary that a hate crime enhancement can apply to any offense (*see* Commentary at 31–32), USAO wants to ensure that the plain language of the statute does not limit the offenses that are subject to this enhancement.

4. USAO recommends amending the Commentary.

Page 27 of the Commentary provides: "This general penalty provides a penalty enhancement where the defendant selected the target of the offense because of prejudice against certain perceived attributes of the target" (emphasis added). The enhancement, however, does not require that the defendant select the target of the offense because of prejudice; rather it requires that the defendant commit the offense because of (or, as USAO recommends, motivated by) prejudice. USAO recommends that this sentence of the Commentary be revised to read: "This general penalty provides a penalty enhancement where the defendant committed the offense motivated by prejudice against certain perceived attributes of the target."

Second Draft of Report #41—Ordinal Ranking of Maximum Imprisonment Penalties

1. USAO continues to recommends that the penalty for Burglary be increased.

USAO reiterates its comments that it previously filed regarding the relative penalty for Burglary. USAO continues to believe that the CCRC understates the seriousness of Burglary in its ranking of maximum penalties, and continues to recommend that, at a minimum, 1st Degree Burglary and Enhanced 1st Degree Burglary both be increased in class. USAO appreciates that the CCRC accepted USAO's recommendation to create a penalty enhancement for committing burglary while armed, which made Enhanced 1st Degree Burglary a Class 7 felony. But that means that the RCC equivalent of 1st Degree Burglary While Armed is still subject only to a maximum of 8 years' incarceration (or 10 years' incarceration under USAO's recommendation above), and unarmed 1st Degree Burglary is subject only to a maximum of 5 years' incarceration. 1st Degree Burglary is, in essence, a home invasion. The fact that this invasion takes place in a dwelling, when a person is home, makes the offense very serious. A person's home should be a place where a person feels most secure, and a burglary can shatter that feeling of safety and security. Homes are where people live, where they raise their children, and where their most valuable and sentimental possessions are stored. A penalty for the invasion of that space should recognize that a burglary violates the sanctity of that space. USAO therefore recommends that the CCRC increase this penalty to be commensurate with the harms caused by this type of invasion of a home.

2. USAO recommends that Enhanced Second Degree Sexual Abuse of a Minor be recategorized as a Class 3 felony.[11]

USAO recommends that Enhanced Second Degree Sexual Abuse of a Minor be increased to a Class 3 felony. Under the CCRC's proposal, Second Degree Sexual Abuse of a Minor is a Class 5 felony, and First Degree Sexual Abuse of a Minor is a Class 4 felony. The only distinction between First and Second Degree Sexual Abuse of a Minor is the age of the victim (under 12 years old versus over 12 years old). USAO recommends that the Enhanced version of both of these offenses, however, be classified as a Class 3 felony. Without the enhancement, it is logical to distinguish between conduct involving a child under 12 and conduct involving a child over 12. But an enhancement applies, among other situations, to a situation where the actor is in a position of trust with or authority over the complainant. If this relationship exists, and the defendant engages in a sexual act with the complainant, the defendant should be equally culpable, regardless of whether the complainant is under 12 or over 12. For example, if a defendant engages in sexual intercourse with his biological daughter, the defendant should be equally culpable regardless of whether the victim was 11 years old or 13 years old. In both situations, the defendant exploited his position of trust and authority over his child, and likely used that trust or authority as a way to cajole the victim into engaging in sexual intercourse.

This would also put the Enhanced version of both of these offenses at the same level as Enhanced 1st Degree Sexual Assault, which is appropriate. As USAO articulated in previous comments, child sexual abuse often does not require the use of force, so it is appropriate to place the most serious versions of forced assault and non-forced abuse of a child at the same gradation. A perpetrator often uses various forms of grooming to induce the child victim's submission to the sexual acts. Non-forced abuse of a child can often result in significant emotional distress, both when the child is under 12 or over 12, and should be penalized accordingly.

3. USAO recommends increasing the penalty for Incest.

The CCRC has classified Incest as a Class A misdemeanor. USAO recommends that Incest be a felony, and that it have a penalty consistent with current law. Under current law, Incest is punishable by a maximum of 12 years' incarceration. D.C. Code § 22-1901. The RCC's proposal would be a steep drop in liability. Incest takes place in a variety of situations, which can include sexual activity between consenting adults, but can also include sexual activity between two relatives where there is a power imbalance, including where one person is a child, or where the abuse began when one person is a child and continued when they became adults. A higher maximum recognizes the potential severity of this offense.

4. USAO recommends increasing the penalty for Creating or Trafficking an Obscene Image of a Minor, and for Possession of an Obscene Image of a Minor.

Under federal law, child pornography offenses carry significant statutory penalties, and USAO recommends that these RCC offenses align more closely with federal law. For example, a first time offender convicted of producing child pornography under 18 U.S.C. § 2251 faces a

[11] Consistent with previous comments, USAO continues to recommend that this offense and other offenses be subject to a maximum sentence of life imprisonment, but makes this argument as an alternative.

minimum of 15 years' incarceration, and a maximum of 30 years' incarceration. A first time offender convicted of possessing child pornography under 18 U.S.C. § 2252(a)(4) faces a maximum of 10 years' incarceration, unless the offense involved a child under 12 years old, in which case they face a maximum of 20 years' incarceration.

5. USAO recommends that Unauthorized Disclosure of a Sexual Recording be recategorized as a Class B misdemeanor.[12]

Under the RCC's proposal, Unauthorized Disclosure of a Sexual Recording is a Class A misdemeanor, and Enhanced Unauthorized Disclosure of a Sexual Recording is a Class 9 felony. Under current law, 1st Degree Unlawful Publication is a felony with a maximum of 3 years' incarceration, D.C. Code § 22-3053, 2nd Degree Unlawful Publication is a misdemeanor with a maximum of 180 days' incarceration, D.C. Code § 22-3054, and Unlawful Disclosure is a misdemeanor with a maximum of 180 days' incarceration, D.C. Code § 22-3052. These offenses and their respective penalties only recently became law in the Criminalization of Non-Consensual Pornography Act of 2014 (L20-275) (eff. May 7, 2015). USAO recommends that the RCC offense track the penalties in current law, which expressly created a non-jury demandable, misdemeanor version of this offense. In a trial for this offense, a victim must discuss sexually explicit photos or videos of herself or himself, which is much more difficult to process emotionally in front of a group of 14 jurors than in front of 1 judge. A victim can be essentially re-victimized during a trial by having these images displayed in front of a factfinder, and if the unenhanced version of that offense results in a misdemeanor conviction (Class A), it will be less traumatizing for a victim to have the misdemeanor tried before a judge instead of a jury.

[12] USAO makes this recommendation consistent with its recommendation above that offenses, including Class B misdemeanors, be jury demandable only when they are punishable by more than 180 days' imprisonment.

GOVERN[1]MENT 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: June 19, 2020

SUBJECT: Second Draft of Report #35 - Cumulative Update to Sections 201-213 of the Revised Criminal Code

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 Second Draft of Report #35, Cumulative Update to Sections 201-213 of the Revised Criminal Code. [1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-204. Causation Requirement.

Paragraph (c) of RCC § 22E-204[2] defines "Legal Cause." It states:

[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 later hearing that the Council may have on any legislation that may result from the Report.

[2] The full text of this provision is:

RCC § 22E-204. Causation Requirement

(a) Causation Requirement. No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.

(b) Factual Cause Defined. A person's conduct is the factual cause of a result if:

> A person's conduct is the legal cause of a result if:
> (1) The result is reasonably foreseeable in its manner of occurrence; and
> (2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result. [emphasis added]

The phrase "justly held responsible for the result" does not seem to articulate a discernible standard. This is of significant concern as it establishes a criterion for the presence or absence of criminal liability. It is hard to imagine a trial involving an offense with a coperpetrator who committed an act where the defense would not argue that it would be unjust to hold his or her client responsible for the result of that act. By asking a factfinder to determine what is just in a situation without giving detailed instructions as to what criteria the factfinder should use invites jury nullification. As the Court stated in *Reale v. United States,*573 A.2d 13, 15 (DC 1990)

> The common-law doctrine of jury nullification permits jurors to acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law. *Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976). While we cannot reverse such an acquittal, *see Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962), we do not encourage jurors to engage in such practice. Thus, we have upheld convictions in cases where, as here, the trial court instructs the jury that it is obligated to find the defendant guilty if the government meets all the elements of the charged offense. *Watts, supra*, 362 A.2d at 710-11.

The removal of (c)(2) would not cause an unjust result, as the government must still prove each and every element of an offense beyond a reasonable doubt. An examination of the example in footnote 30 of the Commentary demonstrates this.

> For example, imagine X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked

> (1) The result would not have occurred but for the person's conduct; or In a situation where the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.
>
> (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

> (c) Legal Cause Defined. A person's conduct is the legal cause of a result if:
> (1) The result is reasonably foreseeable in its manner of occurrence; and
> (2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result.
>
> (d) Other Definitions. "Result element" has the meaning specified in RCC § 22E-201(c)(2).

> by many missteps by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court. In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. Under these circumstances, D's violent response to X's game winning basket was entirely foreseeable…

As noted in the Commentary, this example demonstrates that D's response was foreseeable. However, that is not the end of the inquiry. As X did not commit an assault, the only theory for which he could be prosecuted is as an accomplice. However, RCC § 22E-210 would foreclose that possibility. It states in relevant part:

> (a) *Definition of accomplice liability.* A person is an accomplice in the commission of an offense by another when, acting with the culpability required for that offense, the person:
> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
> (2) Encourages another person to engage in specific conduct constituting that offense.
> (b) *Principle of Culpable Mental State Elevation Applicable to Circumstances of Target Offense.* Notwithstanding subsection (a) of this section, to be an accomplice in the commission of an offense, a person must intend for all circumstance elements required by that offense to exist.
> (c) *Grading distinctions based on culpability as to result elements.* An accomplice in the commission of an offense that is graded by distinctions in culpability as to result elements is liable for any grade for which he or she has the required culpability.

There is no question that although it was entirely foreseeable that X's game winning basket would result in D's viciously beating V, it is clear that X did not act with the culpability required for the offense nor did he or she encourage D to commit the assault and, therefore, even without the proposed language in (c)(2), X would not be guilty of the offense.[3] To avoid jury nullification and because the removal (c)(2) would not cause unjust convictions in the situation described in the footnote, OAG recommends that the CCRC amend (c) to remove subparagraph (2).

If the Commission does not accept OAG's recommendation then we have two suggestions. First, the phrase "volitional conduct" is not defined either in the text of the provision nor in the Commentary. The closest reference to the definition of "volitional conduct" is found in footnote

[3] In addition, it cannot be said that X intended for all circumstance elements required by the offense to exist. In addition, though D may have committed first degree assault against V, under RCC § 22E-1202, it cannot be said that X had any of the mental states required for him to have culpability in the assault.

32 of the Commentary. There it states, "Intervening volitional conduct may include both acts and omissions of others. For example, if a driver speeds through an intersection and strikes a child, initially causing minor injury. If the child's parent does not seek medical care which causes the child's injury to become much more severe, the driver may argue that the parent's omission negates legal causation as to the degree of injury." Because of the importance of this phrase, OAG recommends that the phrase "volitional conduct" be defined in the statutory text as "acts or omissions that resulted from a choice or decision."

Second, as noted above, the phrase "justly held responsible for the result" must be amended to articulate a discernible standard. This is of significant concern as it establishes a criterion for the presence or absence of criminal liability. OAG believes that a factfinder needs more guidance to determine when, as the Commentary notes, "a person may justly be held liable for a given result that can be attributed to the free, deliberate, and informed conduct of a third party or the victim." [internal footnotes excluded] OAG's concern, in addition to jury nullification, is that without more guidance two factfinders, be they a jury or a judge, may come to inconsistent determinations as to criminal liability when faced with nearly identical fact patterns. It would be unjust in that situation for one person to be found guilty and the other one acquitted.

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: June 19, 2020

SUBJECT: First Draft of Report #54, Prostitution and Related Statutes and Related Provisions in Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #54, Prostitution and Related Statutes[1] and Related Provisions in Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties[2]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-4401. PROSTITUTION

Pursuant to RCC § 22E-4401(c)(1) the court, with the defendant's consent, may enter a judgment of guilty and defer further proceedings and place the person on probation.[3] Following a term of pre-adjudicated probation the court is authorized to dismiss the proceedings and retain a nonpublic record for use solely by the court. Subparagraph (c) states:

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] OAG's only comment to the Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties concerns the penalties for Prostitution and Patronizing Prostitution and, so, we have included those comments in this memo.
[3] It appears that this provision is akin to what in some jurisdictions is referred to as probation before judgment.

> (1) When a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him or her from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. 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. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions or other similar provisions) or for any other purpose. [emphasis added]
>
> (2) Upon the dismissal of such person and discharge of the proceedings against him 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 him or her discharged, it shall enter such order…

These subparagraphs permit the retention of a nonpublic record 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 retain and 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.

(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 (c)(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)."[4]

In addition, because these subparagraphs use the term "probation" to describe a defendant's supervision preadjudication, to avoid confusion over the scope of the court's authority, OAG recommends that the Commentary make clear that the court's authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that

[5]OAG recommends that the same suggestions that we have made thus far concerning RCC § 22E-4401(c)(1) also be applied to RCC § 22E-4401(b)(1). In addition, these recommendations are consistent with the recommendation that OAG made regarding the proposed sealing provision in RCC § 48-904.01a, Possession of a Controlled Substance, in the First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6.

a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803.[5]

THE OVERLAP IN ELEMENTS OF RCC § 22E-4401, PROSTITUTION, AND RCC § 22E-4402, PATRONIZING PROSTITUTION.

The offense elements of RCC § 22E-4401, Prostitution, and RCC § 22E-4402, Patronizing Prostitution, though couched in different terms, overlap such that both the prostitute and the person patronizing the prostitute can be charged with either offense.

RCC § 22E-4401(a), pertaining to the elements of the prostitution offense, states:

> *Offense.* An actor commits prostitution when that actor knowingly:
> (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for <u>any person receiving</u> anything of value;
> (2) Agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for <u>any person receiving</u> anything of value; or
> (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for <u>any person receiving</u> anything of value. [emphasis added]

RCC § 22E-4402 (a), pertaining to the elements of the patronizing prostitution offense, states:

> Offense. An actor commits patronizing prostitution when that actor knowingly:
> (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange <u>for giving any person</u> anything of value;
> (2) Agrees, expressly or implicitly, to <u>give</u> anything of value <u>to any person</u> in exchange for any person engaging in or submitting to a sexual act or sexual contact;
> (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange <u>for giving any person</u> anything of value. [emphasis added]

Because "any person receiving" implies that someone gave, and "for giving" to any person implies that someone received, these offenses are essentially the same. To distinguish between the two offenses, OAG recommends that the word "and" appear after each (a)(3) and that a new (a)(4) be added to each offense.

The new RCC § 22E-4401(a)(4) should read "provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value."

The new RCC § 22E-4402(a)(4) should read "was provided the sexual act or sexual conduct that was performed by another person who committed the offense of prostitution pursuant to RCC § 22E-4401."

Because of the reference to RCC § 22E-4401in RCC § 22E-4402(a)(4), the Commentary for Patronizing Prostitution should state that to be convicted of that offense it is not necessary that a person be arrested or convicted for the offense of Prostitution.

RCC § 22E-4403. TRAFFICKING IN COMMERCIAL SEX

Subparagraph (a)(3) states, "Obtains anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act..." As drafted it would technically reach the proceeds derived from a person who has engaged in a commercial sex act even though those proceeds where earned at a part time job that was unrelated to prostitution. OAG recommends that subparagraph (a)(3) be redrafted to say, "Obtains anything of value from the proceeds or earnings from a commercial sex act that a person has engaged in or submitted to..."

Subparagraph (b)(2) provides for enhanced penalties. It states, "In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age." While OAG agrees that there should be an enhancement for recklessly trafficking persons who are under the age of 18, we do not believe that the enhancement goes far enough. Under this provision, a person who was reckless to the fact that they were trafficking a 17 year old girl would be subject to the same penalty as someone who intentionally trafficked an 11 year old girl. We propose that the enhanced penalty be more nuanced by providing for different penalties for knowingly trafficking someone under the age of 18 and for recklessly trafficking someone under the age of 14. We propose that subparagraph (b)(2) be redrafted to say:

> (1) *Enhanced penalties*. In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by:
> (i) one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age but older than 13 years of age; or
> (ii) two classes when the actor is either reckless to the fact that the trafficked person is under 14 years of age or when the actor knowingly traffics a person who is under 18 years of age.

PENALTIES FOR PROSTITUTION AND PATRONIZING PROSTITUTION PROPOSED IN THE THIRD DRAFT OF REPORT #41 - ORDINAL RANKING OF MAXIMUM IMPRISONMENT PENALTIES

On Page 7 of the Third Draft of Report #41 the Commission recommends that the offense of prostitution be a class D misdemeanor, with a maximum penalty of 30 days in jail. The Commission recommends that Patronizing Prostitution be a class C misdemeanor, with a maximum penalty of 90 days in jail.

Pursuant to D.C. Code § 22-2701 the current penalties for prostitution and patronizing prostitution (soliciting prostitution) are the same. This statute states, in relevant part:

> **(a)** … [I]t is unlawful for any person to engage in prostitution or to solicit for prostitution.

(b) (1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be:

(A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and

(B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense.

(2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both

OAG agrees with the CCRC proposal to decrease the penalty for both of these offenses and to do away with the enhancement for second and subsequent offenses. However, we disagree with the proposal to specify separate penalties for these two offenses. OAG recommends that, like under current law, persons who are sentenced for committing these related offenses continue to face the same maximum jail exposure. Therefore, we suggest that the penalties for both of these offenses be class D misdemeanors, with maximum penalties of 30 days in jail.

GOVERN[1]MENT 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: June 19, 2020

SUBJECT: First Draft of Report #55 – Failure to Appear and Violation of Conditions of Release Offenses

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 #55, Failure to Appear and Violation of Conditions of Release Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 23-586. FAILURE TO APPEAR AFTER RELEASE ON CITATION OR BENCH WARRANT BOND

Paragraph (c) provides for a defense to this charge. It states, "A person does not commit an offense under this section when, in fact, a releasing official, prosecutor, or judicial officer gives effective consent to the conduct constituting the offense." Footnote 11, pertaining to a prosecutor giving consent, states, "Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be "no papered") and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear." While OAG agrees that a person should not be charged in the limited situation noted in that footnote, we disagree that in other situations that a prosecutor – as opposed to a judge – should have the authority to excuse a defendant from

[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.

attending a hearing. For example, a prosecutor should not be able to tell a defense attorney that their client does not have to appear at a status, trial, sentencing, or other hearing. Only a judge should have that authority. OAG, therefore, recommends that paragraph (c) be redrafted so that the defense would apply, as to a prosecutor, only when the prosecutor confers with defense counsel (or defendant if he or she is not represented by counsel) before the hearing date and notifies defense counsel (or defendant) that no charges will be filed (i.e. the case will be "no papered") and excuses the defendant from appearing in court. Similarly, OAG recommends that the defense should be limited, as to a releasing official, to the situation noted in footnote 10.[2] In other situations, a releasing official, like a prosecutor, should not be able to excuse a defendant from attending a status, trial, sentencing, or other hearing.

RCC § 16-1005A. CRIMINAL CONTEMPT FOR VIOLATION OF A CIVIL PROTECTION ORDER

An element of this offense is that the person knows that they are subject to a temporary civil protection order, a final civil protection order, or a valid foreign protection order.[3] OAG agrees that this element is consistent with D.C. Code § 16-1005 (f) which states, "Violation of any temporary or final order issued under this subchapter, or violation in the District of Columbia of any valid foreign protection order. In Superior Court practice, orders issued under the temporary civil protection order provision outside of regular court hours are called emergency temporary protection orders. OAG wants to ensure that under the RCC there is no question that violation of these orders would still be covered. Therefore, OAG recommends that the Commentary include a sentence that states, "The reference to temporary civil protection orders includes both orders issued outside of court business hours (termed emergency temporary protection orders) and those issued during regular business hours."

This offense also includes the following element. "Knows they are subject to a protection order that, in fact… Advises the person of the consequences for violating the order, including extension of the order, immediate arrest or the issuance of a warrant for the person's arrest, and the criminal penalties under this section. [emphasis added]. The law requires that an extension of a civil protection order must be separately served on the person and states that any "extension" order is separately appealable. When an order is "extended", the person becomes the subject of a

[2] Footnote 10 states, "Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells her that she is excused from appearing on the date specified."

[3] RCC § 1005A (a) states:

Offense. A person commits criminal contempt for violation of a civil protection order when that person:

(1) Knows they are subject to a protection order that, in fact:

(A) Is one of the following:

(i) A temporary civil protection order issued under D.C. Code § 16-1004;

(ii) A final civil protection order issued under D.C. Code § 16-1005; or

(iii) A valid foreign protection order;

new civil protection order.[4] Therefore, OAG recommends that the phrase "extension of the order" be deleted from the text of the offense. OAG suggests that the point that the Commission was making by including the underlined text be noted in the Commentary.

The Explanatory Note at the beginning of the Commentary includes the statement that "*It replaces subsections (f), (g), (g-1), (h), and (i) of D.C. Code § 16-1005, Hearing, evidence, protection order.* [internal footnotes omitted] [italics in original text]

The Commentary as to paragraph (g-1) states:

> First, the revised statute does not specify that children must be prosecuted as children. Current D.C. Code § 16-1005(g-1) states, "Enforcement proceedings under subsections (f) and (g) of this section in which the respondent is a child as defined by § 16-2301(3) shall be governed by subchapter I of Chapter 23 of this title." This language appears to be superfluous and potentially confusing, as no other criminal offense definition includes a similar cross-reference. This change clarifies the revised statute.

Paragraph (g-1) was added to the D.C. Code because defense counsel argued, at times successfully, that violations of CPOs where not prosecutable as delinquent acts under Chapter 13 of Title 22. While OAG does not object to the Commission recommending that paragraph (g-1) being stricken, we suggest one tweak to the above language to avoid any arguments as to how violations of CPOs by those under 18 years of age should be prosecuted. We recommend that the phrase "This change clarifies the revised statutes and does not change District law" be substituted for the phrase "This change clarifies the revised statute."

RCC § 16-1005A does not include the provision in D.C. Code § 1605 (g) that states, "Orders entered with the consent of the respondent but without an admission that the conduct occurred shall be punishable under subsection (f), (g), or (g-1) of this section." While the Explanatory note, quoted above states that RCC § 16-1005A "*replaces subsection[s] … (i*) of *D.C. Code § 16-1005"* the Commentary does not address the reason for its removal.[5] Similarly to the inclusion of paragraph (g-1), paragraph (i) was added to the D.C. Code because defense counsel argued, at times successfully, that because there was no admission of guilt, a person who entered a consent order without having admitted the underlining conduct could not be prosecuted under paragraphs (f), (g), and (g-1). To avoid any arguments that a person who consents but does not admit guilt

[4] OAG acknowledges that D.C. Code § 16-1005(d) states, "A protection order issued pursuant to this section shall be effective for such period up to one year as the judicial officer may specify, but the judicial officer may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown." However, because the person has to be separately served, a hearing must take place, and an appealable order must be issued (see paragraph (e) "Any final order issued pursuant to this section and any order granting or denying extension, modification, or rescission of such order shall be appealable."), the extension mentioned in paragraph (d) is a new order.

[5] Footnote 2 in the Commentary states, "These orders include orders entered by consent without admission of guilt. *See* D.C. Code § 16-1005(i)" (i.e., consent orders).

may be prosecuted for a violation of this offense, OAG recommends that the substance of paragraph (i) be retained.[6]

[6] If the Commission does not accept this recommendation, OAG requests that the Commentary specifically address this issue and affirmatively state that no change in District law is intended and that a person who consents to an order but does not admit the underlying conduct is treated no differently than a person who admits the underlying conduct.

GOVERN[1]MENT 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: June 19, 2020

SUBJECT: First Draft of Report #57 - Second Look

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 #57 - Second Look.[1]

COMMENTS ON THE DRAFT REPORT

As the Commentary notes "The only changes in the revised statute as compared to the current D.C. Code provision are replacement of the phrases 'offense committed before the defendant's 18th birthday' with 'offense' in subsection (a) and paragraph (b)(1) of the current statute, and omitting "for violations of law committed before 18 years of age" from the statute's title." While OAG is favorably inclined to extending eligibility for second look procedures to older defendants or eliminating the age requirement altogether in D.C. Code § 24-403.03, we are still researching the status of second look legislation around the country, including the qualifying age of the defendant at the time of the offense, the criteria for judicial review, and the resentencing options available to the judge. OAG will communicate our position as soon as this research is completed.

[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.

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: June 19, 2020

SUBJECT: First Draft of Report #58- Developmental Incapacity Defense.

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 #58, Developmental Incapacity Defense. [1]

COMMENTS ON THE DRAFT REPORT

The RCC proposal is to raise the minimum age at which a person can be charged with a delinquent act and to create a new defense to a prosecution against a child based on the actor's developmental immaturity. As discussed below, OAG favorably inclined with the concept of removing the possibility of youth who commit offenses when they are under 12 years of age from being prosecuted as delinquents in Family Court. However, also as discussed below, we oppose, at this time, the proposal to create a developmental incapacity defense for youth who are under 14 years of age.

The substantive portion of the proposal is:

RCC § 22E-501. Developmental Incapacity Defense.

(a) *Defense.* An actor does not commit an offense when:
1. In fact, the actor is under 12 years of age; or

[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 later hearing that the Council may have on any legislation that may result from the Report.

2. The actor is under 14 years of age and, as a result of developmental immaturity, lacks substantial capacity to:
   (A) Conform the conduct alleged to constitute an offense to the requirements of the law; or
   (B) Recognize the wrongfulness of the conduct alleged to constitute an offense.

OAG agrees that the District should have a minimum age for which a youth can be prosecuted for a delinquent offense and that young children should receive services from their health care provider, the Department of Human Services, the Department of Behavioral Health, Child and Family Services Agency, and other providers, as appropriate, rather than in the juvenile justice system. And although we agree that the cutoff should be around the age of 12, we are currently researching a number of issues concerning the setting of a minimum age for prosecuting a child for a delinquent act. OAG will present the CCRC with its recommendations as soon as this research is completed.

Whatever the minimum age that is set in the RCC, OAG recommends changing the statutory reference for such a change. First Draft of Report #58, Developmental Incapacity Defense, and Advisory Group Memo #37, Supplemental Materials to the First Draft Of Report #58, by their terms, do not apply to adults in the criminal justice system. Title 22 of the Code – and the proposed Title 22E – address the District's Criminal Code. Proceedings about delinquency matters are codified in Title 16, Chapter 23 of the Code. This portion of the Code establishes who is a child eligible for prosecution in the Family Court, what a delinquent act is[2]; how juvenile competency challenges are handled[3]; and all other aspects of delinquency proceedings.[4] Persons who litigate delinquency proceedings, and others who want to understand how these proceedings work, look to D.C. Code § 16-2301, *et. seq*., for the statutory framework for delinquency proceedings. So, if the concepts in this proposal, or any portion of them, are adopted by the Commission, those changes should be incorporated into Title 16, not in Title 22E.

RCC § 22E-501 (a)(1) couches the proposed establishment of a minimum age for a person to be prosecuted as a defense. It would be, however, a statutory floor as to who can be adjudicated of a delinquent act and the Commission should state it as such. For that reason, while OAG generally supports the establishment of the proposed floor, it recommends that the floor be established by placing a limitation in Chapter 23 of Title 16 on the filing of charges in petitions against a child for offenses committed by the child when he or she was under the specified age.

D.C. Code § 16-2305 is entitled "Petition; contents; amendment." Paragraph (c)(1) describes the process for the filing of a petition[5] and (c)(2) states, "Where the delinquency petition filed by the

[2] See D.C. Code § 16-2301.
[3] See D.C. Code § 16-2315.
[4] See D.C. Code §§ 16-2301 through 16-2340.
[5] D.C. Code § 16-2305 (c)(1) states,
   Each petition shall be prepared by the Corporation Counsel after an inquiry into the facts and a determination of the legal basis for the petition. If the Director of

Corporation Counsel is the 3rd petition filed against a child and the child is 13 years old or younger, the Child and Family Services Agency shall institute a child neglect investigation against the parent, guardian, or custodian of the child." OAG recommends that paragraph (c) be amended to add a new subparagraph (3) that states, "No charges can be filed in a petition against a child for a delinquent act that was committed when the child was under [x] years of age." [6]

OAG cannot, however, at this time support the proposal in RCC § 22E-501 (a)(2). That proposal is to create a defense applicable to children who are under 14 years of age based upon the undefined phrase "developmental immaturity" when the child "lacks substantial capacity to … Conform the conduct alleged to constitute an offense to the requirements of the law; or … Recognize the wrongfulness of the conduct alleged to constitute an offense." As the Commentary notes, the incapacity defense only has limited support in United States criminal codes and case law" and that "the standard here is employed in the context of developmental immaturity, District case law based on the insanity defense is instructive but not controlling." While we agree that the case law for the insanity defense is instructive, but not controlling, we would point out that the D.C. Code and related case law state that the insanity offense is in not applicable in delinquency proceedings except at the dispositional (sentencing) stage. See D.C. Code § 16-2315 (d) and *In re C.W.M.*, 407 A.2d 617 (D.C. 1979) (The insanity defense was repealed by implication when Congress enacted a statute specifying that results of mental examination may not be used to establish a defense of insanity.) As the court noted in *In re C.W.M,*

> In our view, these provisions clearly mandate that a predisposition report contain information relating to the child's mental state at the time of the offense and also at the time of the disposition hearing to enable the Division to determine whether, as a result of mental illness, the child lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." [emphasis added]

Id. at 624 (internal quotes omitted).

The underlined portion of the quote from *In re C.W.M,* though stated in the reverse order, is almost identical to the proposal in (a)(2) that creates a defense for a child who "lacks substantial capacity to…Conform the conduct alleged to constitute an offense to the requirements of the law; or … Recognize the wrongfulness of the conduct alleged to constitute an offense."

> Social Services has refused to recommend the filing of a delinquency petition, or if the Director of the Agency has refused to recommend the filing of a neglect petition, the Corporation Counsel, on request of the complainant, shall review the facts presented and shall prepare and file a petition if he believes such action is necessary to protect the community or the interests of the child. Any decision of the Corporation Counsel on whether to file a petition shall be final.

[6] D.C. Code § 16-2301 (7) states that a "delinquent act" "means an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law…"

As noted above, OAG does not support enacting a developmental immaturity defense at this time. While OAG is always interested in working with the Council to improve the District's juvenile justice system, we do not believe that the undertaking should be taken by the CCRC. The CCRC's mandate is to redraft the criminal code.[7] The advisory group is made up of agencies and people who have expertise in criminal law.[8] If the Council wanted the CCRC to draft juvenile justice reform, it would have said so explicitly in the Act and it would have

[7] D.C. Code § 3-152. Recommendations for comprehensive criminal code reform.
(a) By September 30, 2020, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes to:
(1) Use clear and plain language;
(2) Apply consistent, clearly articulated definitions;
(3) Describe all elements, including mental states, that must be proven;
(4) Reduce unnecessary overlap and gaps between criminal offenses;
(5) Eliminate archaic and unused offenses;
(6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties;
(7) Organize existing criminal statutes in a logical order;
(8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate;
(9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment;
(10) Propose such other amendments as the Commission believes are necessary; and
(11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.

[8]D.C. Code § 3-153. Code Revision Advisory Group.
(a) The Commission shall establish a Code Revision Advisory Group ("Advisory Group") to review and provide information and suggestions on proposals prepared by the Commission related to the comprehensive criminal code reform recommendations required by § 3-152. The Advisory Group shall consist of 5 voting members and 2 nonvoting members as follows:
(1) The voting members of the Advisory Group shall consist of the following:
(A) The United States Attorney for the District of Columbia or his or her designee;
(B) The Director of the Public Defender Service for the District of Columbia or his or her designee;
(C) The Attorney General for the District of Columbia or his or her designee; and
(D) Two professionals from established organizations, including institutions of higher education, devoted to the research and analysis of criminal justice issues, appointed by the Council;
(2) The non-voting members of the Commission shall consist of the following:
(A) The Chairperson of the Council committee with jurisdiction over the Commission or his or her designee; and
(B) The Deputy Mayor for Public Safety and Justice or his or her designee.

required that some advisory group members have backgrounds devoted to the research and analysis of juvenile justice issues.

Before enacting a defense for youth in the Family Court that is so closely related to the insanity defense, OAG would like an opportunity to review the effect of establishing a developmental immaturity defense in those jurisdictions that have enacted it, including what non-juvenile justice programs have been implemented by those jurisdictions to work with youth who lack developmental immaturity so that public safety is ensured. We would also like to evaluate the effectiveness of those programs.

In conclusion, while OAG supports the establishment of a minimum age for charging of children with delinquent acts, we do not support the establishment of a developmental immaturity defense until further study of this issue.[9] We would, of course, be happy to work with the Council on further reforms to the juvenile justice system.

[9] In addition, if the Commission does not adopt OAG's recommendation about eliminating the proposed developmental immaturity defense, OAG makes the following recommendation concerning RCC § 22E-501 (a)(2). It is unclear what is meant by the language in (a)(2)(A) about a person "conform[ing] the conduct alleged to constitute an offense to the requirements of the law." Conduct "constitut[ing] an offense" does not, *by definition*, conform to the requirements of the law. This should instead say the person was "unable to conform his or her conduct to the law."

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	June 19, 2020
Re:	Comments on Second Draft of Report No. 35, Cumulative Update to Sections 2013-213 of the Revised Criminal Code

The Public Defender Service makes the following comments on the Second Draft of Report No. 35.

PDS recommends that the CCRC adopt language about concurrence as part of causation or as part of Chapter 2, Basic Requirements of Offense Liability. The following language is proposed:

> For offenses that require proof of a mental state and conduct, the mental state that is required for the conduct must concur with the actor's prohibited conduct. To concur, the mental state required for the conduct must actuate the conduct.

The Supreme Court in *Morissette v. United States* described crime as a "compound concept, generally constituted only from the concurrence of an evil-meaning mind with an evil doing hand." 342 U.S. 246, 251 (1952). "…Generally, concurrence reflects a requirement that the mens rea and the action that causes death must go together. "[T]he true meaning of the requirement that the mental fault concur with the act or omission is that the former *actuate* the latter." *1 Wayne R. LaFave, Substantive Criminal Law § 6.3(a),* at 451 (2d ed. 2003) (emphasis added). "[M]ere coincidence [of conduct and *mens rea*] in point of time is not necessarily sufficient." *Id.* "[M]ore is required than that the death-causing acts would not have occurred but for the prior intent." *Id.* at 454 n.21. "[T]he acts must be done *for the actual carrying out of the intent* and *not merely to prepare for its execution*." *Id.* at 454 (emphases added). An illustrative example is where "*A* forms an intent to kill *B*, . . . and . . . he accidentally runs over *B* and kills him." *Id.* Concurrence is lacking in that scenario even if "at the time of the accident, *A* was driving to a store to purchase a gun with which to kill *B*." *Id.* Although *A* had formed an intent to kill *B* and actually caused *B*'s death, his action of running *B* over was not actuated by his intent to kill, and thus does not constitute intentional murder.

While concurrence is a general principle in criminal law, it is especially important for result-element offenses. Because the causation definition refers generally to a person's "conduct" as being the cause of a prohibited result, there is a risk that factfinders might find causation satisfied by any conduct, regardless of whether the conduct concurs with the required mental state. For example, in LaFave's example of the driver who accidentally hits and kills the very person he intended to shoot and kill, the driver's conduct causes the death, but that conduct

does not concur with the driver's intent to kill. Without the principle of concurrence, the driver could be found guilty of first-degree murder.

Turning more specifically to the causation requirement, PDS has three interrelated concerns with RCC § 22E-204(c)(2). First, the "justly held responsible" standard is too vague and subjective to satisfy constitutional requirements. Second, the factors identified in the commentary for determining when a person is "justly held responsible" for the acts of another have no proper role to play in causation analysis. Finally, the standard ultimately codifies an unwarranted twentieth century expansion of criminal law, which tends to undermine the fundamental premise of individuals' responsibility for their actions that justifies much of criminal law and punishment.

PDS reiterates its previous concerns that the definition of legal cause in RCC § 22E-204(c)(2) does not comport with the requirement of the Due Process Clause that criminal laws be defined with specificity. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015). This requirement "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes" and "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). The rule also reflects "the separation of powers—requiring that [the legislative branch], rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.*; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.").

The notion that whether a person is liable for the volitional conduct of a third party turns on whether a jury thinks the person is "justly held responsible" would invite arbitrary results. The same facts presented to two different juries could result in opposite results due to juries' different subjective senses of what is just. *See, e.g.*, Don Stuart, *Supporting Gen. Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective*, 4 Buff. Crim. L. Rev 13, 43 (2000) ("There is also reason to be concerned at the vagueness of the 'just bearing' formulation. Although nobody has been able to suggest a totally satisfactory approach; lawyers and triers of fact need a more workable test."); George P. Fletcher, *Dogmas of the Model Penal Code*, 2 Buff. Crim. L. Rev 3, 6 (1998) ("Including the word 'just' in this proviso, of course, leaves all the difficult problems unresolved, and therefore the attempted verbal compassing of the concept turns out to be words with little constraining effect."). "Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). RCC § 22E-204(c)(2) in its current form would not survive a constitutional challenge and hence would ultimately fail to accomplish the Commission's goals of reforming the District's criminal laws.

PDS understands the difficulties in codifying a standard of legal cause that is neither over-inclusive nor under-inclusive—a task that has eluded legal thinkers for centuries. And while achieving "just" results is the ultimate goal of legal causation, this goal can only be furthered through the development of clear, workable standards, not an appeal to the jury's subjective sense of justice. And while the commentary identifies three non-exhaustive factors that bear on whether a person is "justly

held responsible" for the conduct of another, these factors ultimately fail to cabin factfinders' discretion in any meaningful or consistent way.

The three factors listed in the commentary are also not appropriate considerations for causation analysis. The first two of these factors—"the inherent wrongfulness of the actor's conduct" and "whether the actor desired a prohibited result to occur"—are already accounted for by other aspects of law. They have never played a role in causation analysis. Causation is fundamentally about a physical connection between an act and a result. When commentators speak of legal causation as being about what is fair or just, they are talking about whether it is fair or just to treat conduct as the "cause" of a result when other factors had a more direct role in producing the result. Legal causation has always focused on the causal chain of events and whether the "link" between act and result "is too remote, purely contingent, or indirec[t]." *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (plurality) (internal quotation marks omitted) (alteration in original). It has never turned on the wrongfulness of conduct or the actor's intent to cause a particular harm. In *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258 (1992), for example, the defendants committed fraud—certainly wrongful conduct. Yet the Supreme Court held that these fraudsters were not the cause of foreseeable financial losses. *See id.* at 271. The Court focused exclusively on the indirectness of the causal link. *See id.* ("[T]he link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers."). Similarly, in *Hemi Group*, the Court addressed a claim that a cigarette seller had caused New York City to lose tax revenue by refusing to provide a list of customers that would allow the city to collect unpaid taxes. *See* 559 U.S. at 5-6. Refusing to provide the list was a violation of state law, and hence wrongful. *See id.* And the city's inability to collect taxes was exactly what the cigarette seller wanted—its business model depended on undercutting its competitors' prices by allowing customers to avoid the tax. *See id.* at 12. Despite having effectively built its entire business on purposefully aiding tax evasion, the Supreme Court held the seller was not liable for the loss of tax revenue because the link in the causal chain was indirect. *Id.* at 10; *accord Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 458–461 (2006) (steel company that intentionally defrauded state of tax revenue so that it could undercut its competitor was not liable for causing the competitor's loss of business, even though company's conduct was wrongful and competitor's loss of business was the desired result). As these cases show, legal causation is focused on the nature of the causal link, not the blameworthiness of the underlying conduct.

Causation is not intended to grade blameworthiness or culpability of conduct. For example, a person who intends to inflict a horrible, painful death on someone who is unexpectedly killed by a lightning strike is not liable for murder because, however reprehensible the conduct, causation is lacking. But a person who unintentionally, but recklessly (with extreme indifference to human life), directly causes death is liable for murder. The presence or absence of murder liability in these examples does not turn on the degree of blameworthiness but rather on the nature of the causal chain because murder has a result element. Other aspects of the law account for gradations in the wrongfulness of conduct or the actor's purpose.[1] To incorporate these factors into causation analysis amounts to improper double counting, and ultimately fails to further the point of causation in criminal law.

[1] For example, as the commentary notes, accomplice liability already covers situations where a person contributes to a result directly caused by a third party with the purpose of causing that result. Causation does not need to also attempt to cover this situation.

Much of criminal law is focused on punishing conduct without regard to whether it causes any particular result. But when the law does impose a result element, then a person should be punished only if he has, in fact, "caused" that result. "The doctrine that a person whose conduct excites moral disapproval may be punished for doing what he has not done is . . . a dangerous one." H.L.A. Hart & A.M. Honoré, *Causation in the Law* 328 (2d ed. 1985).

In addition, these factors ultimately do not produce acceptable results. Take the commentary's basketball example: if X makes the winning shot knowing that an enraged D will kill V, X is not liable for murder because he did not cause the death. The commentary justifies this result because X's conduct (making the shot) is not inherently wrongful and X's purpose is not to kill V (X just wants to win the game). But tweak the example slightly and this logic breaks down. Imagine that just before the final play, X sees that D has deliberately loosened the bolts on the backboard so that sinking the next shot will cause the backboard to come crashing down on V, who is standing right under the basket. X, not wanting to kill V but wanting to win the game, makes the shot, and V is killed. In the tweaked example, X *should be* liable for manslaughter. He has recklessly caused V's death.[2] But RCC § 22E-204(c)(2) and the commentary are incapable of explaining X's liability in the loose-backboard example but not the enraged-D example. X's conduct is the same (making the shot). X's purpose is the same (winning the game). Factual causation and reasonable foreseeability are equally present in both examples. And, in both examples, V's death "depends on another person's volitional conduct"—D's. The reason X is liable in the loose-backboard example is that an object falling is exactly the sort of physical phenomenon that a person can be deemed to have legally caused. In the enraged-D scenario, one might say that X's conduct foreseeably "causes" D to kill V, but the law does not regard D's volitional conduct as a phenomenon that can be caused by someone else; rather, the law regards D alone as responsible for his own volitional conduct.[3] Indeed, as the commentary acknowledges, this principle is fundamental to the legitimacy of criminal law—if a person's conduct is "caused" by external forces then punishing the person for that conduct is delegitimized. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 333 (1985) ("To treat the acts of others as causing a person's actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible.").

This fundamental principle that no one causes D's volitional conduct except D himself is uncontroversial when, as in the enraged-D scenario, X's conduct and motives are innocent. The principle requires defense only when X's conduct or motives are wrongful because there is a

[2] Nothing in this example turns on whether D's conduct happens before or after X's. One might imagine that D loosens the bolts just after X launches his shot but before it hits the backboard, but that X sees D preparing to loosen the bolts, realizes what he is going to do, and takes the shot anyway. X would still be liable for manslaughter because his reckless conduct causes the backboard to fall and kill V.

[3] In the loose backboard scenario, D would be liable for intentional murder. But this is not because D "caused" X's volitional conduct of making the shot, but rather because D's act of loosening the bolts foreseeably caused, in combination with X's conduct, the backboard to fall and kill V. And if D had been negligent (or reckless) in failing to tighten the bolts, he could still be liable for some degree of homicide corresponding to his mental state. Causation principles do not vary with D's purposefulness or the inherent wrongfulness of his conduct.

legitimate desire to punish X in that scenario. But the desire to punish X for wrongful conduct need not, and should not, result in twisting the law of causation to make X liable for a result caused by D. If X engages in wrongful conduct, then he can and should be punished for that conduct under the appropriate offense. And if he facilitates D's conduct with an improper purpose, he can be liable for D's conduct as an accomplice. He simply should not be punished for having "caused" the conduct of a different volitional actor.

The third factor in the commentary, the passage of time, is also not a particularly relevant consideration for causation. Ordinarily, the passage of time does not impact causation. If X sets a bomb, X is the factual and legal cause of any resulting death whether he sets the bomb's timer for 10 second, 10 days, or ten years. The passage of time is irrelevant because, no matter how much times goes by, the causal link from act to result is direct and foreseeable. Neither the Court of Appeals' decision in *Fleming*[4] nor the commentary to RCC § 22E-204(c)(2) offers a logical explanation or policy justification for why the passage of time should ever preclude causation. Certainly, there is an intuitive sense that when a third party acts in response to something a person did a long time ago, the person is not the cause of the third party's response. But that is because the passage of time simply makes it easier to see the real causal problem—that a person's deliberate conduct is the product of her own choices, not caused by someone else. To see this, it helps to consider two examples that are identical except for the passage of time. In both examples, X intends to kill D. X knows to a certainty that if he attempts to kill D but fails to do so, D will set out to kill X in revenge, no matter how long it takes. X also knows that D will use any means to take his revenge, including killing bystanders. In the first variation, X shoots at D and misses, but is able to escape. One year later, X is walking down the street when D finally catches up to him and opens fire, killing bystander V. In this example, the *Fleming* opinion and the commentary suggest that X would likely not be guilty of V's murder (though X is guilty of attempted murder for his earlier attempt to kill D). *See Fleming*, 224 A.3d at 224-25.[5] Now imagine the same example, except eliminate the passage of time: X shoots at D and misses (as before), but this time D immediately returns fire and kills bystander V.[6] Under current D.C. law, X would be guilty of murder in this second example because V's death was reasonably foreseeable and there was no passage of time. There is no sensible justification for these different results. In both examples X's conduct and mental state are equally culpable; and the causal link between X's conduct and V's death is identical—X's shooting at D leads to D shooting at X, and hitting V; and V's death is equally foreseeable in both examples. But the passage of time makes it easier to see that D's conduct is a result of D's deliberate choice to seek revenge, not a "caused" phenomenon. The law regards D, and D alone, as the cause of his own volitional conduct. It is not the passage of time that matters; rather, the passage of time makes D's volitional conduct more salient.

[4] *Fleming v. United States*, 224 A.3d 213 (D.C. 2020) (en banc).

[5] As *Fleming* notes, "the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct." 224 A.3d at 224.

[6] To simplify things, assume that D is *not* acting in self-defense—D shoots at X purely for revenge.

While the revised version of RCC § 22E-204(c)(2) largely conforms to the Court of Appeals' decision in *Fleming*, for several reasons RCC § 22E-204(c)(2) should not attempt to codify *Fleming*. First, *Fleming* largely rejected the leading scholarly work on causation in the law because that work was normative rather than descriptive. *See Fleming*, 224 A.3d at 227. But the Commission's role is normative, and the Commission has appropriately looked to the work of leading scholars such as Professors Kadish, Hart, and Honoré, which *Fleming* largely brushed aside. The work of these preeminent scholars establishes the principle that a third party's volitional conduct breaks the causal chain. *See* Kadish, *supra*, at 334-35 ("[W]hen we examine a sequence of events that follows a person's action, the presence in the sequence of a subsequent human action precludes assigning causal responsibility to the first actor. What results from the second actor's action is something the second actor causes, and no one else can be said to have caused it through him."); Hart & Honoré, *supra*, at 326 ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.").

Second, by arbitrarily disregarding the majority of relevant cases on this issue, *Fleming* failed to achieve any logical or doctrinal coherence. *See Fleming*, 224 A.3d at 226-27. *Fleming* acknowledged the longstanding and substantial body of law (indeed, from a majority of jurisdictions) that holds that a defendant does not "cause" a gun-battle death when an adversary fires the fatal shot, but ignored these cases on the ground that they addressed causation for felony murder, whereas *Fleming* involved second-degree murder.[7] But these cases turned on well-defined principles of causation, not anything unique about felony murder. Causation principles have never varied depending on the offense or its degree; and the *Fleming* court offered no justification for why causation should work differently depending on the degree or type of murder charged. The Commission in contrast is appropriately developing a consistent definition of causation for all result-element offenses. And it should appropriately look to the large body of cases that have held, consistent with centuries of precedent and scholarly analysis, that causation is lacking when a death is directly caused by a third party's volitional conduct. [8]

[7] *See* Matthew A. Pauley, *The Pinkerton Doctrine & Murder*, 4 Pierce L. Rev. 1, 2 n.4 (2005); *see also, e.g.*, *Campbell v. State*, 444 A.2d 1034, 1041–42 (Md. 1982) (no liability for death in gun battle with robbery victim and police because defendant did not fire the fatal shot); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (no liable for gun-battle death where adversary fired fatal shot); *Myers*, 261 A.2d at 555 (no liability for person shot by police during gun battle); *State v. O'Kelly*, 84 P.3d 88, 97–98 (N.M. Ct. App. 2003) (defendant not liable for gun-battle death of bystander shot by adversary); *Rivers v. Commonwealth*, 464 S.E.2d 549, 554 (Va. Ct. App. 1995) (same).

[8] *See* Matthew A. Pauley, *The Pinkerton Doctrine & Murder*, 4 Pierce L. Rev. 1, 2 n.4 (2005); *see also, e.g.*, *Campbell v. State*, 444 A.2d 1034, 1041–42 (Md. 1982) (no liability for death in gun battle with robbery victim and police because defendant did not fire the fatal shot); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (no liable for gun-battle death where adversary fired fatal shot); *Myers*, 261 A.2d at 555 (no liability for person shot by police during gun battle); *State v. O'Kelly*, 84 P.3d 88, 97–98 (N.M. Ct. App. 2003) (defendant not

Third, *Fleming* overlooked the large body of historical evidence that, before the general expansion of criminal liability in more recent decades, it was widely accepted that a defendant could not be the "cause" of a death at the hands of someone else.[9] Instead, *Fleming* looked to cases decided in the last "thirty years," *Fleming*, 224 A.2d at 228, a time period that reflects a marked expansion in criminal liability brought about by judicial fear over then-higher crime rates. *See, e.g.*, *Roy v. United States*, 871 A.2d 498, 507 (D.C. 2005) ("While urban gun battles years ago involved revolvers or clipped pistols of limited fire power, they have now escalated to the use of automatic and semiautomatic weapons. The results are pocket wars with no rules of engagement resulting in a highly increased risk to noncombatants. It is this increased risk to innocent bystanders which justifies the application of proximate cause liability to those participants who willfully choose to engage in these battles."). As the law of causation developed over hundreds of years, it was consistently understood that a person could not cause another's volitional conduct. The recent relaxation of that settled doctrine should now be corrected.

PDS proposes that the definition of legal cause reflect the venerable and fundamental principle that individuals do not cause the deliberate volitional conduct of others. RCC § 22E-204(c) should read:

> *Legal Cause Defined*. A person's conduct is the legal cause of a result if the result is reasonably foreseeable in its manner of occurrence. Another person's volitional conduct is not reasonably foreseeable unless the other person's volitional conduct consists of lawful self-defense or defense of others that results from the defendant's actions.

liable for gun-battle death of bystander shot by adversary); *Rivers v. Commonwealth*, 464 S.E.2d 549, 554 (Va. Ct. App. 1995) (same).

[9] *See, e.g.*, John Kaplan et al., *Criminal Law* 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions."); Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 66 (1956) ("For centuries innocent persons and felons have been killed as the result of justified resistance to felonies of violence; in only a handful of such cases has it been even suggested that the surviving felons are guilty of murder."); *Ross v. W. Union Tel. Co.*, 81 F. 676, 677–78 (5th Cir. 1897); *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 553 (Pa. 1970); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (defendant cannot be liable for shooting "committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united")

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	June 19, 2020
Re:	Comments on Second Draft of Report No. 19, Homicide Offenses; Second Draft of Report No. 27, Human Trafficking; First Draft of Report No. 54, Prostitution; First Draft of Report No. 55, Failure to Appear and Violation of Conditions of Release Offenses; First Draft of Report No. 57, Second Look; and First Draft of Report No. 59, Endangerment with a Firearm.

The Public Defender Service makes the following comments.

Second Draft of Report No. 19, Homicide Offenses

1. PDS objects to the inclusion of felony murder as basis for liability in second degree murder and manslaughter. Lowering the mental state required for murder fails to deter crime or appropriately apportion culpability. PDS agrees with the commentary to Hawaii's murder statute about the state's reasons for abolishing felony murder: "Even in its limited formulation, the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case."[1]

   If felony murder remains a basis of liability for second degree murder, PDS strenuously opposes the expansion of felony murder to include persons who did not commit the lethal act the Second Draft of Report No. 19. Felony murder, which already allows for attenuated murder liability, becomes all the more divorced from actual culpability when it is applied to an individual who did not commit the lethal act and who might only be a peripheral aider and abettor to the predicate felony. The examples of miscarriage of justice in such instances are legion and caused California to retroactively amend its felony murder statute to preclude its application to individuals who

[1] Hawaii Rev.Stat., s 707-701.

were not the actor who committed the fatal act and to those who did not actively participate in bringing about the death as accomplices.[2] The RCC attempts to address the well-recognized miscarriage of justice of applying felony murder to those who do not commit a fatal act by creating an additional defense to felony murder. But the RCC commentary contemplates that the defense is much more protective than it would be in reality. The commentary states: "[A]n actor may be held liable for the lethal acts of a fellow participant in a predicate felony if he or she knows that the fellow participant intends to cause death or serious bodily injury, or failed to make reasonable efforts to prevent death or serious bodily injury." According to the RCC commentary, "These changes permit an actor to be convicted of felony murder when a co-felon committed the lethal act only when the actor's culpability is sufficient to warrant liability."[3] But in reality, that is far from the case. By creating a defense rather than elements that the government must prove, whether the actor's conduct is sufficient to warrant liability rests entirely on a jury's assessment of the defendant's testimony. Much of the credibility determination will depend on the defendant's prior record, education, fear about identifying and negatively testifying about co-actors, and jurors' biases about the defendant and his participation in the predicate felony. This defense would in some instances require the defendant to risk his own safety by testifying about the criminal conduct of multiple other actors. The failure to answer questions about other actors would also lead to claims that the defendant is evasive and not credible. Further, to benefit from this defense, in instances where there is uncertainty about who caused the fatal act, the defendant would have to assume the government's burden and prove that he did not commit the fatal act. For these reasons, PDS strongly urges the CCRC to preclude the application of felony murder to individuals who did not commit the fatal act.

If the RCC maintains the offense of felony murder or continues to apply felony murder to actors who do not commit the lethal act, PDS proposes the following revisions:

RCC § 22E-1101. Murder.

(a) *First Degree.* A person commits first degree murder when that person purposely, with premeditation and deliberation, causes the death of another person.
(b) *Second Degree*. A person commits second degree murder when that person:
    (1) Recklessly, with extreme indifference to human life, causes the death of another person; or
    (2) Negligently causes the death of another person, other than an accomplice, <u>by committing the lethal act</u> in the course of and in furtherance of committing or attempting to commit one of the following offenses:
        (A) First or second degree arson as defined in RCC § 22E-2501;
        (B) First degree sexual abuse as defined in RCC § 22E-1303; ...
    (3) <u>(A) Commits or attempts to commit one of the following offenses:</u>

[2] SB 1437, California. Available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437

[3] RCC Report No. 33, page 3.

(i) First or second degree arson as defined in RCC § 22E-2501;
(ii) First degree sexual abuse as defined in RCC § 22E-1303; …
(B) (i) Intending to cause death or serious bodily injury; or
(ii) Knowing another participant in the predicate felony intends to cause death or serious bodily injury;
(C) Did not make reasonable efforts to prevent another participant from causing death or serious bodily injury; and
(D) The death of another person, other than an accomplice, was caused in the course of and in furtherance of committing or attempting to commit the predicate offense.

(c) ...

(g) No Accomplice Liability for Felony Murder. Notwithstanding RCC § 22E-210, no person shall be guilty as an accomplice to second degree murder under paragraph (b)(2) or (b)(3). ~~*Defense to Felony Murder.* It is an affirmative defense to prosecution under paragraph (b)(2) of this section that the actor, in fact, does not commit the lethal act and either:~~

(1) ~~Believes that no participant in the predicate felony intends to cause death or serious bodily injury; or~~
(2) ~~Made reasonable efforts to prevent another participant from causing the death or serious bodily injury of another.~~ …

2. PDS objects to the inclusion of first and second degree criminal abuse of a minor as predicate felonies for felony murder. If the CCRC includes felony murder in the reform code, it should also adopt a merger principle that provides that the predicate felony must have a purpose that is independent of the decedent's death or serious injury.[4] First and second degree criminal abuse of a minor requires that the defendant commit serious injury, either physical or mental, to the minor. Generally, the failure to adopt a merger rule would mean that every act of violence against another that is not immediately fatal could be converted into felony murder – thereby relieving the government from proving the defendant's mental state.

3. PDS makes the same objections and recommendations with respect to RCC § 22E-1102, Manslaughter, as it makes above with respect to RCC § 22E-1101, Murder.

First Draft of Report No. 54, Prostitution

1. PDS recommends rewriting subsection (b)(2) to require that the District, rather than the Metropolitan Police Department (MPD) specifically, refer persons under age 18 who are suspected of violating subsection (a) of the section. PDS hopes that the Council for the District of Columbia and the Mayor answer the call to narrow the duties of MPD and to assign the work

[4] *People v. Rector*, 19 Wend. 569, 592-93 (N.Y. Sup. Ct. 1838).

of delivering health and human services to District agencies that are better suited to delivering those services. Requiring that the *District* make the referral allows the District to assign the work to a current social services agency, a new agency not currently in existence, or if it deems it appropriate, even to MPD.

2. PDS notes that RCC § 22E-4401, prostitution, and RCC § 22E-4402, patronizing prostitution, include provisions to allow for the suspension and dismissal of proceedings. PDS supports these provisions. As it did in its May 1, 2020 comments on the First Draft of Report No. 50, 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 or a criminal graffiti offense or a 2nd degree trespass offense and someone convicted of prostitution or of patronizing prostitution or of a possessory drug offense. All of these 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.[5] The suspension and dismissal of proceedings provisions should be expanded or repeated elsewhere in the RCC to allow for judicial dismissal of all offenses of equivalent or similar grading.

First Draft of Report No. 55, Failure to Appear and Violation of Conditions of Release Offenses

1. PDS recommends rewriting the second element of both first degree and second degree failure to appear in violation of a court order at RCC § 23-1327. Currently, the second element reads: "Knowingly fails to appear or remain for the hearing." The commentary explains that this element "means the person must be practically certain that they failed to appear or remain as required."[6] As written, the element suggests that a person may be found guilty of this offense if they know they were not in court when they knew (pursuant to element 1) they were supposed to be. PDS does not believe that the CCRC intends to make the offense turn on whether or not the person knows they failed to appear in court. The gravamen of the offense is actually whether the person made reasonable efforts to appear in court as required. It is no coincidence that the commentary specifically notes that "the person's conduct must be voluntary,"[7] despite the fact

[5] D.C. Code § 16-803(c)(1).

[6] Report No. 55, page 12.

[7] *Id*.

that the government must prove voluntariness for *every* offense in the RCC.[8] Voluntariness is specifically mentioned because whether the person's non-appearance in court is "voluntary" is largely, though perhaps not exclusively, what determines the culpability of the person. It is not clear that all conduct that should be excused from liability would be excused because it fails to meet the definition of "voluntariness." The voluntariness requirement at RCC § 22E-203 defines both the voluntariness of an act and the voluntariness of omission. Because a person's omission (by failing to appear) provides the basis for liability of this offense, "a person commits the conduct element of [the] offense when [either] (A) the person has the physical capacity to perform the required legal duty [to appear or remain in court] or (B) the failure to act is otherwise subject to the person's control."[9] The failure to appear commentary gives examples of a person's absence being not subject to the person's control such as if the person is incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due to a technological problem.[10] One "stranded" scenario is the defendant in *Foster v. United States*, 699 A.2d 1113 (D.C. 1997), a bus driver for Greyhound who was "stranded in Montreal" when the bus that would have allowed him to drive back to the District from Montreal in time to appear in court was cancelled by his employer.[11]

Consider another scenario: D texts with the Pretrial Services Agency the day before his scheduled trial date in a felony case to confirm the date, time and courtroom of his hearing. D sets an alarm to wake up in plenty of time to get to court, but actually wakes up before his alarm rings. Though he leaves his house earlier than planned, he runs to the metro station (as witnessed by numerous people). When he arrives at the metro station, he learns that it is closed for "track maintenance work." Evidence would show that the metro station had closed one month earlier and that signs had been posted outside the station announcing the closure starting one month prior to the closure. Under the RCC's proposed failure to appear offense, D (1) knew he was required to appear before a judicial officer on a specified date and time for what was in fact a hearing in a felony matter and (2) knew that he failed to appear for the hearing. The question for the factfinder would be whether his "failure to appear" was voluntary, that is was his non-appearance subject to D's control? Under current law, the question for the factfinder in this case would be whether D's "failure to appear" was "willful,' as in "deliberate and intentional" or whether it was "accidental or inadvertent." Rather than asking whether the person was practically certain that he failed to appear, the question that better focuses on the conduct (by act or omission) that justifies holding someone culpable for this offense is whether the person made reasonable efforts to appear in court.

[8] *See* RCC § 22E-203. ("No person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense."

[9] RCC § 22E-203(b)(2).

[10] See Report No. 55, page 12, n. 11.

[11] *Foster*, 699 A.2d. at 1114. The *Foster* court found that, if the trial court credited Mr. Foster's testimony as to the events preceding his trip to Montreal in the days before his court hearing, then there would not be a factual underpinning for a conclusion that Mr. Foster's failure to appear for his trial was "deliberate and intentional, not inadvertent or accidental." *Id*. at 1115.

Even if the "voluntariness" standard is coextensive with the culpability question at the heart of the failure to appear offense, it is inarguable that "voluntariness" does more work in this offense than in most other offenses in the RCC. For that reason alone, it should be "elementized" specifically in this offense. Specifically, PDS recommends rewriting first-degree failure to appear in violation of a court order be rewritten to read as follows:

> A person commits first degree failure to appear in violation a court order when that person:
> (1) Knows they are required to appear before a judicial officer on a specified date and time by a court order for what is, in fact, a hearing:
> (A) In a case in which the person is charged with a felony; or
> (B) In which the person is scheduled to be sentenced; ~~and~~
> (2) Knowingly ~~fails~~ failed to make reasonable efforts to appear or remain for the hearing; and
> (3) In fact, the person did not appear or remain for the hearing.

Second-degree failure to appear should be rewritten similarly.

PDS further recommends that the commentary explaining failure to appear should be clear that it is adding an element that encompasses voluntariness because it is the heart of the offense and that doing so does not diminish the requirement that no person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense.

2. PDS makes the same recommendations for the rewriting of RCC §23-586 as it makes above for rewriting RCC § 23-1327.

3. PDS recommends eliminating the mandatory consecutive sentencing provisions from RCC § 23-1327, failure to appear in violation of a court order, and from RCC § 24-241.05A, violation of work release. The reasoning offered by the CCRC for eliminating all mandatory minimum sentences,[12] which proposal PDS enthusiastically supports, applies equally to this mandatory sentencing provision. It exacerbates, rather than solves, disproportionality. "Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making…"[13] There is no reason to distrust that the judges will not take seriously and exercise carefully their discretion when sentencing for violations of these offenses, particularly when both offenses are in essence about a defendant's defiance of the court's authority to issue and enforce orders.

4. PDS recommends rewriting subsection (d) of RCC § 23-1329A, Criminal contempt for violation of a release condition. First, PDS recommends eliminating the language that would require that the proceeding to determine a violation of this statute be "expedited." PDS recognizes that the

[12] *See* First Draft of Report No. 52, Cumulative Update to the Revised Criminal Code Chapter 6, March 20, 2020, at pages 6-7.

[13] *Id*. at page 6.

statute for the current offense requires that the proceedings be expedited.[14] The CCRC does not cite any legislative history, case law, or court rules to explain what would constitute an "expedited" hearing versus one that is not "expedited." Judges control their calendars and the scheduling of proceedings. This offense is at heart about the court enforcing its own orders. A judge who wishes to initiate a proceeding for contempt under this section or is merely scheduling a proceeding initiated by a prosecutor, may schedule it as soon as their calendar, and the defendant's constitutional rights[15] permit without needing a statutory requirement to do so. On the other hand, if the judge is not in a rush to schedule the proceedings, this offense is not inherently more urgent than any other criminal offense and should not dictate how judicial resources are expended. Second, the subsection should simply provide that the proceedings shall be heard by the court without a jury. It is widely understood that bench trials are by a "single judge" and that the verdict is a conviction generally the same as a verdict in a jury trial. That said, a bench trial is decidedly not the same as a jury trial. To the extent any law distinguishes between a verdict delivered by a single judge and one delivered by a jury, this language proposed by the RCC should not be allowed to erase the stark differences between the two types of proceedings. In sum, subsection (d) should be rewritten as follows:

> (d) ~~Expedited non-jury~~ Non-jury hearing. A proceeding determining a violation of this section shall be ~~expedited. The proceeding shall be by a single judge, whose verdict shall have the same force and effect as that of~~ heard by the court without a jury.

5. PDS reiterates its position[16] that the violation of a release condition should be punished as contempt pursuant to RCC § 23-1329A, even when the violation is the commission of a new offense. If a person is found guilty of committing a new offense, they should be punished for that offensive conduct and not additionally for their "status" of having been released in another matter pursuant to D.C. Code § 23-1321. If the CCRC decides to retain an enhancement for having committed an offense while on release, then the penalty should be significantly lower than what was proposed in Report No. 52.

First Draft of Report No. 57, Second Look

1. CCRC's Second Look Provision, D.C. Code § 24-403.03 (a)(3)(A) provides that "any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in video teleconferencing." PDS recommends that the CCRC both expand and limit this provision. Some BOP facilities do not have the

[14] *See* D.C. Code § 23-1329(c). ("Such contempt proceedings shall be expedited and heard by the court without a jury.")

[15] Whatever "expedited hearing" currently means, it cannot mean a hearing so rushed that it deprives the defendant of their constitutional rights, such as the right to present a defense, which might take time to investigate, and the right to have compulsory process to obtain witnesses.

[16] *See* PDS Comments First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements, dated May 15, 2020.

capacity for video conferencing or may raise objections to video conferencing because it may occur over non-secure lines. Remote participation should include participation by phone. However, non-physical appearance should only occur with the defendant's consent.

PDS recommends the following language:

> With the consent of the defendant, ~~A~~any proceeding under this section may occur by video teleconferencing or by phone and the requirement of a defendant's presence ~~is~~ shall be satisfied. ~~by participation in video teleconferencing.~~

2. With respect to modifications to D.C. Code § 24-403.03, PDS also recommends modifying the requirement at (b)(3)(B) that a "defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility." Rather than mandating detention and a particular placement, PDS recommends the following language: "A defendant brought back to the District under this section, if detained, shall be placed in a manner that maximizes programming and educational supports."

First Draft of Report No. 59, Endangerment with a Firearm

PDS recommends that the statute and commentary make clear that this offense merges with any completed offense or inchoate offense, such as attempt, where part of the government's proof is evidence of the discharge of a firearm. For example, the endangerment with a firearm offense should merge with any homicide or assault or a robbery offense where the death or injury was caused by a projectile from a firearm. Similarly, the endangerment with a firearm offense should merge with any offense, such as menacing, first degree sexual assault, or a human trafficking offense, where the menacing or coercive threat involved the discharge of a firearm. While presumably, these offenses would merge pursuant to the general merger provision at RCC § 22E-214, PDS wants it made clear that this offense, with no precedent in the current criminal code, merges with other offenses as explained above. The endangerment with a firearm offense overlaps with many other criminal offenses. A primary mandate of the CCRC is to create a reform criminal code that reduces such overlap. Failing to address explicitly the overlap/merger issues created by this new offense would threaten to undo much, if not most, of the work the CCRC has done to reduce overlap amongst and between weapons offenses and offenses against persons.

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #53–59, Second Draft of Reports #19, 27, and 35, and Third Draft of Report #41	Date: June 19, 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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #53–59, the CCRC's Second Draft of Reports #19, 27, and 35, and the CCRC's Third Draft of Report #41. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #54—Prostitution

1. USAO recommends modifying the expungement provisions to allow prosecutors to have access to these records.

In RCC § 22E-4401(c) (Prostitution) and RCC § 22E-4402(b) (Patronizing Prostitution), the CCRC makes proposals regarding expungement of records in certain circumstances. In its April 29, 2020 comments on the First Draft of Report #50 (at 18–19), OAG made recommendations regarding an identical proposal in RCC § 48-004.01a (Possession of a Controlled Substance). USAO agrees with OAG's comments that prosecutors and law enforcement need to have access to these nonpublic records. The same rationale applies to Possession of a Controlled Substance, and to Prostitution and Patronizing Prostitution. USAO recommends that, in lieu of expungement, the CCRC create a sealing provision for these offenses. Sealing would accomplish many of the goals of this provision, including lack of public access to these records. Expungement would have adverse impacts that are not immediately apparent. This would include an impact on USAO's ability to locate and disclose relevant *Brady* material. Sealing would help alleviate those *Brady* concerns. Closed files, including those that do not result in a conviction, sometimes contain *Brady* information, and USAO obtains that information from closed files. If those files were expunged, the government would not be able to access that material either for its own investigatory purposes or to disclose to defense. This would be a significant detriment to the defense at trial, and would preclude the government from carrying out its obligations regarding exculpatory information. Exculpatory material can be

[1] This review was conducted under the understanding that the structure of the code reform process allows the members of the CCRC 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.

present even in these relatively low-level misdemeanor offenses. For example, if a case was originally investigated as a felony offense, a witness may have testified in the grand jury and perjured himself or herself. If a case went to trial as a misdemeanor offense, a witness may have perjured himself or herself at trial, or, regardless of whether it went to trial, a witness may have made inconsistent statements to police or prosecutors that could be exculpatory. The government must be able to access those prior statements to assess a witness's credibility and to make disclosures to defense. Finally, a requirement that USAO or federal law enforcement agencies expunge records may violate the Home Rule Act, as the DC Council cannot alter the authority or duties of a federal agency.

First Draft of Report #55—Failure to Appear and Violation of Conditions of Release Offenses

1. USAO recommends amending the Commentary to RCC § 23-1329A—Criminal Contempt for Violation of a Release Condition.

In the Commentary to this offense, a footnote provides: "Disobedience of these and other court orders are also punished under D.C. Code §§ 11-741 and 11-944. *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991). The statute does not apply to a person who is detained. *That is, a person cannot be subject to pretrial or presentencing conditions if they are detained in the same case. For example, no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness.*" (First Draft of Report #55 at 18 n.4 (italics added).) USAO recommends that the CCRC remove the italicized sentences from the Commentary. Although the CCRC appropriately notes that *this* offense is limited to violations of conditions where the defendant is not detained, it is not accurate to state that there is *no* authority under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness. A judge may issue an order other than one listed in D.C. Code § 23-1321, and, as the footnote discusses earlier, a court can punish violations of other court orders under the general contempt provisions of D.C. Code §§ 11-741 and 11-944. D.C. Code § 23-1330 further provides: "Nothing in this subchapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

First Draft of Report #57—Second Look

1. USAO recommends that the CCRC not adopt this provision.

As this proposal would significantly expand second look review from current law, this proposal would affect many cases. Many victims and their families would be affected. Victims are not a monolith voice, and may have vastly differing views on what they want to see happen in a case in which they or a family member were victimized. Many victims, however, are opposed to a defendant's early release, or may require support services beyond those currently available that would enable them to navigate this second look process and/or a defendant's early release. Further, given the gravity of the relief sought in these motions—that is, the early release of a defendant who committed what is likely to have been a serious, violent offense—USAO is concerned about whether USAO and Superior Court will have sufficient resources available to

thoroughly address and litigate these important motions. Finally, USAO is concerned about limited support systems available to defendants who are released early and who transition back to the community following release that would enable them to succeed.

USAO also has concerns regarding the statutory factors that a court must consider, including the fact that the "nature of the offense" is not an expressly enumerated factor for a court to consider. Given that the CCRC, however, notes that its recommendation is based on current law (Commentary at 2 n.1), USAO will address these factors more fully at the appropriate time.

Second Draft of Report #35—Cumulative Update to Sections 201–213 of the Revised Criminal Code

1. USAO recommends removing subsection (c)(2) from RCC § 22E-204.

In an earlier report, the CCRC proposed that this subsection provide that a person's conduct is the legal cause of a result if the result is "not too dependent upon another's volitional conduct, to have a just bearing on the person's liability." In its May 20, 2019 comments on this section, USAO recommended deleting this quoted language. The CCRC modified its proposal, and subsection (c)(2) now provides: "When the result depends on another person's volitional conduct, the actor is justly held responsible for the result."

Determining whether one is "justly" held responsible remains vague, and suffers from many of the same concerns previously articulated by USAO in response to the earlier draft. The Commentary notes this difficulty in precision, stating: "There is no precise formula for determining the point at which intervening influences become so great as to break the causal chain between a defendant's conduct and the prohibited result." (Second Draft of Report #35 at 20.)

The interpretive factors suggested in the Commentary explaining this provision do not resolve this vagueness. For example, the Commentary discusses the "inherent wrongfulness of the conduct." (Second Draft of Report #35 at 20.) This language, however, does not clarify the standard, and introduces additional layers of imprecision, both as to (1) how to measure the "inherent wrongfulness" of particular conduct, and (2) how "inherently wrongful" conduct must be in order to support legal causation. Further, the wrongfulness of the conduct is not related to causation. The Commentary also discusses the "desire to cause the prohibited result." (*Id.*) Likewise, this language is not related to causation, but instead pertains to the defendant's *mens rea*. It also runs counter to the principle behind causation based on reasonable foreseeability, which arises almost exclusively in situations where the defendant did *not* intend the result, but is nonetheless responsible for having caused it because it was reasonably foreseeable.

We agreed that the third factor discussed in the Commentary, the passage of time, may be an attenuating factor. USAO took this position in *Fleming v. United States*, 224 A.3d 213, 224 (D.C. 2020) (*en banc*) ("Although the United States in this case initially appeared to argue that reasonable foreseeability by itself sufficed to establish proximate cause in the [urban gun battle] context, the United States acknowledged at oral argument that concepts of temporal attenuation

are also relevant. For example, the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct."). Given that attenuation principles are already well-established in the case law analyzing reasonable foreseeability, and would probably be used to interpret when to "justly" hold someone responsible, it would be clearer to refer directly to "attenuation" rather than using "justly" as an undefined but roughly equivalent term.

We believe that attenuation principles are properly encompassed within the "reasonable foreseeability" analysis, without the need for a separate provision; and to avoid ambiguity, this could be set out expressly in the Commentary. But if the CCRC disagrees with USAO's recommendation to delete subsection (c)(2) in its entirety, USAO recommends that subsection (c)(2) be modified as follows:

> "When the result depends on another person's volitional conduct, ~~the actor is justly held responsible for~~ the result is not attenuated by that conduct, or by the passage of time."

Third Draft of Report #41—Ordinal Ranking of Maximum Penalties

1. USAO recommends increasing the penalty for RCC § 22E-4120—Endangerment with a Firearm.

We agree with the statements in the Commentary that "[t]he current D.C. Code provides significant liability for possessing or carrying a weapon illegally, irresponsibly, or during a crime but very little additional liability for firing a gun," and that public shootings that are not otherwise part of a crime against property or persons are "distinctly terrifying." (First Draft of Report #59 at 3.) The CCRC has proposed that Endangerment with a Firearm be a Class 9 felony, with a maximum of 3 years' incarceration. USAO recommends that the maximum penalty be increased to account for the significant danger created by discharging a firearm. Even where the defendant does not intend to hit someone, discharging a firearm in a manner that either creates a substantial risk of death or bodily injury to another person, or that is in a location that is open to the general public, etc. at the time of the offense is serious conduct that merits a higher maximum penalty.

2. USAO recommends increasing the penalties for RCC § 23-586—Failure to Appear after Release on Citation or Bench Warrant Bond, and RCC § 23-1327—Failure to Appear in Violation of a Court Order.

The CCRC has proposed that 1st Degree Failure to Appear after Release on Citation or Bench Warrant Bond be a Class B misdemeanor, punishable by a maximum of 180 days' incarceration, and that 2nd Degree Failure to Appear after Release on Citation or Bench Warrant Bond be a Class D misdemeanor, punishable by a maximum of 30 days' incarceration. Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years' incarceration, and the corollary to 2nd degree is a misdemeanor punishable by not more than the maximum provided for the offense for which such citation was issued. *See* D.C. Code § 23-585(b). The CCRC has proposed that 1st Degree Failure to Appear in Violation of a Court Order

be a Class A misdemeanor, punishable by a maximum of 1 year incarceration, and that 2nd Degree Failure to Appear in Violation of a Court Order be a Class C misdemeanor, punishable by a maximum of 90 days' incarceration. Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years' incarceration, and the corollary to 2nd degree is a misdemeanor punishable by a maximum of 180 days' incarceration. *See* D.C. Code § 23-1327(a).

For both offenses, the maximum penalty needs to be sufficiently high to incentivize the defendant's appearance. If it is too low, a defendant may make a calculation that it is better not to appear and not have to face the consequences of the underlying criminal charge. Of course, a defendant is still accountable for the underlying criminal charge if they fail to appear, but, in certain circumstances, it becomes more difficult for the government to proceed after a defendant has failed to appear. This is particularly true when the defendant has failed to appear for a lengthy time, which may impede the government's ability to locate essential witnesses, and may lead to witnesses' memories fading.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	July 17, 2020
Re:	Comments on First Draft of Report No. 60, Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses

The Public Defender Service supports the establishment of the temporary possession affirmative defense, which the CCRC proposes in the First Draft of Report No. 60.[1] PDS recommends that the CCRC expand the defense in two significant ways.

First, the temporary possession defense should apply when the actor possesses the item while acting in lawful self-defense or defense of others. It is easy to imagine a number of scenarios where the actor's possession of a weapon would not be blameworthy but which would not be excused by the temporary possession defense as it is currently drafted. For example:

- X and Y get into an argument; Y attempts to stab X with a knife. X struggles with Y. During the struggle, X stabs Y and then fully gains possession of the knife.
- X is walking home from baseball practice when he sees Y attempting to sexually assault Z. X wields his baseball bat in a threatening manner towards Y, who ceases the assault and runs off.
- Y attempts to rob X with a pistol. Y trips and falls and loses control off the pistol. X picks up the pistol and points it at Y to prevent Y from escaping until the police arrive.

In each of the above scenarios, X's conduct likely constitutes second or third degree carrying a dangerous weapon pursuant to RCC § 22E-4102(b). While X could defend against an assault charge by claiming either self-defense or defense of others, neither is a defense to weapon possession.[2] It

[1] See RCC § 22E-502 (Report No. 60, pp. 13 – 19).

[2] The CCRC has a placeholder in the table of contents for Self-Defense and Defense of Others, at § 22E-404 and § 22E-405 respectively, but CCRC has not yet shared a draft of either defense with the Advisory Group. PDS would welcome a construction of both defenses that spares from liability not just the assaultive or threatening conduct but also other conduct that is essentially tied to the defense. For example, in addition to the weapon possession scenarios offered above, consider if, instead of pointing the pistol at

might be the case that none of the above scenarios would result in a prosecutor bringing charges against X; however, the CCRC should not leave it to prosecutorial discretion to prevent the injustice that would be created by a defense that it drafted too narrowly. Rather, CCRC should expand the Temporary Possession defense to cover conduct that is clearly not blameworthy, to wit: when the actor possesses a weapon while acting in lawful self-defense or defense of others.

Second, PDS recommends not limiting the Temporary Possession defense to only weapons and controlled substances offenses. This is a new defense in the District and it represents an excellent policy idea. As noted above, if law enforcement or the charging prosecutor is aware of the circumstances, such as the actor's temporary possession with intent to turn the item into law enforcement or to permanently dispose of the item, the actor might not be arrested or charged with a possession offense. Rather than rely on law enforcement's ability perceive the circumstances and willingness to exercise their discretion in response, there should be a codified defense that ensures the defendant has the opportunity to show – and the burden of doing so by a preponderance of evidence – that their conduct was not blameworthy. That is true whether the item is a weapon or a controlled substance or whether the item is an obscene image of a minor or an open container of alcohol.

PDS proposes that rather than define the phrase "predicate possessory or distribution offense" with an exclusive list of offenses, particularly a list that only includes weapons and controlled substances offenses, the phrase should be defined to apply to "any offense where the gravamen of the criminal conduct is the possession or distribution of contraband." In addition to the weapons and controlled substances offenses already listed, this definition would then also include RCC § 22E-1808, possession of an obscene image or a minor, and RCC § 25-1001, possession of an open container or consumption of alcohol in a motor vehicle. It would also apply to offenses that are added to the revised code after its adoption by the District. However, the definition would not include offenses such as RCC § 22E-2401, possession of stolen property, because the gravamen of the offense is not mere possession, rather the actor must also have the intent to deprive an owner of the property; or to RCC § 22E-2105, unlawful creation or possession of a recording, because the actor, in addition to possessing the contraband recording, must have the intent to sell, rent, or otherwise use the recording for commercial gain or advantage. The definition would not include RCC § 22E-2702, possession of tools to commit property crime, because in addition to possessing the contraband tools, the actor must have the intent to use the tools to commit one of the enumerated offenses; nor would the definition include RCC § 48- 904.10, possession of drug manufacturing paraphernalia, because in addition to possessing the paraphernalia, the actor would have to have the intent to use the paraphernalia to manufacture a controlled substance. Because distribution is the transfer of possession, distribution offenses should also be generally included and generally defined. For example, if the "distribution" of an obscene image of a minor is the transfer of the possession of the image from X to Y, who is the supervisor of X or the person in charge of the location where the item was found, for Y to take appropriate and lawful action, then X's conduct is as blameless as if the item being "distributed" were a controlled substance or a dangerous weapon.

> Y to prevent Y's escape, X picks up Y's dropped pistol and runs off with it. In addition to a weapon possession charge, X's conduct may technically constitute theft as well.

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: June 19, 2020

SUBJECT: First Draft of Report #60 – Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses

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 #60, Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-401, Lesser Harm

This provision states:

(a) *Defense.* A person does not commit an offense when, in fact:
(1) The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm;

[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 later hearing that the Council may have on any legislation that may result from the Report.

(2) The specific, identifiable harm that the person seeks to avoid significantly exceeds the harm prohibited by the law the person is charged with violating.

(b) *Exceptions.* This defense is not available when:
(1) Recklessness is the culpable mental state for an objective element of the offense and the person is reckless in bringing about the situation requiring a choice of harms;
(2) Negligence is the culpable mental state for an objective element of the offense and the person is negligent in bringing about the situation requiring a choice of harms; or
(3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability.

(c) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the terms "recklessly" and "negligently" have the meanings specified in RCC § 22E-206; and the term "in fact" has the meaning specified in RCC § 22E-207.

There are two statements made in the Commentary explaining this offense that OAG believes should be in the text of the statute because they are not necessarily implicated by a strict reading of the text. The first, is that "A necessity defense excuses criminal actions taken in response to exigent circumstances." [emphasis added] Webster's dictionary defines "exigent" as "requiring immediate aid or action." However, paragraph (a) does not appear to have this requirement.

The second statement is the limitation that the "Conduct is not necessary if the greater harm can be avoided by "a reasonable legal alternative available to the defendants that does not involve violation of the law." Like the Commentary referring to exigent circumstances, the requirement that there not be a reasonable legal alternative is substantive in nature and does not necessarily flow from a plain reading of the substantive text.

OAG proposes that RCC § 22E-401, Lesser Harm, be redrafted to read as follows:

(a) *Defense.* A person does not commit an offense when, in fact:
(1) The criminal actions were taken in response to exigent circumstances;
(2) The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm; and
(3) The specific, identifiable harm that the person seeks to avoid significantly exceeds the harm prohibited by the law the person is charged with violating.

(b) *Exceptions.* This defense is not available when:
(1) Recklessness is the culpable mental state for an objective element of the offense and the person is reckless in bringing about the situation requiring a choice of harms;

(2) Negligence is the culpable mental state for an objective element of the offense and the person is negligent in bringing about the situation requiring a choice of harms; ~~or~~

(3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability~~.~~ or

(4) There is a reasonable legal alternative available to the person that does not involve a violation of the law.

(c) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the terms "recklessly" and "negligently" have the meanings specified in RCC § 22E-206; and the term "in fact" has the meaning specified in RCC § 22E-207.

The Commentary states that "Paragraph (a)(2) requires that the harm to be avoided is significantly greater than the harm prohibited by the law the person is charged with violating." However, it does not provide guidance as to what principled legal metrics a judge uses to fairly decide that one reasonably-feared harm is greater than another. The text or the Commentary should supply a legal principle that would guide how a judge conducts this weighing. OAG has not found any local appellate precedent that sheds light on this question.

Finally, in the discussion in the Commentary about paragraph (a)(1) it states, "The question of necessity is not committed to the private judgment of the person engaging in the conduct, it is a mixed question of fact and law for determination at trial. [footnotes omitted]. However, paragraph (a)(1) states, "The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm." At first glance, it appears that these two phrases may be in conflict; how can it be both what a reasonable person believes and at the same time not be committed to the private judgment of the person? OAG believes that the two phrases can be reconciled if the Commentary is tied to the term "reasonably" in the phrase "reasonably believes." The Commentary should clarify this issue.

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: June 19, 2020

SUBJECT: First Draft of Report #62 – Impersonation of a District Official

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 #62, Impersonation of a District Official.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3201, Impersonation of a District Official, states in relevant part:

(a) *First degree*. An actor commits first degree impersonation of a District official when that actor:
  (1) With intent to:
    (A) Deceive any other person as to the actor's lawful authority; and
    (B) Receive a personal benefit of any kind, or to cause harm to another;

While OAG generally agrees with this formulation, we believe that subparagraph (a)(1)(B) is too limited. It requires that the actor "receive a personal benefit." There may be times, however, where the actor is impersonating a District official to benefit someone else. The following hypothetical illustrates this point. Say a tenant is two months behind on his rent and the landlord wants him out. A friend of the landlord lies and tells the tenant that he is a high ranking OAG

[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 later hearing that the Council may have on any legislation that may result from the Report.

prosecutor and that unless the tenant has moved out by the end of the week he would criminally prosecute the tenant.[2] While the actor would not receive a personal benefit, the landlord would. To cover this type of situation, OAG proposes that subparagraph (a)(1)(B) be redrafted to state, "That any person receive a personal benefit of any kind, or to cause harm to another."

[2] A high ranking OAG prosecutor is a "Public official" under D.C. Code 1-1161 (47) (I), incorporated into the RCC via RCC § 22E-701, by virtue of being a District of Columbia Excepted Service employee.

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #60–62	Date: July 20, 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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #60–62. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #60—Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses

1. USAO recommends, for the Lesser Harm Defense, clarifying consideration of whether a specific, identifiable harm is "imminent" or "immediate."

The CCRC Commentary states that the lesser harm defense statute clearly changes District law by not requiring that the harm to be avoided be an immediate harm. (Commentary at 7.) As the Commentary notes (at 7 & n.18), the necessity defense under current law requires evidence of "a specific, *immediate*, identifiable harm." But even though the CCRC's proposal would not include the word "immediate" or "imminent" in the plain language of the statute, consideration of whether a specific, identifiable harm is immediate or imminent would still be considered as part of the lesser harm analysis.

The commentary to the Model Penal Code choice of evils defense provides: "It is true that genuine necessity rests on the unavailability of alternatives that would avoid both evils, and that *typically when the evil is not imminent some such alternative will be available*, but it is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future." Model Penal Code § 3.02 cmt. at 17 (1985) (emphasis added). Thus, although the Model Penal Code recommends against establishing imminence as an absolute requirement, it contemplates consideration of imminence in assessing whether an alternative is available.

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

The CCRC Commentary to this defense provides: "Conduct is not necessary if the greater harm can be avoided by a reasonable 'legal alternative available to the defendants that does not involve violation of the law.'" (Commentary at 6.) Consistent with the Model Penal Code, when evaluating if there is a reasonable legal alternative available, an important consideration would be whether the specific, identifiable harm to be avoided is "imminent" or "immediate." The CCRC Commentary recognizes the importance of considering imminence when it states: "*In unusual circumstances*, conduct may be necessary to avoid a much later but otherwise inevitable harm." (Commentary at 7 (emphasis added).)

USAO therefore recommends that the Commentary clarify that, although imminence/immediacy of the harm to be avoided may not be an absolute requirement, consideration of imminence/immediacy of the harm to be avoided is an important factor when assessing whether the actor reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid that harm.

Further, as the CCRC drafts additional justification defenses, including self-defense and defense of others, USAO may have additional comments on this defense and any interplay between the justification defenses.

First Draft of Report #62—Impersonation of a District Official

1. USAO recommends renaming this offense to "Impersonation of an Official."

This offense includes impersonation of various District officials, but also includes impersonation of various federal officials, including prosecutors at USAO, federal law enforcement officers, and federal court judges. To eliminate any potential future confusion as to whether federal officials are included in this offense, USAO recommends renaming this offense to "Impersonation of an Official," rather than "Impersonation of a District Official."

2. USAO recommends modifying the language of subsections (a)(1)(B) and (b)(1)(B).

With USAO's changes, subsections (a)(1)(B) and (b)(1)(B) would provide:

"(B) ~~Receive a personal benefit of any kind; or to cause harm to another~~ Cause a benefit, or harm, to any person;"

As currently drafted, a defendant "receiv[ing] a personal benefit" might not include cases where a defendant acts not for his or her own benefit, but for the benefit of someone else, such as a friend or relative. It is appropriate to include liability where a defendant impersonates an official for the benefit of someone else, as that can be equally culpable as impersonating an official for the benefit of himself or herself. USAO therefore recommends modifying the language to include causing a benefit to any person.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 9, 2020

SUBJECT: First Draft of Report #63 –Misrepresentation as a District of Columbia Entity

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 #63 –Misrepresentation as a District of Columbia Entity [1]

COMMENTS ON THE DRAFT REPORT

Both first and second degree Impersonation of a District Official, RCC § 22E-3201, contain the following elements:

(a) An actor commits … impersonation of a District official when that actor:
  (1) With intent to:
    (A) Deceive any other person as to the actor's lawful authority; and
    (B) Receive a personal benefit of any kind, or to cause harm to another;
  (2) Knowingly and falsely represents themselves to currently hold lawful authority as a:
    (A) Judge of a federal or local court in the District of Columbia;
    (B) Prosecutor for the United States Attorney for the District of Columbia, or the Attorney General for the District of Columbia;
    (C) Notary public;
    (D) Law enforcement officer;

[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.

(E) Public safety employee;
(F) District official;
(G) District employee with power to enforce District laws or regulations; or
(H) Person authorized to solemnize marriage…

In addition, the first degree offense includes the element, in subparagraph (a)(3) that the actor "Performs the duty, exercises the authority, or attempts to perform the duty or exercise the authority pertaining to a person listed in paragraph (a)(2)." It is difficult to imagine scenarios where an actor is actually acting as a District official that the complainant would not be harmed in some way by the actor's actions. For example, a complainant who relies on the representation that someone is a notary is necessarily harmed if that person believed that the actor who "notarized" their papers was not, in fact, a notary and that the papers were not actually notarized in compliance with the law.

Similarly, it is hard to imagine situations where a person would deceive another person by representing themselves to be a District official without receiving some personal benefit. Why else would they be involved in the deception? And conversely, if a person did deceive a complainant by impersonating a District official, say by claiming that the actor was a judge, there is no reason to excuse that deception just because the actor did not receive a personal benefit. OAG, therefore, recommends that the element of "Receiv[ing] a personal benefit of any kind, or to cause harm to another" be deleted.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 9, 2020

SUBJECT: First Draft of Report #65 – Contributing to the Delinquency of a Minor

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 #65,– Contributing to the Delinquency of a Minor.[1]

COMMENTS ON THE DRAFT REPORT

OAG has three recommendations concerning RCC § 22E-4601, Contributing to the Delinquency of a Minor. The first relates to the second degree offense of causing a child to engage in conduct constituting chronic truancy. RCC § 22E-4601(b) states:

> (b) An actor commits second degree contributing to the delinquency of a minor when that actor:
>
> (1) In fact, is at least 18 years of age and at least four years older than the complainant;
> (2) Recklessly disregards the fact that the complainant is under the age of 18 years; and
> (3) Knowingly engages in one of the following:
>
> (A) Assists the complainant with the planning or commission of conduct constituting chronic truancy or a violation of a court order;
> (B) Encourages the complainant to engage in specific conduct constituting chronic truancy or a violation of a court order;

[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.

(C) Commands, requests, or tries to persuade the complainant to engage in or aid the planning or commission of specific conduct, which, if carried out, will constitute chronic truancy or a violation of a court order, or an attempt to commit chronic truancy or a violation of a court order; or
(D) Causes the complainant to engage in conduct constituting chronic truancy or a violation of a court order.

The provisions that criminalize assisting, encouraging, commanding, causing… a child to be truant do not distinguish between a parent or guardian, on the one hand, and someone who is not responsible for raising the child, on the other. OAG strongly believes the children who are truant - and their parents - should receive services to not only address the truancy, but the underlying issues that resulted in the unexcused absences as well.[2] While it is a sign of family disfunction, that can be addressed, for a parent or guardian not to send their child to school, there is no excuse for an adult non-parent or guardian to discourage school attendance.

OAG would note that DC Code § 38-203, referenced in footnote 11, gives OAG jurisdiction to prosecute parents and guardians for failing to send their child to school. To avoid the overlapping of offenses and improve proportionality, OAG recommends that parents and guardians be excluded from the provisions of RCC § 22E-4601 that pertain to truancy. One way that the CCRC could do that is to redraft paragraph (c), Exclusions of from liability, by renumbering that provision as (c)(1)[3] and exempting parents and guardians under a new (c)(2) as follows:

(c) *Exclusions from liability.* An actor does not commit an offense:
(1) Under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience; or
(2) Relating to truancy, when the actor is, in fact, a person who is required to send a child to school pursuant to the Compulsory School Attendance Act and is subject to the enforcement provision under D.C. Code § 38-203.

OAG's second recommendation concerns subparagraph (a)(3)(B) and the language that is used to ensure that the revised offense includes criminal liability for an actor who encourages a child to possess or consume alcohol. That subparagraph makes it an offense for an actor who "Knowingly encourages the complainant to engage in specific conduct that, in fact, constitutes a District offense or a comparable offense in another jurisdiction." OAG notes that the

[2] As to parents and guardians, OAG believes that families are better served utilizing a prevention model. Towards that end, starting in January 2018, OAG unveiled the Abating Truancy Through Engagement and Negotiated Dialogue (ATTEND) Mediation Program which is a pre-papering (prior to charges being filed) diversion program that affords parents a venue to openly share their challenges and attendance issues, the ability to communicate directly with key stakeholders (school officials) and receive linkage to appropriate community-based services.
[3] RCC § 22E-4601(c) currently states, "*Exclusions from liability.* An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience.

Commentary makes clear that it is the Commission's intent that this remain criminal behavior. OAG bases this understanding on the following explanation in the Commentary:

> Third, the revised contributing to the delinquency of a minor statute no longer includes as a discrete basis of liability encouraging or causing a minor to possess or consume alcohol. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor complainant to "[p]ossess or consume alcohol." The revised contributing to the delinquency of a minor statute prohibits assisting, encouraging, or soliciting a minor complainant to engage in conduct that constitutes a District "offense," which includes the underage possession of alcohol law in current D.C. Code § 25-1002. It is unnecessary to codify in the revised statute a provision that is specific to encouraging or causing a minor to possess or consume alcohol. This change improves the clarity of the revised statutes.

Their point is driven home in footnote 59, which states:

> Current D.C. Code § 25-1002 prohibits a person under 21 years of age from "purchas[ing], attempt[ing] to purchase, possess[ing], or drink[ing] an alcoholic beverage in the District, except as provided under subchapter IX of Chapter 7." D.C. Code § 22-1002(a). A violation of current D.C. Code § 25-1002 is a "misdemeanor," although the statute also states that "No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section." D.C. Code § 25-1002(a), (c)(4)(D). Although a minor is not subject to criminal prosecution, a violation of current D.C. Code § 25-1002(a) is still an "offense," and the RCC contributing to the delinquency of a minor statute treats it as such. Assisting, encouraging, or soliciting a minor complainant to engage in conduct that violates current D.C. Code § 25-1002(a) is sufficient for liability under the RCC contributing to the delinquency of a minor statute.

As noted above, OAG's concerns are not with the substance of the Commission's recommendation, but rather with the drafting. While it is true, that D.C. Code § 25-1002 (a) does not specifically state that it is not an "offense" for a person under 21 to possess or drink alcohol, it does limit the enforcement of actions against those persons to civil penalties. It could be argued that the language in D.C. Code § 25-1002 (a) that provides for civil penalties means that it is no longer an "offense" for a person who is under the age of 21 to possess or drink alcohol.[4] To forestall arguments that the plain meaning of the statute precludes the Court from looking at

[4] An offense has been defined as "A crime or misdemeanor; a breach of the criminal laws. *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306; *lilies v. Knight*, 3 Tex. 312; *People v. French*. 102 N. Y. 583, 7 N. E. 913; *State v. West*, 42 Minn. 147, 43 N. W. 845. It is used as a genus, comprehending every crime and misdemeanor, or as a species, signifying a crime not indictable, but punishable summarily or by the forfeiture of a penalty. In re *Terry (C. C.)* 37 Fed. 649." See https://thelawdictionary.org/offense/.

the legislative history, as contained in the Commentary, to conclude that it was the drafter's intent that this behavior remain criminal, OAG recommends that the text of RCC § 22E-4601(a)(3)(B) be redrafted to say, "Knowingly encourages the complainant to engage in specific conduct that, in fact, constitutes a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction."

OAG's final recommendation has to do expanding the explanation concerning OAG's lack of prosecutorial role in the new statute. While OAG does not disagree with the proposal, given the evolving nature of the analysis concerning the distribution of prosecutorial authority in the District[5], we believe that a fuller explanation is warranted. OAG proposes that the Commentary be amended as follows:

> Eighth, the revised contributing to the delinquency of a minor statute does not ~~assign~~ mention ~~prosecutorial authority to~~ the Office of the Attorney General for the District of Columbia (OAG) as having a prosecutorial role, which ~~makes it an offense that~~ leaves the United States Attorney for the District of Columbia (USAO) ~~prosecutes~~ as the sole prosecutor for all of the offenses contained in that statute. The current D.C. Code contributing to the delinquency of a minor statute states that OAG "shall" prosecute all violations that have a maximum term of imprisonment of six months, while USAO shall prosecute violations subject to higher sentences.[6] The legislative history for the current D.C. Code contributing to the delinquency of a minor offense indicates that the Council regarded it as a new offense,[7] and the sole rationale for assignment of prosecutorial authority to OAG was the likelihood that OAG would be involved in prosecution of the underlying violations by the minor.[8] However, the legislative history failed to

[5] See *In re Prosecution of Nicco Settles*, 218 A.3d 235 (D.C. 2019).

[6] The current D.C. Code contributing to the delinquency of a minor statute states that "The Attorney General for the District of Columbia, or his or her assistants, shall prosecute a violation of subsection (a) of this section for which the penalty is set forth in subsection (c)(1) of this section." D.C. Code § 22-811(e). The reference to paragraph "(c)(1)" appears to be an error. There is no paragraph (c)(1) in the current statute and subsection (b) codifies the penalties. Per paragraph (b)(1), all violations of the current D.C. Code contributing to the delinquency of a minor statute, except contributing, causing, etc., a minor to commit a felony, have a maximum term of imprisonment of 6 months, provided that the enhanced penalties for prior convictions, serious bodily injury, or death do not apply. D.C. Code § 22-811(b)(1) ("Except as provided in paragraphs (2), (4) and (5) of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 6 months, or both.").

[7] *See* Testimony of Robert J. Spagnoletti, Attorney General for the District of Columbia, Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006" at 27 ("The District does not have a law that prohibits contributing to the delinquency of a minor.").

[8] *Id.* at 28-29 ("The misdemeanor offense would be prosecuted by OAG and the felony offense would be prosecuted by the USAO. The rationale for this bifurcated system of prosecution is based on the likelihood that OAG would be involved in the criminal and/or civil prosecution of most of the underlying offenses that would give rise to a misdemeanor violation of this Act, while the USAO is better situated to prosecute the felony violations.").

note that, in 1963, the authority to prosecute the crime of contributing to the delinquency of a minor was provided to OAG (then Corporation Council) by Congress under D.C. Code §§ 11-1583, 11-1554. Public Law 88-241, December 23, 1963. D.C. Code § 11-1554 provided that "[t]he Juvenile Court has original and exclusive jurisdiction to determine cases of persons 18 years of age or over charged with willfully contributing to, encouraging, or tending to cause by any act or omission, a condition which would bring a child under the age of 18 years within the provisions of section 11-1551." Under D.C. Code § 11-1583 (a)(3), the Corporation Counsel of the District of Columbia or any of his assistants shall "prosecute cases arising under sections 11-1554 and 11-1556 and the sections specified by section 11-1557, in which a person 18 years of age or over is charged with an offense."

The Act Reorganizing the District of Columbia Courts, however, replaced the entirety of what was Title 11 of the D.C. Code, and created a Family Division in the Superior Court, which would handle, among others, cases of juvenile delinquency, paternity, support, and intra-family offenses (civil protective orders). Public Law 91-358, July 29, 1970 ("Title 11 of the District of Columbia Code is amended to read as follows" and did not move or restate 11-1551, 11-1554, 11-1557 in any other portion of the D.C. Code). Procedures related to the Family Division in the D.C. Superior Court and in particular, juvenile matters, were moved to Title 16 of the D.C. Code. *Id*. (renaming 11-1551 in 16-2303). While Public Law 91-358 did not specifically state that it was repealing sections 11-1554, 11-1556, and 11-1557, Congress repealed it, as those section did not appear in either Title 11 or 16 and the table in the 1973 version of the D.C. Code stated that these provisions were repealed by the Reorganization Act.

However, controlling DCCA case law based on the Home Rule Act precludes Council assignment of prosecutorial authority to OAG unless the offenses falls into one of the categories in D.C. Code § 23-101(a).[9] In contrast to current law, the revised contributing to the delinquency of a minor statute does not purport to assign any prosecutorial authority to OAG because doing so ~~appears~~ creates an argument that such assignment would ~~to~~ be a violation of District case law based on the Home Rule Act. While ~~There~~ is history of OAG enforcement of this offense, there is no other evidence that the current contributing to the delinquency of a minor statute meets or was intended to meet the exceptions to USAO prosecution for a penal statute in the nature of a police or municipal

[9] *See, generally: In re Crawley*, 978 A.2d 608 (D.C. 2009); *In re Hall*, 31 A.3d 453, 456 (D.C. 2011); and *In re Settles*, 218 A.3d 235 (D.C. 2019).

regulation, or otherwise. This change improves the enforceability and consistency of the revised statutes.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 9, 2020

SUBJECT: First Draft of Report #66 - Defense of Self, Others, or Property

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 #66, Defense of Self, Others, or Property.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-403. Defense of Self or Another Person

Paragraph (c) contains a nonexclusive list of factors that the factfinder shall consider in determining whether the law enforcement officer reasonably believed the conduct was necessary. Subparagraph (c)(4) states, "Whether the law enforcement officer increased the risk of a confrontation resulting in deadly force being used." OAG interprets this phrase to mean whether the officer chose to act in ways that increased the risk, rather that whether the law enforcement officer's mere presence increased the risk of confrontation. The former interpretation is in line with the lead in language in paragraph (c) that "…a factfinder shall include consideration of all of the following when determining whether the actor reasonably believed the conduct was necessary…" The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, A23-336, phrased this factor as "Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used." OAG recommends that the Commission model this factor

[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.

more closely to the language used in A23-336 to make clear that what is being evaluated is the officer's conduct, not their presence.

The remainder of OAG's recommendations address text in the Commentary. On the bottom of page 4 going into page 5, it states, "A person acting in the heat of passion caused by an assault may actually and reasonably believe something that seems unreasonable to a calm mind and does not necessarily lose a claim of defense or another person by using greater force than would seem necessary to a calm mind." It's true that reasonableness relies heavily on the actor's own perceptions, and those perceptions may be especially imperfect in the heat of the moment. *Lee v. United States*, 61 A.3d 655, 660 (D.C. 2013) makes that clear. It is unclear, however, what it means to "reasonably believe" something in the *heat of passion*. The heat of passion, after all, seems to indicate that passion has overtaken reason. Either the statutory text or the Commentary should clarify what a reasonableness inquiry would look like there.

Referring to paragraph (a), on page 5, it states, "Conduct is not necessary if the harm can be avoided by a reasonable 'legal alternative available to the defendants that does not involve violation of the law…'" Paragraph (a), however, does not incorporate this definition. Given the importance of that statement to the correct interpretation of the statute, OAG suggests that that sentence be used in paragraph (a).

On page 6, the Commentary explains subparagraph (b)(2)(B). Paragraph (b)(2) states, in relevant part, "The actor recklessly brings about the situation requiring the defense, unless, in fact …The actor's conduct that brought about the situation is speech only." The Commentary states, "Under subparagraph (b)(2)(B), the defense is still available to an initial aggressor who is engaging in speech only." [footnotes omitted] OAG recommends clarifying the comment. Someone "engaging in speech only", discounting menacing speech, is not an aggressor in any ordinary sense of that word. OAG recommends that the Commentary be amended to state, "Under subparagraph (b)(2)(B), the defense is still available to an actor who recklessly brings about the situation requiring the defense when the actor is engaging in speech only" (with the relevant footnotes added back in).

RCC § 22E-404. Defense of Property

On page 14, in referring to paragraph (a), on page 13, it states, "Conduct is not necessary if the harm can be avoided by a reasonable 'legal alternative available to the defendants that does not involve violation of the law…'" Paragraph (a), however, does not incorporate this definition. Given the importance of that statement to the correct interpretation of the statute, and consistent with OAG's recommendation to amend RCC § 22E-403, OAG suggests that that sentence be used in paragraph (a).

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 9, 2020

SUBJECT: First Draft of Report #67 - Entrapment, Duress, and Mental Disease or Defect Defenses

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 #67, Entrapment, Duress, and Mental Disease or Defect Defenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-501. Duress

Paragraph (a) states:

(a) *Affirmative defense*. It is an affirmative defense that, in fact:
(1) The actor reasonably believes another person communicated to the actor that the person will cause a criminal bodily injury, sexual act, sexual contact, or confinement to any person;
(2) The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to avoid the threatened criminal harm; and
(3) A reasonable person of the same background and in the same circumstances as the actor would comply.

[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.

While paragraph (a)(2) includes the phrase "to avoid the threatened criminal harm" paragraph (a)(1) does not mention "the threatened harm." Paragraph (a)(1) as written appears to refer to an open ended threat, not one that is premised on avoidance of the threatened harm if the actor violates the law. The first paragraph of Criminal Jury Instruction 9.300 DURESS states:

> [Name of defendant] must have had a reasonable belief that s/he would suffer immediate serious bodily injury or death if s/he did not [[commit] [participate in] the crime] [[leave] [fail to return to] a correctional institution][2] [emphasis added]

To make it clear that the defense of Duress only applies when the action is taken to avoid the threatened harm, OAG recommends that paragraph (a)(1) be redrafted to say, "The actor reasonably believes another person communicated to the actor that unless the actor commits the act constituting the offense the person will cause a criminal bodily injury, sexual act, sexual contact, or confinement to any person."

Paragraph (b) lists the exceptions to the defense. Subparagraph (1) states, "The person recklessly brings about the situation requiring a choice of harms." The phrase "brings about" is not defined in the text, nor is it explained in the Commentary.[3] OAG recommends that the Commentary describe the contours of that phrase and give examples of situations that fall within and without that requirement.

Subparagraph (b)(3) lists an exception when "The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability. The Commentary explains "Paragraph (b)(3) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified defense or exclusion from liability." Because, in general, a person may raise multiple defenses, including statutory ones, the Commentary should include examples of the applicability of this exception.

In the Commentary to subparagraph (a)(2) it states, "Conduct is not necessary if it can be avoided by a reasonable '[a] legal alternative available to the defendants that does not involve

[2] The full text of Instruction 9.300 DURESS is:
A person who commits [name of criminal act] because of duress is not guilty of that charge. Duress requires more than simply a fear for one's safety. It has [two] [three] equally important elements.

1. [Name of defendant] must have had a reasonable belief that s/he would suffer immediate serious bodily injury or death if s/he did not [[commit] [participate in] the crime] [[leave] [fail to return to] a correctional institution] [and]
2. [Name of defendant] must have had a reasonable belief that s/he had no reasonable opportunity to avoid the danger except by [[committing] [participating in] the crime] [[leaving] [failing to return to] the institution] [and]
3. [Name of defendant] must have immediately returned to custody once the threat of harm was no longer imminent.

[3] This phrase is repeated in subparagraph (b)(3).

violation of the law." [footnotes excluded] Given the importance of that statement to the correct interpretation of the statute, OAG suggests that that sentence be used in subparagraph (a)(2).[4]

In the Commentary to subparagraph (b)(4) it states, "For this offense, a defendant must not only prove that duress not only caused them to leave custody but also prove inhibited them from safely returning." [footnotes omitted] However, in *Stewart v. U.S.*, 370 A.2d 1374, 1376–77 (D.C. 1977), contained in footnote 13, the Supreme Court stated, that they "do not distinguish cases in which duress was directed at a defendant while in custody from those situations in which he was prevented from returning to custody following a temporary lawful absence." The Commentary should note that the applicability of the defense to situations where the person was granted a temporary absence and either fails to return or waits longer than reasonable to return.

RCC § 22E-503. Entrapment

The last paragraph of the Commentary pertaining to this offense states:

> …the District of Columbia Circuit has held that such a defense is available only if the alleged inducement communicated by the unwitting intermediary is the *same* inducement, directed at the *same* target as the inducement that the government agent directs the intermediary to communicate. Resolving this ambiguity, the revised statute requires that the conduct is the result of the same encouragement, inducement, or creative activity—that is, it does not apply where an intermediary deviates from the government's plan—but it does not require that the inducement be directed at the same target. [emphasis in original][footnotes omitted]

At the end of that quote is a footnote that presents a hypo. The hypo is:

> Consider, for example, a law enforcement officer who runs a sting operation to take down a fraudulent college admissions scheme. The officer arrests the owner of the business running the scheme and, by offering a plea bargain, persuades the owner to wear a wire and ask a desperate parent to sign up her child to participate. The parent subsequently agrees and then convinces her child to participate in the scheme. In this hypothetical the owner is a person acting directly at the encouragement of a law enforcement officer. The parent may raise an entrapment defense on the ground that the owner persuaded her (but must also satisfy subsection (b)). With respect to their child, the parent is a person acting indirectly at the encouragement of a law enforcement officer. The child may raise an entrapment defense on the ground that the parent persuaded her (but must also satisfy subsection (b)).

OAG does not believe that the hypo is correct. The statute captures indirect entrapment, but that indirect entrapment still has to be directed at a target set by the law enforcement officer, since the indirect entrapper still has to be acting at the law enforcement officer's direction. Applying this

[4] This is consistent with OAG's recommendation that that sentence, in the Commentary to RCC § 22E-403(a), Defense of Self or Another Person, be included in the text of that offense.

to the hypo, in order for the parent's entrapment of the child to fall under this defense, the parent would have to be entrapping the child at the officer's direction. It's not clear whether that that is what the hypo contemplates.

RCC § 22E-504. Mental Disease or Defect Affirmative Defense

Paragraphs (a) and (c) of this offense include the following:

(a) *Affirmative defense*. It is an affirmative defense in a criminal proceeding[5] that, in fact, as a result of a mental disease or defect, the actor lacked substantial capacity to:
    (1) Conform the actor's conduct to the requirements of the law; or
    (2) Recognize the wrongfulness of the actor's conduct…
(c) *Definitions*…
    (2) In this section, the term "mental disease or defect" means an abnormal condition of the mind, regardless of its medical label, that affects mental or emotional processes and substantially impairs a person's ability to regulate and control their conduct.

The Commentary, explains "Subsection (a) requires that the actor must be suffering a 'mental disease or defect,' a defined term, at the time the offense is committed. The disease or defect may affect either volitional control, under paragraph (a)(1), or cognitive understanding, under paragraph (a)(2). [footnotes omitted] [emphasis added] However, notwithstanding that paragraph (a) has an "or" between subparagraphs (1) and (2), when read carefully paragraph (a) seems to suggest that the actor must satisfy both in order to use this defense. To explain this point, we can put paragraph (a) into the form of a sentence. As a sentence, it says the actor "lacked substantial capacity to conform the actor's conduct to the requirements of the law or recognize the wrongfulness of the actor's conduct." [emphasis added] Anyone reading that sentence would read it to mean that if the actor can conform their conduct to the law, or can recognize the conduct's wrongfulness, the actor cannot satisfy the requirements of the defense. To clarify this paragraph, OAG suggests restructuring paragraph (a) to say:

(a) It is an affirmative defense … that, in fact, as a result of a mental disease or defect, the actor either:
    (1) Lacked substantial capacity to conform the actor's conduct to the requirements of the law; or
    (2) Lacked substantial capacity to recognize the wrongfulness of the actor's conduct.

OAG also notes an incongruity between the introductory portion of paragraph (a) and the definition in subparagraph (c)(2). If you substitute the definition of "mental disease or defect" from subparagraph (c)(2) into paragraph (a) for that phrase, you get, in relevant part:

[5] OAG would note that the other defenses included in the First Draft of Report #66 and the First Draft of Report #67 do not contain the phrase "in a criminal proceeding." Given this defense's placement in the criminal code, this phrase is superfluous and should be deleted. The phrase is also used in the first sentence of the Commentary, below the Explanatory Note, and should be deleted there as well.

(a) *Affirmative defense*. It is an affirmative defense in a criminal proceeding that, in fact, as a result of an abnormal condition of the mind … that affects mental or emotional processes and substantially impairs a person's ability to regulate and control their conduct, the actor lacked substantial capacity to…

(1) Recognize the wrongfulness of the actor's conduct… [emphasis added]

A person's failure to recognize the wrongfulness of their conduct, however, does not flow from their inability to regulate and control their conduct. OAG submits that the capacity to recognize the wrongfulness of conduct is distinct from the ability to regulate conduct. As originally drafted, suppose a person has a mental condition that that does not inhibit their ability to regulate and control their conduct, but does prevent them from recognizing the wrongfulness of that conduct. It would appear that this defense does not reach that person.

MEMORANDUM

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

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

From: Public Defender Service for the District of Columbia

Date: November 9, 2020

Re: Comments on First Draft of Report No. 63, Misrepresentation as a DC Entity; First Draft of Report No. 65, Contributing to the Delinquency of a Minor; First Draft of Report No. 66, Defense of Self, Others, or Property; and First Draft of Report No. 67, Entrapment, Duress, and Mental Disease or Defect Defenses

The Public Defender Service submits the following comments for consideration.

First Draft of Report No. 63, Misrepresentation as a District of Columbia Entity

PDS reiterates the comment it made at the CCRC's October 7, 2020 public meeting that the actor's intent to deceive as to their lawful authority should be rewritten to require an intent to deceive as to the actor's lawful authority *as a District of Columbia government entity*. As the Misrepresentation as a D.C. Entity offense is currently written, the following conduct would be violative.

> Dylan Collins engages in the business of collecting debts. His business is called *Dylan Collins Debt Collection*. Sometimes, he shortens it to *D.C. Debt Collection*. While entirely lawful when he first began his business, Collins knows his license to operate a business the District has expired. A prospective customer calls Collins. Collins answers, "DC Debt Collection." The caller says she is interested in a 12-month contract with a debt collection company to handle all of the debt collection in D.C. for her business. Among other questions, the caller specifically asks Collins: "Does Dylan Collins Debt Collection have all of the necessary licenses and permits to be able to carry out such a contract?" Collins, writing a note to himself to renew his license as soon as he gets off the phone, answers, "Absolutely."

Dylan Collins knowingly engages in the debt collection business and uses the words "D.C." in some of his business communications. In that call, he intended to deceive the caller as to his lawful authority to engage in the debt collection business; he did so with the intent to receive a 12-month contract, a business benefit; and in fact, the name "D.C. Debt Collection" would (arguably) cause a "reasonable person" (though this not this specific caller) to believe that Collins is a D.C. government entity. While arguably meeting every element of the offense as currently written, Collins utterly fails to commit the gravamen of the offense – that of, intentionally deceiving someone that he is a District of Columbia government entity for personal or business benefit. PDS proposes rewriting the offense

to clarify a requirement of a nexus between the intent to deceive and the lawful authority *to represent oneself as a D.C. government entity or representative*.

First Draft of Report No. 65, Contributing to the Delinquency of a Minor

1. PDS proposes eliminating Second Degree Contribution to the Delinquency of Minor. PDS agrees with Professor Butler's comments at the CCRC October 7, 2020 public meeting that this conduct is better addressed outside of the criminal legal system. While the offense does not appear to be directed at parents or at mothers specifically, PDS believes that is who prosecutors will target. It is difficult to imagine scenarios where law enforcement will have evidence to bring a case against a non-parent for knowingly assisting, encouraging, requesting or causing a minor to engage in chronic truancy or in the violation of a court order. On the other hand, it is quite easy to imagine scenarios where law enforcement will be able to build a case against the minor's parent(s). Prosecuting a minor's parent for contributing to the delinquency of a minor almost certainly means prosecuting mothers, as women are more often held accountable for the conduct of their children regardless of the family structure. Prosecuting a child's mother does nothing to solve the underlying problems that are causing truancy – whether they are problems related to the child's school placement or whether they are problems that are happening at home or with the physical or mental health of the child. A criminal legal system response in such instances will only aggravate the underlying problems and will create new ones with time and resources spent going to court instead of on solutions.

   In addition to the expected gender disparity, this offense will almost by definition have a race and class disparate impact. To sustain a charge of 2nd degree contributing to the delinquency of a minor, there must first be chronic truancy or a court order directed towards a child. Truancy correlates with poverty.[1] Indeed, "[p]overty … remains the driving factor for chronic absence."[2] As the wealth and income gap in the District falls starkly, though not at all surprisingly, along racial lines.[3] Thus, we can expect that Black

[1] *See* "Data Matters: Using Chronic Absence to Accelerate Action for Student Success" http://new.every1graduates.org/wp-content/uploads/2018/09/Data-Matters_083118_FINAL-2.pdf ("Our analysis also found that greater poverty can predict higher levels of absenteeism." at page 5.).

[2] "Groundbreaking Johns Hopkins analysis shows national scale of chronic student absence," Johns Hopkins School of Education (September 15, 2018), https://education.jhu.edu/2018/09/groundbreaking-johns-hopkins-analysis-shows-national-scale-of-chronic-student-absence/. *See also*, Annette Fuentes, "The Truancy Trap," *The Atlantic* (September 5, 2012) https://www.theatlantic.com/national/archive/2012/09/the-truancy-trap/261937/ ("Chronic absenteeism is how poverty manifests itself on school achievement. It isn't an argument for making truancy criminal."); Dana Goldstein (in conjunction with The Marshall Project), "Inexcusable Absences," The New Republic, March 6, 2015, https://newrepublic.com/article/121186/truancy-laws-unfairly-attack-poor-children-and-parents. ("The criminalization of truancy often pushes students further away from school, and their families deeper into poverty.").

[3] In 2016, the median household income of Black D.C. residents was less than one-third of the median household income of white D.C. residents, $38,000 compared to $126,000. See Tinsae

women in D.C. will pay the price if 2nd degree contributing to the delinquency of a minor based on truancy is codified. That alone makes it intolerable.

Similarly, Black women will pay the price if 2nd degree contributing to the delinquency of a minor based on the violation of a court order is codified. First, there must be a court order directed at a child. Violation of a court order will be racially disproportionate because of who is prosecuted in juvenile court. Black children are overrepresented in juvenile court. Using the demographics of DC public school students, which would already skew Black, shows that in the 2018-2019 school year, 66% of D.C. public school students were Black (non-Hispanic), 18% Latino, 10% white (non-Hispanic); and 4% were "other."[4] Compare that racial breakdown to the race of children interviewed by the Public Defender Service Defender Services Office to determine their eligibility for court appointed counsel.[5]

	Black	White	Hispanic/Latino	Race Not Specified
Feb 2020	78%	1%	10%	11%
Feb 2019	79%	0%	7%	12%
Feb 2018	85%	0%	8%	7%
Feb 2017	92%	2%	2%	3%

White children rarely end up in the system and are therefore almost never subject to court orders. Thus, white parents will almost never be charged with 2nd degree contributing to the delinquency of a minor. It is also incredibly unlikely that the parents in wealthy households with children who attend private schools would ever be charged – that truancy would likely be addressed through school psychologists, counselors, drug treatment or other affirmative supports rather than criminalization.

Not only should this second degree delinquency of a minor be eliminated because it will only serve to perpetuate the racism and classism of the District's criminal legal system, it is not a necessary tool for holding parents accountable. A "neglected child" includes a child "who is without proper parental care or control, subsistence, [or] *education* as required by law…"[6] Thus, while a child can be "in need of supervision" if they are "subject to

Gabriel, "Economic Inequality in DC Reflects Disparities in Income, Wages, Wealth, and Economic Mobility. Policy Solutions Should Too.," DC Fiscal Policy Institute Blog, August 6, 2018, https://www.dcfpi.org/all/economic-inequality-in-dc-reflects-disparities-in-income-wages-wealth-and-economic-mobility-policy-solutions-should-too/. In 2014 and 2014, white households in D.C. had a net worth 81 times greater than Black D.C. households. See Kilolo Kijakazi et al., "The Color of Wealth in the Nation's Capital," November, 1, 2016, https://www.urban.org/research/publication/color-wealth-nations-capital.

[4] *See* https://osse.dc.gov/page/data-and-reports-0. *See also* "Landscape of Diversity in D.C. Public Schools," D.C. Policy Center, December 17, 2018, https://www.dcpolicycenter.org/publications/landscape-of-diversity-in-dc-public-schools/.

[5] All children who are detained and brought to Superior Court are interviewed by DSO.

[6] D.C. Code § 16-2301(9)(A)(ii).

compulsory school attendance and habitually truant from school without justification,"[7] the parent can be charged with "educational neglect" for contributing to the child's habitual truancy. In addition, in all juvenile proceedings in Family Court, the court "shall" enter an order requiring a parent or guardian to participate in the rehabilitation process of a juvenile, "including … mandatory attendance at a juvenile proceeding, parenting class, counseling, treatment, or an education program," unless such an order would not be in the best interest of the child.[8] A parent's failure to comply with such an order is punishable by civil contempt of court.[9]

For all of the above reasons, PDS strongly recommends eliminating RCC §22E-4601(b) in its entirety.

2. PDS recommends rewriting first degree and, if it is not eliminated, second degree. As noted throughout the commentary, the proposed offense largely tracks accomplice liability at RCC § 22E-210 and the solicitation offense at RCC § 22E-302.[10] Thus, it is largely duplicative and has no place in a reform code written with a mandate to reduce overlap as a primary goal. If there is a place for such an offense in the RCC, however, it should be written so that it does not punish a person for speaking to a minor, even if that speech is to suggest that the minor engage in criminal behavior. Neither should the offense allow liability for speech knowingly made but without any intent for the speech to have an effect.

   PDS proposes changing the mental state required of the actor in (a)(3) and (b)(3) from *knowingly* to *purposefully*. It is not clear what it even means to "knowingly command," for example, as allowed at (a)(3)(C) and (b)(3)(C). As explained in the commentary, it means that the actor must be "practically certain that he or she commands … the [minor] to engage in or aid the planning or commission of specific conduct which, if carried out, will constitute specific conduct."[11] The "specific conduct" must be a District offense or an offense comparable to a District offense, but there is no mental state required for this circumstance. In other words, the government need only prove that the specific conduct, as a matter of law, is a District offense or a comparable one. So then is it the case that to violate the offense all the actor must *know* is that his speech is an instruction to do particular conduct? Does there have to be a chance that the minor will engage in that conduct and does the actor have to have some mental state with respect to that chance? Imagine a 20-year-old young man sees a 15-year-old girl walking down the street wearing a karate uniform with a black belt. He says: "Hey cool! A girl who can fight. That guy over there just bumped into me. Would you go give him a karate chop?" The chances are incredibly low that the teenager is going to assault a man at the request of a stranger, yet technically, the 20-year-old is "practically certain" that he has requested specific conduct. If *knowingly* means more in this context, the commentary must say so. PDS proposes that

[7] D.C. Code § 16-2301(8)(A)(i).

[8] D.C. Code § 16-2325.01(a).

[9] D.C. Code § 16-2325.01(c).

[10] *See e.g.*, Report No. 65 at 3, 4, and 5.

[11] Report No. 65 at 4. See also Report No.65 at 5 for second degree.

the adult should have to act purposefully and consciously desire that the minor engage in the conduct.

PDS further proposes adding an element requiring that the minor had to engage in the conduct or attempt to do so. It should not be a crime merely to suggest specific conduct which if carried out would constitute a crime. If the minor ignores the "command, request," or attempted persuasion, then the adult has not contributed to the delinquency of a minor. Speech that no one heeds is not corrupting and we should not send someone to prison for speech that is ignored.

3. If the CCRC does not eliminate the second degree of the offense, PDS recommends rewriting the definition of "chronic truancy," at RCC §22E-4601(g)(2), and adding to the commentary to explain more clearly that chronic truancy is being absent from school without a legitimate excuse after having already been absent from school without an excuse for at least 10 days. In other words, "chronic truancy" starts on the 11th day and assisting, encouraging, or commanding a minor to skip school on what would be the 10th day of unexcused absence would not be a violation of this law.
4. Finally, PDS recommends narrowing the merger restriction at RCC § 22E-4601(f)(4) to disallow merger of this offense with a conviction for the target offense, that is the offense the actor assisted, encouraged, or commanded the minor to commit. Prohibiting merger with any offense that arises from the same course of conduct is too broad. As currently written, the restriction would disallow merger of this offense with the almost identical offense of solicitation.[12] It would also disallow merger with a conviction for criminal abuse of a minor or criminal neglect of a minor or any other offense where liability rests on the actor being responsible for the health, welfare, or supervision of the minor. That is not to say that RCC § 22E-214 should necessarily require the merger of either degree of contributing to the delinquency of a minor with the examples provided; it is simply to say that there is no good policy reason to preclude the possibility of such merger.

First Draft of Report No. 66, Defense of Self, Others, or Property

PDS proposes modifications to the CRCC's codification of self-defense and defense of others that brings it into closer linguistic alignment with current law. Although the version proposed in the RCC is largely in *conceptual* alignment with current law, the use of different terms and a different structure may make it less recognizable to practitioners and judges in this formulation. The District's self-defense law has been developed through a long common law history.[13] It is a nuanced body of law and PDS has serious concerns that adopting new language and structure will obscure the statute's roots in that common law, confusing practitioners and upending the application of self-defense in the courtroom. The defense is employed in some of the most serious cases charged in Superior Court and typically requires a defendant to testify. In light of these concerns, PDS proposes a modification of the language at the core of the defense that will maintain more consistency across the language of current self-defense law. PDS has a number of additional requested modifications of RCC § 22E-403.

[12] RCC § 22E-302.

[13] *See Parker v. United States*, 155 A.3d 835, 839 (D.C. 2017).

1. Use of "Necessary"

   PDS has concerns about defining self-defense at RCC § 22E-403(a) as: "the actor reasonably believes that the conduct constituting the offense is necessary… to protect" the actor or another person." The use of "necessary" in addition to the legal requirement that the actor's conduct be reasonable both subjectively and objectively invites a jury to speculate about what was truly necessary under those circumstances and whether some alternative conduct was available to the actor. The use of the word "necessary" may build in a *duty* to retreat – if not as a matter of law, then as a matter of how the jury would analyze whether the conduct was "necessary," as in "required." Adding a duty to retreat is clearly contrary to the CCRC's intent and the language of the defense should not open the door to the jury engaging in such analysis. While the concept of necessity is connected to the concepts of excessive use of force and to imminence, necessity has never been an independent part of the District's standard and should not be injected into our standard now.

2. Duty to Retreat

   The RCC commentary seems to invite a jury to consider failure to retreat in cases that do not involve deadly force. [14] The DCCA has said that failure to retreat is uniquely relevant in deadly force cases. In *Dawkins v. United States*[15] the DCCA held that:

   "Where a defendant has presented any evidence that she acted in self-defense, the government bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." The government may carry this burden by showing that a defendant who employed deadly force either did not reasonably believe that she was in imminent danger of death or serious bodily injury, or "used greater force than she actually and reasonably believed to be necessary under the circumstances.

   These means of disproving a self-defense claim are available to the government whether a defendant employs nondeadly force or deadly force. *But in the deadly force context*, this court has acknowledged that a defendant's ability to retreat is a special consideration in assessing the viability of his self-defense claim. . .

   Accordingly, this court held in *Gillis* that a defendant's failure to retreat, *instead using deadly force*, is one factor the jury is "allow[ed]" to consider "together with all the other circumstances" in determining if the government has disproved beyond a reasonable doubt that a defendant acted in self-defense."

   Dawkins also notes that the weight of authority contradicts any notion that the law requires "anticipatory disengagement from every potential interpersonal conflict."[16] "It seems everywhere agreed that one who can safely retreat need not do so before using nondeadly

[14] Report No. 66 at 5, 8, and 10.

[15] *Dawkins v. United States*, 189 A.3d 223, 231–33 (D.C. 2018) (emphasis added) (citations omitted).

[16] *Id*. at 235.

force."[17] Therefore, the CRCC should clarify that the consideration of any ability to retreat is applicable only to the use of deadly force.

3. Dwelling Place

RCC 22E-403(b)(1)(B)(i) lowers the degree of harm or risk that must be perceived by the actor prior to using deadly force when the actor is "inside their own individual dwelling unit." This formulation provides more protection to individuals who live in single-family housing and would allow them to use deadly force in self-defense in the foyer of their single-family home, but would prohibit a similarly situated person from using deadly force under similar circumstances in the entryway or hallway in a multiple dwelling unit. The heightened need to protect oneself in one's own home should not be differentiated based on income level and type of home. PDS recommends allowing this heightened level of action for individuals in common space of their multi-unit housing as long as the defensive conduct is against someone who is not also a resident of the multi-unit housing.

4. Provocation

RCC § 22E-403 prohibits self-defense where "the actor recklessly brings about the situation requiring the defense," with exceptions for withdrawal and where the actor's conduct "that brought about the situation is mere speech." The RCC language is a slight modification of the infamous case of *Laney v. United States.*[18] *Laney* held that a Black man on his way to work, accosted on the street by an armed lynch mob shouting "kill the n*," forfeited his right to defend himself by going out into the street.[19] The provocation doctrine as derived from *Laney* was that an individual forfeited self-defense if he had "reason to believe that his presence there would provoke trouble."[20] The *Laney* opinion has been uniformly panned by legal scholars, who have called *Laney* racist, overbroad, unworkable, and violative of "our collective sense of justice."[21]

Laney is an embarrassment to the District. The doctrine it established cannot be divorced from its racist roots; that it is so contrary to almost all other jurisprudence in this country should be taken as evidence that had the facts of the case been different – had the race of the defendant or of the decedent been different – then the decision, and the development of the District's provocation jurisprudence, would also have been different. Frankly, PDS was disappointed that the CCRC

[17] *Id*. at 235 citing, LAFAVE, SUBST. CRIM. L. § 10.4(f) (3d ed.); *accord Higgenbottom v. United States*, 923 A.2d 891, 899 n.7 (D.C. 2007).

[18] *Laney v. United States*, 294 F. 412 (D.C. Cir. 1923).

[19] *Id.* at 413–14.

[20] *Id.* at 414.

[21] José Felipé Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. Balt. L. Rev. 313, 318 (2006) (noting "obvious racial overtones of [*Laney*]");John D. Moore, Note, *Reasonable Provocation: Distinguishing the Vigilant from the Vigilante in Self-Defense Law*, 78 Brook. L. Rev. 1659, 1685–86 (2013) (*Laney* "cannot be accepted as a workable principle"); *see also* Joshua D. Brooks, Note, *Deadly-Force Self-Defense & the Problem of the Silent, Subtle Provocateur*, 24 Cornell J.L. & Pub. Pol'y 533, 565 (2015) (*Laney* "impermissibly supports a bully's control over another person's freedom"); Margaret Raymond, *Looking for Trouble: Framing & the Dignitary Interest in the Law of Self-Defense*, 71 Ohio St. L.J. 287, 307 (2010) (criticizing *Laney*'s "racist views of autonomy, dignity and privilege"); Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 Va. L. Rev. 1, 12 (1985) (*Laney* rule unfairly punishes negligence the same as a malicious intent to kill).

did not plainly and vehemently disavow *Laney*. While the use in the proposed statute of the phrase "recklessly brings about the situation requiring the defense" adds some affirmative action prior to the forfeiture of self-defense, the requirement remains vague and does not require purposeful conduct by the actor. Rather than modifying *Laney*, the CRCC should bring the District's provocation doctrine in line with other jurisdictions. In the commentary, the CCRC in no uncertain terms should repudiate *Laney* and confirm that neither the *Laney* decision nor its progeny has any role in shaping the RCC provocation doctrine.

Instead of the current draft proposal, the CRCC should adopt a purpose-based standard for provocation and come into line with nearly all other states, the Model Penal Code, and Supreme Court jurisprudence.[22] The vast majority of states—at least 44—do not permit forfeiture of self-defense unless the defendant provokes violence on purpose or intentionally.[23] Six states require wrongful, affirmative conduct to forfeit self-defense, such as forcibly entering a home or a robbery, that could only be expected to provoke a violent response.[24] Some jurisdictions require an affirmative provocative act *in addition* to the intent to provoke.[25]

The drafters of the Model Penal Code also selected a purpose-based standard for forfeiture: self-defense is unavailable to a person who, "with the *purpose* of causing death or serious bodily injury, provoked the use of force against himself in the same encounter."[26]

A purpose-based standard would also be consistent with long-standing Supreme Court case law. Around the turn of the twentieth century, the Supreme Court decided a series of cases that have collectively been dubbed "the Self-Defense Cases" and remain "precedents for any court which must consider common law self-defense issues."[27] In the Self-Defense Cases, the Supreme Court held that a person forfeits self-defense by provocation only if he has a purpose to provoke violence. For instance, in *Beard v. United States*,[28] the Court held that a person does not forfeit self-defense unless he provokes violence purposefully. In that case, Beard, armed with a shotgun, approached three men with whom he was involved in a property dispute, one of whom had threatened to kill him. Beard was attacked, and killed one of his adversaries.[29] The Supreme Court held that it was error for the trial judge to have instructed the jury on forfeiture of self-defense by provocation because "[t]here was no evidence tending to show that Beard went from his dwelling house to [the three men] for the *purpose* of provoking a difficulty, or with the *intent*

[22] See attached chart.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] Model Penal Code § 3.04(2)(b)(i) (emphasis added).

[27] David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted A Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 Am. J. Crim. L. 293, 298–99, 325 (2000).

[28] *Beard v. United States*, 158 U.S. 550 (1895).

[29] *Id.* at 552–53.

of having an affray."[30] Similarly, in *Thompson v. United States*[31], Thompson encountered the decedent, who had threatened him, while running an errand; Thompson was concerned enough by that encounter to arm himself for his return past the same spot.[32]. But he did not forfeit self-defense: "Certainly the mere fact that the accused used the same road [where he knew he would see the decedent] would not warrant the inference that his return was with the *purpose* of provoking an affray, particularly as there was evidence that this road was the proper and convenient one."[33]

The RCC's standard of reckless provocation continues *Laney's* reliance on a vague actus reus of "bringing about the situation" and fails to account for all the ways that individuals may have to disregard risks of violence in order to go about their lives – to live in their communities, to go to work, to see their families. This standard puts an unfair onus on individuals, that will disproportionately be borne by the District's Black residents, to avoid situations that pose a risk of violence as a result of merely residing in a neighborhood where crime and violence are more prevalent.

5. Withdrawal

   RCC § 22E-403(b)(2)(C) applies where the defendant is the initial aggressor but then "withdraws or makes reasonable efforts to withdraw from the location." Requiring an individual to withdraw from the location is too narrow a standard for withdrawing from conflict. An individual may effectively withdraw from a conflict and communicate the withdrawal without leaving a location. For example, if the actor starts a fight with another person at school, and then communicates his unequivocal withdrawal from the fight, the actor should not also have to leave school in order to regain a right of self-defense if the other person refuses to accept the withdrawal and attacks the actor. Withdrawing from the conflict, rather than the location, should be sufficient.

6. Nature

   PDS objects to the use of the word "nature" as vague. PDS does not understand, and the commentary does not explain, what it would mean to determine whether the "nature" of the actor's conduct – as opposed to just its timing and degree – was reasonable in light of the perceived risk of harm.

7. Standards for Law Enforcement

   PDS suggests that the CRCC develop use of force standards for non-deadly force by law enforcement officers that include many of the considerations required for deadly force including whether the officer engaged in de-escalation measures and whether the officer increased the risk of confrontation. Further, use of deadly force by a law enforcement officer should be permissible only in response to an imminent threat. While noting PDS's objection to the use of "necessary," the broader standard of "necessary in its timing" may be suitable

[30] Id. at 558 (emphasis added).

[31] *Thompson v. United States*, 155 U.S. 271 (1894).

[32] *Id.* at 274-76.

[33] *Id.* at 278.

for actors who are not officers, but law enforcement officers should be held to a standard of absolute imminence given their training, the availability of back-up, and the abundance of resources to address situations that are not absolutely imminent without killing people.

Suggested statutory language follows:

Defense of Self or Another Person

(a) *Defense*.
- (1) It is a defense that
  - (A) The actor, in fact, believes that they or another person are in danger of a physical contact, bodily injury, sexual act, sexual contact, confinement, or death;
  - (B) The actor has reasonable grounds for their belief; and
  - (C) The actor's conduct constituting the offense was reasonable in its timing and degree.
- (2) Retreat is a factor in the reasonableness of the actor's response only when the actor has used or attempted to use deadly force.

(b) *Exceptions*. This defense is not available when:
- (1) In fact, the actor uses or attempts to use deadly force, unless the actor:
  - (A) All
    - (i) The actor, in fact, believes that they or another person are in danger of a serious bodily injury, sexual act, confinement, or death;
    - (ii) The actor has reasonable grounds for their belief; and
    - (iii) The actor's conduct constituting the offense was reasonable in its timing and degree; or
  - (B) All
    - (i) The actor, in fact, believes that they or another person are in danger of a serious of a physical contact, bodily injury, sexual act, sexual contact, confinement or death;
    - (ii) The actor has reasonable grounds for their belief; and
    - (iii) Is inside their own individual dwelling unit or, as against a person who, in fact, is not a co-occupant of the multi-unit dwelling, is in a communal area of their multi-unit dwelling that is secured against the public.
- (2) While acting with the purpose to provoke, the actor engages in an unlawful affirmative act that would induce a reasonable person in the passion of the moment to lose self-control and commit a violent or lethal act on impulse and without reflection unless, the actor withdraws or makes reasonable efforts to withdraw from the conflict; or
- (3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.

First Draft of Report No. 67, Entrapment, Duress, and Mental Disease or Defect Defenses

Duress

PDS recommends removing the provision at RCC § 22E-501(b)(3) that prevents a defendant from presenting a duress defense to a jury if the conduct constituting the offense is expressly addressed by another available defense. A defendant, consistent with their Sixth Amendment rights, should be able to present evidence of all applicable defenses and to have all available defenses go to the jury. There is no fair basis for depriving a defendant of the right to have a jury consider the entire circumstances of their case. Further, this limitation is particularly unjust given that the government is allowed to present various theories of liability, such as conspiracy and aiding and abetting in the same trial. The government is not limited in its presentation of evidence and the defense should not be either.

Entrapment

PDS recommends defining "predispose" in the text of the statute, using the explanation in the commentary. That is, CRCC should add the following definition to subsection (c) of RCC § 22E-503: "'Predisposed' means the defendant was ready and willing to commit the offense whenever an opportunity presented itself."[34]

Mental Disease or Defect

1. PDS objects to the use of the word "defect." It is antiquated, offensive, and stigmatizing. PDS strongly urges the CCRC to adopt a term that recognizes neurological differences without disparaging those differences. PDS recognizes that the term should be a defined legal term, not a psychiatric or neurological term.[35] PDS proposes using the phrase "mental disease or atypical mental condition" instead.
2. PDS requests that CCRC note in the commentary the reference in RCC § 22E-504 to D.C. Code § 24-501 was procedural in nature only. As a review of D.C. Code § 24-501 is beyond the mandate of the Commission, the CCRC takes no position on whether the statute would or would not benefit from reform and the reference to the statute is not meant to imply otherwise.
3. PDS objects to the categorical statement in the commentary that mental disease or [atypical mental condition] "does not include voluntary intoxication." The statement, and accompanying footnote, is strikingly at odds with the RCC approach to voluntary intoxication and how it "excuses" criminal behavior. While the CCRC might decide that voluntary intoxication should not serve as "the basis" for a mental disease or [atypical mental condition], it should not go so far as to imply that voluntary intoxication has no

[34] *See* Report No. 67 at 10.

[35] "While medical evidence is highly relevant to the question of the existence of a mental disease or defect, the provision that this definition relates to 'any abnormal condition of the mind, *regardless of medical label*' specifies that the legal standard for a relevant mental incapacitation is not identical to the medical definition of a mental disease or defect." Report No. 67 at 16.

relevance in the manifestation of a person's mental disease or [atypical mental condition] in a particular case. At a minimum, PDS urges that the commentary clarify that while voluntary intoxication cannot serve as the basis for the mental disease or [atypical mental condition], that is not to say that an actor's mental disease or atypical mental condition is irrelevant when, pursuant to RCC § 22E-209, a factfinder is considering whether the actor's intoxication negates the existence of a culpable mental state.

4. PDS recommends eliminating subsection (d). Including it implies that the court, as a matter of settled and static law, has some "ability" *sua sponte* to order a psychiatric examination or to raise a mental disease or [atypical mental condition] defense. The commentary does little to explain the contours of this ability or even the constitutional or statutory basis for it. The subsection is unnecessary. PDS does not object to the commentary noting that RCC § 22E-504 is independent of and not meant limit any authority the court might have to order a psychiatric examination or to raise a mental disease or [atypical mental condition] defense.

PROVOCATION LAW BY JURISDICTION

Jurisdictions that require an intent or purpose to provoke violence for forfeiture of self-defense			
Alabama	Ala. Code § 13A-3-23(c)(1)	Iowa	Iowa Code Ann. § 704.6(2)
Alaska	Alaska Stat. Ann. § 11.81.3309(a)(2)	Kansas	Kan. Pattern Instructions Crim. 52.240
Arizona	*State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963)	Kentucky	Ky. Rev. Stat. Ann. § 503.060(2)
Arkansas	Ark. Code Ann. § 5-2-606(b)(1)	Louisiana	*State v. Short*, 46 So. 1003, 1006 (La. 1908)
California	Cal. Crim. Jury Instruction 3472	Maine	Me. Rev. Stat. tit. 17-A, § 108(2)(C)(1)
Colorado	Colo. Rev. Stat. Ann. § 18-1-704(3)(a)	Maryland	*Gunther v. State*, 179 A.2d 880, 882 (Md. 1962)
Connecticut	Conn. Gen. Stat. Ann. § 53a-19(c)(1)	Mississippi*	*Patrick v. State*, 285 So. 2d 165, 169 (Miss. 1973)
Delaware	Del. Code Ann. tit. 11, § 464(e)(1)	Missouri	*State v. Evans*, 28 S.W. 8, 11 (Mo. 1894)
Florida	*Barnes v. State*, 93 So. 2d 863, 864 (Fla. 1957)	Montana	Mont. Code Ann. § 45-3-105(2)
Georgia	Ga. Code Ann. § 16-3-21(b)(1)	Nebraska	Neb. Rev. Stat. § 28-1409(4)(a)
Hawaii	Haw. Rev. Stat. § 703-304(5)(a)	Nevada	*Johnson v. State*, 551 P.2d 241, 242 (Nev. 1976)
Idaho[1]	*State v. Livesay*, 233 P.2d 432, 435 (Idaho 1951)	New Hampshire	N.H. Rev. Stat. Ann. § 627:4(III)(c)
Illinois	Ill. Pattern Jury Instructions-Crim. 24-25.11	New Jersey	N.J. Stat. Ann. § 2C:3-4(b)(2)(a)
Indiana	Ind. Code Ann. § 35-41-3-2(g)(2)	New Mexico	*State v. Cochran*, 430 P.2d 863, 864–65 (N.M. 1967)

[1] An asterisk indicates states that require an affirmative unlawful or provocative act in addition to an intent to provoke for forfeiture of self-defense.

New York	N.Y. Penal Law § 35.15(1)(a)	South Dakota	*State v. Means*, 276 N.W.2d 699, 701–02 (S.D. 1979)
North Carolina	*State v. Sanders*, 281 S.E.2d 7, 14–15 (N.C. 1981)	Tennessee	*Floyd v. State*, 430 S.W.2d 888, 890 (Tenn. Crim. App. 1968)
North Dakota	N.D. Cent. Code Ann. § 12.1-05-03(2)(a)	Texas*	*Smith v. State*, 965 S.W.2d 509, 513–14 (Tex. Crim. App. 1998)
Ohio	*State v. Melchior*, 381 N.E.2d 195, 200 (Ohio 1978)	Utah	Utah Code Ann. § 76-2-402(2)(a)(i)
Oklahoma*	Okla. Uniform Jury Instructions-Crim. 8-50	Washington	*State v. Wasson*, 772 P.2d 1039, 1040 (Wash. Ct. App. 1989)
Oregon	Or. Rev. Stat. Ann. § 161.215(1)	West Virginia	*State v. Bowyer*, 101 S.E.2d 243, 249 (W. Va. 1957
Pennsylvania	18 Pa. Cons. Stat. Ann. § 505(b)(2)(i)	Wisconsin	Wis. Stat. Ann. § 939.48(2)(c)
Rhode Island	*State v. Hanes*, 783 A.2d 920, 926 (R.I. 2001)	Wyoming	*State v. Bristol*, 84 P.2d 757, 763–64 (Wyo. 1938)

Jurisdictions that require wrongful, affirmative conduct for forfeiture of self-defense			
Massachusetts	*Com. v. Chambers*, 989 N.E.2d 483, 489–90 (Mass. 2013)	South Carolina	*State v. Williams*, 733 S.E.2d 605, 609 (S.C. Ct. App. 2012)
Michigan	*People v. Bailey*, 777 N.W.2d 424, 425–26 (Mich. 2010)	Virginia	*Bausell v. Com.*, 181 S.E. 453, 461–62 (Va. 1935)
Minnesota	*State v. Edwards*, 717 N.W.2d 405, 412 (Minn. 2006) (plurality); *State v. Gardner*, 104 N.W. 971, 975 (Minn. 1905)	Vermont	Vt. Model Crim. Jury Instructions CR07-091

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #63–67	Date: November 9, 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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #63–67. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #65—Contributing to the Delinquency of a Minor

RCC § 22E-4061. Contributing to the Delinquency of a Minor.

1. USAO recommends that the RCC clarify that the Developmental Incapacity Defense would not preclude liability for an adult defendant under this provision.

At the October 7, 2020, Advisory Group meeting, the Advisory Group members discussed adding a provision to clarify that the Developmental Incapacity Defense would not preclude liability for an adult defendant under this provision. The RCC Developmental Incapacity Defense, as currently drafted, provides that a child under the age of 12—or 14, under certain circumstances—does not commit an offense. RCC § 22E-505. The CCRC clarified that, even if a child defendant legally could not be prosecuted for the underlying conduct due to their age or other developmental incapacity, liability should still attach under this provision for an adult who contributes to that child's delinquency. For example, if an adult defendant were charged with contributing to the delinquency of an 8-year-old child, the adult could be prosecuted, even if the child legally could not be prosecuted for the underlying conduct. To ensure liability under this statute, USAO recommends that the CCRC clarify this point.

Similarly, USAO recommends clarifying that D.C. Code § 25-1002(c)(4)(D) would not exclude liability for an adult defendant providing alcohol to a minor. At the November 4, 2020, Advisory Group meeting, the CCRC clarified that, even if a person under the age of 21 could not be charged with a criminal offense for possessing or drinking an alcoholic beverage, liability

[1] This review was conducted under the understanding that the structure of the code reform process allows the members of the CCRC 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.

should still attach under this provision for an adult who contributes to a minor's delinquency by providing them with alcohol. D.C. Code § 25-1002(c)(4)(D) states: "No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section." Because this statute makes it only a civil offense—not a criminal offense—for a minor to possess alcohol, under the plain language of the RCC statute, it is arguable whether this would "constitute a District offense." Moreover, it is unclear whether this offense would constitute a "misdemeanor offense" for purposes of the RCC penalty provision. To ensure liability under this statute, USAO recommends that the RCC clarify this point.

2. USAO recommends removing subsection (c).

Subsection (c) provides: "An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience." Although this tracks current law, *see* D.C. Code §§ 22-811(a)(5), (a)(7), it is unclear what would constitute "civil disobedience." USAO is not aware of any legislative history or case law that would elucidate the definition of "civil disobedience" in this statute.

3. USAO recommends, in subsection (f)(1), adding the words "or, if carried out, would constitute."

With USAO's changes, subsection (f)(1) would provide:

"First degree contributing to the delinquency of a minor is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of X], or both, when the complainant's conduct, in fact, constitutes or, if carried out, would constitute a District offense that is a felony, or a comparable offense in another jurisdiction."

This language tracks the language in subsection (a)(3)(C). Liability for First Degree Contributing to the Delinquency of a Minor is based on the defendant encouraging/assisting the complainant with committing an offense, or commanding/requesting/trying to persuade the complainant to engage in conduct that, if carried out, would constitute an offense. Because liability is based primarily on the defendant's actions in commanding the complainant to engage in certain conduct—not the complainant's actions—felony liability should attach where the defendant is trying to command the complainant to engage in felony-level conduct, regardless of whether the complainant, in fact, engages in such conduct.

First Draft of Report #66—Defense of Self, Others, or Property

1. USAO strongly opposes eliminating the imminence or immediacy requirement for the use of force in self-defense.

The RCC's proposal would make the District an extreme outlier by eliminating the requirement that a harm be immediate or imminent for a person to lawfully employ force in self-defense. District law has included such a requirement since at least 1912. *See Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912). The RCC's proposal removes this imminence

requirement, noting the Model Penal Code's commentary on Necessity: "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." *See* Model Penal Code § 3.02 cmt. at 17 (1985).

However, when applied to the use of force in self-defense, the MPC's commentary seems particularly inapt. Without an imminence requirement, B may arguably be justified in simply killing A (as opposed to taking his car) despite the fact that the threatened harm will not occur for another three weeks and that B may have many opportunities to escape the threatened harm without the use of violence (such as taking A's car and leaving). Eliminating the imminence requirement gives a green light to the preemptive use of violence in resolving private disputes. It is inconsistent with life in an ordered, civilized society. Rather, it draws from some of the darkest chapters of human experience—the vendetta, the blood feud, and vigilante justice.

Perhaps because of this, every jurisdiction that has fully adopted the Model Penal Code has maintained a requirement of imminence or immediacy for the use of force in self-defense.[2] These jurisdictions do not stand alone, as "most of the modern codes require that the defendant reasonably perceive an 'imminent' use of force." Wayne R. LaFave, 2 Subst. Crim. L. § 10.4(d) (3d ed.). LaFave finds the reasoning for such a requirement to be compelling: "As a general matter, the requirement that the attack reasonably appear to be imminent is a sensible one. If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open

[2] *Diggs v. State*, 168 So.3d 156, 161 (Ala. Crim. App. 2014); *Ha v. State*, 892 P.2d 184, 191 (Alaska App. 1995); *State v. Buggs*, 806 P.2d 1381, 1385 (Ariz. App. 1990); *Stalnaker v. State*, 437 S.W.3d 700, 704 (Ark. App. 2014); *People v. Janes*, 982 P.2d 300, 304 (Colo. 1999); *State v. Hargett*, 229 A.3d 1047, 1063 (Conn. App. 2020); *Lewis v. State*, 144 A.3d 1109, 1117 (Del. 2016); Hawai'i Revised Statutes § 703-304 ("Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion."); *People v. Willis*, 577 N.E.2d 1215, 1220 (Ill. App. 1990); *White v. State*, 726 N.E.2d 831, 834 (Ind. App. 2000); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988); *Commonwealth v. Bennett*, 553 S.W.3d 268, 271 (Ky. App. 2018); *State v. Smith*, 472 A.2d 948, 950 (Me. 1984); *State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999); *State v. Goodine*, 196 S.W.3d 607, 620 (Mo. App. 2006); *State v. King*, 304 P.3d 1, 6 (Mont. 2013); *State v. Chen*, 813 A.2d 424, 428 (N.H. 2002); *State v. Aguiar*, 730 A.2d 463, 465 (N.J. Super. Ct. 1999); McKinney's Penal Law § 35.15(1) (N.Y.) (Subject to certain exceptions, "A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person".); *State v. Leidholm*, 334 N.W.2d 811, 816 (N.D. 1983); *State v. Thomas*, 673 N.E.2d 1339, 1342 (Ohio 1997); Oregon Revised Statutes § 161.209. ("Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose."); *Commonwealth v. Grove*, 526 A.2d 369, 373-75 (Pa. Super. Ct. 1987) (rejecting argument that enactment of Model Penal Code changed Pennsylvania common law requiring an imminent threat of death or serious bodily injury to justify self-defense instruction); *State v. Bruder*, 676 N.W.2d 112, 116 (S.D. 2004); *State v. Leaphart*, 673 S.W.2d 870, 873 (Tenn. App. 1983); *McKee v. State*, 785 S.W.2d 921, 926 (Tex. App. 1990); *State v. Lucero*, 283 P.3d 967, 969 (Utah App. 2012); *State v. Bradley*, 10 P.3d 358, 361 (Wash. 2000); *State v. Head*, 648 N.W.3d 413, 430 (Wis. 2002).

to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent." *Id.*[3]

Ha v. State, an Alaska Court of Appeals case, shows the danger of eliminating an imminence or immediacy requirement. *See* 892 P.2d 184 (Alaska App. 1995). Defendant Ha, a commercial fisherman, was violently assaulted one evening by another fisherman when both were aboard a fishing vessel. *Id.* at 186. Following the assault, the defendant could not sleep, as he relived the violent assault he had just suffered. *Id.* at 186–87. The following morning, the defendant armed himself with a rifle and left the boat to look for the other fisherman. *Id.* at 187. At 1:30 that afternoon, the defendant found him, walking home from the grocery store, carrying a bag of groceries. *Id.* The defendant shot him seven times in the back, killing him instantly. *Id.*

The trial court did not provide a self-defense instruction to the jury, in part because the evidence did not show that the defendant was in imminent risk of harm from the initial aggressor. *Id.* at 188. On appeal, the defendant argued that this failure to instruct was erroneous because the Alaska statute did not specifically include an imminence requirement. The appellate court noted that the defendant's fear of the other fisherman was entirely reasonable. *Id.* at 191. The victim was a violent person "who nursed grudges" and "came from a violent, criminal clan." *Id.* But the appellate court found that "a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy." *Id*. The court held that there must be an imminent threat of harm to the defendant to justify a self-defense instruction, despite the Alaska statute's silence on that point. *Id.* at 194.

In many homicides in the District of Columbia, the defendant *has* reason to fear the decedent, from some past interaction, beef, or dispute. Eliminating the requirement that the defendant fear an imminent threat of harm to justify a self-defense instruction will give license in too many instances for aggrieved individuals to take justice into their own hands and preemptively kill an enemy. And as neighborhood beefs escalate, more and more innocent men, women, and children will be caught in the cross fire and killed or seriously injured.[4] USAO therefore urges the CCRC to include an imminence or immediacy requirement in the proposed self-defense statute.

[3] LaFave also lays out the following scenario: "Suppose *A* kidnaps and confines *D* with the announced intention of killing him one week later. *D* has an opportunity to kill *A* and escape each morning as *A* brings him his daily ration. Taken literally, the *imminent* requirement would prevent *D* from using deadly force in self-defense until *A* is standing over him with a knife, but that outcome seems inappropriate." Wayne R. LaFave, 2 Subst. Crim. L. § 10.4(d) (3d ed.). The proposed language in the self-defense statute would address this scenario, however, because it permits a person to use a reasonable amount of force not just to repel a deadly assault, but also in the face of "confinement." *See* First Draft of Report #66, RCC § 22E-403(a).

[4] *See* Fatimah Fair, "In some parts of D.C., the worry isn't on getting into college but being caught in crossfire," *Washington Post*, February 7, 2020, available at https://www.washingtonpost.com/opinions/local-opinions/in-some-parts-of-dc-the-worry-isnt-on-getting-into-college-but-being-caught-in-crossfire/2020/02/06/32f5b2cc-4798-11ea-bc78-8a18f7afcee7_story.html, last visited November 6, 2020.

First Draft of Report #67—Entrapment, Duress, and Mental Disease or Defect Defenses

RCC § 22E-501. Duress

1. USAO recommends limiting this defense to situations where the threatened harm is imminent or immediate.

The RCC recognizes that the proposal to remove an imminence/immediacy requirement would be a change in law, and that current District case law requires a reasonable belief that the actor would suffer immediate harm. (Commentary at 3 & n.14 (citing *McClam v. United States*, 775 A.2d 1100, 1104 (D.C. 2001). For the reasons stated above with respect to the RCC's proposal to remove the imminence/immediacy requirement for self-defense, USAO similarly opposes removing the imminence/immediacy requirement for duress.

2. USAO recommends that this defense contain a proportionality requirement.

USAO recommends modifying subsection (a)(2) as follows:

"(2) The actor reasonably believes the conduct constituting the offense is necessary and proportionate, in its timing, nature, and degree, to avoid the threatened criminal harm;"

USAO recommends that this defense create a proportionality requirement that the harm to be avoided be objectively worse than the harm committed. The actor should reasonably believe both that the offense is necessary and that the offense is proportionate to avoid the threatened criminal harm. This is particularly true in light of the fact that the RCC's proposal is no longer limited to "serious bodily harm or death," which allows the possibility of a far wider range of behavior to invoke this defense. For example, if person A threatens to punch person B in the face unless person B kills person C, it would be absurd to allow person B to claim duress as a complete defense to the murder of person C. Subsection (a)(3) may permit an argument that a reasonable person in the situation of person B would not have murdered person C, because the harm that person B committed is disproportionate to the harm that he was trying to avoid. To eliminate any ambiguity on this point, however, USAO recommends that the statute expressly include a proportionality requirement.

3. USAO recommends clarifying subsection (a).

As currently drafted, under subsection (a)(1), an actor must reasonably believe that another person communicated to the actor that the person will cause bodily injury, etc., and under subsection (a)(2), the actor must reasonably believe the conduct is necessary to avoid the threatened harm. It is ambiguous, however, whether an actor must also reasonably believe that the harm will occur. The Redbook Jury Instruction for Duress states the first element of duress as: "[Name of defendant] must have had a reasonable belief that s/he would suffer immediate bodily injury or death…" Criminal Jury Instructions for the District of Columbia, No. 9.300 (5th ed. 2019). The RCC does not state that this is a change in law, so, consistent with current law, the RCC appears to have intended that an actor must reasonably believe that the harm will, in fact, occur. To clarify this point and eliminate any potential ambiguity, USAO recommends

clarifying subsection (a) to provide that the actor must also reasonably believe that the harm will occur.

4. USAO recommends including the word "death" in subsection (a)(1).

USAO recommends that the list of harms in subsection (a)(1) include "death." This is likely a typographical error, and it is appropriate to include it here because acting under threat of death would clearly count as a duress situation.

RCC § 22E-504. Mental Disease or Defect Affirmative Defense.

1. USAO recommends the following modifications to subsection (b):

(a) *Effect of Defense.* An actor who is ~~not guilty by reason of~~ acquitted solely on the ground of mental disease or defect shall be ~~civilly~~ committed under D.C. Code § 24-501.

USAO recommends clarifying that this commitment occurs when the defendant is "acquitted solely on the ground of mental disease or defect." This is consistent with D.C. Code § 24-501(d)(1), which provides: "If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release. . ."

Further, commitment following an acquittal by reason of insanity is not a civil commitment, but rather a form of criminal commitment. *See Brown v. United States*, 682 A.2d 1131 (D.C. 1996). To clarify this, USAO recommends removing the word "civilly" so that the statute provides simply "committed."

2. USAO recommends revising the definition of "mental disease or defect" in subsection (c)(2) to be consistent with the current Redbook definition.

The Redbook Jury Instruction for Insanity provides, in relevant part:

> "Mental disease or defect includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs a person's ability to regulate and control his/her conduct. A 'mental disease' is a condition which is capable of either improving or deteriorating; a 'mental defect' is a condition not capable of improving or deteriorating. An abnormal condition of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish that [name of defendant] had a mental disease or defect."

Criminal Jury Instructions for the District of Columbia, No. 9.400 (5th ed. 2019). The RCC's proposal incorporates the first sentence from this excerpt, but not the remaining sentences. The second sentence in the Redbook clarifies the definition of "mental disease" and "mental defect," so should be incorporated into the RCC definition. The Commentary discusses these definitions

(Commentary at 17 n.14), but USAO recommends that they be included in the plain language of the statute for clarity.

The RCC proposes changing current law by no longer excluding "abnormalities manifested only by repeated criminal or otherwise antisocial conduct from the definition of mental disease or defect." (Commentary at 17.) The Commentary recognizes that this proposal is contrary to both the Model Penal Code and DCCA case law as set forth in *Bethea v. United States*, 365 A.2d 64, 79 (D.C. 1976). USAO opposes this change.

As a practical matter, it is unclear how a defendant would be permitted to prove an abnormality that manifested only by repeated criminal or otherwise antisocial conduct. Under the current system, expert testimony is essential to establish whether or not a defendant is deemed criminally responsible.[5] Under the RCC's proposal, it is unclear whether expert testimony would be required, or how this would be proven otherwise, and it could be inappropriately broad. For example, could a defendant argue that the fact of their criminal record demonstrates a mental disease or defect, and rely solely on their criminal history record rather than expert testimony? Would a court-appointed or government expert be permitted to evaluate a defendant who intended to rely solely on their criminal record in support of this defense? Further, the nature of any person committing an offense—given that commission of an offense is inherently contrary to society's rules—may demonstrate certain antisocial characteristics, so this defense could be interpreted very broadly.

3. <u>USAO recommends that the procedural mechanisms in D.C. Code § 24-501(j) be incorporated into this provision.</u>

   USAO proposes adding the following language to RCC § 22E-504:

   "Mental disease or defect shall not be a defense in any criminal proceeding unless the actor or the actor's attorney in such proceeding, at the time the actor enters a plea of not guilty, or within 15 days thereafter, or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of the actor's intent to rely on such defense."

D.C. Code § 24-501(j) provides: "Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty, or within 15 days thereafter, or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his

[5] Under current law, once a defendant provides notice of their intent to raise an insanity defense, the court orders a criminal responsibility examination by an expert. The expert evaluates the defendant, reviews the records and evidence in the case, and may conduct external third party interviews of individuals who are familiar with the defendant. Following a full evaluation and review of the relevant materials, the expert makes a determination as to whether the defendant should be deemed criminally responsible. The government and the defense are both entitled to retain independent experts to conduct their own examinations of the defendant and, as appropriate, present that evidence at trial.

insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."

Although the burden of proof in the second sentence of D.C. Code § 24-501(j) has been incorporated into the RCC proposal, USAO recommends incorporating the first sentence of this provision into the RCC proposal as well. The RCC refers to D.C. Code § 24-501 for commitment *following* an acquittal by reason of mental disease or defect, but this procedural mechanism would necessarily be required *before* an acquittal and subsequent commitment. Therefore, as currently drafted, this defense under the RCC would not require this procedural mechanism of notice to the prosecution to invoke this defense. Consistent with current law, a defendant must be required to serve notice of intent to rely on this defense to allow the prosecution to investigate and prepare this defense.

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: January 29, 2021

SUBJECT: First Draft of Report 68 - Red-Ink Comparison and Attachments

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 68 - Red-Ink Comparison and Attachments.[1]

COMMENTS ON THE DRAFT REPORT

The first part of this memorandum focuses on OAG's proposed amendments to the RCC as contained in the First Draft of Report 68. The second part contains OAG's comments and recommendations concerning the CCRC's responses to previous comments, as reflected in Appendix D2, CCRC's Disposition of Advisory Group Comments & Other Draft Documents.

I. OAG's Proposed Amendments

RCC § 22E-102. Rules of Interpretation

In an attempt to make the RCC reader friendly, the CCRC has chosen to include a paragraph in many of the code sections entitled "Definitions." This paragraph cross-references terms and phrases used in the substantive paragraphs of the code provision with definitions for those terms and phrases found elsewhere in the RCC. However, during the review process OAG has noted instances in proposed code sections where a defined term or phrase was used, but where the "Definitions" paragraph failed to contain the definitional cross-reference or where a definitional

[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.

reference was included in the Definition's paragraph, but where the term or phrase was not used in the substantive provision. While OAG appreciates both the scope of this endeavor and the effort that the CCRC has made to appropriately include these cross-references, we want to ensure that the inclusion or absence of a cross-reference not affect the interpretation of the various code sections. Terms and phrases should be interpreted to be consistent with the plain meaning of the statute.[2] See *Pannell-Pringle v. D.C. Dep't of Emp't Servs.*, 806 A.2d 209, 213-14 (D.C. 2002). To accomplish this clarification, we propose that a new paragraph RCC § 22E-102 (d) be added that specifically addresses this issue. This provision should read:

[2] For an example of litigation that was caused by the inclusion of a specific cross-reference see *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins.*, 54 A.3d 1188, 1215 (D.C. 2012). There, the Court of Appeals noted "When the final legislation was enacted by the Council, however, it included the "unreasonably large" language from the Maryland statute *and* kept the "maximum feasible extent" requirement from the initial Council draft, with the specific cross-reference to that mandate we have discussed in the provision charging the Commissioner to determine whether a corporation's surplus is "excessive." D.C. Act 17-704 §§ 2 (c) & (d), 56 D.C. Reg. at 1347, D.C. Code §§ 31-3505.01 & 31-3506(e). The legislative history and the Council's alterations of the MIEAA during the drafting process reinforce our reading of the statute's language that the Act was designed primarily to enforce the obligation of the corporation to reinvest in community health to the maximum extent consistent with its financial soundness. Viewing the language of the statute as a whole, and considering its legislative history and purpose, we hold that, as a matter of law, the two determinations required by § 31-3506(e)(2) — whether GHMSI's surplus is "unreasonably large" and whether the surplus is "inconsistent" with GHMSI's community health reinvestment obligations under § 31-3505.01 — must be made in tandem, not *seriatim*, to give full effect to the statute. Because in applying the statute, the Commissioner divorced these two determinations and focused first — and exclusively — on whether the surplus was "unreasonably large," we conclude that the Commissioner's interpretation is not faithful to the statute's language, overall structure, and purpose. However, we recognize that, beyond the essential requirement that the Commissioner's "unreasonably large" determination must consider the mandate to reinvest in the community to the "maximum extent feasible" consistent with financial soundness, there remain details as to how such a determination is to be made. As to the specification of how surplus and community reinvestment are to be calculated and balanced, we defer to the agency's reasonable discretion in light of its expertise in this subject matter. We, therefore, remand the case to the Department for an express interpretation of the MIEAA that captures all the relevant provisions, in light of the statute's legislative purpose. *Cf. District of Columbia Office of Human Rights*, 40 A.3d at 928 (noting that "special competence of the agency was not required" before engaging in de novo judicial review of regulations)."

(d) *Effect of definitional cross-references*.[3] Definitional cross-references that appear at the end of substantive code sections are included to aid in the interpretation of the provisions and unless a different meaning plainly is required, their inclusion or exclusion in a cross-reference shall not affect the provision's interpretation.[4]

RCC § 22E-301. Criminal Attempt

Paragraph (d) establishes the penalty structure for criminal attempts. Subparagraph (d)(1) now states, "An attempt to commit an offense is subject to not more than one-half the maximum term of imprisonment or fine…" [emphasis added] The Commentary, on pages 218 and 219 explains this sentence by saying that "the default rule governing the punishment of criminal attempts under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense" and then explains, in relevant part, that "'Punishment,' for purposes of this paragraph, should be understood to mean: (1) imprisonment and fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; and (3) fine only if imprisonment is not applicable to the target offense." To make subparagraph (d)(1) clearer, OAG suggests that the "or" above be changed to an "and" so that (d)(1) read "An attempt to commit an offense is subject to not more than one-half the maximum term of imprisonment and fine…"[5]

RCC § 22E-408. Special Responsibility for Care, Discipline, or Safety Defense

Paragraph (a) provides for a parental defense that permits someone who is acting with the effective consent of a parent to "engage[] in conduct constituting the offense with intent to safeguard or promote the welfare of the complainant, including the prevention or punishment of the complainant's misconduct." However, parents frequently give limited effective consent to people who perform childcare. For example, parents do not always authorize persons caring for their child to administer corporal punishment. While OAG believes that the text of subparagraph (a)(1)(B)(ii) would make this defense unavailable to a babysitter who exceeded the scope of their effective consent, an example in the Commentary would aid the reader in understanding this point. OAG proposes the following example. "A parent leaves their four year-old child with a babysitter for three hours. The only instructions the parent gives to the babysitter is not to give

[3] To aid the reader, OAG has included as italicized text in this memo any italics that appear in a quoted portion of an RCC provision or CCRC response contained in the First Draft of Report 68 – Appendix D2, Disposition of Advisory Croup Comments.

[4] On a related note, the Report adds a new paragraph (b) to RCC § 22E-213, Withdrawal Defense to Legal Accountability, as it does to other provisions, that states, "Definitions. The term 'in fact' has the meaning specified in RCC § 22E-207." However, 22E-207 does not, strictly speaking, provide a meaning to the term "in fact." Rather paragraph 22E-207 (b) says that "A person is strictly liable for any result element or circumstance element in an offense…[t]hat is modified by the phrase 'in fact.'" If the RCC is going to have definitional cross-references in various statutes, to avoid confusion, those cross-references should be to actual definitions, like they are in most of the other statutes. OAG recommends that either the phrase "in fact" be defined or the cross-reference be reworded.

[5] OAG recommends that this change also be made to the relevant portions of RCC § 22E-302, Criminal Solicitation, and RCC § 22E-303, Criminal Conspiracy.

the child any snacks. While the parent is gone the babysitter sees the child with a bag of cookies in her hand and smudge of chocolate on her face. The babysitter spanks the child. When the parent returns home they see the bruise caused by the spanking. In this situation the babysitter would not be acting with the effective consent of the parent and so could not avail themselves of this defense."

RCC § 22E-505. Developmental Incapacity Affirmative Defense[6]

For persons who are under 12 years of age, OAG does not believe that these children should be prosecuted in the juvenile justice system. Instead of requiring a child of this age to mount an affirmative defense, OAG recommends that this provision be amended to state that "a child who is under 12 years of age does not commit a delinquent act."[7] However, because a child is not required to carry identification to show their age, or may lie about their age, police officers may nevertheless inadvertently arrest a child in this age group or may seize the child prior to making an arrest to confirm the child's age. As a result, OAG may bring charges against a child who is under the age of 12 and that prosecution would continue until such time as proof of age has been established. To ensure that there is no civil liability for such an act, OAG recommends that this provision also include the statement that "Nothing in this section shall be construed as creating a cause of action against the District of Columbia or any public official[8] for seizing, arresting, or prosecuting a child who is under 12 years of age."[9]

OAG reiterates its strong objection to this affirmative defense, or if the CCRC accepts our previous recommendation, a Minimum Age for Which a Child Can Commit a Delinquent Act provision, being codified within the RCC and not in Title 16. As stated in our memorandum concerning the First Draft of Report #58- Developmental Incapacity Defense:

> Proceedings about delinquency matters are codified in Title 16, Chapter 23 of the Code. This portion of the Code establishes who is a child eligible for prosecution in the Family Court, what a delinquent act is; how juvenile competency challenges are handled; and all other aspects of delinquency proceedings. Persons who litigate delinquency proceedings, and others who want to understand how

[6] Because of OAG's recommendation below, OAG recommends that this provision be retitled "Minimum Age for Which a Child Can Commit a Delinquent Act. D.C. Code § 16-2301 (7) states, "The term 'delinquent act' means an act [committed by a child] designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law."

[7] OAG's recommendation is consistent with the relevant portion of the RCC's previous version of this defense. It read "An actor does not commit an offense when [] the actor is under 12 years of age."

[8] RCC § 22E-701 states, a "'Public official' means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47)."

[9] As to children who are under 14 years of age, OAG renews its recommendation there not be a codified developmental immaturity defense at this time, pending further study of the issue. See page 31 of Appendix D2, Disposition of Advisory Group Comments & Other Changes to Draft Documents.

> these proceedings work, look to D.C. Code § 16-2301, et. seq., for the statutory framework for delinquency proceedings. So, if the concepts in this proposal, or any portion of them, are adopted by the Commission, those changes should be incorporated into Title 16, not in Title 22E. [footnotes omitted]

RCC § 22E-608. Hate Crime Penalty Enhancement

Paragraph (a) states, "A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of prejudice against the person's or group's perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression as, in fact, defined in D.C. Code § 2-1401.02(12A)." [internal strikeouts removed] [emphasis added] The Commentary, on page 88, explains that "the revised statute extends liability for the penalty enhancement in some situations to a complainant who is not themselves perceived to have (or actually have) one of the protected characteristics." In footnote 13 it states, "For example, a hate crime penalty enhancement is applicable to an actor who destroys the office of a politically unaffiliated lawyer representing a political party when the actor's purpose was to engage in criminal damage to the property in part because of prejudice against the perceived political affiliation of the lawyer's client."

While OAG agrees that the penalty enhancement should apply to the persons harmed as described in the Commentary and footnote, the text of RCC § 608 does not accomplish that goal. In the example cited, the offense was committed against the lawyer. However, the text of the provision requires that the offense had to be "because of prejudice against the person's or group's perceived race, color…" and there is no qualifying prejudice against the lawyer. [emphasis added]

In addition, while OAG agrees that this enhancement should apply when the offense was committed because of the perceived attributes of the victim, we, believe that it is important to note that these offenses are mostly committed against people because of their actual attributes. OAG's position is consistent with current law. See D.C. Official Code § 2-1402.11. This statute says, "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information of any individual…" [emphasis added]

To accomplish the CCRC's goal as stated in the Commentary, and to amend this provision to add the term "actual," OAG suggests that the provision be amended to read as follows:

> *Hate crime penalty enhancement.* A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of:

(1) prejudice against the person's or group's actual or perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression as, in fact, defined in D.C. Code § 2-1401.02(12A) or
(2) that person's or groups actual or perceived business, personal, or supportive relationship to a person or group described in paragraph (a)(1).

RCC § 22E-1201. Robbery

Third Degree Robbery makes it an offense when the actor "Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control by … Applying physical force that moves or immobilizes another person present; or Removing property from the hand or arms of the complainant. The Commentary notes "Taking or exercising control over property from the person or from the immediate physical control of another without bodily injury, threats, or overpowering physical force is no longer criminalized as robbery in the RCC, but as a form of theft." It is unclear why the offense should be limited in this manner. See *Williams v. United States*, 113 A.3d 554, 560-61 (D.C. 2015) where it was held that:

> "[i]n the District of Columbia, robbery retains its common law elements," and that "the government must prove larceny and assault." *Lattimore, supra*, 684 A.2d at 359 (citations omitted). The elements of robbery are: "(1) a felonious taking, (2) accompanied by an asportation [or carrying away], of (3) personal property of value, (4) from the person of another or in his presence, (5) against his will, (6) by violence or by putting him in fear, (7) *animo furandi* [the intention to steal]." *Id.* (alteration in original) (citations omitted).[10] [emphasis added]

OAG supports limiting third degree robbery to where actual, as opposed to theoretical force is used. However, limiting the offense to where the victim was moved or immobilized or when the property was removed from the victim's hand or arms narrows the offense too much.

Consider the following examples. Victim 1 has a diamond broach valued at $2,000 attached to her blouse. The defendant walks up to the victim, reaches over and brazenly rips the broach from her blouse. Victim 2 is wearing a pocketbook on a strap hung across her body and the defendant grabs the pocketbook using enough force to break the strap, but not enough to move the victim.

[10] *In Williams v. United States*, 113 A.3d 554, 555 (D.C. 2015), the Court ruled that the government failed to prove the element of "violence or putting a person in fear" of robbery under D.C. Code § 22-2801 (2012), as the government's evidence established that the victim handed over his wallet after three young people walked by him, turned around and walked back to him, and two of the young people said, "what, what, what"; this evidence did not prove menacing conduct that would engender fear or some threatening act that would lead a reasonable person to believe he was in imminent danger of bodily harm. See also *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) where the Court said, "However, it *is* possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear." [italics in original]

Because in these examples the victim was not moved or immobilized nor was the broach or pocketbook in her hand or on her arm, the RCC would treat these as theft offenses. It equates these takings directly from the victim's body, with the victim's knowledge, to the taking of the broach or pocketbook from a table next to where the victim is sitting. It ignores that the taking of the broach or pocketbook from the victim's body would put the victim in fear and that it is just as traumatic for the victim, if not more so, then if she was jostled or if the broach or pocketbook was taken from her hand. The defendant's actions and mental states in these hypos are consistent with a taking directly from the victim's hand, or arm, or which causes the victim to move.

OAG recommends that the elements of this offense be amended to make it a robbery anytime the item is so attached to the victim or their clothing as to require actual force to effect its removal or when the victim is put in fear by the taking. The Commentary can make clear that the force has to be more than trivial.

While we agree that third degree robbery should not be broad enough to support a robbery complaint when the victim does not realize that the property was taken,[11] a victim who has had property taken directly from them certainly believes that they have been robbed and, they have been under current law.[12] Taking current law into account, OAG believes that anytime a person steals property directly from a victim that taking should be classified as a robbery. Therefore, OAG recommends that these types of robberies be included in a new RCC fourth degree robbery offense. In recognition that these robberies are not as heinous as those contemplated by first, second, and third degree robberies, OAG recommends that these robberies be classified as a class B misdemeanor which carries a maximum penalty of 180 days of imprisonment.[13]

RCC § 22E-1204. Criminal Threats

OAG recommends that the Commentary add a hypo that would help the reader better understand the parameters of this offense. The hypo should show that this offense includes the scenario where a threat is made to person A that they intend to harm person B, even if that threat is not

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[11] For example when someone's pocket was picked or a hand that was surreptitiously slipped into a backpack and property taken.

[12] See page 54 of the First Draft of Report 68, Commentary Subtitle II, Offenses Against Persons where under the heading "Relation to Current District Law," the Report states, "First, the revised robbery offense does not criminalize non-violent pickpocketing or taking or exercising control over property without the use of bodily injury, overpowering physical force, or threats to cause bodily injury or to engage in a sexual act or sexual contact, or by taking property from a person's hands or arms. The current robbery and carjacking statutes criminalize all pickpocketing and other takings of property from the person or from the immediate physical control of another by sudden or stealthy seizure, or snatching, even when the complainant did not know the property was taken (and so was not menaced, let alone injured)," as well as the supportive Court of Appeals decisions found in footnote 38.

[13] Pursuant to First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses, the CCRC is recommending that a third degree robbery be designated as a class 9 felony with a maximum penalty of two years imprisonment.

communicated to person B. As noted in the comment's section to Criminal Jury Instruction 4.130, threats:

> *Beard v. U.S.*, 535 A.2d 1373, 1378 (D.C. 1988), makes clear that the defendant need not intend that the threat be communicated to the victim and that it need not actually be communicated to the victim, so long as someone heard the threat. *See also U.S. v. Baish*, 460 A.2d 38, 42 (D.C. 1983); *Joiner v. U.S.*, 585 A.2d 176 (D.C. 1991).

RCC § 22E-1301. Sexual Assault

The Red-Ink Comparison of the second degree version of this offense states that one way of committing this offense is engaging in a sexual act when the complainant is "Asleep, unconscious, ~~paralyzed~~, or passing in and out of consciousness."[14] [strikeout in original] See RCC § 22E-1301 (b)(2)((B)(1). OAG believed that the term "paralyzed" was originally included to cover, among other scenarios, the following hypo. A woman has a spinal cord injury that prevents her from being able to move any part of her body. She is in a long term nursing facility and her ex-boyfriend comes into her room and has sexual intercourse with her against her will. OAG believes that this behavior should remain covered by second degree sexual assault and, therefore, recommends that the term "paralyzed" be added back in this subparagraph.[15]

In addition, OAG recommends that the rape of a paralyzed victim should also be a first degree sexual assault. That provision reads as follows:

(a) *First degree*. An actor commits first degree sexual assault when ~~that~~ the 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~~ causing~~'s~~ bodily injury to the complainant, ~~overcomes,~~ or by using physical force that moves or immobilizes ~~restrains~~ the complainant ~~any person~~;
    (B) By ~~threatening~~ communicating to the complainant, explicitly or implicitly, that the actor will cause:
      (i) The complainant to suffer a bodily injury, confinement or death, ~~kill, kidnap, or cause bodily injury to any person, or to commit a sexual act against any person~~; or
      (ii) A third party to suffer a bodily injury, sexual act, sexual contact, confinement, or death; or

[14] Throughout this memo OAG has included the red-ink changes that appear in the "First Draft of Report 68 – Red Ink Comparison when we felt that their inclusion would aid the reader in understanding the issues OAG has raised.

[15] The term "paralyzed" was also deleted from fourth degree sexual assault. See RCC § 22E-1301 (d)(2)((B)(1). OAG's recommends that the term be re-added to this subparagraph as well.

(C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
  (i) With intent to impair the complainant's ability to express willingness or unwillingness to engage in the sexual act; and
  (ii) In fact, the drug, intoxicant, or other substance renders the complainant:
    (a) Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness;
    (b) Substantially incapable of appraising the nature of the sexual act; or
    (c) Substantially incapable of communicating willingness or unwillingness to engage in the sexual act.

As drafted, a person commits a first degree sexual assault when they administer a drug to impair the victim's ability to express their unwillingness to have sex and where the drug renders the victim "Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness; substantially incapable of appraising the nature of the sexual act; or substantially incapable of communicating willingness or unwillingness to engage in the sexual act." [emphasis added] While OAG agrees that drugging a victim to have sex with them under these circumstances should be a first degree sexual assault, we believe that raping someone who is paralyzed should also be a first degree sexual assault. While having sex with a victim who is drugged so that they are asleep or unable to appraise the nature of the sexual act is reprehensible, under these situations the victim is at least not aware of the rape as it is occurring. When a victim is paralyzed on the other hand, the victim is aware that the rape is taking place and is traumatized to a greater degree. The perpetrator does not need to use physical force or a drug to immobilize the victim because the perpetrator is taking advantage of the victim's preexisting paralysis.[16]

RCC § 22E-1303. Sexual Abuse by Exploitation

As to the class of people to whom this offense applies, both first and second degree sexual abuse by exploitation, state that the actor "is a coach, not including a coach who is a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contract employee, or volunteer …" See paragraphs (a)(2)(A) and (b)(2)(B). As drafted, it is ambiguous as to whether the phrase "not including a coach who is" only modifies the phrase "is a secondary school student" or if it also exempts "a teacher, counselor, principal, administrator, nurse, coach, or security officer at a secondary school, working as an employee, contract employee, or volunteer …"

To clarify that teachers, counselors, etc., do fall withing the purview of this provision, OAG recommends that the punctuation in this subparagraph be modified to read "is a coach, not including a coach who is a secondary school student; a teacher; counselor; principal;

[16] For the reasons stated here, OAG also recommends that the other degrees of sexual assault, that previously contained the term "paralyzed," be similarly amended.

administrator; nurse; or security officer at a secondary school; working as an employee; contract employee; or volunteer …"

RCC § 22E-1307. Nonconsensual Sexual Conduct

Both first and second degree nonconsensual sexual conduct contain the element that the actor act "Reckless as to the fact that the actor lacks the complainant's effective consent." Paragraph (c) contains the exclusions from liability. It states that "An actor does not commit an offense under this section when, in fact, the actor uses deception, unless it is deception as to the nature of the sexual act or sexual contact." [emphasis added] Footnote 6, on page 256 of the Commentary states, in relevant part "In addition, deception as to the nature of the sexual act or sexual contact includes a practice known as "stealthing," generally understood as removing a condom without the consent of the sexual partner. See, e.g., https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-61098.[17] In the RCC, "stealthing" is sufficient for nonconsensual sexual conduct, if the other requirements of the offense are met."

OAG agrees that if consent to sexual intercourse is premised on the male partner wearing a condom then the surreptitious removal of the condom vitiates that consent. As noted in one article "Stealthing is considered sexual assault by sexual violence prevention experts because it essentially turns a consensual sexual encounter (protected sex) into a nonconsensual one (unprotected sex). Stealthing is a clear violation of informed consent." [internal quotations omitted][18] The nonconsensual removal of a condom exposes the victim to an unwanted risk of pregnancy. The same argument, however, applies to the situation where a woman tells a man that she is using birth control before the two have sexual intercourse. In this situation, the consent to sexual intercourse is premised on the female partner using birth control and her misrepresentation, likewise, vitiates the male partner's consent. In addition, a woman who intentionally damages a female condom is subjecting the male to the risk of sexually transmitted diseases just as a male would expose the woman by stealthing. To be clear that this provision is not meant to be gender specific, OAG recommends that footnote 6 be amended to include these situations.

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime

OAG recommends that the language in subparagraph (b)(1)(D) be amended so that it is clear that the exclusion from a sexual assault counselor's duty to report includes sexual contacts as well as sexual assaults as is currently required under the Sexual Assault Victims' Rights Amendment Act of 2019. Sub paragraph (b)(1)(D) states:

[17] OAG would note that it was unable to access the webpage cited. However, we were able to access, what we believe is the relevant article at https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-610986. The Commission may want to cite to this source.

[18] See https://www.health.com/condition/sexual-assault/what-is-stealthing

(A) A sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication, unless the sexual assault counselor is aware of a substantial risk that:
(i) A sexual assault victim is under 13 years of age;
(ii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is in a position of trust with or authority over the sexual assault victim; or
(iii)A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is more than 4 years older than the sexual assault victim.

OAG recommends that it be amended to say:

(A) A sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication, unless the sexual assault counselor is aware of a substantial risk that:
(i) A victim of a sexual assault or sexual contact is under 13 years of age;
(ii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is in a position of trust with or authority over the victim of a sexual assault or sexual contact; or
(iii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is more than 4 years older than the victim of a sexual assault or sexual contact.

RCC § 22E-1401. Kidnapping

The elements of First Degree Kidnapping is:

(a) An actor commits first degree kidnapping when the actor:
(1) Knowingly and substantially confines or moves the complainant;
(2) Either:
(A) Without the complainant's effective consent; or
(B) By any means, including with acquiescence of the complainant, when the actor is:
(i) Reckless as to the facts that:
(I) The complainant is an incapacitated individual; and
(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or
(ii) In fact, 18 years of age or older and reckless as to the facts that:
(I) The complainant is under 16 years of age and four years younger than the actor; and
(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; and
(3) With intent to:
(A) Hold the complainant for ransom or reward;
(B) Use the complainant as a shield or hostage;
(C) Facilitate the commission of any felony or flight thereafter;

(D) Inflict serious bodily injury upon the complainant;
(E) Commit a sexual offense defined in Chapter 13 of this Title against the complainant;
(F) Cause any person to believe that the complainant will not be released without suffering serious bodily injury, or a sex offense defined in Chapter 13 of this Title;
(G) Permanently deprive a person with legal authority over the complainant of custody of the complainant; or
(H) Confine or move the complainant for 72 hours or more.

OAG agrees that a person of any age who confines or moves a victim without the victim's effective consent for ransom (or for any of the other reasons listed in subparagraph (a)(3)) or when the victim is an incapacitated should fall within the gamut of first degree kidnapping. However, we see no reason why the additional means of committing first degree kidnapping, found in subparagraph (a)(2)(B)(ii), limits this offense to a person who is 18 years of age or older when the victim is under 16 years of age and four years younger than that person. Consider the following hypos. In the first, the actor is 17 years old. He takes a 15 year old child to his apartment and detains the child. He then sends a ransom note to the child's parent asking for $5,000 for the safe return of the child (or for any of the other reasons listed in subparagraph (a)(3)). In the second, the actor is 15 years old. He takes a 10 year old child to his apartment and detains the child. He also sends a ransom note to the child's parent asking for $5,000 for the safe return of the child. There is no reason why the 17 or 15 year olds in these examples, like an 18 year old, should not be guilty of First Degree Kidnapping. In these examples, the 17 year old and the 15 year old actors are in need of care and rehabilitation. This same analysis and recommendation applies to Second Degree Kidnapping.[19]

OAG recommends that (a)(2)(B)(ii) be deleted and that (a)(2)(B)(i)(I) be redrafted, and renumbered, to say "The complainant is an incapacitated individual or a person under the age of 16."

RCC § 22E-1402. Criminal Restraint

Pursuant to subparagraph (b)(2)(B) it is a defense when the actor "Is a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity." [emphasis added] This defense contains an internal contradiction. A person who persuades a complainant to go to a location has not moved the complainant. The complainant has moved themselves. No force was involved. The example given in the Commentary actually highlights this point. It states, "For example, a store owner who convinces a 12 year old child unaccompanied by a parent or guardian to enter the store would technically satisfy the elements of criminal restraint under subparagraph (a)(2)(B), by moving the complainant without consent of a person with legal authority over the complainant.

[19] OAG is not making the same recommendation concerning the same limitation found in RCC § 22E-1402 (a)(2)(B) Criminal Restraint. We do not believe that a 15 year old who confines or moves a 10 year old with the acquiescence of the 10 year old, but without the parent's permission, should be guilty of an offense.

This defense bars criminal liability for this conduct."[20] OAG does not agree that the store owner in this example has moved the child and so we disagree with the conclusion that the store owner would have technically satisfy the elements of (a)(2)(B).

The elements of this offense are:

(a) *Offense.* An actor commits criminal restraint when that actor knowingly and substantially confines or moves the complainant:
  (1) Without the complainant's effective consent; or
  (2) By any means, including with acquiescence of the complainant, when the actor is:
    (A) Reckless as to the facts that:
      (i) The complainant is an incapacitated individual; and
      (ii) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or
    (B) In fact, 18 years of age or older and reckless as to the facts that:
      (i) The complainant is under 16 years of age and four years younger than the actor; and
      (ii) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement. [emphasis added]

The gravamen of this offense is that the perpetrator confined or moved someone. A storekeeper who talks a 12 year old into coming in a store has neither confined nor moved the child. Therefore, the RCC should be amended to remove this newly proposed defense.

RCC § 22E-1403. Blackmail

For the reasons stated below, OAG recommends that the second of the affirmative defenses contained in paragraph (c) be deleted.

Pursuant to paragraph (a):

An actor commits blackmail when the actor:
  (1) Purposely causes another person to commit or refrain from any act,
  (2) By communicating, explicitly or implicitly, that if the person does not commit or refrain from the act, any person will:
    (A) Take or withhold action as an official, or cause an official to take or withhold action;
    (B) Accuse another person of a crime;
    (C) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:

[20] See page 309 of the First Draft of Report 68 – Commentary Subtitle II, Offenses Against Persons.

(i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
(ii) Significant injury to credit or business reputation;
(D) Significantly impair the reputation of a deceased person;
(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(F) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns;
(G) Engage in conduct that, in fact, constitutes:
(i) An offense under Subtitle II of this title; or
(ii) A property offense as defined in subtitle III of this title (sic)

There are two affirmative offenses for blackmail. Paragraph (c) states:

(1) It is an affirmative defense to liability under this section committed by means of the conduct specified in subparagraphs (a)(1)(A)-(F) that:

(A) The actor reasonably believes the threatened official action to be justified, or the accusation, secret, or assertion to be true, or that the photograph, video, or audio recording is authentic, and
(B) Engages in the conduct with the purpose of compelling the other person to:
(i) Desist or refrain from criminal or tortious activity or behavior harmful to any person's physical or mental health,
(ii) Act or refrain from acting in a manner reasonably related to the wrong that is the subject of the accusation, assertion, invocation of official action, or photograph, video or audio recording; or
(iii) Refrain from taking any action or responsibility for which the actor believes the other unqualified.

(2) It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense.

OAG summits that the affirmative defense contained in subparagraph (c)(2) would never. occur.[21] Either the substance of what the actor communicated to the complainant is true or it is not. If it is not true, then it is incomprehensible that the complainant would give effective

[21] How can a person consent to being coerced by another person? Isn't that a contradiction in terms? The Commentary states "While it may be highly unusual for a person to give effective consent to another to cause them to engage in an act by the specified types of communication, should such effective consent exist it would negate the harm the blackmail offense is intended to address." It does not give any examples, let alone real world examples of when this would occur. See page 131 of the First Draft of Report 68 – Commentary Subtitle II, Offenses Against Persons.

consent to the actor to blackmail him or her using an untrue allegation.[22] If the communication is true, then the other affirmative defense contained in subparagraph (c)(1) would apply. Then even if the actor was acting with the effective consent of the complainant, the actor would have necessarily believed that the accusation, etc., is true. In addition the actor's motivation would have been done for one of the purposes outlined in subparagraph (c)(1)(i) through (iii).

In addition, it is unclear what circumstances would trigger that affirmative defense. How can a person consent to being coerced by another person? Isn't that a contradiction in terms? The Commentary states "While it may be highly unusual for a person to give effective consent to another to cause them to engage in an act by the specified types of communication, should such effective consent exist it would negate the harm the blackmail offense is intended to address."[23]

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor

This offense, like many of the adjacent offenses, contain an affirmative defense that states:

> (2) It is an affirmative defense to liability under subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B) of this section that, in fact:
>
> (A) The actor is under 18 years of age; and
>
> (B) Either:
>
> (i) The actor is the only person under 18 years of age who is, or who will be, depicted in the live performance; or
>
> (ii) The actor reasonably believes that-every person under 18 years of age who is, or who will be, depicted in the live performance gives effective consent to the actor to engage in the conduct constituting the offense.

OAG agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity. However, the RCC states that children under the age of 12 are developmentally incapacitated such that they should be precluded from prosecution for their violation of any criminal offense. See RCC § 22E-505, Developmental Incapacity Affirmative Defense. There is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent. Take the following hypo. Actor A is 17 years of age. Victim 1 is 10 years of age and Victim 2 is 8 years of age. Actor A talks the two victims into performing oral sex in front of an audience. Despite the age and developmental differences between the actor and the victims, the affirmative defense stated above would apply because the actor and both victims are under the age of 18. OAG does not believe that it should. To resolve the tension between the competing principles that youth who are of similar age should not be prosecuted for engaging in consensual activity and that children

[22] For example, when would a complainant consent to blackmail by giving an actor effective consent for the actor to threaten to state a lie to cause the complainant to commit an act by communicating to the complainant that if the complainant does not commit the act the actor will accuse another person of a crime? If the complainant was inclined to do the action requested, they would simply do it and not involve the actor.

[23] See page 131 of the First Draft of Report 68 – Commentary Subtitle II, Offenses Against Persons.

under the age of 12 are developmentally incapacitated, OAG recommends that this affirmative offense be amended to limit it to when there is a four year age difference between the actor and the victim(s), like it does in other RCC offenses that involve sexual activities between people under the age of 18 or 16.[24] For example, see the affirmative defense contained in subparagraph (c)(3) this offense.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater

While OAG generally agrees with the text of this offense, we make one recommendation that we believe will avoid litigation over whether, in one set of scenarios, the actor's actions constitute a completed offense or an attempt. Paragraph (a) states:

(a) *Offense*. An actor commits unlawful operation of a recording device in a motion picture theater when the actor:
    (1) Knowingly operates a recording device within a motion picture theater;
    (2) Without the effective consent of an owner of the motion picture theater; and
    (3) With the intent to record a motion picture. [emphasis added]

The issue arises when the actor fails to record the entire motion picture. For example, when the actor begins recording the movie after it has started or otherwise records some, but not all, of it. We believe that in these situations, the offense should apply to the actor's behavior. However, because subparagraph (a)(3) refers to "a motion picture" there is an argument, no matter how weak, that to be liable for the completed offense, the actor must have intended to record the entire movie. To address this issue, OAG recommends that subparagraph (a)(3) be amended to state, "With the intent to record a motion picture, or any part of it."

RCC § 22E-2203. Check Fraud

The text of subparagraphs (a)(3) and (b)(3) state that a person has committed either first or second degree check fraud when, the other elements of the offense has been met and the amount of loss to the check holder is, in fact, $5,000 or more, in the case of the first degree, or if it is, in fact, $500 or more, in the case of second degree. What is unclear in this formulation is what is meant by "the amount of loss to the check holder." Take the following examples. A store owner offers to sell an item for $550. The item cost the store owner $450. The actor and another person are interested in purchasing the item. However, the actor acts first to "purchase" it by writing a fraudulent check for $550. Is the "amount of loss to the" store owner the $550 that they would have gotten if the other interested party had acted first or is the amount of loss the $450 dollars which represents the cost of the item to the store owner? Does the outcome change if only the actor is interested in "purchasing" the item at that time – even though the store usually sells the item for $550? To avoid litigation on what is meant by "loss to the check holder," the text of the

[24] For the reasons stated above, OAG suggests that this same recommendation be applied to the adjacent offenses that have similar affirmative defenses. For example, the affirmative defense found in RCC § 22E-1810(c)(2)(B)(ii) pertaining to Attending or Viewing a Live Sexual Performance of a Minor.

statute needs to be clear on these issues. OAG does not believe that the Commentary addresses these scenarios.

RCC § 22E-2601. Trespass

Paragraph (d)(1) establishes an exclusion from liability for trespass. It states, "An actor does not commit an offense under this section by violating a District of Columbia Housing Authority bar notice, unless the bar notice is lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis." The Commentary, on page 151, explains this paragraph. It states:

> Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a District of Columbia Housing Authority ("DCHA") barring notice, it must prove that the barring notice was issued for a reason described in DCHA regulations. Additionally, the government must offer evidence that the DCHA official who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied. Even if sufficient cause for barring in fact exists, the issuance of a DCHA barring notice without objectively reasonable cause will render the notice invalid. [footnotes omitted]

Both the statutory text and the Commentary seem to limit the issuance of the barring notice to DCHA officials. However, because the Commentary does not flag this apparent limitation as a change to District law, it is unclear if this was intentional. OAG would note that under current law, other individuals have authority to issue barring notices at these properties. See 14 DCMR 9600.8 which states:

> Bar Notices shall only be issued by the following persons:
>
> (a) Members of the DCHA Office of Public Safety including sworn officers and special police officers;
> (b) Members of the Metropolitan Police Department;
> (c) Members of cooperative law enforcement task forces as may be authorized by the Chief of DCHA Office of Public Safety; and
> (d) Private security providers contracted by DCHA or DCHA's agent. 14 DCMR 9600.8.

To clarify that no change in law was intended, OAG recommends that paragraph (d)(1) be amended to state "An actor does not commit an offense under this section by violating a barring notice issued for District of Columbia Housing Authority properties, unless the bar notice is lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis." And, we recommend that the Commentary be similarly redrafted to say:

> Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove

> unlawful entry premised on a violation of a barring notice for District of Columbia Housing Authority ("DCHA") property, it must prove that the barring notice was issued for a reason described in DCHA regulations. Additionally, the government must offer evidence that the individual who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied. Even if sufficient cause for barring in fact exists, the issuance of the barring notice without objectively reasonable cause will render the notice invalid. [footnotes omitted][25]

RCC § 22E-2701. Burglary

Both first and second degree burglary contain the element that an actor enter the property "Reckless as to the fact that a person who is not a participant in the burglary is inside and directly perceives the actor or is entering with the actor." [emphasis added] See paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii). The Commentary, on page 162, explains "Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) further require that a non-participant directly perceive the actor, by sight or sound or touch.[26] Entering a building undetected is punished as third degree burglary but not as second degree." [footnotes omitted]. OAG would note that pursuant to First Draft of Report 69, Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses, the penalty for third degree burglary is 1 year.

Footnote 23 of the Commentary explains the text above. It states, "Consider, for example, a person who enters the lobby and mailroom of a large building, undetected by an employee on the fifth floor." While OAG does not disagree with the outcome highlighted by this footnote, we do disagree with the requirement that in other situations an actor is only guilty of third degree burglary when they are inside an occupied home, but are not directly perceived by the victim. Take the following two examples. In the first, the actor breaks into a woman's home at 3:00 am. He goes into her bedroom where she is sleeping. He searches her nightstand, taking her jewelry, and steals other things from her dresser and closet. He also ransacks the rest of her apartment stealing other items. When the victim wakes up she sees the condition of her nightstand and the rest of her bedroom and then she sees the condition the actor left the rest of her apartment. The second example is the same as the first, but instead of the victim being asleep at 3:00 am, she is in her bathtub soaking at 8:00 pm while her premises are being ransacked.

In situations similar to the examples above, the victims of these offenses have been extremely traumatized by the burglary. Even though the victims were not sexually assaulted, the perpetrator's proximity to them while they were vulnerable have exasperated the trauma that they experienced. One can never know what could have happened to them had they perceived the burglar and the burglar reacted to that perception. OAG does not believe that such intrusions should be relegated to a third degree burglary with a penalty of 1 year in prison. To distinguish OAG's example from that in footnote 23, OAG recommends that first and second degree

[25] There may be other places in the Commentary that has to be amended to be consistent with this clarification.

[26] Given the sensory limitations of some District residents, it is unclear why the sense of smell is excluded from this list. OAG recommends that it be added.

burglary be amended to make an exception to the requirement that the victim directly perceive the perpetrator when the burglary is in a dwelling.[27]

RCC § 22E-3401. Escape from a Correctional Facility or Officer

The elements of second degree escape from a correctional facility or officer are contained in subparagraph (b). That subparagraph states:

> (b) An actor commits second degree escape from an institution or officer when that actor:
> (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. [emphasis added]

Paragraph (f) states that the phrase "law enforcement officer" has the meaning specified in RCC § 22E-701. This provision states:

> "Law enforcement officer" means:
> (A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;
> (B) An investigative officer or agent of the United States;
> (C) An on-duty, civilian employee of the Metropolitan Police Department;
> (D) An on-duty, licensed special police officer;
> (E) An on-duty, licensed campus police officer;
> (F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or
> (G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.

Notwithstanding the scope of the definition of a law enforcement officer stated above, RCC § 22E-3401 (b), by its terms, would limit this offense to a "law enforcement officer of the District of Columbia or of the United States." [emphasis added] Escaping from an on-duty, licensed special police officer or campus police officer would not be covered. OAG believes that this limitation may have been inadvertent as the Commentary, on page 13, states, "The term "law enforcement officer" is defined in RCC § 22E-701 and includes persons with limited arrest powers, such as special police officers and community supervision officers acting in their official capacity, but excludes private actors who are performing a citizen's arrest." To comport the text of paragraph (b) with the explanation in the Commentary, OAG recommends that the phrase "of the District of Columbia or of the United States" be deleted.

[27] OAG's recommendation would move the RCC closer to the current burglary offense. The current offence distinguishes between occupied residences on the one hand and unoccupied residences and buildings on the other. See D.C. Code § 22-801.

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

Paragraph (c) contains the exclusions from liability for this offense. It states, "A person does not commit an offense under this section for possession of a firearm within the first 24 hours of the prior conviction or service of the protection order." On page 33 of the Commentary it states, "…the revised statute provides a 24-hour grace period between the time the person is convicted or served with a protection order. The current D.C. Code § 22-4503(a)(5) provides no exception for having a reasonable opportunity to safely dispose of a firearm after a protection order goes into effect. In contrast, the revised statute ensures that a law-abiding gun owner does not commit an offense the moment their status changes to a someone who is now unauthorized to possess a firearm. The person may retrieve and safely transport the firearm and relinquish ownership."

OAG agrees that a person who is subject to this offense should have a reasonable time to dispossess themselves of their firearm and relinquish ownership. However, we submit that the risk that some of these individuals pose by possessing a firearm for 24 hours is too great and a judge who presided over the sentencing for the prior conviction or at the hearing for the protection order should be able to limit the time that the defendant has to dispose of the firearm as is necessary for the protection of a person or the community based upon the individual facts of each case. Take for example when a judicial officer finds that there is good cause to believe the actor has threatened to shoot the petitioner and the actor is known to have a gun, a bad temper, and is angry that the petitioner obtained the protection order. In that situation, the law should not arbitrarily give that actor 24 hours to dispose of their gun. The risk to the petitioner is too great. To account for special circumstances where the risk to the safety of the community, generally, or to a petitioner, in particular, warrants, a judicial officer should be able limit the timeframe for the actor to turn in their gun and the actor's defiance of this order should expose the actor to the offense of possession of a firearm by an unauthorized person. Therefore OAG recommends that paragraph (c) be amended to say, "A person does not commit an offense under this section for possession of a firearm within the first 24 hours of the prior conviction or service of the protection order, unless the judicial officer sentencing the actor or issuing the protection order specifically orders a shorter period of time for the actor to retrieve and safely transport the firearm or relinquish ownership."

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles

This provision declares a "dangerous article," as defined therein, to be a nuisance. It authorizes designated individuals to seize a dangerous article and then establishes procedures for its return, if authorized by the provision; its destruction; or for the Mayor to otherwise dispose of it.

Subparagraph (g)(2) defines a dangerous article as a firearm, restricted explosive, firearm silencer, bump stock, or large capacity ammunition feeding device. Subparagraph (g)(1) refers the reader to RCC § 22E-701 for the definition of a firearm. RCC § 22E-701 states, in relevant part, that a "firearm" "has the meaning specified in D.C. Code § 7-2501.01." However, D.C. Code § 7-2501.01 excludes an antique firearm from the definition of a firearm. While OAG agrees that for the purposes of Title 7 an antique firearm should be excluded from the definition of a firearm, because the use of an antique firearm can still be lethal, OAG recommends that

when they are unlawfully owned, possessed, or carried that they too should be declared to be a nuisance, subject to the procedures for their return, destruction, or disposition from the Mayor.

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

OAG disagrees with three aspects of this provision. RCC § 22E-4119 states:

(a) The court shall not enter a judgment of conviction for more than one of the following District offenses based on the same act or course of conduct:
  (1) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under RCC § 7-2502.01A;
  (2) Possession of a Stun Gun under RCC § 7-2502.15;
  (3) Carrying an Air or Spring Gun under RCC § 7-2502.17;
  (4) Carrying a Dangerous Weapon under RCC § 22E-4102;
  (5) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103; and
  (6) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104.

(b) The court shall not enter a judgment of conviction for more than one of the following District offenses based on the same act or course of conduct:
  (1) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103;
  (2) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; and
  (3) Any offense under Subtitle II of this title that includes as an element, of any gradation, that the person displayed or used a dangerous weapon.

(c) Where subsection (a) or (b) of this section prohibits multiple convictions, the court shall enter a judgment of conviction in accordance with the procedures specified in [RCC § 22E-22E-214 (c)-(d)].[28]

(d) *Definitions*. The term "act" has the meaning specified in RCC § 22E-701.

RCC § 22E-22E-214 (c) and (d) state:

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

[28] The reference in paragraph (c), in Report 68, contains a typo and actually says RCC § 22E-212(d)-(e). However, RCC § 22E-212, is entitled "Exclusions from Liability for Conduct of Another Person." OAG is substituting RCC § 22E-22E-214 (c)-(d) for this reference after consulting with the Commission.

(d) *Final judgment of liability.* A person may be found guilty of 2 or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:

(1) The time for appeal has expired; or

(2) The judgment appealed from has been decided.

First, RCC § 22E-4119 (a) and (b) prohibit a court from entering a judgment of conviction for more than one of the specified weapons offenses. It is unclear how this will work in practice. A hypo may help explain the issue. The trier of fact finds the actor guilty of carrying a dangerous weapon in violation of RCC § 22E-4102. They also find the actor guilty of possession of an unregistered firearm, in violation of RCC § 7-2502.01A. Pursuant to RCC § 22E-4119 (a), the court cannot enter a judgment of conviction for both. So, pursuant to RCC § 22E-22E-214 (c) the court will only enter a conviction for carrying a dangerous weapon[29]. If initially the court only enters a single conviction for carrying a dangerous weapon, then the trier of fact's finding the defendant was guilty of unregistered firearm would not be reviewed by the Court of Appeals. This makes RCC § 22E-22E-214 (d)'s merger provisions superfluous. To fix this issue, OAG has two recommendations. First, the text of RCC § 22E-4119 (a) and (b) should be amended to state that the trier of fact shall initially enter a judgment for more than one of the listed offenses based on the same act or course of conduct, however, pursuant to RCC § 22E-22E-214 (c) and (d) only the conviction for the most serious offense will remain after the time for appeal has run or an appeal has been decided. Second, to ensure that a defendant does not serve additional time pending an appeal, or for the time to appeal to have expired, OAG also recommends that any sentences issued pursuant to this paragraph run concurrently.

Second, it is unclear whether under this provision a person can have multiple convictions for carrying more than one unregistered firearm. OAG states this because the Commentary, on page 72, incorrectly states, "Under current District case law, multiple convictions for a possession of an unregistered firearm merge ..." [footnotes omitted] while in footnote 11, it states, "Under current District law, there are different units of prosecution for possessing than for carrying multiple weapons without permission. *Hammond v. United States*, 77 A.3d 964, 968 (D.C. 2013) (the unit of prosecution for possessing an unregistered firearm is each weapon)." [emphasis added] So, under District case law, multiple convictions for possession of unregistered firearms do not merge. As the Court of Appeals stated in *Hammond*, "Since the UF statute is not ambiguous, the rule of lenity does not apply and we affirm appellant's conviction for two counts of possession of an unregistered firearm. *See Murray v. United States*, 358 A.2d 314, 321 (D.C. 1976) (holding that the rule of lenity did not apply where "the language and logic of the statute reflect the legislature's intent" as to the unit of prosecution)."

Limiting convictions for a person who has multiple unregistered firearms to a single conviction,[30] would be disproportionate. It would mean that a person who was found guilty of possessing 5 unregistered firearms would be subject to the same penalty as a person who was

[29] Assuming that the penalty for that offense is ultimately greater that the other offense upon passage of this legislation.

[30] If such a limitation is the Commission's intent.

found guilty of possessing one unregistered firearm. This provision should be redrafted to make it clear that the unit of prosecution and conviction for possessing an unregistered firearm remains each weapon.

Finally, OAG disagrees with the inclusion of unregistered firearm with the other offenses listed in RCC § 22E-4119. The social interests for this offense is not the same as the interests in the other offenses. The District has a legitimate interest in ensuring that all legal firearms are registered. Unsafe firearms should not be registerable. This is a separate interest from how a registered or unregistered firearm or the other weapons are used or whether the actor is licensed to carry the weapon. For example, the limitation on convictions apply to carrying a dangerous weapon, under RCC § 22E-4102, and possession of an unregistered firearm, under RCC § 7-2502.01A. One way to commit the offense of carrying a dangerous weapon includes the element that the person is carrying a pistol without a license. See RCC § 22E-4102 (a)(1)(B) and (b)(1)(B). To understand the difference, OAG submits that as to how licensing is concerned, carrying a pistol without a licensee is like driving a car with a license. Whereas, possessing an unregistered firearm, is comparable, as to the registration requirement, to driving an unregistered car. No one would argue that a person who is caught driving without a license should not also be convicted of driving an unregistered vehicle. Similarly, a person who is guilty of carrying a pistol without a license should, if the firearm is unregistered, also be able to be convicted for that offense; as should a person who does not have a license to carry a registered firearm. Because the interests to society is different, RCC § 22E-4119 should be amended to permit the multiple convictions for these offenses.

RCC § 22E-4201. Disorderly Conduct[31]

Paragraph (a)(1)(A) of this offense, like the introductory language to the current offense under D.C. Code § 22-1321, includes the requirement that the offense occur in a location that is open to the general public. In footnote 4 of the Commentary, on page 77, it states as to the RCC offense, "For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. The current statute, D.C. Code § 22-1321 could not have interpreted the phrase "open to the general public" in the way that the Commission appears to, because after that lead in language, the current law makes it an offense to "engage in loud, threatening or abusive language, or disruptive conduct, which reasonably impedes, disrupts, or disturbs the lawful use of a public conveyance…" People on public conveyances, e.g. a METRO train or bus, paid a fare to get through the gate or onto a bus.

[31] OAG believes that subparagraphs (a)(2)(A) through (C) have a typo that was caused by the striking of some of the language. For example, subparagraph (a)(2)(A) now states, "Recklessly, by conduct other than speech, causes any person present to reasonably believe that they are likely to suffer immediate criminal ~~harm involving~~ bodily injury, taking of property, or damage to property." OAG believes that the word "criminal," preceding the stricken language should also have been stricken. The word "criminal" is not needed in that, or the other subparagraphs. Similarly, OAG recommends that the term "criminal" be deleted from the rioting statute found in RCC § 22E-4301(a)(2).

The RCC language implies that while a person may be guilty of disorderly conduct when they are outside the fare gates, for example by requesting someone present to cause someone else immediate bodily injury or knowingly continuing to fight after receiving a law enforcement officer's order to stop,[32] this same behavior would not be disorderly conduct even though inside the METRO station the victim may actually be in more danger because of their proximity to the electrified train tracks, the possible fall from a lengthy escalator or from the middle level of the train station to the track level. Notwithstanding the fare requirements, most lay people think of the METRO station as open to the public. Similarly, the offense of disorderly conduct should apply to behavior that occurs on METRO trains and buses. People have the expectation that they can ride METRO trains and buses unmolested. METRO should be able to intervene in activities on their trains and buses before their passengers are actually hurt. Therefore, OAG recommends that paragraph (a)(1), which now states the offense only occurs when the actor:

(1) In fact, is in a location that is:
  (A) Open to the general public at the time of the offense; or
  (B) A communal area of multi-unit housing;

be amended to say:

(1) In fact, is in a location that is:
  (A) Open to the general public at the time of the offense;
  (B) Inside a METRO station, train, or bus; or
  (C) A communal area of multi-unit housing;

In addition, OAG is concerned about behavior on METRO trains and buses that prevent its passengers from peaceably enjoying their travel, notwithstanding that the behavior does not rise to the level of potential harm required by paragraphs (a)(2) of this offense. For example, OAG has seen cases where youth hang from bars on buses and trains preventing passengers from getting to their seats or exiting at their stop. Therefore, OAG recommends that this offense, or the offense of public nuisance, in RCC § 22E-4202, add back some of the language, mentioned above from the current law, so that it continues to be an offense to engage in disruptive conduct, which reasonably impedes or disrupts the lawful use of a public conveyance…"[33]

RCC § 22E-4203. Blocking a Public Way

This offense, like D.C. Code § 22-1307 requires that the person continues or resumes the blocking after receiving a law enforcement officer's order that, in fact, is lawful, to stop. At the hearings on D.C. Code § 22-1307 the issue came up as to whether repeated warning are necessary when the person is asked to stop blocking a location and then leaves, but keeps coming

[32] See RCC § 22E-4201 (a)(2) (B) and (D).

[33] OAG's recommendation does not include the term "disturbs" as we want to make clear that this offense should be reserved more than mere disturbance. In addition, if the CCRC adopts OAG's proposal to amend paragraph (a)(1) to include Metro trains and buses, then there is no reason for this paragraph to include "loud, threatening, or abusive" conduct as that behavior would be appropriately covered by the offenses proposed in paragraphs (a)(2).

back and blocking the location. To address this issue, the Council added to the legislative history the following:

> It is the Committee's intent that a person can be arrested if he or she reappears in the same place after warning, even if some time later- e.g., if the officer gives the warning, remains present, the person stops incommoding, but then the person resumes incommoding in the officer's presence. If a homeless person, as another example, is asked by the same officer to move day after day from blocking a store entrance, and then the officer says something to the effect that "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again you will be arrested," the Committee expects that the person could be arrested without another warning.[34]

OAG recommends including this reference in the Commentary to forestall any arguments concerning whether repeated warnings are necessary prior to making an arrest for this offense.

Unlike the D.C. Code 22-1307, this provision does not make it an offense to block the entrance or exit of a non-government building.[35] The Commentary, on page 95, states:

> Second, the revised statute applies only to land or buildings owned by a government, government agency, or government-owned corporation. The current crowding, obstructing, or incommoding statute is unclear as to whether the streets, sidewalks, etc., or entrances to buildings covered by the statute must be on publicly owned property. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history, the DCCA has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building." In contrast, the RCC blocking a public way statute excludes conduct on or in all privately owned land and buildings. Unwanted entries onto private property remain separately criminalized as trespass. The revised statute's phrase "owned by a government, government agency, or government-owned corporation" makes clear that land or buildings owned by the Washington Metropolitan Area Transit Authority, Amtrak, and similar locations are within the scope of the revised statute. This change clarifies and reduces unnecessary overlap between revised offenses. [footnotes omitted] [emphasis added]

The Commentary quoted above misses one common scenario that the Council recognized in the legislative history noted above. The following hypo demonstrates this. A person stands on the sidewalk in front of a CVS drug store blocking people from entering and exiting the store.

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[34] See the Section-by-Section analysis regarding Section 2(a) contained in Report on Bill 18-425, the Disorderly Conduct Amendment Act of2010.

[35] D.C. Code 22-1307 (a) states, in relevant part, "It is unlawful for a person, alone or in concert with others [] [t]o crowd, obstruct, or incommode [] the entrance of any public or private building or enclosure." [emphasis added]

Because the CVS is not located in a government building, this offense does not apply. However, because the person is standing on the sidewalk, the offense of trespass does not apply. The person is not committing "Unwanted entries onto private property." To address the harm to store owners and others, OAG recommends that paragraph (a)(2) be amended to include, as the current law does, the blocking of entrances and exits to private property.

RCC § 22E-4206. Indecent Exposure

Paragraph (c)(1) states as one of the exclusions from liability that "A person does not commit an offense under this section when, in fact, that person is under 12 years of age." In light of Developmental Incapacity Affirmative Defense, found in RCC § 22E-505, OAG does not believe that this exclusion is necessary. RCC § 22E-505 (a) states, in relevant part, "It is a defense that, in fact, the actor [i]s under 12 years of age." RCC § 22E-505 relates to all criminal conduct.

RCC § 7-2502.15. Possession of a Stun Gun

Paragraph (e)(2) states, "*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." D.C. Code § 5-335.01 is titled "Enforcement of the post-and-forfeit procedure."

OAG objects to the inclusion of paragraph (e)(2). D.C. Code § 5-335.01 authorizes the post-and-forfeit procedure to ANY offense that meets the eligibility criteria established by OAG. See D.C. Code § 5-335.01 (c)(1). The inclusion of the authorization in paragraph (e)(2) is at best redundant to OAG's authority, or at worst, the failure of other offenses to contain this reference could be viewed as a limitation on OAG's authority to grant post-and-forfeits as a way of resolving its other offenses.[36]

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner

Subparagraph (4)(A) states that for one way of committing the offense, the actor must possess:

[36]OAG acknowledges that Footnote 7, on page 12 of the Commentary states, "Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors." First, the offer of post-and-forfeits are not "negotiated." If the person qualifies they are offered this way of resolving the case short of being prosecuted. They can either accept or not accept the offer. In addition, applying the logic of the statement, the D.C. Code should be amended to include that statement to the over 300 non-traffic offenses and approximately 50 traffic offenses for which OAG has authorized the post-and-forfeit procedure. The statement ignores that OAG may place limits on the offering of post-and-forfeits, including the number of times that a person may avail themselves of this option (e.g. a limitation on the number of times a vendor can use the post-and-forfeit option to resolve the charge of vending without a license such that forfeiting collateral does not become the cost of doing business). In addition OAG is concerned that the inclusion of this language may inadvertently make people think that they will be able to use this option.

ammunition that is conveniently accessible and within reach and is either:
(i) More than is required to fully load the pistol twice; or
(ii) More than 20 rounds;

When reviewing this provision, OAG debated whether the requirement applied to the lesser or greater number of rounds listed. In reviewing the Commentary, on page 27, OAG saw the following statement. "A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice or if they have more than 20 rounds of ammunition, whichever is least." [footnotes omitted] To ensure that the rule of lenity does not apply when the court is interpreting the actual text of paragraph (4)(A), OAG recommends that the phrase "whichever is least" be added to subparagraph (4)(A).

RCC § 16-1022. Parental Kidnapping Criminal Offense

Paragraph (e) contains exclusions from liability for this offense. It includes when the act constituting the offense is taken by a parent fleeing from imminent physical harm to the parent. See subparagraph (e)(1). OAG notes that there is no reasonableness standard attached to the parent's belief that they are fleeing from imminent harm.[37] A parent who unreasonably feels that they are fleeing from imminent physical harm should not be able to avail themselves of this exclusion when they take a child from the child's lawful custodian. To avoid litigation over this issue, OAG recommends that subparagraph (e)(1) include a reasonableness standard.

II. OAG's comments concerning the CCRC's responses to previous comments, as reflected in Appendix D2, CCRC's Disposition of Advisory Group Comments & Other Draft Documents.

RCC § 22E-204. Causation Requirement

The text of RCC § 22E-204 is as follows:

(a) *Causation requirement.* No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.
(b) *"Factual cause" defined.* A person's conduct is the factual cause of a result if:
  (1) The result would not have occurred but for the person's conduct; or
  (2) When the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.
(c) *"Legal cause" defined.* A person's conduct is the legal cause of a result if:
  (1) The result is reasonably foreseeable in its manner of occurrence; and
  (2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result.
(d) *Definitions*.
  (1) "Result element" has the meaning specified in RCC § 22E-201(d)(2).

[37] The Commentary does not address this issue.

On page 2, comment 2 the CCRC responded as follows:

> *OAG, App. C at 556-557, recommends that if RCC § 22E-204 retains paragraph (c)(2), that the term "volitional conduct" be defined in statute, and that the phrase "justly held responsible for the result" be amended to "articulate a discernible standard." In its written comments OAG did not provide any recommended alternate language.*
> The RCC does not incorporate this recommendation at this time. With respect to the term "volitional conduct," the commentary to RCC § 22E-204 states that paragraph (c)(2) relates to the "free, deliberate, and informed conduct of a third party or the victim." The term "volitional conduct" and the accompanying commentary is sufficiently clear to guide fact finders. With respect to the phrase "justly held responsible for the result," the commentary notes that ultimately whether a person may be held liable for the volitional conduct of another is a normative judgment. As discussed above, an objective standard premised solely on reasonable foreseeability may produce unjust results. The commentary provides several factors to guide fact finders in determining whether an actor may be "justly held liable" for volitional conduct of another. Although paragraph (c)(2) does not provide a clear bright line rule, it does define the basic principle of legal causation when there is intervening volitional conduct: the actor should only be held legally responsible when it is *just* to do so, given the surrounding facts of a given case. Although the RCC does not incorporate this recommendation at this time, CCRC staff will continue to evaluate principles of legal causation and will consider recommending updated language at a later date. The CCRC would welcome Advisory Group members' further comments on possible statutory language accounts for factors besides reasonable foreseeability and provides more guidance to factfinders.

As noted above, OAG expressed concerns about both the phrase "volitional conduct" and "justly held responsible." While the reply addresses the first concern, it leaves the second one unanswered. In fact, OAG believes that it underscores our concern by noting that "justly" is a normative inquiry. We do not see what discernible principle guides that inquiry, and since this is a determinant of whether someone can be held criminally responsible for something, this is deeply problematic.

RCC § 22E-403. Defense of Self or Another Person
On page 13, comment 2, the CCRC stated:

> *OAG, App. C at 612, recommends revising the statutory text or commentary to clarify "what it means to 'reasonably believe' something in the* heat of passion*."*
> - The RCC incorporates this recommendation by revising the commentary to state, "It may be reasonable for person acting in the heat of passion to believe a greater degree of force is necessary than would seem necessary to a calm mind." This change clarifies the revised commentary.

While OAG appreciates the CCRC amending the commentary as noted above, we do not believe that this response is sufficient. The defining characteristic of acting in the heat of passion is that one is not acting reasonably.

RCC § 22E-501. Duress

On page 20, comment 2, the CCRC stated:

> *OAG, App. C at 614, recommends that the commentary on paragraph (b)(1) of the defense describe the contours of the phrase "brings about" and give examples of situations that fall within and without that requirement.*
>
> > The RCC partially incorporates this recommendation by adding description in the commentary on the phrase "recklessly brings about the situation requiring a choice of harms." Specifically, the commentary now includes the statement that, "The term 'brings about' requires that the actor caused the situation requiring the defense. The actor's conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable. An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm." Also, the commentary already states: "For example, if a defendant agrees to engage in a highly dangerous criminal endeavor, and a co-conspirator then threatens the defendant to commit an additional crime in furtherance of the conspiracy, the duress defense may not be available, if the defendant was aware of a substantial risk that a co-conspirator would compel him to commit an additional crime." This change clarifies the RCC commentary. [footnotes omitted]

OAG believes that the addition to the commentary, noted above, does aid the reader to understand what is meant by the offense language. However, based on the CCRC's reasoning, OAG wonders why the RCC does not simply say in the text of the defense that the actor "causes the situation," if "causes" is what the CCRC means by "brings about."

RCC § 22E-701. Generally Applicable Definitions

On page 46, comment 1, the CCRC stated:

> *CCRC recommends replacing the phrase "District crime" with the phrase "current District offense." The term includes any crime committed against the District of Columbia under laws predating the RCC that would necessarily prove the elements of a corresponding RCC offense.*

OAG believes that the phrase "current District offense" invites the question: current as of when? Does this mean current as of when the RCC was enacted, when the offense took place, when the person was charged, or when the trial took place. OAG recommends that this ambiguity be resolved by clarifying that the proper reference point is when the offense took place.

On page 46, comment 2, the CCRC stated:

> *The CCRC recommends codifying a new subparagraph (C) in the definition of "consent": that consent "Has not been withdrawn, explicitly or implicitly, by a*

> *subsequent word or act." This change makes clear that consent, once given, can be changed.*

While OAG agrees with the addition of a new subparagraph (C), we submit that the phrase "by a subsequent word or act" is superfluous. After all, if the consent was withdrawn before the offense, there would be no issue of consent. OAG recommends that the new subparagraph (C) be amended to read that consent "Has not been withdrawn, explicitly or implicitly."

On page 59, comment 9, the CCRC stated:

> *The CCRC recommends replacing "contractor" with "contract employee" in subsection (F) of the revised definition of "position of trust with or authority over." The RCC incorporated "contractor" in the previous draft based on a written comment from the Advisory Group. However, "contract employee" appears more accurate because it refers to the individual hired on a contract basis as opposed to the individual that does that the hiring. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include a "contract employee, as does the RCC sexual abuse by exploitation statute (RCC § 22E-1303).* [footnote omitted]

The CCRC quote above contains a footnote which states, "See, e.g., D.C. Code § 22-3013 (first degree sexual abuse of a ward, patient, client, or prisoner statute referring to "[a]ny member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . . ."). [emphasis added]. Despite the fact that the change is consistent with D.C. Code § 22-3013, the change from "contractor" to "contract employee" is not correct. It blurs the distinction between a contractor and an employee. And the suggestion that the word "contractor" could refer to the one doing the contracting rather than the person whose services are contracted is incorrect. A contractor is "a person or company that undertakes a contract to provide materials or labor to perform a service or do a job."[38]

RCC § 22E-1202. Assault

On page 75, comment 6, the CCRC stated:

> *The CCRC recommends codifying an exclusion from liability in what is now subsection (e): "An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation." This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.* [footnotes omitted] [emphasis added]

[38] See https://www.bing.com/search?q=contractor+defined&form=PRLNC8&src=IE11TR&pc=LJSE

While OAG does not oppose codifying an exclusion from liability when District law specifically permits the actor's actions, the new language should say simply "District statute," not "District statute or regulation." An agency cannot, by rule, carve out an exemption to a criminal statute.[39]

RCC § 22E-1301. Sexual Assault

On pages 90 and 91 , comment 15, the CCRC stated:

> *The CCRC recommends deleting what was previously paragraph (e)(3) from the effective consent affirmative defense: "The actor is not at least 4 years older than a complainant who is under 16 years of age." The current D.C. Code consent defense to the general sexual abuse statutes does not have such an age requirement, although the DCCA has held that the defense is not available when the defendant is an adult at least four years older than a complainant under 16 years of age. However, it is unclear if the DCCA holding is still good law, and by codifying this requirement, the previous version of the RCC effective consent defense conflated consent to the use of force with consent to sexual activity. Striking the age requirement allows an effective consent affirmative defense to the use of force when the complainant is under 16 years of age and the actor is at least four years older. If the defense is successful, there is no liability for forceful sexual assault, but there would still be liability for RCC sexual abuse of a minor, which does not require force, and relies on the ages and relationship between the parties to impose liability. For example, if a 20 year old actor has sex with a 15 year old complainant and the complainant gives effective consent to being tied up during sex, there is no liability for sexual assault, but there would be liability for second degree sexual abuse of a minor. In practice, the definition of "consent" in RCC § 22E-701 may preclude a complainant sufficiently under the age of 16 years from giving consent to the use of force by an actor that is at least four years older because the definition excludes consent given by a person who "is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof" or "because of youth . . . is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct." While the RCC provides no bright-line as to what age may render a youth unable to give consent under this provision, the flexible standard would allow for sex assault (not just sexual abuse) charges in some cases. The commentary to the RCC sexual assault statute has been updated to reflect that this is a possible change in law.* [footnotes omitted]

OAG objects to the deletion of paragraph (e)(3). Applying the same carve-out to two kinds of consent does not "conflate" one kind of consent with the other; it acknowledges that the same kind of bright line makes sense for both. The language above acknowledges that "the DCCA has held that the defense is not available when the defendant is an adult at least four years older than

[39]That is not to say, of course, that a regulation cannot repeat an existing statutory exemption – just that, in that case, the exemption comes from the statute, not from the regulation. And it, also, does not mean a regulation cannot define, for instance, the factual predicates for an offense, such as whether a certain occupation is "lawful." OAG recommends this same amendment wherever else this new language is added in this context.

a complainant under 16 years of age." The CCRC should not remove this defense because it believes that the DCCA might overrule this holding.

On pages 138 and 139 , comment 1, the CCRC stated, in relevant part:

> The RCC partially incorporates this recommendation by revising subparagraph (a)(1)(B) of the RCC offense to require that the actor give effective consent "to a third party" to engage in sexual activity with a minor complainant or cause a minor complainant to engage in the sexual activity, as opposed to giving effective consent "for the complainant" to engage in sexual activity in the previous version. The revised language categorically excludes from the offense a parent or other responsible individual giving effective consent to the minor to engage in sexual activity, regardless of whether the sexual activity is legal or illegal (e.g.., violates the RCC sexual abuse of a minor statute (RCC § 22E-1302)). The RCC arranging for sexual conduct statute requires a "knowingly" culpable mental state and does not require that sexual activity actually occur. While the updated statute does not criminalize a parent or other responsible individual "knowingly" giving a minor effective consent to engage in sexual activity that is illegal (i.e. giving a 14 year old complainant effective consent to have sex with the complainant's 19 year old boyfriend), there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes if there is harm or a risk of harm to the minor. In addition, if the parent or other individual "purposely" gives a minor effective consent to engage in sexual activity that is illegal, the person may be charged (and it is more proportionate to charge this conduct) as an accomplice under other provisions in the RCC that have more severe penalties than the RCC arranging for sexual conduct offense. This change improves the consistency and proportionality of the revised statutes. The commentary to the RCC arranging has been updated to reflect that this revision is a change in law.
>
> The RCC also partially incorporates this recommendation by requiring that the consented-to sexual activity between the complainant and the third party or between the complainant and another person violates the RCC sexual abuse of a minor statute. (The previous RCC version of this offense only required that the complainant be under the age of 18 years). The updated arranging statute language consequently excludes from the offense consented-to sexual activity that is legal. For example, the revised language excludes a parent giving effective consent to a 17 year old boyfriend to engage in consensual sexual activity with the parent's 15 year old child, but includes a parent giving effective consent to a 17 year old boyfriend if the child were 12 years of age. This change improves the clarity, consistency, and proportionality of the revised offense. The commentary to the RCC arranging has been updated to reflect that this revision is a change in law. [emphasis added]

OAG objects to "exclude[ing] from the offense a parent or other responsible individual giving effective consent to the minor to engage in sexual activity, regardless of whether the sexual activity is legal or illegal." It is one thing to amend this provision so that the RCC does not

inadvertently criminalize "a parent who 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,"[40] and another for the parent to give effective consent to the minor to engage in sexual activity that is illegal. There is no reason to permit the parent to be complacent in this form of child abuse.[41]

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person

On page 178 , comment 4, the CCRC stated:

> For the comparatively low-level harms required in second degree and third degree of the revised criminal abuse of vulnerable adult or elderly person statute, the new defenses continue to provide a defense when the actor inflicts the injury in a lawful sport or occupation when the injury is a "reasonably foreseeable hazard" of those activities. However, the new defenses also apply when the actor inflicts the injury as a "reasonably foreseeable hazard" of "other concerted activity." This change clarifies that informal activities such as sparring, playing "catch" with a baseball, or helping someone repair their car all are within the scope of the defense when the other defense requirements are satisfied. The "or other concerted activity" tracks the language in the Model Penal Code and several other jurisdictions. [emphasis added][footnote omitted]

OAG recommends noting that, under the statutory text, this other activity must, like an occupation or sport, be lawful.[42]

RCC § 22E-1801. Stalking

Starting with the last comment on the page 196, the CCRC stated:

> *The CCRC recommends requiring that the actor engage in a course of conduct negligent as to the fact that the course of conduct is without the complainant's effective consent. The RCC has been updated to eliminate the general defense for effective consent under RCC § 22E-409. Addition of this negligence element, however, performs a similar function in eliminating liability for conduct such as physically following, where the actor had a reasonable belief that he or she had the complainant's effective consent. The negligence culpable mental state does not require proof of any subjective awareness by the actor that the conduct was without the complainant's effective consent.*

[40] This is the example cited by PDS on page 138 of First Draft of Report 68 – Appendix D2. Disposition of Advisory Group comments.
[41] While the CCRC says the parent might be chargeable as an accomplice, that would only be true if the parent was acting in coordination with the actual perpetrator.
[42]The same note applies wherever else this "other concerted activity" language is added.

OAG is not sure that the CCRC is right to say that, if someone reasonably believes they have effective consent, they are not negligent as to the absence of effective consent, unless "reasonableness" and "should have known" are coextensive; are they? [43]

RCC § 22E-1803. Voyeurism

On page 199, comment 2, the CCRC stated, "The CCRC recommends specifying in a footnote to the commentary that the word "breast" excludes the chest of a transmasculine man. OAG is not certain this carve-out is consistent with the ordinary meaning of the word "breast" in this context. If a transmasculine man has a breast, as opposed to merely a chest, it is unclear why the voyeurism offense should not apply to images of these breasts. The invasion of privacy for the transmasculine man is just as great as if they had a different gender identity. To the extent that the CCRC believes a transmasculine man's breast, should they have any, not be covered by this offense, this carve-out needs to be incorporated into the statutory text.[44]

RCC § 22E-3401. Escape from a Correctional Facility or Officer

On page 245, comment 21, the CCRC states:

> *OAG, App. C at 477, recommends redrafting paragraph (b)(2) to state, "Knowingly leaves custody without the effective consent of the law enforcement officer" instead of "Knowingly, without the effective consent of the law enforcement officer, leaves custody."*
>
> - The RCC does not incorporate this recommendation because it would make the drafting of second degree escape from a correctional facility or officer inconsistent with the other degrees of the offense. Because there are multiple, alternative conduct elements for third degree escape, the circumstance element ("without effective consent") precedes a list. First and second degree mirror this formulation to avoid questions about whether the similar circumstance elements should be read differently, which they should not.

OAG asks the CCRC to reconsider its position. OAG's concern with the CCRC's current formulation is that, since the "without the effective consent" phrase is a prepositional phrase that follows "knowingly," it's not clear whether "knowingly" applies to it. If CCRC is concerned about consistency, it should make our proposed change throughout. For instance, first-degree escape could be amended to read "Knowingly leaves the correctional facility, juvenile detention facility, or cellblock with the consent of…."

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[43]OAG's comment also applies to wherever else this language appears.

[44] This issue arises because the RCC, like the current statute, refers to an image of a "female breast." Once concepts of being transgender are incorporated into the code, which OAG certainly does not object to, then the CCRC may want to consider defining what it means to be "female." Have other jurisdictions found it appropriate here to make a distinction based on an individual's gender identity, or to have that individual's gender identity something that a judge rules on as a factual matter?

RCC § 22E-4401. Prostitution

On page 245, comment 21, the CCRC states:

> *OAG, App. C at 558-560, recommends revising a sentence in paragraph (c)(1) to read "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(1)." The current sentence in paragraph (c)(1) reads, "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." OAG states that the current sentence "does not, on its face, permit a prosecutor from retaining a copy of the records as a check on the court." OAG states that, "[i]n 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 retain and view nonpublic sealed records." In addition, because paragraphs (c)(1) and (c)(2) "use the term 'probation' to describe a defendant's supervision preadjudication," OAG recommends that "the Commentary make clear that the court's authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803."*
>
> - The RCC does not adopt this recommendation at this time. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing. In addition, as is discussed above in the first entry, the RCC prostitution statute deletes the provision for the courts retaining a nonpublic record solely for use in determining whether or not, in subsequent proceedings, a defendant qualifies for the deferred disposition provision.

OAG believes that USAO is correct to note that the Council cannot regulate the records kept by a federal agency, or the form in which they are kept. That applies to current law as surely as it does to this provision. We would also emphasize, here and in the patronizing prostitution statute, that the expungement provisions cannot regulate federal agencies, or say that a person shall not be held guilty of a federal crime; it can only reach District agencies and District offenses.[45]

RCC § 22E-4601. Contributing to the Delinquency of a Minor

On page 293, comment 2, the CCRC states:

> *OAG, App. C at 606-607, recommends revising what was previously subparagraph (a)(3)(B) to read "Knowingly encourages the complainant to engage in specific conduct*

[45] OAG made this point with respect to RCC § 48-904.01a, Possession of a Controlled Substance, as is noted on p. 326, recommendation 4.

that, in fact, constitutes a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction." This subparagraph was previously limited to encouraging the commission of a "District offense or a comparable offense in another jurisdiction," with only a footnote in the RCC commentary explaining that D.C. Code § 25-1002, prohibiting the purchase, possession, of consumption of alcohol by persons under 21 years of age, was an "offense" for the purposes of the revised CDM statute despite the civil penalties for a person under the age of 21 years. OAG states that it could be "argued that the language in D.C. Code § 25-1002(a) that provides for civil penalties means that it is no longer an 'offense' for a person under the age of 21 to possess or drink alcohol."

- The RCC incorporates this recommendation by codifying "for a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction" in subparagraphs (a)(3)(A) and (a)(3)(B), pertaining to both accomplice liability and solicitation liability. This change improves the clarity of the revised statutes.

OAG would note that by classifying something subject to civil penalties as an "offense," it implies that every other use of the word "offense" in this provision sweeps in offenses punishable only by civil penalties. Instead, this language should say something like: "a District offense, a violation of D.C. Official Code § 25-1002, or a comparable offense or violation in another jurisdiction."[46]

On page 296, comment 7, the CCRC states:

USAO, App. C at 632, recommends clarifying that the RCC developmental incapacity defense (RCC § 22E-505) does not preclude liability for an adult defendant under the revised CDM statute. USAO states that at the October 7, 2020 Advisory Group meeting, "the CCRC clarified that, even if a child defendant legally could not be prosecuted for the underlying conduct due to their age or other developmental incapacity, liability should still attach under this provision for an adult who contributes to that child's delinquency." USAO does not recommend specific language.

- The RCC incorporates this recommendation by clarifying in the commentary to the RCC developmental incapacity defense that the defense does not preclude liability for an adult defendant under the revised CDM statute. In addition, paragraph (c)(1) of the revised CDM statute states that an actor may be convicted of CDM even if the minor complainant "has not been prosecuted [or], subject to delinquency proceedings." This change improves the clarity of the commentary.

OAG does not believe that the new comment language described above is accurate. The statutory provision governing accomplice liability does say a person can be convicted as an accomplice even if the other person has not been convicted of the related offense. But it does not say that the person can be convicted even if the other person could not be convicted. In that case, OAG believes that the provisions involving an innocent or irresponsible person, not the accomplice provisions, would apply.

[46] This same point applies everywhere this new language is added.

On page 297, comment 7, the CCRC states:

> *USAO, App. C at 633, recommends removing what was previously subsection (c): "An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience." USAO states that "[a]lthough [this provision] tracks current law . . . it is unclear what would constitute 'civil disobedience.'" USAO states it "is not aware of any legislative history or case law that would elucidate the definition of 'civil disobedience' in" the current D.C. Code contributing to the delinquency of a minor statute.*
>
> - The RCC partially incorporates this recommendation by narrowing the exclusion to liability for civil disobedience to conduct that, in fact, constitutes a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, or a comparable offense in another jurisdiction, by the complainant during a demonstration. The provision makes explicit that a parent or other person cannot be held liable for encouraging such activities protected by the First Amendment. The commentary to the revised CDM statute reflects that this is a possible change in law. This change improves the clarity of the revised statutes.

The text of subsection (b), previously subsection (c) now states, "*Exclusion~~s~~ from liability.* An actor does not commit an offense under this section when, in fact, the complainant's conduct constitute~~s~~~~ing~~, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, ~~a District offense~~ or a comparable offense in another jurisdiction~~, constitutes an act of civil disobedience~~ during a demonstration. While OAG believes that this amendment is an improvement on what was previously drafted, we do not believe that it reaches the concerns raised by USAO. The offenses of trespass under RCC § 22E-2601, public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, and unlawful demonstration under RCC § 22E-4204 are not activities protected by the First Amendment. Though implicating federal, as well as local law, the demonstrations at the Capitol on January 6 provide a good example. Just because someone was demonstrating at the Capitol does not excuse the trespass that that person would have committed by entering the Capitol building. OAG believes that a person who encouraged a minor to enter the Capitol should likewise be guilty of contributing to the delinquency of a minor.

Should the Commission not adopt OAG's recommendation, OAG has one further recommendation pertaining to subsection(b), above. The phrase "during a demonstration" now needs to be moved so that it modifies everything that precedes it. Under these circumstances OAG recommends that subsection (b) be amended to say, "*Exclusion from liability.* An actor does not commit an offense under this section when, in fact, during a demonstration the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction."

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	January 29, 2021
Re:	Comments on First Draft of Report No. 68, Cumulative Update to the Revised Criminal Code

The Public Defender Service submits the following comments on Report No. 68 for consideration.

1. §22E-215, De Minimis Defense. The commentary to de minimis defense, RCC § 22E-215, at footnote 23 provides that "a *de minimis* defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances … a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare." Since, following the initial draft of the RCC's commentary, the D.C. Council decriminalized fare evasion,[1] PDS suggests referencing a different code provision that criminalizes a minimal harm.

2. §22E-401, Lesser Harm, and §22E-402, Execution of Public Duty. Both of these defenses include provisions that disallow the respective defenses if the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion defense. See RCC § 22E-401(b)(3) and §22E-402(b)(1). PDS objects to these provisions and recommends eliminating them. The CCRC made this change to the duress defense in Report No. 68; the same policy reasons support also removing the provision from both §22E-401 and §22E-402. A defendant, consistent with their Sixth Amendment rights, should be able to present evidence of all applicable defenses and to have all available defenses go to the jury. There is no fair basis for depriving a defendant of the right to have a jury consider the entire circumstances of their case. Further, this limitation is particularly unjust given that the government is allowed to present various theories of liability, such as conspiracy and aiding and abetting in the same trial. The government is not limited in its presentation of evidence and the defense should not be either.

3. §22E-604, Authorized Fines. RCC § 22E-604 would allow fines of up to a million dollars to be imposed for class one felonies and up to $10,000 fines for class nine felonies. Almost across the board, this represents a steep increase from the fines imposed under the Fine Proportionality Act.[2] The RCC commentary for § 22E-604[3] seems to justify this difference by arguing that the

[1] D.C. Act 22-592, the Fare Evasion Decriminalization Amendment Act of 2018.

[2] *See* Fines for Criminal Offenses, D.C. Code § 22–3571.01.

[3] Commentary to RCC § 22E-604, at 71.

RCC provision would allow for even greater fines for corporations while "low-income and indigent persons would not be subject to the higher crimes under RCC § 22E-604(c)."

PDS believes that RCC § 22E-604(c) is insufficient to achieve the stated goal of protecting poor people from higher fines. RCC § 22E-604(c) provides only that "a court may not impose a fine that would impair the ability of the person to make restitution or deprive the person of sufficient means for reasonable living expenses and family obligations." Under this exception, a court could still impose fines that burden the District's poorest residents. Reasonable living expenses and family obligations are subject to interpretation and a judge may believe that imposing a $2,000 fine and allowing payment in monthly increments allows a defendant to contribute to family obligations and living expenses, even if it prevents the defendant from saving money to create more financial security for their family. The RCC provision lacks a robust evidentiary process through which the government must prove an ability to pay. The RCC provision also does not include a reconsideration provision for circumstances where a fine becomes a greater burden as a result of job or housing loss or illness. If the CCRC truly intends not to subject poor individuals to burdensome fines, it should begin to do so by precluding the imposition of fines on all defendants with court-appointed counsel.

Across the country, criminal fines have perpetuated poverty by imposing financial obligations on individuals who are already struggling to make ends meet. Criminal fines have also led to incarceration of defendants for failure to pay fines.[4] Those fines have been driven in part by a need to fund state criminal legal systems. As the District moves toward statehood, it should have a system in place that does not create a budgetary incentive for saddling residents with fines.

In the commentary, the CCRC appears to justify the much higher fine structure on the basis that it provides a way of increasing fines for corporate defendants, by allowing the fines to be doubled for corporations[5]. The CCRC could more directly achieve the goal of holding corporations financially accountable for their criminal conduct by creating a separate table for corporate defendants or decreasing the base amount and allowing the statutory maximum for corporate defendants to be multiplied by a greater number.

4. Multiple penalty enhancements. RCC § 22E-606(e) and subsequent provisions which address penalty enhancements allow limitless stacking of penalty enhancements. *See e.g.*, §22E-606(e); §22E-607(d); §22E-608(c); §22E-610(c). Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses. For instance, an actor who commits third-degree robbery reckless as to the fact that the complainant is a protected person (one class level penalty enhancement) and with the purpose of causing a pecuniary loss to the person because of prejudice against the person's perceived religion (hate crime – one class level enhancement) while the actor is on pretrial release (+180 days to 1 year enhancement) and who is subject to the repeat offender

[4] Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Center, 2019. Available at: https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf

[5] *See* note 3.

enhancement (+180 days to 1 year enhancement)[6] will face up to 10 years of imprisonment rather than the base offense penalty of 2 years. Purely as a result of rampant enhancements, that statutory maxima is more comparable to much more serious crimes of violence. In order to prevent unmooring the punishment from the classification of the offense by the RCC, PDS recommends that the RCC limit the government to two enhancements for each case.

5. § 22E-606, Repeat Offender Penalty Enhancement, and §22E-607, Pretrial Release Penalty Enhancement. PDS continues to object to the inclusion of RCC § 22E-606, the repeat offender penalty enhancement.[7] If the RCC does not remove the prior offense enhancement and the offense committed while on release enhancement, the RCC should clarify that these enhancements are applied based on the class of the unenhanced base offense, not in relation to a class of the offense increased by the application of other enhancements.

6. §22E-701, Generally Applicable Definitions, definition of "Dwelling." PDS recommends eliminating the most recent changes to the definition of "dwelling" and returning to the previous definition. The definition should read: "'Dwelling' means a structure that is either designed for lodging or residing overnight at the time of the offense or that is actually used for lodging or residing overnight, including in multi-unit buildings, communal areas secured from the general public." According to the CCRC notes in Appendix D2, the most recent changes, most notably eliminating the phrase "at the time of the offense" were done to make the definition easier to read. The phrase "at the time of the offense" was critical to ensuring that a structure that was originally designed as a dwelling and that might even retain a number of design-elements common to dwellings - e.g., a bathtub in the bathroom - but that no longer serves the actual function of a dwelling would not be included in the definition of "dwelling." A structure that was originally a residential rowhouse but that now functions only to "house" a restaurant or a charitable foundation should not be considered a "dwelling" for purposes of the RCC.

7. 22E-701, Generally Applicable Definitions, definition of "Position of trust and authority." The RCC defines "position of trust and authority" to include a child of a parent's sibling, whether related by blood, adoption, or marriage, domestic partnership either while the legal status exists or after such marriage or domestic partnership exists or an individual with whom such individual is in a romantic, dating, or sexual relationship. "Position of trust" also includes any individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. PDS believes

[6] It is unclear whether §22E-606 and §22E-607, which both add days or years depending on the class level of the offense being enhanced, are calculated based on the class level of the base offense or on the class level after other enhancements have been applied. PDS recommends the CCRC clarify that both enhancements are calculated based on the unenhanced class for the base offense.

[7] Enhancements for prior convictions tend to target older individuals who may have longer criminal records and therefore impose lengthy sentences on individuals who statistically are close to aging out of crime. Prior sentence enhancements also disproportionately impact Black defendants who have been targeted by the criminal legal system and "undercut the goal of making sentence severity proportional to offense severity." Robina Institute, Criminal History Enhancements Sourcebook. Available at: https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/criminal_history_enhancement_web2_0.pdf.

that this definition, which serves as the basis for numerous sex offenses, stretches too far in prohibiting what would be consensual sexual contact between individuals who are legally capable of consent. The RCC justifies the expansion of this definition to first cousins by adoption, marriage, or domestic partnership as improving consistency, proportionality, and removing a possible gap.[8] Rather than removing a gap, the revision extends liability without clear evidence that relationships between first cousins, including cousins who are not biologically related and who may have little family-based contact with one another, for example a cousin who is the biological child of an uncle who is divorced from the would-be complainant's aunt, carry a heightened risk of coercion. In fact, there is nothing inherently coercive in that relationship. A would-be complainant is just as likely to have an independent non-family-based relationship with the child of an aunt or uncle's ex-spouse such that criminalizing that consensual relationship serves to protect no one and merely adds additional crimes that prosecutors can charge at their discretion. Similarly, there is no evidence-based reason for prohibiting all consensual sexual conduct between one half-sibling and someone with whom another half-sibling is in a romantic, dating or sexual relationship. It's not clear why the law should presume that there is a position of trust and authority between one half-sibling's ex-boyfriend who still occasionally has sex with the half-sibling, and another half-sibling who may choose to also engage in occasional sexual contact with the same person. If the RCC employs this expansive definition, it should also import into the definition of "position of trust and authority" a requirement like that in RCC § 22E-1308, incest, that one party obtains the consent of the other by undue influence.

8. §22E-1101, Murder. PDS strongly objects to the current RCC provision for felony murder and to the application of this law to accomplices who do not commit the lethal act. PDS continues to object to the inclusion of felony murder in the RCC but if the RCC maintains a felony murder provision, it is essential that it apply only to the individual who committed the lethal act. As currently formulated, the RCC will exacerbate the injustice of the felony murder doctrine. This is the case because the RCC will abrogate the protections for accomplices to felony murder created in *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2004), and *Robinson v. United States*, 100 A.3d 95 (D.C. 2014). Under *Robinson,* in the prosecution of a non-death-causing accomplice for felony murder while armed with a predicate while armed felony, the government must prove beyond a reasonable doubt that the aider and abettor had actual knowledge that the principal would be armed with or have readily available a dangerous weapon. The actual knowledge is critical in providing some measure of protection for an aider and abettor who does not intend to cause the homicide; it requires the jury to find something more than that the death was caused in the course of and in furtherance of the underlying felony. The predicate offenses for felony murder under the RCC do not require the use of a firearm or a dangerous weapon. Therefore, if the government charges a codefendant with felony murder for their role as a lookout in a first degree robbery, the government will never have to prove beyond a reasonable doubt that the lookout knew that the principal who committed the lethal act was armed. The only procedural protection afforded to the unarmed lookout will be a requirement that the jury find that the death was in the course of and in furtherance of the felony. The predicate felony of first-degree robbery already includes the element of substantial injury, so the injury caused during the robbery could

[8] RCC Commentary to Offenses Against Persons at 270.

be used to bolster the conclusion that the death was caused in the course of and in furtherance of the felony.

In a California case that is indicative of the problem of felony murder, a 15-year old was convicted of felony murder and is serving a sentence of 25 to life for his role in standing by the door as a lookout during a home burglary.[9] The 15-year old entered the home and stole candy but had no part in causing the death of the homeowner. Nonetheless this 15-year old was held responsible for that death-causing action of his codefendant. The injustice of applying felony murder to accomplices often ensnares very young defendants because they are more susceptible to peer pressure and often commit criminal acts with others. Keeping this version of felony murder in the RCC will mean that the United States Attorney's Office can direct file the cases of youth as young as 16 in adult criminal court where they could be sentenced to decades in prison despite not committing the lethal act and without a jury finding that the 16-year-old knew that the codefendant was armed. PDS explained in its June 19, 2020, memo why the RCC's use of a defense in felony murder would not be protective for defendants who must in nearly all instances testify to assert the defense and would encounter all of the barriers created by potential educational deficits or mental illness, and would have to provide testimony against codefendants, which may come with a host of safety issues and other concerns. There is overwhelming evidence of injustice in the application of felony murder to accomplices who do not intend that any fatal act be committed, and there is now growing momentum demonstrated by states such as Hawaii, Massachusetts, Michigan, Kentucky, Vermont, New Hampshire, New Mexico, Arkansas, and California to abolish or limit it.[10] The RCC should embrace this reform.

9. §22E-1102, Manslaughter. PDS makes the same objection to "felony manslaughter" as it does above to felony murder.

10. §22E-1301, Sexual Assault. PDS recommends making it a defense, rather than an affirmative defense, that in fact the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense. This change would be identical to the change to the consent law made by D.C. Law 18-88. The law was changed because of the difficulty of instructing the jury when consent can be an aspect of the government's failure to prove force beyond a reasonable doubt at the same time that consent is an affirmative defense. To resolve that inherent tension, D.C. Law 18-88, in a section proposed by the U.S. Attorney's Office, effectively changed consent from an affirmative defense to a defense such that the government must disprove consent once it is raised by the defense. To prevent the same conundrum before juries and to properly allocate the burden on the government for this serious offense that carries lengthy periods of incarceration and the potential for lifetime sex offender registration, PDS recommends changing §22E-1301(e).

11. Marriage and domestic partnership defense, for example in §22E-1302, Sexual Abuse of a Minor. RCC § 22E-1302 defines sixth degree sexual abuse as consensual sexual contact between

[9] Abbie VanSickle, If He Didn't Kill Anyone, Why Is It Murder?, New York Times, June 27, 2018. Available at: https://www.nytimes.com/2018/06/27/us/california-felony-murder.html

[10] Katie Rose Quandt, A Killer Who Didn't Kill, Slate, September 18, 2018. Available at: https://slate.com/news-and-politics/2018/09/felony-murder-rule-colorado-curtis-brooks.html

one actor who is under age 18 and another who is at least 4 years older than the other actor and in a position of trust or authority over the other actor. The RCC provides that marriage is an affirmative defense to the offense. Since the offense criminalizes otherwise consensual conduct but for the status of the individuals, marriage should be a preclusion to liability rather than an affirmative defense that the defendant must prove. The same change should be made in RCC § 22E-1303, sexual abuse by exploitation in the second degree, which criminalizes otherwise consensual conduct due to the status and age of the individuals, RCC § 22E-1304, sexually suggestive conduct with a minor, and RCC § 22E-1305, enticing a minor into sexual contact.

12. §22E-1308, Incest. The conjunction between the second and third elements of first- degree incest should be "and," not "or." This is consistent with the RCC commentary.[11]

13. §22E-1808, Possession of an Obscene Image of a Minor. PDS recommends adding an affirmative defense that the image is possessed with intent, exclusively and in good faith, to permanently dispose of the item, similar to the temporary possession affirmative defense at §22E-502(a)(1)(F).

14. The affirmative defenses in the distribution of sexual recording and obscene images offenses, specifically at §22E-1804(c), 22E-1805(c)(2), 22E-1806(c)(2), and 22E-1807, should be expanded to allow distribution with the intent to permanently dispose of the item, similar to the temporary possession defense at RCC §22E-502(a)(1)(F). Specifically, PDS proposes the affirmative defenses be rewritten as follows:

> It is an affirmative defense to liability under this section, that the actor:
> (A) With intent, exclusively and in good faith, to report possible illegal conduct, ~~or~~ seek legal counsel from any attorney, or permanently dispose of the image or audio recording;
> (B) Distributed the image or audio recording to a person whom the actor reasonably believes is:
> (i) A law enforcement officer, prosecutor, or attorney…

15. §22E-4103, Possession of a Dangerous Weapon with Intent to Commit Crime. PDS continues to object to attempt liability for this offense. While intending to commit a crime, there is a difference between coming dangerously close to committing the offense by actually possessing a weapon that the person believes is a dangerous weapon but, because of a mistake of fact, is not a dangerous weapon and coming dangerously close to possessing a dangerous weapon but not in fact possessing it. By allowing attempt liability without limitation, the statute would impose criminal liability on a person who has only come dangerously close to possessing the weapon while having an intent to commit a crime. If the underlying crime were committed or even attempted, the offense of possession of a dangerous weapon with an intent to commit a crime would ultimately merge with it. So we are necessarily focused on a situation where there is evidence (e.g., a text message) of an intent to commit a crime in the future and the person comes dangerously close to possessing a dangerous weapon. PDS is not suggesting that the person would not be liable for attempted possession of a prohibited weapon or accessory pursuant to 22E-4101. The problem is holding someone liable for not yet possessing a weapon while

[11] RCC Commentary to Offenses Against Persons at 266.

intending but not yet even attempting to commit a crime. Assume in January, X decides to buy a bomb to use to blow up a building on a particular date two months hence. X comes dangerously close to buying the bomb but is arrested before he is actually holds, carries on his person, or has the ability and desire to exercise control over the bomb. Arguably, X has committed attempt 1st degree possession of a prohibited weapon. But the intended crime isn't for another 2 months; X could change his mind. He could have changed his mind even absent the arrest. It is possible, even had the police not intervened, that X would have abandoned the plan to take possession of the bomb. Since X came dangerously close to possessing the dangerous weapon, however, PDS accepts the law holding X liable for attempted possession. It is too far to hold X liable for coming dangerously close to possessing a weapon but not actually possessing it while intending to commit a crime that X has not committed or even come dangerously close to committing. For that reason, PDS objects to allowing attempt liability for this offense without limitation.

16. §22E-4105, Possession of a Firearm by an Unauthorized Person. The commentary makes clear that the mental state of "knowingly" is to apply to the element "is a fugitive from justice" at §22E-4105(b)(2)(B). However, there is an intervening mental state of "in fact" buried in the preceding paragraph at (b)(2)(A); the rules of interpretation applicable to culpable mental states mean that the mental state for "is a fugitive from justice" then becomes "in fact," rather than "knowingly." PDS recommends switching the order so "is a fugitive from justice" is at (A) and the prior conviction paragraph is at (B).

17. §22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses – Paragraph (3) of subsection (b) refers to "an element, of any gradation, that the person displayed or used a dangerous weapon." This seems to be an outdated reference to the structure of many offenses prior to Report No. 68, where "displays or uses a dangerous weapon" was an element of a higher gradation. Now it is often, if not always, a penalty enhancement rather than a gradation. See e.g., §22E-1201(e)(4) ("The penalty classification for first, second, or third degree robbery is increased in severity by one penalty class when a person commits the offense … by using or displaying what is, in fact, a dangerous or imitation dangerous weapon.")

    PDS notes that while the limitation on convictions at §22E-4119(b)(3) applies only to Subtitle II of Title 22E, the offense of possession of a dangerous weapon with intent to commit a crime at §22E-4103 allows for liability when the actor intends to commit an offense under Title III of Title 22E. This appears to be an oversight as there is no statement in the commentary to explain why offenses against persons would merge with possession of a dangerous weapon with intent to commit a crime but a property offense would not.

    In sum, PDS recommends rewriting paragraph (3) to read as follows: "Any offense ~~under Subtitle II of this title~~ that includes <u>either</u> as an element, of any gradation, <u>or as a penalty enhancement</u> that the person displayed or used a dangerous weapon."

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #68	Date: January 29, 2021

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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #68. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #68—RCC Compilation

A. RCC § 22E-504. Mental Disability Defense.

USAO recommends changing the name of this defense back to "Mental Disease or Defect Defense," rather than "Mental Disability Defense."

The CCRC originally proposed that this offense be called the "Mental Disease or Defect Defense," and subsequently changed it to the "Mental Disability Defense." USAO recommends that it be changed back to the "Mental Disease or Defect Defense" to reduce confusion. The words "mental disability" are very similar to "intellectual disability," which are used in other contexts. For example, the Citizens with Intellectual Disabilities Act (CIDA) defines "intellectual disability" as "a substantial limitation in capacity that manifests before 18 years of age and is characterized by significantly below-average intellectual functioning, existing concurrently with 2 or more significant limitations in adaptive functioning." D.C. Code § 7-1301.03(15A). This is different from the RCC's proposed definition of "mental disability" in this defense. CIDA provides a basis for civil commitment for those with intellectual disabilities, which is different from commitment for those found not guilty on the basis of a mental disability under this defense. Further, the words "mental disease or defect" are used elsewhere in the D.C. Code, *see* D.C. Code § 24-531.01(5) (definition of "incompetent" for purposes of competency evaluations and proceedings), and it is unclear what the relationship would be between the RCC's defined terms and terms used elsewhere in the D.C. Code.

[1] This review was conducted under the understanding that the structure of the code reform process allows the members of the CCRC 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.

B. RCC § 22E-606. Repeat Offender Penalty Enhancement.

USAO opposes limiting the felony repeat offender penalty enhancement to felony offenses under Subtitle II.

The CCRC proposes modifying subsection (a) so that only felony offenses under Subtitle II can be enhanced. In support of creating this limitation, the CCRC states: "This change makes the enhancement for felonies similar in approach to that for misdemeanors and focuses the enhancement on crimes against persons and omits the possibility of the enhancement being applied to drug or other offenses outside Subtitle II." (App. D2 at 36–37.) USAO recommends that this enhancement apply to felony offenses outside of Subtitle II, particularly to the offenses of Burglary and Arson. A defendant who has committed multiple burglaries or arsons should be subject to a repeat offender penalty enhancement, as those are offenses that are, in many ways, as serious as some felony offenses under Subtitle II. The previous CCRC proposal required that, if the prior conviction(s) were felony offenses under Subtitle II, only one prior conviction would be required for the enhancement to apply. By contrast, if the prior conviction(s) were felony offenses outside Subtitle II, two or more prior convictions would be required for the enhancement to apply, also requiring that both convictions have been committed within 10 years. Thus, a defendant convicted of felony-level assault would only need one prior felony-level assault conviction for the enhancement to apply, but a defendant convicted of burglary would need two prior convictions for burglary for the enhancement to apply. This is a sufficient limitation on the enhancement. Accordingly, USAO recommends removing the words "under Subtitle II" from subsection (a) of this enhancement.

C. RCC § 22E-701. Definitions.

USAO recommends the following changes to the definition of "Consent."

"Consent" means a word or act that:

(A) Indicates, explicitly or implicitly, agreement to particular conduct or a particular result; and

(B) Is not given by a person who:

(i) In fact, ~~H~~is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof; or

(ii) Because of youth, mental illness or disorder, or intoxication, ~~is believed by the actor to be~~ the actor knew or should have known is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof; and

(C) Has not been withdrawn, explicitly or implicitly, by a subsequent word or act.

USAO recommends adding the word "in fact" to subsection (B)(i) to clarify that the relevant inquiry, for purposes of subsection (B)(i), is whether the person "in fact" is legally incompetent to authorize the conduct, and does not require a higher mental state by the actor. USAO recommends, in subsection (B)(ii), replacing the words "is believed by the actor to be" with the words "the actor knew or should have known is." The objective reasonableness of the

actor's belief is important. For example, if an actor claims that the actor believed that a young child consented to an activity, the actor's subjective belief should be balanced with the objective reasonableness of such a belief. Under USAO's proposed standard, the actor should have known that the young child would be unable to make a reasonable judgment as to the nature of the conduct, as that belief was not objectively reasonable.

USAO recommends the following change to the definition of "Prior conviction."

"Prior conviction" means a final order, by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term "prior conviction" does not include:

(A) An adjudication of juvenile delinquency;
(B) ~~A conviction that is subject to successful completion of a diversion program or~~ probation under D.C. Code § 48-904.01(e);
(C) A conviction that has been reversed, vacated, sealed, or expunged; or
(D) A conviction for which a person has been granted ~~clemency or~~ a pardon.

USAO recommends, in subsection (B), removing the words "a conviction that is subject to successful completion of a diversion program." There could be certain diversion programs whereby, as a result of successful completion of a diversion program, a charge is reduced to a lesser charge, such as a felony charge being reduced to a misdemeanor conviction. This misdemeanor conviction would and should still qualify as a "prior conviction." Further, in many cases, successful completion of a diversion program would not result in a conviction at all. For example, if a defendant successfully completes a deferred prosecution agreement (DPA), the defendant never has to plead guilty, so never has a conviction. If a defendant successfully completes a deferred sentencing agreement (DSA), the defendant's guilty plea is withdrawn, and no conviction results.

USAO also recommends, in subsection (D), removing the words "clemency or." Clemency may consist of either a pardon or a commutation of a sentence. A commutation of a sentence would reduce the amount of time that a person serves, but would not impact the fact of a conviction. Rather, a pardon should be the only type of clemency exempted from a "prior conviction."

D. RCC § 22E-1101. Murder.

USAO opposes the elimination of First and Second Degree Criminal Abuse of a Minor as enumerated predicate offenses for Felony Murder, and recommends inclusion of First and Second Degree Criminal Neglect of a Minor as predicate offenses for Felony Murder.

USAO opposes removing first and second degree criminal abuse of a minor as enumerated predicates to felony murder. The CCRC originally recommended including these offenses as predicates to felony murder, and removed them in the latest draft. Eliminating these offenses as predicates does not adequately account for the heinous nature of child abuse resulting in death and creates a gap in liability for felony murder. In certain circumstances, this change could result in a defendant improperly escaping liability for murder, despite engaging in a prolonged period of torture and/or abuse of a child that ultimately leads to a child's death.

Under current law, first degree cruelty to children is a predicate felony for felony murder. *See* D.C. Code § 22-1101. The District of Columbia is not alone in making child abuse offenses predicate felonies for felony murder. Alabama,[2] Alaska,[3] Arizona,[4] Arkansas,[5] Florida,[6] Georgia,[7] Idaho,[8] Iowa,[9] Kansas,[10] Louisiana,[11] Michigan,[12] Minnesota,[13] Mississippi,[14] Nevada,[15] North Dakota,[16] Oklahoma,[17] Oregon,[18] Tennessee,[19] Utah,[20] Wyoming,[21] and the United States Congress,[22] have all categorized child abuse as a predicate felony. In addition, Delaware, New Mexico, Pennsylvania, and Texas more broadly make any felony a predicate felony. South Carolina also has a special offense entitled "Homicide by Child Abuse."[23]

Ensuring that child abuse remains a predicate felony fills what would otherwise be a gap in criminal liability for defendants who engage in horrendous patterns of physical abuse of children, but where no single act of abuse can be pointed to as the cause of death. "A conviction for intentional homicide [in the child abuse context] is difficult to obtain." Barry Bendetowies, *Felony Murder and Child Abuse: A Proposal for the New York Legislature*, 18 Fordham Urb. L.J. 383, 384 (1991). "First, the government must prove intent to cause death, a factor often absent in child abuse cases." *Id.* "Second, frequently the sole witness is the abuser, since such crimes usually occur in private." *Id*. "Moreover, it is difficult to convince a jury that a parent intentionally killed his child." *Id.* at 384–85. Rather, "in a case of child abuse of long duration the jury could well infer that the perpetrator comes not to expect death of the child from his action, but rather that the child will live so that the abuse may be administered again and again." *Midgett v. State*, 729 S.W.2d 410, 413 (Ark. 1987).[24] Courts have "held that child abuse may have several independent purposes: to punish, to chastise, to force the child's conformity with the father's idea of propriety, and to impress upon the child the virtues of obedience and

[2] Ala. Code 1975 13A-6-2(a)(3).
[3] AS § 11.41.100(a)(2).
[4] A.R.S. § 13–1105(A)(2).
[5] A.C.A. § 5–10–102(a)(3).
[6] West's F.S.A. § 782.04(1)(a)(2)(h)
[7] Ga. Code Ann., § 16-5-1(d).
[8] I.C. § 18-4003(d).
[9] I.C.A. § 707.2(1)(e).
[10] K.S.A. 21-5402(c)(1)(G).
[11] LSA-R.S. 14:30(A)(1).
[12] M.C.L.A. 750.316(1)(B).
[13] M.S.A. § 609.185(a)(5).
[14] Miss. Code Ann. § 97-3-19
[15] N.R.S. 200.030(1)(b).
[16] NDCC, 12.1–16–01(1)(c).
[17] 21 Okl. St. Ann. § 701.7(C).
[18] O.R.S. § 163.115(1)(b)(J), (c).
[19] T. C. A. § 39–13–202(a)(2).
[20] U.C.A. 1953 § 76-5-203(1)(b).
[21] W.S.1977 § 6-2-101(a).
[22] 18 U.S.C. § 1111(a).
[23] Code 1976 § 16-3-85.
[24] Following this decision, the Arkansas legislature amended the statute to define knowingly taking the life of a child under the age of 14 as first degree murder. A.C.A. § 5–10–102(a)(3).

discipline." Bendetowies, 18 Fordham Urb. L.J. at 401 (citing *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637, 641 (1st Dist. 1985)).

In a pattern of abuse case, the abuser often does not intend to kill the child. The abuser acts recklessly and repeatedly over a course of time with disregard for the fact that their conduct may kill a child. For example, some children can survive being shaken once or twice, but they may have internal injuries that are not diagnosed. Subsequently, when the child is shaken, the child may die. As a further example, if a child is beaten and has broken ribs or a lacerated liver, the child may not immediately die, but following a subsequent beating, the same conduct may cause the child's death. In certain situations, the abuser's conduct may constitute circumstances manifesting extreme indifference to human life, which would constitute second degree murder under the RCC. But there may also be situations where the government is unable to prove that a defendant's reckless conduct manifested extreme indifferent to human life, but where murder liability should still attach. In those situations, where the government could prove that the defendant negligently caused the death of the child in the course of committing the offense of criminal abuse of a minor—which is the RCC's proposed standard for felony murder—a defendant should be liable for felony murder, with criminal abuse of a minor as the predicate offense.

Moreover, USAO recommends that first and second degree criminal neglect of a minor also be predicate felonies for felony murder. The RCC divides the current offense of cruelty to children under D.C. Code § 22-1101 into two offenses of criminal abuse and criminal neglect. Death can foreseeably result, however, from both types of harms. Indeed, first degree criminal neglect of a minor requires that the defendant "[c]reated, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death." RCC § 22E-1502(a)(2).

Where a child actually dies due to the defendant's repeated neglect in a manner that would constitute first or second degree criminal neglect of a minor, liability should also attach for felony murder. USAO, for example, has prosecuted cases where both parents have refused to feed a newborn child over a prolonged period, resulting in its death. Similarly, USAO has prosecuted cases where parents know their child has suffered severe injury, including multiple rib and bone fractures and severe diaper rash, and yet have not sought medical care for that child. In these types of cases, it is the defendant's failure to act that causes the death of the child. To the extent such conduct does not otherwise meet the causation and intent elements for murder under the RCC, first and second degree criminal neglect of a minor should be incorporated as predicate felonies to hold defendants liable for the deaths of their children in such cases.

The offenses of first degree cruelty to children and first degree child sexual abuse were made predicate felonies for felony murder by the D.C. Council in 1997, following the recommendation of then-U.S. Attorney Eric Holder. The change in law reflected a need to include circumstances where, despite the horrific nature of abuse suffered by children, the evidence was not sufficient to show the defendant's specific intent to kill the child. In his testimony before the D.C. Council, U.S. Attorney Holder focused on examples including *United States v. Aaron Morris*, where a three-year-old girl "was burned in scalding water, had cigarette burns on her body, suffered severe blunt force injuries to her head and abdomen, and was

strangled and smothered to death." Statement of Eric Holder to the D.C. Council Committee on the Judiciary, March 12, 1997. Despite the extent of these injuries, the jury appears to have found that the defendant (based on his own admission) punched the child in the stomach several times, but attempted to resuscitate the child and was sorry for what he had done. *Morris v. United States*, 728 A.2d 1210, 1214 (D.C. 1999). As a result, the jury acquitted the defendant of murder and convicted him of the lesser-included offense of involuntary manslaughter and cruelty to a child. *Id.* In response to this and similar situations, the amendment incorporated first degree cruelty to children as a predicate offense to felony murder, so that murder liability could attach where appropriate.

Maintaining first and second degree criminal abuse of a minor and adding first and second degree criminal neglect of a minor as predicate offenses for felony murder is essential to ensure that the seriousness of deaths to children and infants resulting from chronic abuse is adequately reflected within the RCC. In removing first and second degree criminal abuse of a minor as predicate felonies, the CCRC states: "First and second degree criminal abuse of a minor criminalize recklessly causing serious or significant bodily injury. In most cases, applying the felony murder rule to these offenses criminalizes recklessly causing the death of another as murder, without any intentional or purposeful wrongful conduct. All of the other predicate offenses require at least knowing or intentional conduct." (App. D2 at 67–68.) To the extent that the CCRC's concern is that first and second degree criminal abuse of a minor requires only reckless conduct, not knowing or intentional conduct as with the other predicate felonies, the CCRC may consider including first and second degree criminal abuse of a minor—along with first and second degree neglect of a minor—as predicates to felony murder where the defendant acted "intentionally" rather than "recklessly" in the relevant predicate offense.

E. RCC § 22E-1205. Offensive Physical Contact.

USAO recommends that the RCC clarify that non-consensual sexual touching can qualify as Second Degree Offensive Physical Contact.

The Commentary to Offensive Physical Contact states: "The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting 'bodily injury.' However, the RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law, and, depending on the facts of the case, there may be liability under RCC Chapter 12 offenses, RCC weapons offenses, or sex offenses under RCC Chapter 13." (Commentary to Subtitle II at 122.) Although we recognize that the CCRC intends to abolish liability under the Assault provisions for non-consensual sexual touching, the Commentary to this offense implies that the CCRC may abolish liability under the Offensive Physical Contact provisions for non-violent sexual touching as well. Second Degree Offensive Physical Contact, however, would provide liability for a non-violent sexual touching under certain circumstances. For example, where a defendant touches a complainant's stomach, outer thigh, or other sensitive area in a location that would not constitute a "sexual contact," but where the defendant intends such contact to be offensive, and where a reasonable person in the situation of the complainant would deem it offensive, liability should attach for Offensive Physical Contact. USAO accordingly recommends that the Commentary clarify that there could still be

liability for a non-violent sexual touching as Offensive Physical Contact, even if there could no longer be liability for a non-violent sexual touching as Assault.

In addition, USAO recommends that the CCRC include the following provision for offensive physical contacts that are based on a non-violent sexual touching: "Where the complainant is under 16 years of age, or where the complainant is under 18 years of age and the defendant is in a position of trust with or authority over the complainant, consent is not a defense." In *Augustin v. United States*, the DCCA held that, as a matter of statutory interpretation, 16 years is the age of consent for non-violent sexual touching prosecuted as simple assault, so consent is not a defense to non-violent sexual touching when the complainant is under 16 years of age. 240 A.3d 816, 828 (D.C. 2020). The DCCA further held that, as a matter of statutory interpretation, consent is a defense to non-violent sexual touching when the complainant is 16 years of age or older, regardless of whether the complainant and the defendant are in a significant relationship, as defined in D.C. Code § 22-3001(10). USAO recommends that the CCRC incorporate *Augustin*'s holding with respect to complainants under 16 years of age, recognizing that, consistent with other provisions under the RCC, a child under 16 years of age cannot consent to a sexual touching. USAO also recommends that the CCRC provide that, where the complainant is under 18 years of age and the defendant is in a position of trust or authority over the complainant, a minor under 18 years of age cannot consent to a sexual touching. *Augustin*'s holding to the contrary was a matter of interpretation, not a matter of policy, and USAO recommends that, consistent with other provisions under the RCC, a minor under 18 years of age cannot consent to a sexual touching where the defendant is in a position of trust or authority over the complainant.

F. RCC § 22E-1308. Incest.

USAO recommends removing subsections (a)(3) and (b)(3).

USAO recommends removing the requirement that the actor "obtains the consent of the other person by undue influence" from both subsections (a)(3) and (b)(3). "Undue influence" is defined in RCC § 22E-701 as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes the person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." This term is used in RCC § 22E-2208, Financial Exploitation of a Vulnerable Adult or Elderly Person, and has a similar definition under current law at D.C. Code § 22-933.01. It is inappropriate, however, to use it in the incest context. An example of incest is a father having sex with his minor biological daughter. The complainant may act of her own free will, in that no force is used and no threats are made. It is unclear at what point the complainant would no longer be deemed to be acting on their own free will. This sexual abuse is often the result of grooming behavior by the defendant, but it is unclear whether grooming behavior (for example, buying candy for a child, giving gifts to a child, normalizing certain sexual behavior, escalating in sexual behavior) would qualify as "mental, emotional, or physical coercion." Moreover, it is unclear who would decide if the sexual abuse is "inconsistent with his or her financial, emotional, mental, or physical well-being." By criminalizing child sexual abuse, society has essentially made a value judgment that certain sexual conduct is inconsistent with a child's financial, emotional, or physical well-being. But a victim often will not internalize such abuse as being detrimental to their well-being. Nor

would a parent or guardian necessarily always characterize the abuse as detrimental, particularly where the parent or guardian is the perpetrator. In sum, USAO recommends removing this provision from the Incest offense, as it is not appropriate for this offense.

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

USAO recommends removing subsection (b).

USAO recommends removing subsection (b) in its entirety. USAO's previously submitted comments (App. C at 358) recommended adding a subsection to this offense to clarify that D.C. Code § 23-1303(d) has no impact on GPS-interference cases. The RCC incorporated this recommendation (App. D1 at 369), but made certain changes that could be confusing. The RCC proposes subsection (b) as follows: "The restriction on divulging detection device information from the Pretrial Services Agency for the District of Columbia under D.C. Code § 23-1303(d) shall not apply to this offense." This proposed language suggests that D.C. Code § 23-1303(d) precludes PSA from divulging detection device information in other contexts—a reading that has been rejected by at least one Superior Court judge and that USAO does not support. Given the confusion that may be created by this language—and, indeed, the confusion that could have been caused by USAO's originally proposed language—USAO believes that § 23-1303(d) is better left unaddressed in the misdemeanor tampering statute.

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

USAO recommends the following changes to subsection (b) of this offense.

(b) *Second degree.* An actor commits second degree possession of a firearm by an unauthorized person when that actor:
- (1) Knowingly possesses a firearm; and
- (2) In addition:
  - (A) Has a prior conviction for what is, in fact:
    - (i) A District offense that is currently punishable by imprisonment for a term exceeding one year, or a comparable offense, within 10 years;
    - (ii) An offense under Chapter 41 of this subtitle, or a comparable offense, within 5 years; or
    - (iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), that requires as an element confinement, ~~sexual conduct~~, a sexual act, a sexual contact, bodily injury, or threats, or a comparable offense, within 5 years.
  - (B) Is a fugitive from justice; or
  - (C) Is, in fact, subject to a ~~final civil protection order issued under D.C. Code § 16-1005.~~court order that:
    - (i) Requires the actor to relinquish possession of any firearms or ammunition, or to not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the order is in effect; and

(ii) 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; and
(I) Was issued after a hearing of which the actor received actual notice or for which the actor was personally served with notice, and at which the actor had an opportunity to participate; or
(II) Remained in effect after the actor failed to appear for a hearing of which the actor received actual notice or for which the actor was personally served with notice.

As to subsection (b)(2)(A)(iii), USAO recommends changing the words "sexual conduct" to "a sexual act, a sexual contact." "Sexual conduct" is not an element of RCC offenses, but a sexual act and a sexual contact are elements of RCC offenses.

As to subsection (b)(2)(C), the CCRC proposed modifying this provision to only include a final civil protection order. USAO had filed a comment recommending that this provision include a stay away/no contact order, in addition to a "no HATS" order. The CCRC states that it partially incorporates this recommendation by including any final civil protection order issued under D.C. Code § 16-1005. (App. D2 at 256.) However, this limitation excludes other important types of stay away orders, including stay away orders imposed as part of a criminal case, either as a condition of release pending trial or as a condition of probation. Moreover, under the Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020 (B23-181), which has been passed by the DC Council and is currently pending congressional review, stay away orders could also be imposed as part of a newly created civil mechanism known as anti-stalking orders. USAO therefore recommends similar language to our previous proposal.

In subsection (b)(2)(C)(ii), USAO also recommends modifying the "actual notice" language to include situations in which the actor was personally served with notice. This language is consistent with the notice requirements in the Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020, as clarified by Councilmember Charles Allen's amendment to the legislation. The rationale for this amendment was that "requiring *actual* notice could allow a respondent to avoid being found in violation of an order by remaining willfully ignorant of the order's contents and prohibitions. This amendment clarifies that *personal* service of a temporary protection order, civil protection order, valid foreign protection order, temporary anti-stalking order, or anti-stalking order also suffices for the purposes of finding a violation of the order." Amendment #1 to B23-0181, the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020" (December 15, 2020).

I. D.C. Code § 16-705. Jury trial; trial by court.

USAO opposes the proposal that, three years following the enactment of the RCC, all offenses punishable by imprisonment be jury demandable.

USAO incorporates its arguments made in previous submissions regarding the significant expansion of jury trials proposed by the CCRC.

J. D.C. Code § 23-586. Failure to Appear After Release on Citation or Bench Warrant Bond.

USAO recommends eliminating the language that a defendant "fail to make reasonable efforts" to appear or remain for a hearing.

In response to PDS's comments, the RCC amended subsections (a)(2) and (b)(2) to require proof that the defendant "knowingly fails to make reasonable efforts to appear or remain for the hearing." It is unclear, however, how the government could prove that the defendant failed to make reasonable efforts to appear or remain for the hearing. PDS notes that there could be situations where a defendant desires to appear but fails to appear. (Appendix D2 at 319–20.) PDS provides examples where a person is stranded due to a bus cancellation, a person is unable to connect to a virtual hearing due to a technological problem, or a person is hospitalized. (App. C at 585.) Many of these situations, however, would be virtually impossible for the government to prove as an affirmative element. The government could not preemptively know what circumstance caused a defendant not to appear and investigate all those potential circumstances. Requiring the government to prove that the defendant failed to make reasonable efforts to appear would create a gap in liability for this offense. USAO therefore recommends that the CCRC remove this provision from the statute.

In the alternative, if the CCRC wishes to account for the possibility of these situations, the RCC could create an affirmative defense that allows a defendant to prove, by a preponderance of the evidence, that the defendant made all reasonable efforts to appear or remain for the hearing. That way, a defendant could offer proof—which could include the defendant's testimony or other evidence—of their bus breaking down, a serious injury, etc. This should be an affirmative defense, rather than a defense that the government must prove the absence of beyond a reasonable doubt, because the defendant will typically be the only party able to provide proof that they made all reasonable efforts to appear following a failure to appear.

K. D.C. Code § 23-1327. Failure to Appear in Violation of a Court Order.

USAO recommends eliminating the language that a defendant "fail to make reasonable efforts" to appear or remain for a hearing.

USAO repeats the above recommendations for RCC § 23-586 for this section as well.

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: February 16, 2021

SUBJECT: First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses

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 #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-602. Authorized Dispositions[2]

For the reasons stated below, OAG objects to the proposal that judges be authorized to grant unlimited "probations before judgements" (PBJ)[3] to the same defendant, over government opposition, notwithstanding that neither the judge nor the prosecutor, because of the expungement provision, know how many times the defendant has received this benefit for committing the instant offense or for committing any number of other covered misdemeanor

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] Found at Appendix D3 – Disposition of Advisory Group Comments & Other Changes to Draft Documents (App. D3) page 1 and page 47 of the First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses.
[3] Throughout this memo, OAG will refer to the CCRC proposal as a "probation before judgment" or "PBJ" as that is familiar phrase for when the court places a defendant on probation without entering the conviction.

offenses. Instead, OAG recommends that the judge's authority to grant a PBJ, for the designated offenses - over the government's objection[4]- should be limited to one PBJ in any 10 year period and that if the defendant successfully completes the PBJ, that the law enforcement and court records associated with the PBJ be sealed – not expunged.

Paragraph (c) states:

> *Dismissal of proceedings.*
>
> (1) When a person is found guilty of violation of any Class C, D, or E offense[5], the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation the person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against the person. Discharge and dismissal under this subsection shall be without court adjudication of guilt. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions) or for any other purpose.
>
> (2) Upon the dismissal of the person and discharge of the proceedings against the person under paragraph (1) of this subsection, the person may apply to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that the person was dismissed and the proceedings against the person discharged, it shall enter such order. The effect of such order shall be to restore the person, in the contemplation of this law, to the status the person 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 the person for any purpose. [emphasis added]

On page 1 app D3, it states "Under current District law and prior versions of the RCC, deferred disposition was only available for possession of a controlled substance (a Class C or Class D

[4] OAG does not object to the court entering a PBJ more often than once every 10 years if the government concurs. See discussion below concerning deferred sentencing agreements.

[5] In prior Reports Class C, D, or E offenses were 90 day, 30 day, and no jail time offenses, but in Report 69 they were reduced to 60 day, 10 day, and no jail time. See RCC § 22E-603.

offense under the RCC), and prostitution and patronizing prostitution (both Class D offenses under the RCC). This change makes deferred disposition available to all other Class C, D, and E offenses." This note understates both the availability of a PBJ and the scope of the expansion.

In appropriate cases, OAG and a defendant enter into an agreement that if the defendant pleads guilty and agrees to go on probation, that if the defendant successfully completes the term of the probation, that OAG agrees not to oppose the defendant withdrawing their guilty plea and, after the plea is withdrawn, OAG dismisses the case under Superior Court Criminal Rule 48 (a). Thus, PBJs are actually granted across the range of offenses that OAG prosecutes (not merely for the USAO charges of controlled substances, prostitution, and patronizing prostitution). This plea bargain arrangement is referred to as a deferred sentencing agreement or DSA. DSAs are not the only mechanism that OAG uses to dispose of appropriate cases in a way that allows a defendant not have a conviction on their record. OAG also offers defendants deferred prosecution agreements or DPAs. A DPA is like a DDA, except that in a DPA the defendant does not have to plead guilty or otherwise admit guilt in any way. DPAs and DSAs make up a portion of a continuum whereby OAG offers a defendant a mechanism not to have their criminal behavior lead to a conviction. This continuum includes OAG allowing law enforcement to offer post and forfeits as a way of resolving the offense; OAG exercising its discretion not to bring charges, including when we offer diversion opportunities; offering post charging post and forfeits; DPAs; and DSAs. This continuum, however, is based on the fact that OAG and law enforcement know the defendant's criminal history because, even if prior arrests, charges, and convictions have been sealed from public view, pursuant to D.C. Code § 16-803, OAG knows the defendant's criminal record and can authorize the appropriate level of intervention necessary to try and rehabilitate or sanction the defendant. If OAG is deprived of the person's criminal record, then we will not know the level of intervention that is necessary and just. Which is the same position under RCC § 22E-602, that a judge would be in when trying to decide if the defendant's plea or finding of guilt at trial should be expunged under this provision. The judge will not know the person's true criminal history.

As noted above, both a DSA and a DDA may be sealed under D.C. Code 16-803. Law enforcement and court records sealed under this provision, like the CCRC expungement proposal, provide that the person cannot be found guilty of perjury or giving a false statement for failing to disclose the facts of their criminal history. See RCC § 22E-602 (c)(2) and D.C. Code § 16-803 (m).[6] However, there is a major difference between a record being sealed and it being

[6] RCC § 22E-602 (c)(2) provides that "(2) Upon the dismissal of the person and discharge of the proceedings against the person under paragraph (1) of this subsection, the person may apply to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that the person was dismissed and the proceedings against the person discharged, it shall enter such order. The effect of such order shall be to restore the person, in the contemplation of this law, to the status the person 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 the person for any purpose. [emphasis

expunged. Under the CCRC proposal, neither the judge nor the prosecutor in any case will know whether the defendant was a first offender or someone who has had their records expunged numerous times pursuant to RCC § 22E-602 (c)(2). Under current law, only when individuals who have their records sealed for actual innocence will the records generally not be available to judges, prosecutors, and law enforcement. As the Council Court Excellence stated in the Committee Report for B16-0746, the Criminal Record Sealing Act of 2006:

> The calculus is quite different, however, when the records to be sealed relate to an individual who may be or is guilty of a criminal offense. In such instances, there are strong reasons for preserving the ability of law enforcement agencies to access those records for legitimate law enforcement purposes. As the D.C. Circuit Court of Appeals has noted:
>
> > The government does … have a legitimate need for maintaining criminal records to efficiently conduct future criminal investigations. Law enforcement authorities have an interest in knowing, for example, that a definite suspect in a crime under investigation had previously been arrested or convicted, especially if for a similar offense. Likewise, police investigators will be greatly assisted if they are able to check whether persons residing or having been observed at the situs of an offense involving a particular modus operandi had previously been arrested or convicted of an offense involving the same modus operandi.
>
> *Doe v. Webster,* 606 F. 2d 1226, 1243 (D.C. Cir. 1979). Similarly, courts often consider criminal records in making a wide variety of decisions, ranging from pre-trial detention to sentencing decisions.[7]

See page 17 of Council for Court Excellence's report contained in the Committee Report for B16-0746, the Criminal Record Sealing Act of 2006. In the same year that the Circuit Court decided *Webster*, the D.C. Court of Appeals issued an opinion in lock step with the Circuit Court. The Court of Appeals stated:

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added]. Though OAG disagrees with the proposal, as explained in the text above, we do note that the quoted language of (c)(2) above appears to be inconsistent. While the court can expunge an information; a finding of guilt, which would include a plea of guilty; and a dismissal, the defendant could *still* be prosecuted for perjury or giving a false statement for failing to mention those to events because the last sentence of RCC § 22E-602 (c)(2) is limited to indictments and trials.

[7] There are other uses of criminal records that the Court in *Doe* did not mention that the government would be deprived of if records were expunged rather than sealed. These include how many times – and under what circumstances -a defendant made a knowing waiver of their right to remain silent, prior to claiming in the instant case that they do not understand their rights. Also, if records are expunged, the government will not have access to potential *Brady* information that the government would have had to turn over to another defendant which could help exculpate that second person. See *Brady v. Maryland*, 373 U.S. 83 (1963),

> [it] has been said that law enforcement officials use records of arrests in the following ways: Police officers will use an arrest record "in subjecting the individual to rearrest on the basis of past arrests and in deciding whether to bring formal charges"; the prosecutor, in deciding the category of the offense to charge a defendant and whether to plea bargain with him, could consider the defendant's past arrests; parole boards, in determining whether to release a defendant under sentence, could consider the arrest records of the potential parolee; and finally, courts might well give some weight to a particular defendant's past arrests in determining the conditions for his release pending trial of a current charge. *District of Columbia v. Hudson,* 404 A.2d 175, 179 (D.C. 1979), *citing* Retention and Dissemination of Arrest Records: Judicial Response at 855.

All of the sound reasons cited by the two appellate courts for permitting nonpublic retention of records would be lost under the CCRC proposal to expunge these records.

Very few jurisdictions have adopted the CCRC recommendation permitting judges to grant PBJs without the prosecutor's consent. And, of those that permit this practice, it does not appear that any allow it for all offenses within multiple misdemeanor classes. As noted on pages 60 and 61 of the 2017 proposed Final Draft of the Model Penal Code: Sentencing (entry on judicial deferral):

> d. *Process*. Deferred-adjudication provisions that do not require the consent of the prosecutor are relatively rare, but not unknown. See N.Y. Crim. Proc. Law § 170.56 ("Adjournment in contemplation of dismissal in cases involving marihuana"); Vt. Stat., title 13, § 7041 (trial court has authority to defer adjudication without agreement of prosecutor in specified circumstances). See also Ohio Rev. Code § 2935.36 (prosecutor must initiate pretrial diversion process based on prosecutor's belief that the defendant "probably will not offend again," although case law grants judges nonstatutory authority to devise their own similar programs; see Lane v. Phillabaum, 912 N.E.2d 35 113 (Ohio Ct. App. 2008)).
>
> There is no general deferred-adjudication statute in New York, but courts have created a deferred-adjudication process under their own rules, allowing guilty pleas to be withdrawn with the consent of the prosecutor following successful completion of a period of probation. See N.Y. City Bar, The Immigration Consequences of Deferred 4 Adjudication Programs in New York City (2007), at 2-3, available at 5 http://www.nycbar.org/pdf/report/Immigration.pdf; N.Y. Crim. Proc. Law §§ 160.5, 160.55. [emphasis added]

The recommendation made by the American Law Institute Model Penal Code Sentencing (recommendations) is even more limiting in its approach.[8] On page 58 it states:

[8]See mpcs_proposed_final_draft.pdf

> d. Process. The main significance… is that a deferred adjudication does not require the approval of the prosecutor, though it always requires the consent of the defendant. The majority of existing state provisions interpose prosecutors as gatekeepers to deferred adjudications, and the revised Code would disapprove of this arrangement in all cases… [emphasis added]

While OAG disagrees with the proposal to allow judges to grant unlimited PBJs for this class of misdemeanors over the government's objection, we do not oppose a more limited grant of authority. OAG proposes that RCC § 22E-602 be amended to permit a judge to grant a PBJ over the government's objection only once every 10 years. OAG's proposal is modeled on provisions in the Maryland Code. See Maryland Code § 6-220 (d).[9] This limitation ensures that defendants who receive this benefit deserve it. A defendant should not be able to commit crime after crime and escape having a criminal record. By limiting the judge's ability to require a PBJ to once every 10 years, the provision targets defendants whose criminal offenses represent aberrant behavior for them. Few jurisdictions grant this authority to judges and those appear to be for a very limited number of offenses. It is one thing for a judge to grant a PBJ when it is part of a plea bargain which was agreed to by the parties and another for a judge to be able to do it over the objection of the prosecutor. The broad scope of CCRC's recommendation, like RCC § 22E-215, De Minimis Defense, improperly impedes on prosecutorial discretion in seeking justice. When the CCRC's proposed amendments to D.C. Code § 16-705, eventually granting jury trials to any person who has any jail exposure,[10] is considered, we end up with a system where a defendant charged with a Class C, D, or E offense will first be able to argue that the offense is De Minimus (basically a jury nullification argument), if they lose they get a jury trial, and when they lose, they will not end up with a conviction because a judge grants a PBJ, even though neither the judge nor the prosecutor was aware of the number of times that the person has previously received a PBJ. For the foregoing reasons, OAG objects to the recommendation as drafted in RCC § 22E-602 and recommends, instead, that the judge's grant of authority to order a PBJ over the government's objection be limited to once every 10 years.

Whether or not the CCRC adopts OAG's proposal, OAG recommends an amendment to subparagraph (c)(2) above. The proposed language, echoing some sealing language in existing law, states, "The effect of such order shall be to restore the person, in the contemplation of this law, to the status the person occupied before such arrest or indictment or information. No person

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[9] For example, Maryland Code § 6-220 (d)(1) states that a court may not stay the entering of judgment and place a defendant on probation for [] "a violation of § 21-902 of the Transportation Article or § 2-503, § 2-504, § 2-505, § 2-506, or § 3-211 of the Criminal Law Article, if within the preceding 10 years the defendant has been convicted under § 21-902 of the Transportation Article or § 2-503, § 2-504, § 2-505, § 2-506, or § 3-211 of the Criminal Law Article, or has been placed on probation in accordance with this section, after being charged with a violation of § 21-902 of the Transportation Article or § 2-503, § 2-504, § 2-505, § 2-506, or § 3-211 of the Criminal Law Article." [emphasis added]

[10] See proposed amendments to D.C. Code § 16-705 (b), on page 51 of First Draft of Report 69, which states in relevant part "After [midnight on a date three years after enactment of the RCC], in a criminal case tried in the Superior Court … The defendant is charged with an offense that is punishable by a fine or penalty of more than $250, or by imprisonment…"

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 the person for any purpose." In other sealing contexts, OAG has recommended that "law" read "District law," in light of the fact that the District lacks the authority to control the operation of federal law.

RCC § 22E-1201. Robbery[11]

Subparagraph (e)(5) establishes a class of penalty enhancements. As to firearms, it states:

> The penalty classification of second and third degree robbery is increased by:
>
> (A) One class when the actor commits the offense…
>
> (II) Under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; or
>
> (B) Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon.

OAG believes that the Commentary overstates the necessary linkage in the proposed statutory text between the displaying of the weapon and any bodily injury that the victim may have suffered. For example, subparagraph (c)(1)(A), a triggering offense under (e)(5)(B) above, includes the element that the perpetrator must "Caus[e] bodily injury to the complainant or another person present, when the perpetrator "Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control."

The Commentary states, in relevant part:

> Paragraph (e)(5) provides two penalty enhancements for second and third degree robbery that are the same as under paragraph (e)(4), except that there are more severe penalties for committing the robbery by inflicting a bodily injury or significant bodily injury by recklessly displaying or using what, in fact, is a dangerous weapon. To receive the higher (two penalty class) enhancement the dangerous weapon must directly or indirectly cause the bodily injury or significant bodily injury to the complainant.[12] [emphasis added]

[11] In this memo, OAG is addressing a narrow aspect of the RCC robbery offense. For OAG's comments, generally, see OAG's Memorandum on the First Draft of Report 68 - Red-Ink Comparison and Attachments, dated January 29, 2021.

[12] Following the quoted text, the Commentary continues If the government proves the presence of at least one element listed under paragraph (e)(5)(A), the penalty classification for second and third degree robbery may be increased in severity by one penalty class. If the government proves the presence of the element listed under paragraph (e)(5)(B), the penalty classification for second and third degree robbery may be increased in severity by two penalty classes. The increased penalty reflects the greater risk of more serious injury when actually using a dangerous weapon

The Commentary includes footnote 4 here. It states, "For example, if a defendant displays a gun during a robbery and the gun's display causes a complainant to step back, trip, fall, and suffer an injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot."

The disconnect between the proposed statutory text and the Commentary, is that when the penalty enhancement in subparagraph (e)(5)(B) is applied to the offense in (c)(1)(A), it appears that there will be an enhancement when the perpetrator commits the robbery and causes bodily injury to someone. The text does not appear to require the causation element that the display of the dangerous weapon directly or indirectly causes the bodily injury. If it does, it is because of the CCRC's belief that the word "by," in the quote above, by itself, requires this connection. To ensure that it is clear that the text of this enhancement matches the intent of the CCRC as expressed in the Commentary, OAG recommends amending subparagraph (e)(5)(B) to read:

> Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon and that the display or use of the dangerous weapon directly or indirectly causes the injury to the complainant.

RCC § 22E-2701. Burglary

On page 22 of Appendix E are the proposed penalties for the different gradations of the burglary offense. They are as follows:

• Enhanced 1st Degree Burglary	Class 7 felony	8 years (96 months)
• 1st Degree Burglary	Class 8 felony	4 years (48 months)
• Enhanced 2nd Degree Burglary	Class 8 felony	4 years (48 months)
• 2nd Degree Burglary	Class 9 felony	2 years (24 months)
• Enhanced 3rd Degree Burglary	Class 9 felony	2 years (24 months)
• 3rd Degree Burglary	Class A misdemeanor	1 year (12 months)

RCC § 22E-2701 (a) states the elements for first degree burglary. It says:

> (a) *First degree*. An actor commits first degree burglary when that actor:
> (1) Reckless as to the fact that a person who is not a participant in the burglary is inside and directly perceives the actor or is entering with the actor;
> (2) Knowingly and fully enters or surreptitiously remains in a dwelling, or part thereof;
> (3) Without a privilege or license to do so under civil law;
> (4) With intent to commit inside one or more District offenses that is, in fact, an offense under Subtitle II of this title or a predicate property offense.[13]

against another person. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.

[13] See pages 149 and 150 of the First Draft of Report 68 – Red-Ink Comparison.

Subtitle II, mentioned in subparagraph (a) (4) above, is the subtitle that contains "Offenses Against Persons.[14] Predicate property offenses are defined in paragraph (e)(2) as:

(A) Theft under RCC § 22E-2101;
(B) Unauthorized Use of Property under RCC § 22E-2102;
(C) Unauthorized Use of a Motor Vehicle under RCC § 22E-2103;
(D) Extortion under RCC § 22E-2301;
(E) Arson under RCC § 22E-2501;
(F) Reckless Burning under RCC § 22E-2502; or
(G) Criminal Damage to Property under RCC § 22E-2503.

The current burglary statute is found in D.C. Code § 22-801. Paragraph (a), like RCC § 22E-2701 (a), establishes the offense for a burglary of an occupied residence. It states:

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

Therefore, while the current law provides a range of 5 years to 30 years for burglarizing an occupied residence, the CCRC recommends that the offense carry a maximum penalty of just 4 years. In addition, whereas committing an armed burglary of a residence, under current law carries a maximum penalty of 60 years and a 5 year mandatory minimum for a first offense[15], the CCRC recommendation is that this offense, designated as enhanced 1st degree burglary, carry a maximum penalty of only 8 years. To recognize the seriousness of a burglary of an occupied residence, including the trauma and potential harm to a victim, OAG recommends that the CCRC amend the burglary penalty provision to increase, by one class the penalty for first degree burglary and enhanced first degree burglary.[16]

D.C. Code § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000

[14] See pages 47 through 124 of the First Draft of Report 68 – Red-Ink Comparison.
[15] See D.C. Code § 22-4502, additional penalty for committing crime when armed.
[16] OAG's recommendation is consistent with the recommendation previously made by USAO. It varies in that OAG is making a specific recommendation as to which penalty class should be assigned by to first degree and enhanced first degree burglary. See page 240 of Appendix D2: Disposition of Advisory Group Comments & Other Changes to Draft Documents.

For the reasons stated below, OAG recommends deleting the reference to August 5, 2000 from this provision. Paragraph (a) of the CCRC draft, on page 38, retains verbatim the existing language of D.C. Code § 24-403.01 (a). That paragraph states:

> For any felony committed on or after August 5, 2000, the court shall impose a sentence that:
> (1) Reflects the seriousness of the offense and the criminal history of the offender;
> (2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the offender and others; and
> (3) Provides the offender with needed educational or vocational training, medical care, and other correctional treatment.

B13-0696 - Sentencing Reform Amendment Act of 2000 added the language that references August 5, 2000 in D.C. Code § 24-403.01 which was carried over into this provision. On page 2 of the Committee Report for this legislation, in the Purpose section, it states, "Congress established a determinate sentencing scheme for the District of Columbia that abolished parole for subsection (h) offenses committed on or after August 5, 2000 and requires offenders to serve at least 85% of the determinate sentence."[17]

OAG's recommendation to remove the date is based upon three premises. First, few, if any, people are likely to be sentenced for offenses committed at least 22 years before the RCC's enactment. Second, in hindsight, for those old offenses, there is no reason why the court should not impose an indeterminate sentence that:

> (1) Reflects the seriousness of the offense and the criminal history of the offender;
> (2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the offender and others; and
> (3) Provides the offender with needed educational or vocational training, medical care, and other correctional treatment.

This is especially true because, as the Council for Excellence noted as to the effects of indeterminate sentencing:

> It was our experience and expectation at the time we were involved in these cases that the minimum, or "bottom number," of an indeterminate sentence was the amount of time felt appropriate to serve as punishment for the offense. Absent specific circumstances, such as poor conduct while incarcerated, that led the Parole Board to decide that additional incarceration was appropriate, the offender was presumptively expected to be released upon serving the minimum sentence… The signatories to this letter who participated in sentencing -- prosecutors who recommended sentences, public defenders who advised their clients regarding plea offers, and judges who imposed the sentences -- acted based on the

[17] See https://lims.dccouncil.us/Legislation/B13-0696.

> presumption that people serving indeterminate sentences would be eligible for release upon serving their minimum sentence, and would be released absent specified aggravating conduct while incarcerated. While not commenting on any specific case, we would be surprised to learn that those whose cases we were involved in were not granted parole at the bottom number, despite having risk scores appropriate to being released and absent disqualifying institutional behavior..[18]

After the RCC is enacted, judges who must sentence a person for an offense that occurred when the District still had indeterminate sentencing should be guided by the redrafted D.C. Code § 24-403.01 (a) when determining the minimum and maximum sentence.[19]

Third, by removing the date, we avoid an issue concerning how people should be sentenced for offenses that where committed between August 2000 and the effective of the RCC.

In addition, the Commentary should make it clear that the removal of the date is not intended (nor understood) to require resentencing for someone who has already been sentenced under the then existing statutory provision.

[18] See http://www.courtexcellence.org/uploads/publications/Restoring_Local_Control_of_Parole_Sign_On_Letter.pdf

[19] This is not to say that the remainder of D.C. Code § 24-403.01 should apply to offenses that occurred before the RCC is enacted.

M E M O R A N D U M

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	February 9, 2021
Re:	Comments on First Draft of Report No. 69, Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses

The Public Defender Service submits the following comments on Report No. 69 for consideration.

1. **Reduce sentence length**. PDS acknowledges that the Commission reduced many maximum sentences from 60 years or life without release to 45 years or less. However, as conceded in the RCC commentary, 45 years still amounts to a life sentence and is more than the 39.2 years that the Bureau of Prisons considers to be a life sentence.[1] PDS understands the CCRC's point that maximum penalties of 45 and 40 years, though seemingly lower than the D.C. Code's maximum allowable prison sentences, are in fact comparable to life without possibility of release because the life expectancy for non-Hispanic Black men in the District is just under 69 years.[2] However, the notion that we would create a system that sets penalties based on ensuring the possibility that the punishment can be longer than the life of the person being punished is extremely troubling. PDS has repeatedly advocated[3] against creating life sentences in the Revised Criminal Code and joins scholars and researchers who argue for setting the absolute maximum sentence for an offense at no more than 20 years of incarceration.[4] In the District, long prison sentences are imposed almost exclusively on Black residents.[5] This long-term incarceration traumatizes families and perpetuates poverty by depriving families of the support and wages of incarcerated

[1] RCC Commentary First Draft of Report #69 page 5.

[2] PDS notes with sadness and alarm the fact that a discussion of life expectancies in the context of the District's criminal legal system could quote only one statistic to have relevance for the overwhelming vast majority of the defendants in the system.

[3] See PDS comments to Comments on First Draft of Report No. 51, Jury Demandable Offenses and First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements, May 15, 2020.

[4] See e.g. Marc Mauer, *A 20-Year Maximum for Prison Sentences.* Available at: https://www.sentencingproject.org/news/a-20-year-maximum-for-prison-sentences/.

[5] For example, the 2019 Annual Report of the DC Sentencing Commission states that 93% of the individuals sentenced for felonies that year were Black. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/service_content/attachments/Annual_Report_Final%2004-10-2020.pdf.

family members. While inflicting deep harm, there is no evidence that sentences beyond 20 years further community safety. Numerous studies have shown that criminal behavior correlates strongly with age and that individuals "age out of crime." Researchers have concluded that "age is one of the most robust predictors of criminal behavior." The age-crime curve "shows that most criminal offending declines substantially beginning in the mid-20s and has tapered off substantially by one's late 30s."[6]

There is also no evidence that increasing sentences from 20 years to 45 years deters criminal conduct. The study of deterrence has led to the conclusion that it is the certainty of punishment that serves as a deterrent rather than the length of punishment.[7] It is also unrealistic to think that an individual weighing whether to commit a crime would be deterred by 45 years but would not be deterred by 20 years.[8] The life-expectancy statistic is important. Rather than use it to justify penalties that are effectively death sentences, the statistic should justify lowering the sentences to 20 years maximum imprisonment.

While incarcerating older individuals offers diminishing returns from a public safety standpoint, it comes with significant financial costs. Given the District's movement toward statehood, the District can no longer ignore the financial costs of incarceration which have for decades been paid for by the federal government. According to Vera Institute, the average cost of incarceration is $45,000 per year per individual.[9] The cost for care increases for all people as they age, but since health declines more rapidly for incarcerated individuals as a result of poor health care and environmental stress, the costs associated with incarceration will increase sharply as a result of aging.[10] By allowing sentences over 20 years in length, the District will be forced to allocate funds that could go to education, housing, drug treatment and conflict resolution training – the lack or insufficiency of which are all root causes of entry into the criminal legal system – to warehousing older individuals when they pose no threat to public safety.

2. **Reduce time on probation.** While the current version of the RCC does not address reform of probation, PDS urges the Commission to address this aspect of sentencing as well. Probation, just like supervised release, should have much shorter periods of supervision, set at a maximum of two years. Further, to increase any positive impacts of probation and to minimize intrusive,

[6] Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, May 3, 2017. Available at: https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.

[7] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, at 10. Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

[8] *Id.*

[9] Vera Institute, *The Price of Jails*, May 2015. Available at: https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration#:~:text=The%20annual%20cost%2C%20per%20incarcerated,the%20total%20cost%20of%20jails.

[10] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, at 10. Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

unproductive, and lengthy supervision, the RCC should consider tying the length of probation to completion of a goal rather than an arbitrary amount of time. The RCC should also establish a one-year review of probation at which time there should be a presumption that probation will be terminated unless the government can show a compelling reason for continuing probation. According to research analyzed by the Pew Institutes, "studies show that after the first year, many supervision provisions, such as reporting requirements and community-based services, have little effect on the likelihood of re-arrest, so keeping probation terms short and prioritizing resources for the early stages of supervision can help improve success rates among people on probation, reduce officer caseloads, and protect public safety."[11]

3. **Reduce supervised release terms**. PDS urges the Commission to reduce the time that individuals are required to spend on supervised release and to set two years as the maximum period of supervision. Long periods of supervision are not only demeaning to individuals, they feed a system of mass incarceration through which supervision officers use minor violations to send individuals to prison for infractions that could be better addressed through community programs or a problem-solving approach. As of 2016, as many as 4.5 million people were on probation or parole, amounting to one out of every 55 individuals.[12] "Across the United States, in 20 states, more than half of all state prison admissions in 2017 stemmed from supervision violations. In six states—Utah, Montana, Wisconsin, Idaho, Kansas, and South Dakota—violations made up more than two-thirds of state prison admissions."[13] In February 2021, when arguably fewer people were detained by the United States Parole Commission, nearly 13 percent of non-federal detentions at the DC Department of Corrections were for alleged parole and supervised release violations.[14] Much of this incarceration stems from technical violations, which reflect the over-policing of Black communities and exacerbate the disparities in a system that already incarcerates African Americans at disproportionate rates.[15]

   Further, the District should be exceedingly cautious about imposing supervision requirements. As currently structured, supervised release is supervised by the Court Services Offender Supervision Agency (CSOSA), over which the District has no control. For example, the District is powerless to stop CSOSA's practice of requesting warrants and the arrest of individuals for minor infractions of supervision requirements. Similarly, the District cannot order CSOSA to stop onerous check-in requirements and electronic monitoring for individuals who pose little risk of recidivism. Rather than responding to District initiatives, this federal agency will respond to federal prerogatives that have often run afoul of local interests. Once CSOSA requests a warrant or informs the United States Parole Commission (USPC) of a supervision infraction, the warrant

[11] Pew, States Can Shorten Probation and Protect Public Safety, December 3, 2020. Available at: https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety.

[12] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, July 31, 2020. Available at: https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states.

[13] *Id.*

[14] Data provided through the Criminal Justice Coordinating Council.

[15] See supra note 3.

is almost always issued by the USPC, another federal entity over which the District has no control and can exercise no oversight. If the power to rescind supervision rested with judges, then the Council and the Mayor would at least be in a position to legislate surrounding the circumstances that would trigger a revocation and decide the length of incarceration to be served for an infraction. As the District prioritizes achieving statehood, it should not add to the federal control of its residents by relegating them to long periods of federal supervision without meaningful local checks. Until there is a restructuring of the authority of CSOSA and the United States Parole Commission, the clearest way to ensure that the District plays the largest role in the fate of District residents is by limiting the time spent on supervised release and instead proactively working to make programming, housing, education, and employment available to returning citizens in a voluntary fashion that respects their dignity.

4. **Expand misdemeanor dismissal provision.** RCC § 22E-602(c) Authorized Dispositions, allows a judge to place an individual found guilty of any Class C, D, or E offense on probation and then dismiss the proceedings against the person at the end of the period of probation, or earlier. PDS strongly supports this provision but believes that it should be expanded beyond Class C, D, and E offenses. As written, this option is available to judges for offenses that carry a maximum term of 60 days of incarceration. Under the current D.C. Code, an analogous provision exists only for first time drug offenses that would otherwise carry 180 days of incarceration.[16] The RCC should build and expand on that provision by including all misdemeanors and low-level felonies.

   RCC § 22E-602(e) is not a mandatory dismissal procedure, but instead grants discretion to judges to fashion appropriate remedies for District residents. Until the District becomes a state and has a locally elected prosecutor and local input on what cases should be brought to court in the first instance and what should be resolved through diversion, community programs, and restorative justice, the CCRC should give broad discretion to judges to fashion justice. Without a broad provision that allows for judicial dismissal, the decision about what happens to District residents and how they are treated in the criminal legal system will in most cases fall to a United States Attorney that the District had no vote in confirming. The RCC should recognize the need to give lawyers the opportunity to argue for a complete set of remedies to Superior Court judges and allow those decision-makers, in addition to the United States Attorney's Office, to have a role in deciding the fair outcome of prosecutions.

   The dismissal procedure is also necessary to bring a measure of racial equity to the District's criminal legal system. As shown by the Sentencing Commission's felony sentencing data, more than 90 percent of the individuals sentenced on felonies are Black[17], and any time spent in misdemeanor and traffic courtrooms in Superior Court shows that the same racial dynamics exist for misdemeanors. It is not that white residents do not commit offenses, rather they are diverted out of the system before they ever get to a courtroom. White defendants are not arrested, are given warnings, dismissal opportunities, and second chances. The non-arrests do not register in any database, are not counted against them and do not create barriers for employment, education, or housing. RCC § 22E-602(e) provides a way for Black defendants to have an opportunity to

[16] D.C. Code § 48–904.01(e)(1).

[17] See supra note 5.

have a small measure of the compassion enjoyed by white residents, although RCC § 22E-602(e) will still require criminal prosecution and probation.

Finally, a dismissal procedure in not an extraordinary remedy that would be unique to the District. New York allows for dismissal of all misdemeanors in the interests of justice.[18] Twelve states recognize the judicial capacity to dismiss cases in the interest of justice.[19] If the District aims to undue its role in the mass incarceration of Black residents, it needs to open multiple avenues to allow individuals to exit the criminal legal system.

5. **Limit Enhancements**. PDS maintains its objection to enhancements based on prior convictions (RCC §22E-606) and on pre-trial release status (RCC §22E-607) and incorporates its previous arguments explaining why these enhancements are overly punitive and amplify the racial disparities and inequities of our criminal legal system.[20] Compounding the problems with those enhancements is the policy choice to allow stacking of enhancements. PDS continues to argue that allowing the stacking of enhancements undermines the commendable work of the CCRC to eliminate as much as possible sentences that are disproportionate to the person's conduct and harm caused.[21] For Report No. 69 in particular, PDS reiterates its recommendation that the repeat offender enhancement and the pre-trial release status enhancement, which both increase the statutory maximum for an offense add a certain number of years to increase the statutory maximum of an offense based on the class of the offense, add years based on the class of the unenhanced offense (e.g., 2nd Robbery) rather than on an already enhanced offense (e.g., enhanced 2nd Robbery (significant bodily injury by dangerous weapon)). If CRCC persists in the policy choice of increasing punishment based on the status of the offender rather than based only on the offender's conduct, PDS strongly recommends that the status-punishment be minimal. In many cases, the enhanced offense and the unenhanced offense would receive the same status-punishment. For example, 1st Robbery is in class 6 and enhanced 1st Robbery is in class 5. The status-punishment based on prior convictions (RCC §22E-606) adds 2 years to the statutory maximum for an offense that is in either class 5 or class 6. In other cases, allowing the status-punishment on the enhanced offense would make a difference. For example, 2nd Robbery is in class 8. The significant bodily injury, dangerous weapon enhancement at RCC § 22E-606(e)(5)(B) adds two classes, class 6. The status-punishment based on prior convictions adds 1 year for a class 8 offense but adds 2 years for a class 6 offense. The punishment for the offense is already untethered from the conduct committed, allowing punishment that is disproportionate, the CCRC should not add to the disparity by increasing the punishment that is based only on status. For clarity, PDS recommends that the addition to the explanatory note for robbery[22] include a footnote following the sentence that reads: "These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6." That footnote should

[18] New York Criminal Procedure § 170.40.

[19] Valena E. Beety, Judicial Dismissal in the Interest of Justice, Missouri Law Review, 2015. Available at: https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4147&context=mlr

[20] See Appendix C, Cumulative Advisory Group Written Comments on CCRC Draft Documents (1-29-21) at C42 - C45 and C533 - C536.

[21] See Appendix C at C678 – C679.

[22] See Report #69 at 36.

clarify the enhancements authorized by RCC §22E-606 and §22E-607 enhance the unenhanced robbery gradation.

In addition, PDS recommends changing Appendix E so that the main charts only show the class rankings of the offense gradations and not any enhanced rankings. For example, instead of showing that Enhanced 1st Robbery is in class 5; 1st Robbery is in class 6; Enhanced 2nd Robbery (significant bodily injury by dang weapon), Class 6; etc., the chart should just show 1st Robbery (class 6), 2nd Robbery (class 8), and 3rd Robbery (class 9). The problem with ranking unenhanced offenses and enhanced offenses in the same chart is that it is confusing and could allow a practitioner to apply an enhancement based on the classification of an enhanced offense. If CCRC likes the idea of a chart that shows the ranking of enhanced offenses, it could create a separate chart, also in Appendix E, only for enhanced offenses.

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #69	Date: February 16, 2021

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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #69. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #69—Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses

In addition to the recommendations below, USAO incorporates our previous recommendations regarding imprisonment terms and classification of RCC offenses.

A. RCC § 22E-602. Authorized Dispositions.

USAO recommends that the CCRC clarify that subsection (c) is only available for a deferred disposition where a Class C, D, or E offense is the most serious offense of which a defendant has been found guilty.

As currently drafted, RCC § 22E-602(c)(1) provides, "When a person is found guilty of violation of any Class C, D, or E offense, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. . . ." As currently drafted, for example, a defendant found guilty of both a felony and a Class C misdemeanor in the same case could theoretically benefit from this deferred disposition in the misdemeanor. This result would not be justified by the rationale and likely was not intended by the drafters. The Commentary provides: "This discretionary authority is warranted given that Class C, D, and E offenses are the least serious offenses in the RCC . . . ." (First Draft of Report 69 at 49.) Thus, the deferred disposition should only be available if a defendant were found guilty *only* of one of the least serious offenses in the RCC—that is, a Class

[1] This review was conducted under the understanding that the structure of the code reform process allows the members of the CCRC 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.

C, D, or E misdemeanor—and should not be available if the defendant were found guilty of a more serious offense in addition to that offense.

USAO recommends increasing the penalties for Class C and Class D misdemeanors.

The CCRC originally proposed that Class C misdemeanors be punishable by a maximum of 90 days imprisonment, and that Class D misdemeanors be punishable by a maximum of 30 days imprisonment. The CCRC modified its initial proposal to recommend that Class C misdemeanors be punishable by a maximum of 60 days imprisonment, and that Class D misdemeanors be punishable by a maximum of 10 days imprisonment. The CCRC recognizes that this would have the effect of lowering the penalty for many of these offenses under current law. (*See* Report 69 at 4 n.3.) USAO recommends that the CCRC return to its initial proposal of 90 days for Class C misdemeanors and 30 days for Class C misdemeanors. Notably, even under this framework, the penalties for many offenses would be lower than they are under current law.

B. RCC § 22E-1101. Murder.

USAO continues to oppose lowering the penalty for Murder, particularly for First Degree Murder.

Premeditated first degree murder is the most serious criminal offense that can be committed. The penalty for this offense should be commensurate with the seriousness of this offense, and USAO opposes the CCRC lowering that penalty.

Although social science has long shown that the risk an individual will commit a violent offense declines as the individual ages, "an emerging theme in the literature is that offenders that are convicted of homicide offenses, including 1st degree murder, are more likely than other offenders to subsequently perpetrate lethal violence relative to offenders that have never committed a homicide." Matt DeLisi, *et al*., *Who will kill again? The forensic value of 1st degree murder convictions,* Forensic Science International: Synergy 1 (2019) at 12.

Professor DeLisi, an influential criminologist, conducted a study of 682 male offenders in Florida and found that a prior first degree murder conviction "was significantly associated with current homicide offending." *Id*. at 13. This remained true when the data was adjusted to account for age and race. *Id*. "Forensically, prior 1st degree murder convictions appear to be a marker for an offender who not only poses elevated risk of killing again, but also elevated risk of killing multiple victims." *Id*. at 15.

> Prior convictions for 1st degree murder and subsequent homicide offending are also likely manifest indicators of a latent homicidal propensity. To illustrate, a recent study of a population of federal correctional clients found that about 12% of the population experience some degree of homicidal ideation. Moreover, correctional clients with homicidal ideation were significantly more likely to perpetrate a host of crimes including completed and attempted homicides, kidnapping, armed robbery, and aggravated assault, and these offenders also evinced more severe and extensive psychopathology.

Id. at 15. Given these findings, the penalty for first degree murder under current law is essential to protect the community from offenders who are significantly more likely to commit additional murders and other violent offenses. Accordingly, USAO urges the CCRC not to lower the penalty for First Degree Murder and Enhanced First Degree Murder.

C. RCC § 22E-1201. Robbery.

USAO recommends that the penalty enhancement in subsection (c)(5)(A)(II) increase the penalty classification by two classes, rather than one class.

The CCRC has proposed increasing the penalty classification for Second and Third Degree Robbery by one class when the actor commits the offense under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; and by two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon. Under this proposal, there would be a two-class increase for Third Degree Robbery where, for example, the defendant hit the victim with the gun to accomplish the robbery, but only a one-class increase for Third Degree Robbery where, for example, the defendant held a gun to the victim's head and threatened to kill the victim to accomplish the robbery, or where the defendant moved the victim by pushing the victim with the gun without causing any level of bodily injury. These offenses, however, are equally serious, and do not merit a distinction in offense level. Rather, there should be a single enhancement that increases the penalty classification by two classes where the defendant used or displayed what, in fact, is a dangerous weapon or imitation dangerous weapon. At a minimum,[2] a maximum penalty of 8 years imprisonment (rather than 4 years) is appropriate for all armed robberies.

This is consistent with recent Superior Court practice. For robbery, between 2010 and 2019, the 0.5 quantile for imprisonment was 33 months, the 0.75 quantile for imprisonment was 54 months, the 0.9 quantile for imprisonment was 72 months, the 0.95 quantile for imprisonment was 84 months, and the 0.975 quantile for imprisonment was 108 months. (App. G, Line 157.) 27.7% of convictions were enhanced. (App. G, Line 157.) The bottom of the sentencing guideline range for robbery (a Group 6 offense) for a person with the lowest criminal history score is 18 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 42 months. The bottom of the sentencing guideline range for armed robbery (a Group 5 offense) for a person with the lowest criminal history score is 36 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 84 months. Moreover, for assault with intent to rob, between 2010 and 2019, the 0.5 quantile for imprisonment was 42 months, the 0.75 quantile for imprisonment was 60 months, the 0.9 quantile for imprisonment was 85.8 months, the 0.95 quantile for imprisonment was 120 months, and the 0.975 quantile for imprisonment was 169.5 months. (App. G, Line 45.) 45.6% of convictions were enhanced. (App. G, Line 45.) Most likely, many of these enhanced convictions for assault with intent to rob would be similar to Enhanced Third Degree Robbery (or Enhanced Second Degree Robbery) under the RCC.

[2] USAO previously recommended increasing the penalties for Robbery generally. (App. C. at 425–26.)

Under the CCRC's proposal, absent significant bodily injury, a maximum of 96 months (8 years) would be available for some forms of armed robbery, and a maximum of 48 months (4 years) would be available for other forms of armed robbery. To adequately reflect the seriousness of all forms of armed robbery, and to align with recent Superior Court practice, USAO recommends that all forms of armed robbery be categorized as a Class 7 felony.

USAO continues to oppose decreasing the penalty for carjacking.

The CCRC has proposed that unarmed carjacking be categorized as Second Degree Robbery, a Class 8 felony punishable by a maximum of 4 years imprisonment. The CCRC has proposed that armed carjacking be categorized as Enhanced Second Degree Robbery, a Class 7 felony punishable by a maximum of 8 years imprisonment. USAO opposes the significant decrease in penalty for carjacking proposed by the CCRC, particularly as the District is facing a troubling increase in carjacking. A carjacking is a significant intrusion into a person's personal space, and a carjacking is a violation of that sense of personal space. It also results in the loss of what is often a more significant asset than is lost in another form of robbery.

For armed carjacking, between 2010 and 2019, the 0.5 quantile for imprisonment was 180 months, the 0.75 quantile for imprisonment was 180 months, and the 0.9 quantile for imprisonment was 180 months. (App. G, Line 160.) The mandatory minimum for armed carjacking under D.C. Code § 22-2803(b)(2) is 15 years (180 months). The bottom of the sentencing guideline range for armed carjacking (a Group 3 offense) for a person with the lowest criminal history score is 90 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 138 months. The 0.5 quantile, 0.75 quantile, and 0.9 quantile, therefore, all represent instances of the court imposing the mandatory minimum sentence.

For unarmed carjacking, by contrast, between 2010 and 2019, the 0.5 quantile for imprisonment was 84 months, the 0.75 quantile for imprisonment was 96 months, and the 0.9 quantile for imprisonment was 108 months. (App. G, Line 159.) The mandatory minimum for unarmed carjacking under D.C. Code § 22-2803(a)(2) is 7 years (84 months). The bottom of the sentencing guideline range for unarmed carjacking (a Group 5 offense) for a person with the lowest criminal history score is 36 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 84 months. The 0.5 quantile for imprisonment represents the mandatory minimum for this offense. The 0.75 quantile and 0.9 quantile, however, reflect instances where the court thought the circumstances of the case merited a higher sentence than was required by the mandatory minimum or the bottom of the sentencing guidelines. The CCRC's proposal to make unarmed carjacking punishable by a maximum of 4 years imprisonment (48 months) would therefore have the effect of significantly lowering the maximum penalty available for this offense.

D. RCC § 22E-1205. Offensive Physical Contact.

USAO recommends increasing the penalties for Offensive Physical Contact.

The CCRC has proposed categorizing 1st Degree Offensive Physical Contact as a Class C misdemeanor, and 2nd Degree Offensive Physical Contact as a Class D misdemeanor. The CCRC has proposed classifying the enhanced versions of these offenses as Class B and Class C misdemeanors, respectively. USAO recommends increasing all of these penalties by one class. The harm caused to a person by 1st Degree Offensive Physical Contact—which requires that the defendant cause the complainant to come into physical contact with bodily fluid or excrement—is similar to the harm caused by Fourth Degree Assault—which requires the infliction of some level of bodily injury. Likewise, the harm caused to a person by 2nd Degree Offensive Physical Contact—which requires that the defendant cause the complainant to come into physical contact with that person with the intent that the contact be offensive—is similar to the harm caused by Attempted Fourth Degree Assault, and should be punished proportionally.[3] Further, USAO previously recommended that the RCC clarify that non-consensual sexual touching can qualify as Second Degree Offensive Physical Contact. (App. C. at 689.) It would be more appropriate for non-consensual sexual touching to be a Class C misdemeanor than a Class D misdemeanor, and for it to be a Class B misdemeanor when committed against a protected person, including a child.

E. RCC § 22E-1301. Sexual Assault.

USAO continues to oppose decreasing the penalty for First Degree Sexual Assault and Enhanced First Degree Sexual Assault.

The CCRC has proposed a maximum penalty of 288 months for First Degree Sexual Assault, and a maximum penalty of 360 months for Enhanced First Degree Sexual Assault. With the repeat offender enhancement, there would be a maximum penalty of 336 months and 408 months, respectively. For first degree sexual abuse (force), between 2010 and 2019, the 0.5 quantile for imprisonment was 144 months, the 0.75 quantile for imprisonment was 198 months, the 0.9 quantile for imprisonment was 300 months, and the 0.975 quantile for imprisonment was 444 months. (App. G, Line 161.) 35.8% of those convictions were enhanced. (App. G, Line 161.) The bottom of the sentencing guideline range for first degree sexual abuse and first degree sexual abuse while armed (both Group 2 offenses) for a person with the lowest criminal history score is 144 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 192 months. Although the RCC's proposal would encompass the vast majority of convictions for this offense, the RCC should have a high enough maximum for this offense that it would encompass all recent convictions for this offense. As USAO has noted previously, the maximum penalty for an offense should be sufficiently high to account for the worst possible version of an offense. To account for this, USAO recommends increasing the penalty for First Degree Sexual Assault and Enhanced First Degree Sexual Assault.

F. RCC § 22E-1401. Kidnapping.

USAO recommends, in subsections (a)(3)(D) and (a)(3)(F), that the CCRC clarify that liability would attach where the defendant intended to cause either serious bodily injury or death.

[3] As discussed above, USAO also recommends that a Class C misdemeanor be punishable by a maximum of 90 days imprisonment, which would be consistent with the penalty for Attempted Fourth Degree Assault.

As currently drafted, subsections (a)(3)(D) and (a)(3)(F) create liability where the defendant either intended to inflict serious bodily injury upon the complainant, or caused any person to believe that the complainant will not be released without suffering serious bodily injury. USAO recommends that the CCRC clarify that liability would also attach where the defendant intends to cause death, in addition to serious bodily injury. USAO recommends that subsection (a)(3)(D) provide: "Inflict death or serious bodily injury upon the complainant," and that subsection (a)(3)(F) provide: "Cause any person to believe that the complainant will not be released without suffering death or serious bodily injury, or a sex offense defined in Chapter 13 of this Title."

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

USAO recommends that the CCRC update the language in subsection (d)(2) to conform with the penalty recommendations in Report #69.

In Report #69, the CCRC recommends that the unenhanced version of this offense be a Class B misdemeanor, and that the enhanced version of this offense be a Class 9 felony. The language in subsection (d)(2) provides that the penalty classification for this offense is increased by *one* class when an enhancement applies. USAO recommends that the CCRC modify the language in subsection (d)(2) to align with Report #69 and provide that the penalty classification for this offense is increased by *two* classes when an enhancement applies.

H. RCC Subtitle III. Property Offenses.

USAO continues to recommend decreasing the monetary thresholds for Theft, Fraud, and related offenses.

As USAO stated previously, the monetary thresholds for each gradation are so high that the top gradations will likely only be used very rarely, if ever. (App. C. at 427.) Thus, USAO continues to recommends decreasing the monetary threshold for Theft, Fraud, and related offenses to align with the CCRC's recommended penalties. In response to USAO's previous recommendation, the CCRC stated: "From 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years." (App. D1 at 315.) Under current law, first degree theft is a theft involving property $1000 or more. *See* D.C. Code § 22-3212(a). Under the CCRC's penalty recommendation, a theft that would constitute first degree theft under current law could be either 4th Degree Theft (if the property is $500 or more), 3rd Degree Theft (if the property is $5,000 or more), or a higher gradation if the property was over $50,000. The CCRC has proposed categorizing 4th Degree Theft as a Class A misdemeanor punishable by 1 year incarceration, and 3rd Degree Theft as a Class 9 felony punishable by 2 years incarceration. The CCRC states that its proposal is consistent with current practice, but then states that "[f]rom 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years." The proposed maximum penalties of 1 year and 2 years, accordingly, are lower than current practice. Although current practice could, theoretically, include property theft of $50,000 or more, theft of this value—particularly where the theft is prosecuted under the D.C. Code instead of under federal law—is likely very rare. Thus, the CCRC's recommendation would not necessarily be consistent with current practice, and would have the effect of lowering the

maximum penalty in many instances. Moreover, although these offenses do not involve physical violence, theft, fraud, and related offenses may cause far-reaching and irreparable harm to victims, and could result in them being unable to put food on the table, pay rent, or lose their homes. These are significant harms, and can result from losses even below $50,000. USAO recommends that the CCRC sufficiently account for these harms in its monetary thresholds and related penalty recommendations. Consistent with our previous recommendations, USAO recommends the following penalty gradations:

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

I. RCC § 22E-3401. Escape from a Correctional Facility or Officer.

USAO continues to recommend that the CCRC increase the penalty classifications for Escape.

USAO recommends that, at a minimum,[4] the CCRC increase the penalty classification for 3rd Degree Escape. The CCRC has proposed that 1st Degree Escape be a Class 8 felony, 2nd Degree Escape be a Class A misdemeanor, and 3rd Degree Escape be a Class C misdemeanor. The CCRC's recommendation—particularly with respect to 3rd Degree Escape—would be substantially lower than current sentencing practice in Superior Court. Appendix G reflects that, for D.C. Code § 22-2601, the 0.75 quantile for sentencing was 10 months; for D.C. Code § 22-2601(a)(1), the 0.75 quantile for sentencing was 10 months, for D.C. Code § 22-2601(a)(2), the 0.75 quantile for sentencing was 12 months; and for D.C. Code § 22-2601(a)(3), the 0.75 quantile for sentencing was 5 months. Most likely, many of the convictions categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) would involve conduct similar to the conduct proscribed by the RCC's proposal for 3rd Degree Escape. Thus, the CCRC's recommendation would not be consistent with current practice and represents a substantial departure from current law.

J. RCC § 4120. Endangerment with a Firearm.

USAO continues to recommend increasing the penalty for Endangerment with a Firearm.

The CCRC has proposed categorizing this offense as a Class 9 felony. USAO previously recommended increasing the penalty for this offense. (App. C at 592.) The CCRC responded to USAO's recommendation as follows: "The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. For example, increasing the penalty class for this offense by one class would punish endangering a person with a firearm (which does not require inflicting any fear or injury) more severely than using a firearm to cause a significant bodily injury." (App. D2 at 271.) Under the RCC's proposed penalties, however, causing significant bodily injury (Third Degree Assault) would be a Class 9 felony, and using a firearm to cause a significant bodily injury (Enhanced Third Degree Assault) would be a Class 7 felony. Thus, USAO's proposal to increase the penalty for this offense (for example, to a Class 8 felony)

[4] USAO previously recommended that all gradations of escape be felonies. (App. C at 355, 428.)

would not punish endangering a person with a firearm more severely than using a firearm to cause a significant bodily injury, and would more adequately represent the substantial danger posed by a person who fires a gun.

K. D.C. Code § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000.

USAO recommends removing subsection (b)(2)(C).

Among other recommendations, the CCRC proposes creating a new D.C. Code § 24-403.01(b)(2)(C) to provide that a judge shall impose a term of supervised release of not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than 8 years. Offenses with a maximum term of imprisonment of less than 8 years would include 3rd Degree Assault (including domestic violence strangulation), certain sexual offenses (including 6th Degree Sexual Abuse of a Minor), and other offenses that can be relatively serious. For many offenses, a 1-year term of supervision may not be a sufficient period of supervised release.

Rather, the CCRC's proposal in this section to allow a judge discretion to impose a term of less than 3 years of supervision where the maximum term of imprisonment authorized is less than 24 years provides a judge with the option of imposing a term of 1 year of supervised release where appropriate. This discretion accounts for the situations where a 1-year term of supervised release could be appropriate. The fact that a 1-year period of supervision may not be sufficient in all cases was implicitly recognized by the DC Council in the recent passage of the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020" (B23-181). In that act, which is pending congressional review, the DC Council modified the term of a civil protection order from an initial term of up to 1 year to an initial term of up to 2 years. In support of that change, the Committee Report cited to the testimony of the Legal Aid Society of the District of Columbia as follows: "There are many situations in which a one-year order simply is not enough. For example, the abuse may be egregious that a client will still be fearful in a year's time, or a survivor may need more than a year to secure a safety transfer to an apartment somewhere safe from their abuser." Report on Bill 23-0181, the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020," Committee on the Judiciary & Public Safety, Council of the District of Columbia, at 11 (Nov. 23, 2020). This logic applies equally—if not more forcefully—to felony offenses. Moreover, it would not be consistent for a period of supervision in a civil protection order (that could stem from a misdemeanor offense) to last up to 2 years with the possibility of extension, and for a period of supervision in a felony case to last only up to 1 year.