APPENDIX D.
DISPOSITION OF ADVISORY GROUP COMMENTS & OTHER CHANGES FROM DRAFT DOCUMENTS

Appendix D is a compilation of all CCRC written responses to Advisory Group members' written comments (see Appendix C) as well as an elaboration on any additional, substantive changes that were made to the drafts on CCRC initiative. This Appendix is organized in chronological order with the most recent responses and explanations of changes appearing at the end.

RCC § 22E-102. Rules of Interpretation.

(1) *OAG, App. C. at 15-16, recommends adding the phrase "to determine the legislative intent" to the second sentence of subsection (a) so it reads "If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined*."

- The RCC incorporates the language in the OAG recommendation. This added language is not intended to change current District case law, rather it reflects the fundamental tenet of all statutory interpretation that legislative intent is controlling. Per the first sentence of subsection (a), the first and usually definitive way of determining legislative intent is the plain language of the statute. This change clarifies the revised statutes.

(2) *USAO, App. C at 24, recommends changing subsection (b) to read: "If* 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." USAO cites for support to United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997).[1]

- The RCC incorporates the language in the USAO recommendation. This change clarifies the revised statutes.

(3) *USAO, App. C. at 24, recommends the commentary reflect District case law recognizing that titles and captions may be of aid in interpreting ambiguous statutes.*

- The RCC incorporates the USAO recommendation by amending the commentary to cite to relevant portions of *In re: J.W.,* 100 A.3d 1091, 1095 (D.C. 2014) and *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013). This change clarifies the revised statutes.

(4) *USAO, App. C. at 24, says it believes a footnote in an earlier draft report concerning other jurisdictions' provisions regarding codification of the effect of headings and captions is imprecise. USAO notes that while the draft report's cited jurisdictions do have statutory provisions concerning the effect of headings and captions, these statutes prohibit reliance on headings.*

- The RCC does not incorporate this comment because the commentary has been changed since to not include other jurisdiction references. Other jurisdiction references made in prior draft reports remain saved in an appendix to the RCC Commentary but are not updated to stay current with changing laws in other jurisdictions.

(5) *USAO, App. C. at 25, recommends adding the phrase "otherwise ambiguous" to subsection (c) to clarify that headings and captions may only be of aid in interpreting "otherwise ambiguous" statutory language.*

[1] *U.S. Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997), adhered to on reh'g en banc, 711 A.2d 85 (D.C. 1998) ("The rule of lenity, therefore, can "tip the balance in favor of criminal defendants only where, exclusive of the rule, a penal statute's language, structure, purpose and legislative history leave its meaning genuinely in doubt.". *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C.1989) (internal quotation marks omitted); see Luck, 617 A.2d at 515.").

- The RCC incorporates the language in the USAO recommendation. This change clarifies the revised statutes.

RCC § 22E-103. Interaction of Title 22E With Other District Laws.

(1) O*AG, App. C. at 16, says that the statutory language and/or commentary needs to be "clarified or changed." OAG notes that "[b]eing 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," and questions whether case law establishing such estoppel is preserved by the RCC provision. OAG does not recommend any specific language to clarify or change the statute.*

- The RCC addresses this comment by amending the statute to begin "Unless expressly specified by this title or otherwise provided by law,…" and explaining in commentary that District civil statutes and civil case law may provide consequences for criminal convictions, or Title 22E provisions may expressly provide such consequences (by statute). This change clarifies the revised statutes.

RCC § 22E-104. Applicability of the General Part.

(1) *The CCRC recommends changing this statute to read "Unless otherwise expressly specified by statute, the provisions in Subtitle I of this title apply to all other provisions of this title."*

- This change is not intended to substantively change the statute. However, this change clarifies that Subtitle I applies to all other provisions in Title 22, unless expressly specified by *statute*, as opposed to any other source of law.

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

(1) *The CCRC recommends generally specifying the burden of proof for exclusions from liability, defenses, and affirmative defenses in a new subsection (b). If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt. If there is any evidence of a statutory defense at trial, the government must prove the absence of all elements of the defense beyond a reasonable doubt. Unless otherwise expressly specified by statute, a defendant has the burden of proving an affirmative defense by a preponderance of the evidence.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-202. Conduct Requirement.

(1) *The CCRC recommends subdividing paragraph (c)(2) to include subparagraphs for each alternative element.*

- This change does not substantively change the revised statute.

RCC § 22E-203. Voluntariness Requirement.

(1) *The CCRC recommends substituting the phrase "required for that offense" for the phrase "necessary to establish the offense," consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(2) *The CCRC amends the Definitions subsection to cross-reference RCC § 22E-202. The previous reference to RCC § 22E-201 was a typographical error.*

- This change does not substantively change the revised statute.

RCC § 22E-204. Causation.

(1) *PDS, App. C at 225-228, and USAO, App. C at 242-243,[2] both offer detailed recommendations concerning the definition of legal cause under RCC § 22E-204(c). Although there are material areas of disagreement between the agencies, there are two main propositions upon which both PDS' and USAO's comments converge. First, both agencies state that the RCC's use of the double negative, "not too unforeseeable" employed in the foreseeability prong of subsection (c) is problematic and should be avoided. Specifically, PDS describes this phraseology as "indeterminate," while USAO describes it as "needlessly indirect." Both PDS and USAO recommend, as a partial solution to these problems, rephrasing the foreseeability prong to read: "reasonably foreseeable in its manner of occurrence." Second, both agencies state that the RCC's reliance on the phrase "just bearing on the person's liability" in subsection (c) is problematic and should be avoided. Specifically, PDS explains that this language "injects a completely subjective element of moral judgment that would lead to arbitrary and unpredictable results." And USAO explains that this language manifests "imprecision," "practical opacity," and "vagueness." Both PDS and USAO therefore recommend eliminating the phrase "just bearing on the person's liability" from subsection (c) altogether.[3]*

- The RCC incorporates PDS' and USAO's consensus recommendations in accordance with the rationales offered by both agencies, while making additional revisions consistent with the concerns underlying those recommendations. To start, and in order to ensure clarity of communication, RCC § 22E-204(c) is reorganized into two separate paragraphs. The first paragraph, (c)(1), rephrases the foreseeability prong along the lines recommended by both PDS and USAO: "reasonably foreseeable in its manner of occurrence." Rephrased in this way, the foreseeability prong now avoids use of the double negative. The second paragraph, (c)(2), rephrases the volitional conduct prong to omit reference to the "just bearing" language in accordance with both agencies' recommendations. Instead, the volitional conduct prong now reads: "not too dependent upon another's volitional conduct *to hold the person responsible for it*." The italicized language, which replaces the phrase "to have a just bearing on the person's liability," more clearly states the principle upon which the volitional conduct prong rests, without inviting

[2] USAO's comment on legal causation was submitted on May 20, 2019. However, the deadline for comments on the First Draft of Report No. 35 was May 12, 2019.

[3] While PDS and USAO agree on omission of the "just bearing" language, as well as revision of the reasonable foreseeability prong, the agencies disagree on what to do about the volitional conduct prong in subsection (c). For example, PDS recommends reframing it in terms of being "*directly dependent* upon another's volitional conduct," whereas USAO would simply eliminate it altogether. In addition, PDS recommends adding an entirely new prong to subsection (c), which focuses on evaluating whether the "connection between the conduct and the result is not otherwise remote, indirect, or purely contingent on other factual causes." In contrast, USAO recommends relying on the requirement of reasonable foreseeability as the sole basis for evaluating legal causation under the RCC.

unnecessarily broad considerations of justice into the fact finder's evaluative process.[4]

- These revisions do not further change current District law, and they improve the clarity and consistency of the revised statutes.

(2) *The CCRC recommends omitting all references in the Commentary to "*urban *gun battle liability," and replacing them with references to "gun battle liability." The term "urban" does not serve any useful explanatory purpose in this context and may be unnecessarily prejudicial. This revision is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends omitting the final two sentences in the current District law section addressing legal causation*, *which may improperly suggest that legal causation under the RCC is only a matter of fairness, wholly detached from considerations of foreseeability or volitionality.*[5] *This revision is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

[4] USAO recommends deleting the volitional conduct prong in its entirety. In support of this deletion, the agency offers the following rationale, which reads (in its entirety): "Nor is [the volitional conduct prong] 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." For a detailed explanation of why the reasonable foreseeability requirement does not, and cannot, adequately account for the causal influence of the volitional conduct of another person, see the Explanatory Note and Relation to Current District Law entry on RCC § 22E-204(c)(2).

[5] These two sentences state that: "[The] inquiry [required by the RCC approach to legal causation] would not necessarily preclude the assignment of criminal liability upon X for D's criminal conduct. But it would require the factfinder to consider the fairness of attributing criminal liability under such circumstances."

RCC § 22E-205. Culpable Mental State Requirement.

(1) *The CCRC recommends deleting the phrase "or a comparable mental state specified in this Title" from the definition of culpable mental state in RCC § 22E-205(b)(1). This revision better accords with the Council's ultimate authority to define criminal offenses (i.e., whatever culpable mental state the Council drafts is what applies to an offense, regardless of what a prior legislative provision of general application says). Corresponding to this revision, the CCRC also recommends revising the accompanying Explanatory Note to omit discussion of the now-deleted language. Both of these revisions are consistent with informal comments received from OAG.*

- These revisions do not change current District law, and they improve the clarity and consistency of the revised statutes.

RCC § 22E-207. Rules of Interpretation Applicable to Culpable Mental States.

(1) *The CCRC recommends amending the distribution of culpable mental states provision to provide that, like the culpable mental states, any strict liability specified in an offense applies to all subsequent result elements and circumstance elements.*

- Offenses definitions have been amended to ensure this rule does not substantively change the revised offenses.

RCC § 22E-208. Mistake.

(1) *The CCRC recommends reorganizing paragraph (c) so that paragraph (c)(1) is not left blank.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(2) *The CCRC recommends rephrasing paragraph (d) so that the introductory sentence is clearer and the culpable mental state (purpose) appears before the conduct element in (d)(2), consistent with other provisions in the RCC.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(3) *The CCRC recommends revising a footnote in the Explanatory Note accompanying RCC § 22E-208(c) to clarify the interaction between the RCC approach to culpability as to criminality under this subsection and the RCC approach to deliberate ignorance under RCC § 22E-208(d).*[6] *This revision is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends revising the Explanatory Note accompanying RCC § 22E-208(d) to address the substantial motivating factor requirement governing deliberate ignorance evaluations in the main text of the commentary, rather than in the footnotes. (Other than moving the footnote to the main text, no further changes to the relevant statement have been made.) This new placement better reflects the relative importance of the principle being stated and is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

[6] That footnote adds, in relevant part:

> Another example of an implied culpability as to illegality element is reflected in the RCC general provision governing deliberate ignorance, RCC § 22E-208(d), which authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) the actor avoided confirming or failed to investigate the existence of the circumstance with the purpose of avoiding criminal liability. The second prong of this general provision entails proof of knowledge as to the illegality of the deliberately ignorant actor's conduct to the extent that such awareness of criminality is a necessary prerequisite to acting "*with the purpose of avoiding criminal liability.*" RCC § 22E-208(d)(2) (italics added).

RCC § 22E-209. Intoxication.

(1) *The CCRC recommends revising the phrase "afford a general defense to a charge of crime," as employed in RCC § 22E-209(d)(2), to more simply, succinctly, and clearly read: "establish a general defense." This revision is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends substantially expanding a footnote in the Explanatory Note addressing the definition of self-induced intoxication to both highlight and clarify the "pursuant to medical advice" exception under RCC § 22E-209(d)(2).*[7] *This revision is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends revising the self-induced intoxication provision to clarify that a person must act "at least" negligently. This clarifies that proof that a person acted intentionally or purposely is also sufficient.*

- This change clarifies and does not substantively change the revised statute.

(4) *The CCRC recommends revising the self-induced intoxication provision to specify that medical advice must be given by a "licensed health professional," as defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.

(5) *The CCRC recommends replacing the pronouns "his or her" with gender-neutral references to "the person."*

- This change does not substantively change the revised state.

[7] That footnote now adds, in relevant part:

> Note[] that a person who knowingly consumes an intoxicating substance "pursuant to medical advice" falls outside the scope of the RCC definition of self-induced intoxication. RCC § 22E-209(d)(2)(C); *see, e.g.,* Model Penal Code § 2.08(5)(a) (excluding from definition of self-induced intoxication person who "introduces [intoxicating substances] pursuant to medical advice"); ROBINSON, *supra* note 6, at 2 CRIM. L. DEF. § 176 ("[T]hough a patient may voluntarily take prescription drugs, intoxication as a result of such use may be involuntary so long as it is done pursuant to medical advice."). In contrast, where "medically prescribed drugs" are *not* "taken according to prescription," then any intoxication resulting from their knowing consumption *could* be considered "self-induced" for purposes of RCC § 22E-209. *E.g., State v. Gardner*, 230 Wis. 2d 32, 41–42 (Wis. Ct. App. 1999) (for this reason involuntary intoxication defense unavailable "where a patient knowingly takes more than the prescribed dosage, [] or mixes a prescription medication with alcohol or other controlled substances") (collecting cases).

RCC § 22E-210. Accomplice Liability.

(1) *The CCRC recommends clarifying that the accomplice must intend that "all" circumstance elements exist.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

(1) *The CCRC recommends striking "causes" from the definitions subsection because "causes" is not a defined term in the RCC.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.[8]

(1) *The CCRC recommends retitling the provision to make clear that it is an exclusion from liability. Under RCC § 22E-201(b), if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt.*

- This change clarifies the revised statute.

(2) *The CCRC recommends replacing subsection (b) with a prefatory clause at the beginning of the provision that states, "Unless otherwise expressly specified by statute," consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

[8] Previously titled "Exceptions to Legal Accountability."

RCC § 22E-213. Withdrawal Defense to Legal Accountability.

(1) *The CCRC recommends striking the burden of proof subsection as unnecessary in light of the revisions to RCC § 22E-201, which now specifies the burden of proof for all exclusions, defenses, and affirmative defenses in the RCC.*

- This change improves the consistency of the revised statute.

(2) *The CCRC recommends striking the word "otherwise" from paragraph (a)(2) as superfluous.*

- This change clarifies and does not substantively change the revised statute

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

(1) *USAO, App. C at 233-234, recommends deleting RCC § 22E-214(a)(4), which provides for merger where: "One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." USAO states that this "open-ended provision is vague and subjective, and thus contrary to the RCC's overarching goal of stating the law clearly [], rather than relying upon common law []." In addition, USAO notes that "[t]his subsection would likely exacerbate, rather than remedy, the historically 'uneven treatment' of merger issues that § 214 seeks to address," while "confer[ring] a windfall upon defendants, who would surely invoke the Rule of Lenity in seeking its broad application." Lastly, USAO states that, "[i]f 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."*[9]

- The RCC does not incorporate USAO's recommended deletion. Paragraph (a)(4) offers a fair and effective resolution of the unavoidable tension between proportionality, certainty, and administrative efficiency in merger evaluations. Removal of paragraph (a)(4), in contrast, would support the disproportionate multiplication of liability, and effectively provide for a *de facto* rule of severity in merger evaluations, with comparatively small efficiency gains. However, consistent with USAO's comment, the current draft of the RCC special part incorporates a greater number of offense-specific merger rules, thereby circumscribing the situations in which reliance on paragraph (a)(4) will be necessary.
- The elements test (and comparable formulations[10]) purports to offer a wholly descriptive, bright-line rule for resolving merger evaluations. However, as outlined at length in the RCC commentary, legal practice both inside and outside the District has revealed two fundamental problems with the elements test. First, the requisite comparative analysis between offense elements is highly uncertain in difficult cases (of which there are many). Second, the elements test analysis is inherently narrow, and thus effectively creates a default presumption in favor of multiplying convictions and punishment for offenses that substantially (if not entirely) overlap. The first of these problems creates significant amounts of litigation (e.g., legal disputes over when the elements of one offense are necessarily included in another), while the second problem detrimentally impacts the administration of justice (e.g., by distorting the plea-bargaining process and leading to disproportionate collateral consequences).

[9] USAO also states that the more expansive, fact-sensitive proportionality-based approaches to merger stated in the Report "do not support (a)(4) at all, in that they are based on a rationale that the RCC disavows."

[10] *See* RCC §§ 22E-214(a)(2)-(3) (stating merger principles similar to, or arising from, the elements test).

- There are a few paths for solving these problems. The first, and simplest, path is by limiting the government to one conviction per course of conduct, thereby avoiding the need for a comparison of offense elements (or application of any other merger standard). There are a few jurisdictions that appear to employ a categorical merger limitation of this nature. However, such an approach arguably supports disproportionate leniency,[11] while largely departing from current District practice.[12] For these reasons, the CCRC does not recommend pursuing this path.
- The second path is through offense-specific merger rules, which specify in advance the combinations of offenses that should, and should not, merge as a matter of law. This kind of approach, which is recommended by USAO, directly furthers the interests of clarity and consistency, and is employed by RCC to the greatest extent possible.[13] However, this approach unfortunately does not offer a workable, long-term solution. There is a multitude of section-level, offense-specific merger combinations arising under any criminal code, which the legislative branch of government would need to resolve to comprehensively dispose of all proportionality-related issues raised by the elements test. And neither the RCC, nor any other criminal code, attempts to do this (though the RCC likely goes much farther than any other American criminal code in this respect).
- The question, then, is what to do about those combinations of substantially overlapping offenses that are neither disposed of *explicitly* by the RCC (through offense-specific rules) or *clearly* by the elements test. To deal with this narrower set of potential merger combinations, two policy alternatives present themselves. The first option, which follows from USAO's recommended revision, is to do nothing (i.e., legislative silence).

[11] That is, where a single course of conduct satisfies the requirements of liability for two unrelated offenses (e.g., rape and theft), limiting the government to a single conviction ignores the distinct violation of a separate societal interest protected by the additional offense. *See also, e.g.,* Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (noting that the problem with a system in which courts "impose concurrent sentences for multiple offenses of conviction [when such offenses do not overlap]" is that it "has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense.").

[12] *But see* DCSG R. 6.2 ("The following sentences must be imposed concurrently: For offenses that are not crimes of violence: multiple offenses in a single event…"); RCC § 22E-214, Relation to Current District Law ("[Under this Rule,] multiple convictions for all non-violent offenses arising from the same course of conduct are to be sentenced concurrently. This appears to be true, moreover, without regard to whether there exists *any overlap* between the offenses of conviction in the first place. So, for example, a judge sentencing a defendant convicted of theft and carrying a dangerous weapon (CDW) based on the same course of conduct would, under this rule, impose concurrent sentences for each offense—notwithstanding the fact that CDW and theft are completely different offenses.").

[13] For example, RCC § 22E-214(a)(5) and (6) has always codified an assortment of categorical rules for dealing with merger of inchoate offenses, while the most recent draft of the RCC special part has been revised to incorporate a variety of chapter-specific merger rules.

In effect, this establishes a general presumption of multiple liability and punishment for any combinations of offenses that fail the formalistic (and therefore narrow) elements test. The second option, in contrast, is to adopt a standard that goes beyond the scope of elements test, and merges combinations of substantially (but not wholly) overlapping offenses for which multiple liability and punishment would be disproportionate.

- This kind of merger standard provides the third path for mitigating the problems associated with the elements test, and is reflected in the proportionality-based, fact-driven approaches applied in a number of jurisdictions. In practice, these approaches strive to ensure that relatively minor variances between offenses (that fail the elements test) do not disproportionately multiply liability and punishment. In so doing, however, these approaches may also bring with them costs of their own, namely, increased and more fact-intensive litigation, as well as uncertainty surrounding their scope of application. With that in mind, the RCC incorporates a modified proportionality-based approach that largely excludes factual considerations,[14] while providing—through legislative text and accompanying commentary—significant clarity concerning its intended scope. This appears to be the best resolution of a difficult policy problem under the circumstances.

(2) *OAG, App. C at 230, recommends revising RCC § 22E-214(d)(1) to clarify that the phrase "statutory maximum" refers to "statutory maximum* sentence*." This addresses the current ambiguity regarding 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), 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." Building on this recommendation, OAG recommends revising RCC § 22E-214(b) 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." The current RCC language reads: "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." In contrast, OAG suggests that the language be amended to state that: "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*."*

[14] Paragraph (a)(4) circumscribes the factual analysis employed in other jurisdictions with comparable proportionality-based approaches in the interests of balancing considerations of proportionality with those of efficient judicial administration. It is therefore not the case that these other approaches are "based on a rationale that the RCC disavows." USAO, App. C at 234. The RCC approach, like these other approaches, seeks to further the interests of proportionality; the only difference is that paragraph (a)(4) does not go quite as far given the sizeable administrative costs associated with fact-and-law-driven merger analyses.

- The RCC incorporates OAG's first recommendation, but not OAG's second recommendation. Specifically, RCC § 22E-214(d)(1) and accompanying commentary now reference "statutory maximum *term of incarceration*," based on the rationale offered by OAG. In contrast, RCC § 22E-214(b) does not incorporate an additional exception for legislative intent-based departures from the rule of priority. As a matter of policy, it is unclear that "a much higher maximum fine" provides an appropriate basis for merging an offense subject to a greater statutory maximum sentence of incarceration. And, as a matter of statutory interpretation, it is even less clear that the language proposed by OAG would actually support OAG's preferred outcome in such cases. Finally, as a matter of legislative drafting, the language proposed by OAG would add significant complexity to RCC § 22E-214(b).
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C at 230-231, recommends revising RCC § 22E-214(d)(2) to clarify the treatment of two merging offenses with the same statutory maximum penalty one of which has a mandatory minimum sentence. OAG states that: "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." Specifically, the current language referenced by OAG reads: "When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be…If the offenses have the same statutory maximum, any offense that the court deems appropriate." In contrast, OAG recommends this latter language be amended to read: "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."*

- The RCC does not incorporate OAG's recommendation. The CCRC language allows judges to use their discretion as to which of any two offenses with the same statutory maximum is the most apt offense under the circumstances. The existence of a statutory minimum or mandatory minimum does not necessarily indicate a greater seriousness for an offense than an offense with the same maximum but no minimum. To the extent that the Council may, at any time, opt to apply a statutory or mandatory minimum to a particular offense, that decision may reflect procedural or other concerns that are distinct from the seriousness of the offense. Finally, judicial discretion allows consideration of sub-statutory, persuasive authorities as to the most serious offense, such as, for example, the District's voluntary sentencing guidelines.

(4) *OAG, App. C at 229 n. 3, and USAO, App. C at 234, offer similar, but distinct, revisions to RCC § 22E-214(e)(2), which currently reads: "The judgment appealed from has been decided." OAG originally recommended this language; however, it now "believes that there is a better formulation of this concept,"*

which more clearly accounts for the fact that "[a]n appellate court does not technically decide a judgment; it decides an appeal." With that in mind, and "[g]iven the lead-in language in section (e), OAG suggests that this phrase be tweaked to read, 'The appeal of the conviction has been decided.'" USAO, in contrast, "recommends that, in paragraph (e)(2), the words 'has been decided' be replaced with the words 'becomes final.'" USAO states that "[r]eplacing 'has been decided' with 'becomes final' would more accurately define what we believe is the RCC's intended time when the appeal has ended." USAO highlights two reasons in support. "First, the 'judgment' is by the trial court, and is the subject (not the result) of the appeal, so it already 'has been decided.'" Second, "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," USAO states, "subsection (e) is meant to allow multiple convictions to stand while the direct appeal plays out to its conclusion." With that in mind, "[b]ecomes final' would convey that the intended deadline is the end of the direct appeal."

- The RCC incorporates USAO's recommendation, such that paragraph (e)(2) now reads: "The judgment appealed from becomes final." This revision is supported by USAO's rationale; however, it also appears to adequately address OAG's concerns.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends revising RCC § 22E-214(d)(1) to omit the phrase "among the offenses in question" as superfluous. Read in context, it is already clear that paragraph (d)(1) is referring to the "offenses in question," so removing this language increases the brevity (and therefore accessibility) of the RCC.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends amending paragraph (a)(1) to clarify that one offense must be "necessarily" established by the other offense.*

- This change clarifies and does not substantively change the revised statute.

(7) *The CCRC recommends replacing the phrase "lesser kind of culpability" with "lower culpable mental state under RCC § 22E-206."*

- This change clarifies and does not substantively change the revised statute.

(8) *The CCRC recommends striking the alternative elements provision as potentially confusing. In many instances, the "elements upon which a defendant's conviction is based" are unknown because the jury delivers a general verdict.*

- This change clarifies the revised statute.

(9) *The CCRC recommends amending the rule of priority to state that the "conviction" that remains is the "conviction for…," as opposed to the "offense" that remains.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-215. De Minimis Defense.

(1) *OAG, App. C at 220-222, recommends incorporating into RCC § 22E-215 "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."*

- The RCC incorporates OAG's recommendation, while also adding further specificity to it, through a new subsection (e), which reads: "The court shall state its specific findings of fact and law in open court or in a written decision or opinion regarding: (1) The availability of this affirmative defense in a jury trial or bench trial; and (2) The applicability of this affirmative defense in a bench trial." In general policy terms, the proposed reason-giving requirement finds support in both national legislative practice and legal commentary surrounding *de minimis* provisions.[15] However, the particular manner in which subsection (e) is implemented is both rooted in and supported by current District practice.[16]

[15] *See, e.g.,* Model Penal Code § 2.12 ("The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.") (citing subsection (3), which authorizes a *de minimis* dismissal when the defendant's conduct "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense"); *Id.*, cmt. at 404 ("Because the authority in Subsection (3) [is] stated in terms of such generality, it is appropriate to require that the court explain, in a written opinion, its reasons when exercising the authority that the subsection grants."); *see also* ROBINSON, at 1 CRIM. L. DEF. § 67 ("The requirement of written reasons may be useful in many situations, but it seems particularly useful where, as here, the court is stating what it believes to be the legislature's intent. These statements permit the legislature to easily review the court's interpretation and to take legislative action to overrule it if the court's interpretation is incorrect."); *compare id.* at 1 CRIM. L. DEF. § 67 ("A few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground.") (collecting state statutes).

[16] Specifically, subsection (e) requires the court to "state its specific findings of fact and law in open court or in a written decision or opinion." This phrase is drawn from, and intended to be construed in accordance with, the D.C. Superior Court Rules of Criminal Procedure. *Id.*, Rule 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its *specific findings of fact in open court or in a written decision or opinion.*") (italics added); *see, e.g., Saidi v. United States*, 110 A.3d 606, 612 (D.C. 2015) ("[S]pecial findings in a non-jury criminal trial inform an appellate court of the specific grounds relied on by the trial judge in reaching a verdict and enable the appellate court to undertake its review of the record with a clear understanding of the bases of the trial judge's decision.") (citations omitted).

Through such language, subsection (e) is also intended to further many of the same policy interests that underwrite the District's current approach to special findings. As the DCCA has observed:

> Special findings [] serve an important access to justice function and advance the goal of procedural fairness in the criminal justice system. A clear statement by a trial judge explaining the ruling in a case informs the parties of the reasons underlying the court's decision and provides critical assurance to an unsuccessful litigant that positions advanced at trial have been considered fairly and decided on the merits in accordance with governing law. The resulting increase in transparency promotes acceptance of the court's ruling and fosters compliance with its requirements.

Saidi, 110 A.3d at 612 (citing *United States v. Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973) ("The requirement that a trial judge prepare findings which will cast light on his reasoning is not a trivial matter. It is an

- This revision does not further change current District law,[17] and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends incorporating into RCC § 22E-215 a new subsection (d), which establishes that: "This affirmative defense is unavailable in a situation reasonably envisioned by the legislature in forbidding the charged offense." This revision is responsive to a general point offered by OAG in its comments:*

> [A]ny 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.

Also consistent with OAG's comment, the CCRC recommends revising the commentary to further expand upon the meaning of the new subsection (d) as follows:

> This clarifies that a *de minimis* defense will only provide a basis for escaping liability in unusual circumstances, which go beyond what the legislative intent underlying passage of a given criminal statute can fairly be understood to reach. In contrast, where the defendant's conduct is merely a typical instance of a statutory violation of a particular offense, it can be assumed that the legislature has itself made an authoritative judgment that such behavior is "[]*sufficiently* blameworthy to warrant the condemnation of a criminal conviction under the circumstances."[18]

Finally, the CCRC recommends adding to this new commentary the following statement: "The threshold determination presented by subsection (d) is a matter for judicial resolution." This importantly clarifies that where the court

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important element of fairness to the accused…The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice.")).

[17] Which is to say: because there's no formally-recognized *de minimis* defense in the District, there's no current District law to change by subjecting this new legislative defense—the recognition of which clearly would change current District law—to a special findings requirement.

[18] An accompanying footnote further illustrates that:

> Consistent with this reasoning, a de minimis defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances: (1) a person charged with drug possession knowingly exercises control over a non-negligible amount of a controlled substance for the purpose of recreational use; or (2) a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare.

determines that the circumstances presented by a given case were "reasonably envisioned by the legislature in forbidding the charged offense," the factfinder should not be instructed on, or (in a bench trial) consider, the de minimis defense.

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends expanding the Commentary's Explanatory Note accompanying RCC § 22E-215 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the de minimis defense. These explanations address, among other issues, questions raised by OAG in its comments.*[19]

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

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[19] For example, OAG, App. C at 221, asks: (1) whether the "expressly identified factors the factfinder must consider [are] 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')?"; and (2) "[w]hen a de minimis defense is raised, how does a judge decide what evidence can be excluded"?

Building on pre-existing commentary which already partially addresses these questions, the Explanatory Note now further clarify that:

> [The expressly identified] factors are largely objective, rather than subjective, in nature. For example, in considering the "triviality" of the harm caused or threatened by the defendant's conduct or the extent to which the defendant's conduct furthered or was intended to further "legitimate" societal objectives, the factfinder should consider the community's conception of triviality and the value that the community places upon particular types of activities, in contrast to the defendant's view of harmfulness or the value that the defendant subjectively placed on particular kinds of activities. *See, e.g.,* RCC § 22E-206, Explanatory Note (discussing comparable blameworthiness analysis in the context of recklessness and negligence liability); Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006) (same); *see also* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("To determine whether a risk is justifiable [the requisite] balance must be based on societal values, not the actor's personal gain"). Along similar lines, whether the defendant is "responsible" for an individual or situational factor that hindered his or her ability to follow the law hinges on an objective understanding of responsibility, in contrast to a subjective one. *See, e.g.,* RCC § 22E-209(d) and accompanying Explanatory Note (establishing principles for distinguishing between intoxication that is, and is not, self-induced).
>
> In light of this analysis, it would be appropriate for the court to limit the presentation of evidence or argumentation in support of a *de minimis* defense when it conflicts with the proper construction of these factors as a matter of law. For example, in a case where the defendant, a white supremacist, premeditatedly and openly shoplifts chewing gum from a minority-owned store for the purpose of making the store's owner feel unwelcome in the neighborhood (or to send some other toxic message to either the owner or the community), the court would be justified in constraining the factfinder from considering evidence offered by the defendant in support of the benefits of preserving racial or religious segregation. Likewise, if the defendant knowingly and voluntarily takes PCP before committing an assault, the court could preclude the defendant from arguing that an intoxicated state *for which he is not responsible* rendered him less blameworthy for committing that assault (i.e., given that the defendant is, in fact, *responsible* for that intoxicated state).

(4) *The CCRC recommends striking the burden of proof subsection as unnecessary in light of the revisions to RCC § 22E-201, which now specifies the burden of proof for all exclusions, defenses, and affirmative defenses in the RCC.*

- This change improves the consistency of the revised statute.

RCC § 22E-301. Criminal Attempt.

(1) *USAO, App. C at 234-237, offers three revisions to the culpability of attempt liability. First, USAO "recommends that, in subsection (a)(1), the word 'Planning' be replaced by the words 'With the intent.'" In support of eliminating the term "planning" from subsection (a)(1), USAO states that "a person's 'plan' or 'planning' is not required by the controlling case law on attempt." USAO further notes that "inclusion of a separate element requiring the defendant to have engaged in 'planning' [inappropriately] implies that the person must have thought through or contemplated his or her actions before acting." Second, USAO recommends that "subsection (a)(2) be removed."*[20] *In support of eliminating paragraph (a)(2), USAO states that "the proposed provision [] adds an additional culpability requirement that does not exist in current law." USAO further notes that "[i]f 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.'" Third, USAO "recommends removing subsection (b)." In support of eliminating subsection (b), USAO states that the proposed provision is "both confusing and adds an additional culpability requirement that does not exist in current law." Specifically, "[t]his 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.'" Viewed collectively, under USAO's recommended revisions, the culpability of attempt liability would read in its entirety: "With the intent to engage in conduct constituting that offense." USAO explains that "[t]his 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."*

- The RCC does not incorporate USAO's recommended deletions.[21] The phrase "With the intent to engage in conduct constituting that offense,"

[20] On June 19, 2019, USAO submitted a revision to its earlier comments, which states:

> 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.

This CCRC response focuses on the original version of the comment; however, the revised version of the comment raises similar issues. For example, even if subsection (a)(2) is preserved, it is still unclear under USAO's proposal whether reckless or negligent attempt liability (as to result elements), which is barred in nearly every jurisdiction in America, would exist under the RCC. (*See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.) It is also unclear how to interpret USAO's new recommendation to preserve subsection (a)(2) in RCC § 22E-301 in light of USAO's continued recommendation to *delete* identical language from the RCC general provisions on general solicitation and conspiracy liability under RCC §§ 22E-302 and 303.

[21] *But see infra* (clarifying that "planning" does not necessarily entail proof of premeditation or deliberation through commentary, in accordance with USAO's comments).

which USAO recommends as the sole legislative statement of the culpability of criminal attempts under the RCC, is open to multiple interpretations, including one that would create extremely expansive general attempt liability, and one that would create extremely narrow general attempt liability.[22]

- However, to address USAO's concerns regarding the term "planning," the RCC clarifies in commentary that the term has the same substantive meaning as "intent," and thus does not entail proof of premeditation or deliberation.
- The communicative and potential[23] policy problems presented by USAO's recommended formulation can be appreciated by the following hypothetical, which is drawn from the RCC commentary. Police stop a demolition operator just in the nick of time from destroying an apparently abandoned building that, unbeknownst to this cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the operator is subsequently prosecuted for attempting to commit a manslaughter offense, which prohibits anyone from: "Recklessly killing a person, negligent as to whether that person is over 65 years of age."
- Under the current RCC language, the government's burden of proof as to the requisite culpability is clear. First, it must be proven that defendant planned to engage in conduct that, if carried out, would have resulted in the victim's death (i.e., the demolition of the building).[24] Second, it must be proven that the defendant intended to cause the result element of the target offense, the death of a person.[25] And third, it must be proven that the defendant possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.[26] This clear statement follows directly from the current RCC language, and is generally consistent with the attempt policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless demolition operator cannot be convicted of attempting to commit manslaughter.
- Under USAO's recommended formulation, in contrast, the government's burden of proof is susceptible to multiple constructions. The phrase "an intent to engage in conduct constituting that offense" mirrors the first of the three requirements explicitly addressed by the RCC approach (i.e., "planning" to engage in conduct constituting an offense). However, USAO's recommended formulation is silent on the requisite state of mind

[22] *See infra* (discussing first and third constructions of USAO's proposed formulation).
[23] *See infra* (discussing third construction of USAO's proposed formulation, which would not necessarily create any policy problems).
[24] RCC § 22E-301(a)(2).
[25] RCC § 22E-301(b).
[26] RCC § 22E-301(a)(1).

that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.

- Under the first construction the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare intent to engage in conduct that would culminate in the results and/or circumstances of the target offense to suffice for attempt liability. If adopted, such an approach would reduce the culpability requirement for all attempt offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form of culpability, above and beyond that required by the target offense.[27] Beyond that, this approach would support convicting the otherwise blameless demolition operator depicted in the above fact pattern.[28]
- Under the second construction the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC's explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.[29] This approach has little support in District law and national legal trends.[30] With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing an attempt conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). As to circumstance elements, in contrast, such an approach would narrow liability beyond that provided for in nearly every American jurisdiction by *requiring* for an attempt conviction *at least* recklessness as to a circumstance. Although lacking support in national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. And, at the very least, this collective treatment of result and circumstance elements would preclude the

[27] *See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

[28] This is so because the operator clearly did possess the only culpable mental state that USAO's formulation would explicitly require: intending to engage in conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

[29] *See* RCC § 22E-207(c) ("*Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).").

[30] *See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

blameless operator discussed above from liability for attempted manslaughter.

- Under a third construction the result and circumstance elements of the target offense are subject to a requirement of intent. Per this construction, USAO's proposal is that there be a single, categorical intent requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., "an intent to *commit the actus reus* of the target offense"). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in nearly every jurisdiction in America.[31] With respect to circumstance elements, in contrast, this approach entails culpability elevation by requiring intent as to circumstance elements, whereas the RCC and current District law would allow for the culpable mental state requirement governing the target offense to suffice. Although lacking support in District law or national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and circumstance elements would preclude the blameless operator discussed above from liability for attempted manslaughter.[32]
- These three potential constructions of USAO's proposed formulation highlights the importance of clearly addressing the relationship between the culpability of an attempt and the objective elements of an offense through a general legislative formulation such as that currently offered by RCC § 22E-301. And they also highlight the clarificatory import of the "planning" requirement incorporated into subsection (a)(2) in particular, which effectively distinguishes between an attempter's non-culpable objective to engage in *conduct* constituting the target offense, and an attempter's culpability—i.e., purpose, intent, recklessness, or negligence—as to the result and circumstance elements of the target offense. That being said, in light of USAO's comments, the RCC does recommend clarifying in commentary that the term "planning" (1) is not substantively different than "intending" and (2) does not necessarily entail proof of premeditation or deliberation.[33]

[31] *See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

[32] Note, however, that even under the third construction, USAO's recommendation to delete RCC § 22E-301(a)(2), which requires that the person act "With the culpability required by that offense," risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. For example, two intentional *completed* killings may be graded quite differently on the basis that one was committed in the presence of mitigating circumstances (e.g., provocation/manslaughter) whereas the other was not (e.g., no provocation/murder). The same distinctions should accordingly be made in the context of attempted intentional homicide; however, USAO's proposed revisions would seem to ignore them, by simply requiring an "intent to engage in conduct constituting that offense," without recognition of broader aspects of culpability.

[33] Specifically, a pre-existing passage in the relevant Explanatory Note has been revised and expanded to read:

(2) *USAO, at App. C at 236, recommends that, in subsection (a)(3), the words "completing" and "completion" be replaced with the words "committing" and "commission." USAO states that "[t]his 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." USAO notes that "[t]he current comments to the jury instructions for Attempt also reflect this view that 'committing' is clearer in this context than 'completing.'"*

- The RCC does not incorporate USAO's recommended revisions. An earlier draft of RCC § 22E-301(a) utilized the terms "committing" and "commission"; however, those terms were replaced so as to "avert confusion about the point at which the target offense has been 'committed.'"[34] In addition, the CCRC notes that the revised robbery offense does not incorporate an asportation requirement.

(3) USAO, *App. C at 236-237, "opposes repealing the 'assault with intent' ("AWI") class of crimes, contrary to the CCRC's suggestion." Specifically, USAO states*

This planning requirement is to be distinguished from the voluntariness requirement under section 203. *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense."). The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*

In this sense, the term "planning" as employed in this section is substantively identical to the term "intent" under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has "planned" to kill). Paragraph (a)(1) could have just as easily been drafted to state "intending to engage in conduct constituting [an] offense"; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "[w]ith the culpability required by [the target] offense").

For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator "planned to engage in conduct constituting" murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term "planning," as opposed to "with intent," in paragraph (a)(1) helps to distinguish these concepts. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

[34] PDS, App. C at 048 (requesting change, and providing quoted rationale).

that the RCC general attempt statute "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." To illustrate, USAO offers the following example:

> *[I]f 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.*

USAO additionally notes that "under current law, AWI an offense is sometimes punished more severely than an attempt to commit that same offense."

- The RCC does not incorporate USAO's recommended revisions for two reasons. First, as a matter of liability, RCC § 22E-301(a) criminalizes all conduct captured by AWI offenses. And second, as a matter of punishment, the proportionate approach to grading incorporated into RCC § 22E-301(c) fairly addresses AWI conduct.
- The elements of AWI offenses are captured by the elements of general attempt liability under subsection (a). With respect to *mens rea*, for example, "there is no meaningful difference between" the culpable mental state requirement governing both general attempt liability and AWI offenses.[35] In contrast, there is a potentially meaningful difference between the conduct requirement of an AWI offense, an assault, and that of general attempt liability under subsection (a), dangerous proximity to completion. However, that difference illustrates the comparative breadth of general attempt liability, namely, it is well established in both case law and commentary that the dangerous proximity standard can be satisfied

[35] *Flanagan v. State*, 675 S.W.2d 734, 749 (Tex. Crim. App. 1982) ("point[ing] out that there is no meaningful difference between [assault with intent to murder and] attempted murder.").

Under current District law, both categories of offenses require proof of "specific intent." *See, e.g., Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999); *Riddick v. United States*, 806 A.2d 631, 639 (D.C. 2002); *Snowden v. United States*, 52 A.3d 858, 868 (D.C. 2012); *Robinson v. United States*, 50 A.3d 508, 533 (D.C. 2012); *Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015) (Beckwith, J., concurring) (discussing, among other cases, *Sellers v. United States*, 131 A.2d 300 (D.C.1957); *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987); and *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975)); *compare* D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) *with* D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts).

An extensive discussion of the meaning of "with intent" under both current District law and the RCC is provided in the Commentary accompanying RCC § 22E-206. *See* Explanatory Note and Relation to Current District Law on Purpose, Knowledge, and Intent.

prior to reaching the present ability requirement of assault necessary for an AWI conviction.[36]

- Within the District, this distinction is most clearly illustrated by the DCCA's decision in *Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978), which held that an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under the dangerous proximity standard.[37] The commentary accompanying RCC § 22E-301(a) explicitly endorses this construction of the dangerous proximity standard, while providing numerous other examples, which clearly illustrate that AWI offenses are necessarily subsumed by general attempt liability under subsection (a).[38]

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[36] As the Maryland Court of Appeals has observed:

> Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. *See Bittle v. State,* 78 Md. 526, 28 A. 405 (1894). An aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. *See People v. Grant,* 105 Cal.App.2d 347, 233 P.2d 660 (1951). [] A person who fires a shot at an empty bed where he mistakenly believes the victim is sleeping has committed attempted murder, but not an assault. *State v. Mitchell,* 170 Mo. 633, 71 S.W. 175 (1902).

Hardy v. State, 301 Md. 124, 129, 482 A.2d 474, 477 (1984); *see, e.g.,* R. PERKINS, *Criminal Law* 578 (2d ed. 1969) ("The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of 'dangerous proximity to success' (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.")

It is notable that, contrary to national trends, the DCCA has indicated that the dangerous proximity test can, at least in certain instances, be more or less the same as the conduct requirement of an AWI offense. *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005) ("Short of some assaultive conduct or some other specific effort to inflict harm on the victim, it is difficult to discern any overt act which would cross the threshold from mere preparation to an actual attempt for [aggravated assault]."). However, there is no indication—either in District law or otherwise—that the dangerous proximity test is *narrower* than the conduct requirement for an AWI offense.

Note also that, in some instances, evidence of dangerous proximity may corroborate intent in a significant way as compared to AWI offenses, which may allow a factfinder to infer intent based on stereotypes.

[37] Thus, although District case law has not yet addressed USAO's specific sex crime fact pattern, it seems clear based on this DCCA opinion that a person who has succeeded in physically assaulting someone while stating an intention to commit rape has committed attempted rape under current District law.

[38] Specifically, a footnote in the Explanatory Note states:

> So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones*, 386 A.2d at 312 (upholding attempt liability on such facts). Along similar lines, the dangerous proximity standard could also be established in the following illustrative contexts: (1) the attempted murder prosecution of a person whose pistol accidentally slips from that person's hand and breaks as he or she, with the intent to kill, is walking towards the front door of the victim's residence; (2) the attempted felony assault prosecution of a person who suffers a debilitating heart attack minutes before he or she plans to walk

- With respect to punishment, both current District law and national legal trends support the conclusion that the proportionate approach to grading attempts incorporated into RCC § 22E-301(c) fairly addresses the seriousness of AWI conduct.
- The DCCA has observed that the District's varied AWI offenses, enacted in 1901, were "created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end."[39] At the time, these policies were necessary to supplement the "relatively trivial sanctions" afforded by criminal attempt offenses employed at common law.[40] Since then, however, the modern trend—rooted in the recommendations of the Model Penal Code—has been to grade criminal attempts more severely/proportionately, while simultaneously eliminating AWI offenses.[41] Specifically, and as the DCCA approvingly observed in *Perry v. United States*: "[T]he drafters of the Model Penal Code eliminated crimes of the 'assault-with-intent-to' variety because they recognized that '[m]odern grading of attempt according to the gravity of the underlying offense has rendered laws of this…type unnecessary…"[42]
- Given that the RCC similarly adopts the modern approach of proportionately grading attempts according to the gravity of the underlying offense, the same rationale supports elimination of AWI offenses in the District.[43]

(4) *The CCRC recommends substantially expanding a footnote in the Explanatory Note addressing impossible attempts to clarify that the phrase "the situation [] as the person perceived it" under RCC § 22E-301(a)(3)(A)(ii) is not intended to authorize punishing someone for attempting to achieve a non-criminal objective mistakenly believed to be criminal.[44] This revision is consistent with informal*

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across the street and repeatedly beat, with the intent to cause significant bodily injury, a neighbor mowing her front lawn; and (3) the attempted arson prosecution of a person who is arrested at the site of a building she intends to burn down upon exiting her vehicle with flammable materials in her trunk.

[39] *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011).

[40] Model Penal Code § 211.1 cmt. at 181-82. At common law, as the *Perry* court observes, "attempts to commit serious offenses like rape and murder, which may have come very close to completion and thus provided evidence of extreme dangerousness on the part of the actor, were not graded at a level that appropriately measured the seriousness of the actor's conduct." *Perry*, 36 A.3d at 809 (quotations and citation omitted).

[41] *See* Model Penal Code § 211.1 cmt. at 181-82.

[42] 36 A.3d 799, 811 (D.C. 2011) (quoting Model Penal Code cmt. § 211.1).

[43] LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 16.2. ("virtually all modern codes" have followed suit based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime.") Note: the drafters of the 1978 D.C. revision recommended following a similar course. That is, having treated criminal attempts as "an offense of the class next below that of the crime attempted," they abandoned AWI offenses. 1978 D.C. CODE REV. § 22-201(c).

[44] That footnote now adds, in relevant part:

comments received from OAG, which highlight that the relevant phrase could be construed to criminalize attempts to commit imaginary offenses in the absence of further clarity in the Commentary.

(5) *The CCRC recommends reorganizing subsection (a) so that paragraph (a)(3) is not empty, consistent with the District's legislative drafting manual.*

- This change improves the logical organization of the revised statute and does not substantively change its meaning.

(2) *The CCRC recommends clarifying that the person must intend "all" of the result elements of the offense, instead of "any" one element.*

- This change improves the clarity and consistency of the revised statute.

(6) *The CCRC recommends replacing the word "punishment" with "penalty."*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

Note that the phrase 'the situation [] as the person perceived it,' for purposes of the subjective approach incorporated into RCC § 22E-301(a)(3)(A)(ii), does *not* include a defendant's (inculpatory) mistaken belief that his or her (innocent) conduct is criminalized. *See infra* note 18 (explaining that the legality principle precludes convicting someone of an imaginary crime, and, therefore, pure legal impossibility remains a viable theory of defense under the RCC)."

RCC § 22E-302. Solicitation.

(1) *USAO, App. C at 237-238, offers two revisions to the culpability of solicitation liability. First, USAO "recommends that, in subsection (a), the words 'acting with the culpability required by that offense' be removed." In support of this revision, USAO states that the relevant language "adds an additional culpability requirement that does not exist in current law," and which "is both confusing and not an accurate statement of the current law." Further, USAO explains that "applying this additional [culpability] requirement to various offenses could lead to problematic results," such as, for example, in the situation of a defendant "charged with solicitation to commit first-degree murder," which "requires premeditation and deliberation." Here, "[t]he government need not prove premeditation to solicit the murder for the defendant to be guilty of solicitation to commit first-degree murder." Instead, "the solicitation itself could be used to help prove that the murder was committed with premeditation and deliberation." Second, USAO recommends "removing subsection (b)." USAO recommends deleting subsection (b)"[f]or many of the same reasons as discussed with respect to subsection (a)," namely, "subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law." Further, "[b]ecause 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." Viewed collectively, USAO's recommended revisions would have paragraph (a)(1) state the culpability of solicitation in its entirety: "Purposely commands, requests, or tries to persuade another person to engage in [conduct constituting an offense]…"*

- The RCC does not incorporate USAO's recommended revisions. The purpose requirement in paragraph (a)(1), which USAO's deletions would leave as the sole legislative statement of the culpability of criminal solicitation under the RCC, is open to multiple interpretations, including one that would create extremely expansive general solicitation liability and one that would create extremely narrow general solicitation liability.[45]
- The communicative and potential policy problems presented by USAO's recommended formulation can be appreciated by the following modified demolition hypothetical (see *supra*, attempts), which is drawn from the RCC commentary. On May 14, the general contractor for a large development project hires a demolition operator to destroy an apparently abandoned building on Tuesday, May 15, at 2:00pm. Thereafter, at 1:45pm on the 15th, the police stop the demolition operator from destroying the building, which, unbeknownst to either the general contractor or the cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the contractor is subsequently prosecuted for the solicitation of aggravated murder, which prohibits anyone from:

[45] *See infra* (discussing first and third constructions of USAO's proposed formulation).

"intentionally killing a person, negligent as to whether that person is over 65 years of age, in the absence of mitigating circumstances."

- Under the current RCC language, the government's burden of proof as to the requisite culpability is clear. First, it must be proven that the contractor purposely requested the operator to engage in specific conduct that, if carried out, would have resulted in the victim's death (i.e., the demolition of the building).[46] Second, it must be proven that the contractor intended to cause the result element of the target offense, the death of a person.[47] Third, it must be proven that the contractor possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.[48] And fourth, it must be proven that the solicitation occurred in the absence of mitigating circumstances.[49] This clear statement follows directly from the current RCC language, and is generally consistent with the solicitation policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless contractor cannot be convicted of soliciting aggravated murder.
- Under USAO's recommended deletions, in contrast, the government's burden of proof is susceptible to multiple constructions. The remaining culpability phrase "Purposely commands, requests, or tries to persuade another person to engage in [conduct constituting an offense]" simply addresses the first of the four requirements explicitly addressed by the RCC approach. It is therefore silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.
- Under the first construction, the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare purpose to solicit conduct that would culminate in the results and/or circumstances of the target offense to suffice for solicitation liability. If adopted, such an approach would reduce the culpability requirement for all solicitation offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form

[46] RCC § 22E-302(a)(1).
[47] RCC § 22E-302(b).
[48] RCC § 22E-302(b).
[49] This is due to the requirement in the prefatory clause of subsection (a), which requires that the defendant act "with the culpability required by the [target offense]." *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify).

of culpability, above and beyond that required by the target offense.[50] Beyond that, this approach would support convicting the otherwise blameless contractor depicted in the above fact pattern.[51]

- Under the second construction, the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC's explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.[52] Applying recklessness to all result and circumstance elements of the target offense has little support in District law and national legal trends.[53] With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing a solicitation conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this general approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). At the very least, however, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for solicitation to commit aggravated murder.
- Under the third construction, the result and circumstance elements of the target offense are subject to a requirement of purpose. Per this construction, USAO's proposal is that there be a single, categorical purpose requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., "a purpose to *commit the actus reus* of the target offense"). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in most jurisdictions in America.[54] With respect to circumstance elements, in contrast, this approach entails culpability elevation beyond that required by any jurisdiction.[55] Although lacking support in District law or national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and

[50] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

[51] This is so because the contractor clearly did possess the only culpable mental state that the singular purpose requirement would explicitly require: intending to bring about conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

[52] *See* RCC § 22E-207(c) ("*Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).").

[53] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

[54] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

[55] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

circumstance elements would preclude the blameless contractor discussed above from liability for solicitation to commit aggravated murder.[56]

- These three potential constructions highlight the importance of explicitly addressing the relationship between the culpability of a solicitation and the objective elements of an offense through a general legislative formulation such as that currently depicted in RCC § 22E-302.

(2) *USAO, App. C at 238, "recommends that, in subsection (a)(1), the word 'specific' be removed."*[57] *USAO states that, "[a]s used here, the word 'specific' implies that the defendant must specify how the offense will be carried out to be found guilty of solicitation." To illustrate, USAO notes that, "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." Instead, USAO states that "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."*

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[56] Note, however, that even under the third construction, USAO's recommendation to delete from the prefatory clause the phrase "With the culpability required by that offense" risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. Specifically, USAO points to the situation of a defendant "charged with solicitation to commit first-degree murder," which "requires premeditation and deliberation." Here, "[t]he government need not prove premeditation to solicit the murder for the defendant to be guilty of solicitation to commit first-degree murder." The CCRC disagrees with this policy statement.

It is well-established in District law, national legal trends, and broader Anglo-American jurisprudence that a premeditated purposeful murder, committed in the absence of mitigating circumstances, is more culpable/should be graded more severely than a purposeful murder that is not premeditated and is committed in the presence of mitigating circumstances. The same considerations of proportionality that support these trends carry over to the grading of solicitations; however, USAO's proposed revisions would seem to ignore them, by simply requiring the purposeful solicitation of homicide, without recognition of broader aspects of culpability.

As LaFave explains in the comparable context of accomplice liability:

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, at 2 SUBST. CRIM. L. § 13.2(c); *see generally* RCC § 22E-210(c): Explanatory Note (discussing similar point in the context of accomplice liability).

[57] With USAO's changes, RCC § 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 . . ."

- The RCC does not incorporate USAO's recommended revision. The specific conduct standard furthers important free speech principles and would likely be satisfied by the fact pattern presented by USAO.
- Given the centrality of speech to persuasion/promotion, solicitation liability implicates a criminal defendant's First Amendment rights.[58] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[59] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[60] The specific conduct standard incorporated into paragraph (a)(1)—which is derived from the Model Penal Code approach to solicitation[61]—respects this distinction by requiring that the defendant solicit another person to engage in "*specific* conduct" constituting an offense.[62]
- To satisfy this standard, it is *not* necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. All that must be proven is that the defendant's communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[63]
- In light of this explanation (which is also articulated in the accompanying RCC commentary), the specific conduct standard presumably would be satisfied if—per USAO's hypothetical—"a defendant instructed another person to murder a [specific] complainant." And there is certainly no need

[58] *See, e.g.,* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

[59] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949)).

[60] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

[61] *See, e.g.,* Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added).

[62] *See, e.g.,* Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added). This is consistent with accomplice liability under section 210, which similarly employs a "specific conduct" standard where complicity is based on encouragement. RCC § 22E-210(a)(2) ("Purposely encourages another person to engage in specific conduct constituting that offense."); *see, e.g.,* Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added).

[63] *E.g.,* Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy section 302. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005).

under the RCC approach, that the defendant in a solicitation of murder case—again, per USAO's hypothetical—"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." That said, the specific conduct standard *would* preclude holding the defendant liable for attempting to persuade others of the overarching virtues of killing other people in general.[64]

(3) *USAO, App. C at 238, recommends that, in subsection (c), the word "plans" be replaced by the word "intends."*[65] *Specifically, "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."*

- The RCC does not incorporate USAO's recommended revision for the same reasons discussed in the disposition of USAO's comment on attempt liability. However, the RCC commentary on attempt liability does incorporate new language addressing USAO's concerns in both contexts.[66]

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[64] *See generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[65] 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."

[66] Specifically, a pre-existing passage in the relevant Explanatory Note has been revised and expanded to read:

> This planning requirement is to be distinguished from the voluntariness requirement under section 203. *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense."). The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*
>
> In this sense, the term "planning" as employed in this section is substantively identical to the term "intent" under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has "planned" to kill). Paragraph (a)(1) could have just as easily been drafted to state "intending to engage in conduct constituting [an] offense"; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "[w]ith the culpability required by [the target] offense").
>
> For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of

(4) *USAO, App. C at 238-239, "recommends that, throughout these provisions, the word 'defendant' be changed to the word 'actor.'" This revision "is not meant to be substantive, and is meant to align the language in these sections with the language used throughout the RCC."*

- The RCC does not incorporate USAO's recommended revision. The CCRC believes that the term "defendant" is more accessible and clear than "actor" given the different kinds of actors referenced in the RCC's general inchoate and legal accountability provisions.

(5) *The CCRC recommends that the term "a crime of violence" be replaced with the words "an offense against persons as defined in Subtitle II of Title 22E."*

- The term "crime of violence" is not yet defined in the RCC, and specifying that solicitation only applies to offenses against persons in Subtitle II improves the clarity of the revised statute.

(6) *The CCRC recommends clarifying that the person must intend "all" of the result and circumstance elements of the offense, instead of "any" one element.*

- This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends replacing the word "punishment" with "penalty."*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(8) *The CCRC recommends including a subsection for definitions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

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the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator "planned to engage in conduct constituting" murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term "planning," as opposed to "with intent," in paragraph (a)(1) helps to distinguish these concepts. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

RCC § 22E-303. Conspiracy.

(1) *USAO, App. C at 239-240, offers two revisions to the culpability of conspiracy liability. First, "USAO recommends that, in subsection (a), the words 'acting with the culpability required by that offense' be removed." In support of this revision, USAO states that "[t]he proposed provision adds an additional culpability requirement that does not exist in current law." USAO further explains that "[t]o provide an additional mens rea requirement by referring to the culpability required by the underlying offense makes the statute more confusing." USAO also notes that "applying this additional requirement to various offenses can lead to problematic results," such as, for example, in the situation of a defendant "charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation." Second, USAO recommends "removing subsection (b)." In support of eliminating subsection (b), USAO points to "many of the same reasons as discussed with respect to subsection (a)," namely, "subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law." Specifically, USAO states that, "[t]o 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." USAO acknowledges that "[i]t is implicit that, by intending to enter into an agreement to commit the charged offense, [the parties] desire the offense to take place." However, USAO believes "this subsection makes the conspiracy language more confusing than if the Conspiracy section were to simply track the legal elements set forth above." Viewed collectively, USAO's recommended revisions would have paragraph (a)(1) state the culpability of conspiracy in its entirety as: "Purposely agree to engage in or aid the planning or commission of conduct [constituting an offense]."*

- The RCC does not incorporate USAO's recommended revisions. The purpose requirement in paragraph (a)(1), which USAO's deletions would leave as the sole legislative statement of the culpability of criminal conspiracy under the RCC, is open to multiple interpretations, including one that would create extremely expansive general conspiracy liability, and one that would create extremely narrow general conspiracy liability.[67]
- The communicative and potential[68] policy problems presented by USAO's recommended formulation can be appreciated by the following modified demolition hypothetical (see *supra*, attempts), which is drawn from the RCC commentary. On May 14, the general contractor for a large development project hires a demolition operator to destroy an apparently abandoned building on Tuesday, May 15, at 2:00pm. (Note: both parties agree to the arrangement.) Thereafter, at 1:45pm on the 15th, the police

[67] *See infra* (discussing first and third constructions of USAO's proposed formulation).
[68] *See infra* (discussing third construction of USAO's proposed formulation, which would not necessarily create any policy problems).

stop the demolition operator from destroying the building, which, unbeknownst to either the general contractor or the cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the contractor is subsequently prosecuted for the solicitation of aggravated murder, which prohibits anyone from: "intentionally killing a person, negligent as to whether that person is over 65 years of age, in the absence of mitigating circumstances."

- Under the current RCC language, the government's burden of proof as to the requisite culpability is clear. First, it must be proven that the contractor purposely agreed with the operator to facilitate conduct that, if carried out, would have resulted in the victim's death (i.e., the demolition of the building).[69] Second, it must be proven that the contractor intended to cause the result element of the target offense, the death of a person.[70] Third, it must be proven that the contractor possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.[71] And fourth, it must be proven that the agreement occurred in the absence of mitigating circumstances.[72] This clear statement follows directly from the current RCC language, and is generally consistent with the conspiracy policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless contractor cannot be convicted of conspiracy to commit aggravated murder.
- Under USAO's recommended deletions, in contrast, the government's burden of proof is susceptible to multiple constructions. The remaining culpability phrase "agree to engage in or aid the planning or commission of conduct [constituting an offense]" simply addresses the first of the four requirements explicitly addressed by the RCC approach. It is therefore silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.
- Under the first construction the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare purpose to agree to bring about conduct that would culminate in the results and/or circumstances of the

[69] RCC § 22E-303(a)(1).

[70] RCC § 22E-303(b). The operator must have also possessed this intent, as well as the other mental states discussed *infra*; however, for purposes of simplicity, this entire response merely refers to the contractor's state of mind.

[71] RCC § 22E-303(b).

[72] This is due to the requirement in the prefatory clause of subsection (a), which requires that the defendant and another person act "with the culpability required by the [target offense]." *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify).

target offense to suffice for conspiracy liability. If adopted, such an approach would reduce the culpability requirement for all conspiracy offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form of culpability, above and beyond that required by the target offense.[73] Beyond that, this approach would support convicting the otherwise blameless contractor depicted in the above fact pattern.[74]

- Under the second construction the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC's explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.[75] This approach has little support in District law and national legal trends.[76] With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing a conspiracy conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this general approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). At the very least, however, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for conspiracy to commit aggravated murder.
- Under a third construction the result and circumstance elements of the target offense are subject to a requirement of purpose. Per this construction, USAO's proposal is that there be a single, categorical purpose requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., "a purpose to *commit the actus reus* of the target offense"). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in most jurisdictions in America.[77] With respect to circumstance elements, in contrast, this approach entails culpability elevation beyond that required by any jurisdiction.[78] Although lacking support in District law or national legal

[73] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.
[74] This is so because the contractor clearly did possess the only culpable mental state that the singular purpose requirement would explicitly require: intending to bring about conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.
[75] *See* RCC § 22E-207(c) ("*Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).").
[76] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.
[77] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.
[78] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.

trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for conspiracy to commit aggravated murder.[79]

- These three potential constructions highlight the importance of explicitly addressing the relationship between the culpability of a conspiracy and the objective elements of an offense through a general legislative formulation such as that currently depicted in RCC § 22E-303.

(2) *OAG, App. C at 231-232, recommends replacing the term "conspiracy" in the overt act requirement, RCC § 22E-303(a)(2), with "agreement." OAG states that the reference to "conspiracy" in the overt act requirement "suffer[s] from being a circular definition." Further, "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) [flows] more clearly from (a)(1)." Finally, OAG points out that "the previous version of RCC § 22E-303(a)(2)" used "agreement" instead of "conspiracy."*

- The RCC incorporates OAG's recommendation, such that paragraph (a)(2) substitutes the term "agreement" for "conspiracy," for the reasons referenced by OAG.

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[79] Note, however, that even under the third construction, USAO's recommendation to delete from the prefatory clause the phrase "With the culpability required by that offense" risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. Specifically, USAO points to the situation of a defendant "charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation." Here, "[t]he government need not prove premeditation to engage in the agreement for the defendant to be guilty of conspiracy to commit first-degree murder." The CCRC disagrees with this policy statement.

It is well-established in District law, national legal trends, and broader Anglo-American jurisprudence that a premeditated purposeful murder, committed in the absence of mitigating circumstances, is more culpable/should be graded more severely than a purposeful murder that is not premeditated and is committed in the presence of mitigating circumstances. The same considerations of proportionality that support these trends carry over to the grading of conspiracies; however, USAO's proposed revisions would seem to ignore them, by simply requiring a purposeful conspiracy to commit homicide, without recognition of broader aspects of culpability.

As LaFave explains in the comparable context of accomplice liability:

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 13.2(c); *see generally* RCC § 210(c): Explanatory Note (discussing similar point in the context of accomplice liability).

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C at 232, recommends "redrafting [RCC § 22E-303 (b)(1) to] read, '[i]ntend to cause any result required by that offense.'" OAG notes that, while the current version of RCC § 22E-303 (b)(1) says conspirators must "[i]ntend to cause any result element required by that offense," it is nevertheless the case that "one does not cause a result element; one causes a result."*

- The RCC does not incorporate OAG's recommendation. "Result element," not "result," is statutorily defined in Chapter 2 of the RCC, which is what is "required by [an] offense" under RCC § 22E-303(b)(1). Further, it does make sense to speak of causing a "result element," particularly given that one must "plug" in the referent, which is generally understood to be sound drafting practice. For example, the "result element" of murder is "death," which is a consequence that a person can (and indeed must) intend to cause to be convicted of the offense.

(4) *USAO, App. C at 240, "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.'" USAO states that "[t]his change is not intended to be substantive, but to clarify the language used in this heading." In addition, "[t]he proposed edit also aligns the language of the heading of the subsection with the language in the subsection."*

- The RCC incorporates USAO's recommended revisions, such that the heading of subsection (d) now reads: "Jurisdiction When Object of Conspiracy is to Engage in Conduct Located Outside the District of Columbia," for the reasons referenced by USAO.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends changing the heading of RCC § 22E-303(f) from "Legality of Conduct in Other Jurisdiction Irrelevant" to "Legality of Conduct in Other Jurisdiction No Defense." This revision better reflects a substantive change made to the relevant statutory provision in the Cumulative Update, and is consistent with informal comments received from PDS.*

(6) *The CCRC recommends revising paragraphs (b)(1) and (b)(2) to clarify that the person must intend "all" of the result and circumstance elements of the offense, instead of "any" one element.*

- This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends amending the phrase "can be established" to "are proven," to clarify that the government prove the elements of the conspiracy occurred.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(8) *The CCRC recommends including a subsection for definitions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

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

(1) *USAO, App. C at 240, "recommends that, in subsection (a)(1), the word 'victim' be changed to the words 'intended victim.'" "USAO agrees with the general principle that certain victims should not be deemed guilty of conspiracy or solicitation."*[80] *At the same time, "[h]owever, there are instances where individuals who could be considered a victim should be deemed guilty of conspiracy or solicitation." In support, USAO offers the following illustration:*

> *[I]f 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.*

Based on this analysis, "USAO believes that eliminating liability only for an 'intended victim' would remedy these situations and clarify the law."

- The RCC does not incorporate USAO's recommended revision because the issue identified is already addressed by the proposed statutory language, RCC § 22E-304(a)(1). Under USAO's examples, there is no plausible claim that the injuries sustained by Persons B and D qualify them as "a victim of the *target offense*." The victim of the *target offense* in the first hypothetical is clearly Person C (and not B), while in the second hypothetical it is clearly Person E (and not D).

(2) *USAO, App. C at 241, recommends redrafting paragraph (a)(2), which currently reads: "The person's criminal objective is inevitably incident to commission of the target offense as defined by statute." USAO suggests revising this language to state: "The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission." This "alternative proposal" stems from USAO's "belie[f] that the current wording of (a)(2) is confusing," and, as such, "is intended to be a clarification, not a substantive modification." USAO also "believes [this alternate proposal to be] a more accurate statement of Wharton's Rule, as set forth in the comments to the current jury instructions."*

- The RCC does not incorporate USAO's recommended revision. USAO's alternative proposal would constitute a substantive modification of paragraph (a)(2), which would also be a misstatement of Wharton's Rule as construed by the DCCA.

[80] "For example," as USAO states, "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."

- The current RCC approach bars solicitation and conspiracy liability where the defendant's "criminal objective is inevitably incident to commission of the target offense as defined by statute." As applied, this merely precludes holding (for example) the purchaser in a drug sale criminally liable for conspiring in the commission of drug distribution because the purchaser's criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances.[81]
- Under USAO's recommended revision, in contrast, a conspiracy (or solicitation) to commit drug distribution (or other target offenses such as bribery or trafficking in stolen property) could never be charged because the acts of distribution (or bribery or trafficking in stolen property) "is of such a nature as to necessarily require the participation of two people for its commission."
- USAO's recommended approach is substantively consistent with the most expansive interpretation of Wharton's Rule; however, this interpretation has been subject to significant criticism.[82] Under the narrower and more defensible reading, in contrast, Wharton's Rule merely "supports a presumption" that, "absent legislative intent to the contrary," charges for conspiracy and a substantive offense that requires "concerted criminal activity" should "merge when the substantive offense is proved."[83]
- This latter approach is recommended by most commentators.[84] And it appears to most clearly reflect current District law, under which: "Wharton's Rule [merely] bar[s] convictions for both the substantive offense and conspiracy to commit that same offense," so, "[e]ven if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment."[85]
- This is also the approach followed by the RCC through the combination of section 304(a)(2), as currently drafted, in combination with the RCC's general merger provision.[86]

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[81] In contrast, paragraph (a)(2) would not preclude holding the dealer liable for conspiring to *distribute* controlled substances based on an agreement with the purchaser. This is because the dealer's criminal objective—the *distribution* of controlled substances—is not inevitably incident to commission of the target offense, but rather, actually *constitutes* the target offense (i.e., provides the actual basis for a drug distribution charge).

[82] *See, e.g.,* Model Penal Code § 5.04(2) cmt. at 481 ("[Such an approach] completely overlooks the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4).

[83] *Iannelli v. United States*, 420 U.S. 770, 785–86 (1975).

[84] *See, e.g.,* LAFAVE, at 2 SUBST. CRIM. L. § 12.4(c)(4) ("To the extent [Wharton's Rule simply] avoids cumulative punishment for conspiracy and the completed offense, [the doctrine] makes sense."); Model Penal Code § 5.04(2) cmt. at 481 ("[Wharton's] rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime that inevitably requires concert.").

[85] *Pearsall v. United States*, 812 A.2d 953, 962 & n.11 (D.C. 2002).

[86] *See* RCC § 22E-214(a)(4) (establishing presumption of merger whenever "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each"); *id.*, Explanatory Note ("For example, where D, a drug dealer, is convicted of both conspiracy to commit drug

(3) *The CCRC recommends replacing subsection (b) with a prefatory clause at the beginning of the provision that states, "Unless otherwise expressly specified by statute," consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, 'reasonably accounts' for the former.").

RCC § 22E-305. Renunciation Defense to General Inchoate Liability

(1) *USAO, App. C at 241, "recommends removing § 22E-305 in its entirety." USAO offers this recommendation based on its "belie[f] that this section does not accurately reflect the state of the law." Specifically, "[c]ompletion of the target offense is never required for the offenses of attempt, conspiracy, and solicitation." USAO acknowledges that, [i]f 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." At the same time, "[h]owever[,] the fact that the offense was not completed does not affect his already completed culpability for attempt, conspiracy, and solicitation." In support, USAO offers the following illustration:*

> *[I]f 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.*

That being said, however, "[i]f the CCRC is inclined to codify a defense in this section, USAO recommends that the RCC codify a withdrawal defense." Importantly, though, "[u]nder the withdrawal defense [recommended by USAO] 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."

- The RCC does not incorporate USAO's recommended revisions. The renunciation defense codified in section 305 is supported by national legal trends and compelling policy considerations. It also fills an important gap in District law in a manner that is generally consistent with District law.
- A "majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense," while "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation" and "to a charge of conspiracy."[87]
- Widespread recognition of "renunciation as an affirmative defense to inchoate crimes" is often said to be driven by "two basic reasons":

  > First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely "preparatory" activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the

[87] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019); *see, e.g.,* Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989).

> penal law seeks to prevent. Where the defendant has performed acts which indicate, *prima facie*, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.
>
> Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.[88]

- The current state of District law concerning the renunciation defense is unclear. The D.C. Code does not codify any general defenses to criminal conduct, including renunciation. There also does not appear to be any District case law directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some District authority relevant to the renunciation defense exists in the context of general inchoate crimes, providing modest support for its recognition.[89]

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[88] Commentary on Haw. Rev. Stat. Ann. § 705-530 (citing Model Penal Code § 5.01 cmt. at 361); *see, e.g.,* Moriarty, *supra*, at 5-6 (observing that a renunciation defense is "[a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous."); Moriarty, *supra*, at 5 ("Just as the degree structure of criminal [provides] greater deterrence for the higher degrees of crime [through more severe punishments], so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.").

Perhaps a better explanation of the renunciation defense's recognition, though, is "[r]etributively oriented," namely, that voluntary and complete renunciation "makes us reassess our vision of the defendant's blameworthiness." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981). As numerous legal authorities have recognized:

> All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.

Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011) (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.4 (3d ed. Westlaw 2019) which in turn quotes Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see, e.g.,* PAUL H. ROBINSON & JOHN DARLEY, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014) (finding strong support in public opinion for renunciation defense).

[89] In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime." *E.g.*, *Wormsley v. United*

- In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that a complete withdrawal defense is available to those being prosecuted as aiders and abettors.[90] Which is to say, an accomplice that "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[91]
- Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed,

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States, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); *see also In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is "imperfect" in the sense that "failure is not an essential element of criminal attempt"). As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a "voluntary abandonment demonstr[ates] that the agent would not have 'committ[ed] the crime except for' extraneous intervention." R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.,* Model Penal Code § 5.01 cmt. at 357-58; LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 11.5. Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal. Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy *liability*. Instead, it addresses when an actor may be relieved from the *collateral consequences* of a conspiracy. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities). For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators." LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 12.4. Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run." LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 12.4. On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation." *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005). And, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the criminal jury instructions indicate that the burden is on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it." COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102.

[90] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal [as a defense to accomplice liability] has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

[91] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.").

soliciting or conspiring with another person to commit a crime are two ways of aiding and abetting its commission.[92] But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively "constitute[s] a form of inchoate liability."[93] And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *non-consummation* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.[94] Arguably, then, the failure to recognize a renunciation defense to general inchoate crimes would be "inconsistent with the doctrine allowing an analogous defense in the complicity area."[95]

(2) *The CCRC recommends incorporating the term "Renunciation" into the heading of RCC § 22E-305(b), such that it now reads: "Scope of Voluntary and Complete* Renunciation*." This revision describes the operative principle more clearly and is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends striking the burden of proof subsection and instead specifying the burden of proof for all defenses in RCC § 22E-201.*

- *This change improves the consistency of the revised statutes and does not further change District law.*

(4) *The CCRC recommends including a subsection for definitions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

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[92] *See, e.g., Tann v. United States*, 127 A.3d 400, 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, supra note 1, at 2 SUBST. CRIM. L. § 13.2); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States,* 196 F.2d 573, 580 (D.C. Cir. 1952)); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

[93] Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 756 n.14 (2012).

[94] As one commentator phrases the distinction:

> "Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates. "Renunciation" generally requires not only desistance, but more active rejection, and usually contains specific subjective requirements, such as a complete and voluntary renunciation.

ROBINSON, *supra*, at 1 CRIM. L. DEF. § 81.

[95] Model Penal Code § 5.03 cmt. at 457.

RCC § 22E-408. Special Responsibility Defenses.[96]

(1) *USAO, App. C at 274, recommends that subsection (a)(1)(B) be rewritten to codify current* in loco parentis *law.[97] USAO states that the provision, "person acting in the place of a parent per civil law" is confusing and should be eliminated. 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 (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…"*

- The CCRC does not incorporate this recommendation because it may result in disproportionate penalties, would be inconsistent with other RCC provisions, and may be confusing by addressing guardians in this manner (without definition). The revised statute uses a term defined in RCC 22E-701: ""Person acting in the place of a parent under civil law" means both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the direction of a court with jurisdiction over the child." This short, defined term more clearly states what constitutes a "guardian" and is used in multiple RCC provisions without repeating the longer phrasing suggested by USAO. The RCC also broadens availability of the defense beyond those having a formal parental or guardian status to others who may be recognized under civil law (in contrast to the USAO recommendation to limit the defense to those who "*both assuming parental status and by discharging the duties and obligations of a parent toward a child*"). However, the RCC still limits availability of the defense to those who are responsible for the health, welfare, or supervision of the complainant.

(2) *USAO, App. C at 274-275, 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."[98] USAO states that it is clearer to point out some of the most relevant considerations in this analysis.*

- The RCC partially incorporates this recommendation by revising the commentary to specifically note with regard to the phrase "under all the circumstance" that "The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may

[96] Previously titled "Special Responsibility for Care, Discipline, or Safety Defense."
[97] Criminal Jury Instructions for the District of Columbia, No. 4.121 (5th ed. Rev. 2018).
[98] *See* Criminal Jury Instructions for the District of Columbia, No. 4.120 (5th ed. Rev. 2018). USAO also suggests including the word "size," which is not included in the jury instructions.

include a complainant'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, or other relevant factors." The RCC defense requires simply that, "under all the circumstances" the actor's conduct be reasonable in manner and degree. The determination of reasonableness in manner and degree may or may not be aided by the listed circumstances such as age.

(3) *The CCRC recommends adding to the persons who may claim a special responsibility defense persons who are reasonably mistaken that they have the effective consent of a relevant person with legal authority. In the parental defense this change expands the defense to include a person who "reasonably believes that they are acting with the effective consent of a parent or person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant," instead of the prior language referring only to "Someone acting with the effective consent of such a parent or person." Similarly, this change expands the persons who may claim a guardian defense to a person who "reasonably believes that they are acting with the effective consent of a court-appointed guardian to the complainant" instead of the prior language referring only to "Someone acting with the effective consent of such a guardian." Also, this change expands the persons who may claim an emergency health professional defense to a person who "reasonably believes that they are acting at a licensed health professional's direction," replacing the prior language referring only to "a person acting at a licensed health professional's direction." It appears unjust to deny this defense to a nurse or other person acting under a reasonable mistake that they have the effective consent of a relevant person with legal authority.*

- *This change improves the proportionality of the revised statutes.*

(4) *The CCRC recommends adding "in fact" to specify that there is no culpable mental state for elements of the special responsibility defenses where none were previously specified in the draft defenses, not including subparagraphs (c)(5)-(c)(7) of the emergency health professional defense (discussed below).*

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends a culpable mental state of acting "with intent" apply to subparagraphs (c)(5)-(c)(7) of the emergency health professional defense. This requires proof that the actor believed to a practical certainty that the medical procedure was administered or authorized in an emergency, that no person who was permitted under District law to consent to the medical procedure on behalf of the complainant could be timely consulted, and that there was no legally valid standing instruction by the complainant declining the medical procedure.*

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends replacing "wishing to safeguard the welfare of the complainant" in the emergency health professional defense with "desiring to safeguard the welfare of the complainant." This revision uses terminology that*

tracks the definition of a "purposeful" culpable mental state described elsewhere in the revised statutes.

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(7) *The CCRC recommends that the special responsibility offenses be available for conduct under: Forced Labor or Services (RCC § 22E-1601); Trafficking in Labor or Services (RCC § 22E-1603); and Chapter 18 offenses, other than Creating or trafficking an obscene image of a minor (RCC § 22E-1807) when charged under subparagraphs (a)(1)(B) and (a)(1)(E) or subparagraphs (b)(1)(B) and (b)(1)(E) and Arranging a live performance of a minor (RCC § 22E-1809).*

(8) *The CCRC recommends that the special responsibility offenses not be available for conduct under: Creating or trafficking an obscene image of a minor (RCC § 22E-1807) when charged under subparagraphs (a)(1)(B), (a)(1)(E), (b)(1)(B) or (b)(1)(E); and Arranging a live performance of a minor (RCC § 22E-1809).*

(9) *The CCRC recommends striking the burden of proof paragraph in the defense provision and instead specifying the burden of proof for all defenses in RCC § 22E-201.*

- *This change improves the consistency of the revised statutes and does not further change District law.*

RCC § 22E-409. Effective Consent Defense.

(1) *The CCRC recommends adding "in fact" to specify that there is no culpable mental state for elements of the effective consent defense where none were previously specified in the draft defense.*

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends striking the burden of proof paragraph in the defense provision and instead specifying the burden of proof for all defenses in RCC § 22E-201.*

- *This change improves the consistency of the revised statutes and does not further change District law.*

RCC § 22E-701. Generally Applicable Definitions.

"Amount of damage"

(1) *The CCRC recommends codifying a definition of "amount of damage" that applies to the RCC criminal damage to property offense (RCC § 22E-2503). This is in response to a recommendation OAG made for the RCC criminal damage to property offense. The definition is generally consistent with DCCA case law for the current malicious destruction of property offense and is discussed in detail in the commentary to RCC § 22E-701.*

- This change improves the clarity and consistency of the revised criminal damage to property offense.

"Attorney General"

(1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, the language "Attorney General for the District of Columbia" is substituted in the statutory text.*

- This change clarifies, but does not substantively change, the revised code.

"Block"

(1) *OAG, App. C at 245-246, seeks clarification of the definition of the term "block," posing the question, "Why is rendering a space impassable without unreasonable hazard 'blocking' but rendering impassable with an unreasonable hazard is not?"*

- The RCC incorporates this recommendation to clarify the definition of "block." The definition is amended to state, "'Block' and other parts of speech, including 'blocks' and 'blocking,' mean render safe passage through a space difficult or impossible." This change clarifies the meaning of the revised definition.

(2) *OAG, App. C at 246, notes that although the Explanatory Note says, "similar language" to this definition "is used in the current crowding, obstructing, or incommoding statute," current D.C. Code § 22-1307 does not include any language comparable to the revised definition.*

- The RCC incorporates this recommendation to clarify the explanatory note for the definition of "block." The relevant sentence is revised to state, "The RCC definition of 'blocks' is new; the term is not currently defined in Title 22 of the D.C. Code (although a similar word, 'obstruct,' is used in the current crowding, obstructing, or incommoding statute).[99]" This change clarifies the revised commentary.

[99] D.C. Code § 22-1307.

"Bodily injury"

(1) *OAG, App. C at 246, recommends revising the definition of* ***"bodily injury"*** *to specifically include "scratch, bruise, abrasion" so that the definition reads "'bodily injury' means physical pain, illness, scratch, bruise, abrasion, or any impairment of physical condition." As currently drafted, OAG states that the language "impl[ies] that something actually has to be impaired."*

- The RCC partially incorporates this recommendation by specifying "physical injury" in the definition, as opposed to specific physical injuries, so that the revised definition reads "physical pain, physical injury, illness, or any impairment of physical condition." In addition, the commentary to the definition lists a scratch, a bruise, and an abrasion as examples of physical injury. This change improves the clarity of the revised statutes.

(2) *USAO, App. C at 276, recommends revising the definition of "****bodily injury****" to include "a contusion, an abrasion, a laceration, or other physical injury" so that the definition reads "'bodily injury' means physical pain, illness, a contusion, an abrasion, a laceration, or other physical injury, or any impairment of physical condition." USAO states that including these injuries clarifies the statute, avoids potential future litigation, and is consistent with the RCC definitions of "significant bodily injury" and "serious bodily injury."*

- The RCC partially incorporates this recommendation by specifying "physical injury" in the definition, as opposed to specific physical injuries, so that the revised definition reads "physical pain, physical injury, illness, or any impairment of physical condition." In addition, the commentary to the definition lists a contusion, an abrasion, and a laceration as examples of physical injury. This change improves the clarity of the revised statutes.

"Class A contraband"

(1) *USAO, App. C at 277, recommends adding a catch-all provision to include any item that is "otherwise designed or intended to facilitate an escape." USAO explains that inclusion of this provision will make it easier to prosecute possession of homemade implements.*

- The RCC does not incorporate this recommendation. Subsection (G) of the revised definition broadly includes any tool—whether machine-made or handmade—that is "created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door." However, criminalizing possession of any item that is *intended* to facilitate an escape would broadly include objects that have not yet been adapted, objects that are not objectively useful, and objects that have other legitimate purposes. Consider, for example, a person who intends to escape by writing a note to a corrections officer, begging for compassionate release. Under USAO's proposed language, that person commits a contraband offense the moment she obtains a pencil or a piece of paper. As the commentary to the definition of "Class A

Contraband" explains, "The revised language creates a more objective basis for identifying contraband—rather than making the subjective intent to facilitate escape the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense."

(2) *USAO, App. C at 277, recommends criminalizing possession of civilian clothing because it can be used to facilitate an escape.*

- The RCC does not incorporate this recommendation. A person who possesses civilian clothing may be subject to disciplinary action[100] but not an additional conviction. Wearing "a law enforcement officer's uniform, medical staff clothing, or any other uniform" is punishable as first degree correctional facility contraband.[101] Wearing civilian clothing together with department-issued inmate clothing—e.g., undergarments, tennis shoes—is unlikely to facilitate an escape. Wearing a full civilian clothing outfit to impersonate a visitor may constitute an attempted escape.[102]

(3) *USAO, App. C at 277, recommends including stun guns in the definition.*

- The RCC does not incorporate this recommendation because the definition already includes stun guns by including any "dangerous weapon," which is defined in RCC § 22E-701 to include stun guns.

(4) *USAO, App. C at 277, recommends including controlled substances and marijuana in the definition of Class A Contraband. Alternatively, USAO recommends adding an intermediate class of contraband for controlled substances and marijuana, graded less severely than weapons and escape implements but more severely than alcohol and drug paraphernalia. USAO explains that these drugs affect the physical and mental stability of incarcerated people and are a potential touchstone for conflict.*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty. The RCC recommends marijuana and controlled substances constitute Class B contraband rather than Class A contraband, carrying a potential punishment for Second Degree Correctional Facility Contraband rather than First Degree Correctional Facility Contraband.
- In the First Draft of Report #37 (July 12, 2019), the CCRC recommended that the RCC criminalize simple possession and trafficking of controlled substances. Any person who possesses a controlled substance—as an inmate or otherwise, for personal use or to use as currency—is subject to prosecution under RCC §§ 48-904.01a (regardless of weight) and 48-904.01b (depending on weight). Subsequently, in the First Draft of Report #41 (October 3, 2019), the CCRC recommended penalty classifications for drug offenses and first and second degree correctional facility contraband.

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[100] *See, e.g.,* Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).

[101] RCC § 22E-701 ("Class A contraband").

[102] RCC § 22E-301 (Criminal Attempt); RCC § 22E-3401 (Escape from a Correctional Facility or Officer).

Under the RCC penalty classifications, an incarcerated person who possesses any amount of a controlled substance could be charged with second degree correctional facility contraband and subject to a Class A penalty, which is significantly more severe than the corresponding Class C or Class D penalties for a civilian possessing any amount of a controlled substance under RCC § 48-904.01a. Where the amount of a controlled substance possessed by an incarcerated person is such as to indicate an intent to distribute, such conduct may be prosecuted under RCC § 48-904.01b, which may be more severely punished than second degree correctional facility contraband depending on the nature of the controlled substance.

- The inclusion of controlled substances in the RCC definition of Class B Contraband ensures more severe punishment for incarcerated persons who merely possess a controlled substance or marijuana (as compared to civilians) but does not equate possession of such drugs with possession of weapons and tools for escape. In addition, anyone incarcerated may be subject to disciplinary action for possession of a controlled substance or marijuana.[103]

(5) *USAO, App. C at 277, recommends reclassifying portable electronic communication devices as Class A contraband. USAO states, "Cell phones can be used by inmates to coordinate escape or violent actions against correctional officers."*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty. Consistent with current D.C. Code § 22-2603.01(3)(A)(iii), the revised correctional facility contraband offense[104] punishes possession of a portable electronic communication device as Class B contraband. Cell phones have many uses other than facilitating an escape or violence. Though prohibited and subject to criminal punishment in the RCC as Second Degree Correctional Facility Contraband, behaviors such as listening to music, reading the news, conducting legal research, and corresponding with acquaintances do not pose a danger commensurate with the danger posed by weapons and other escape implements. In addition, a person who uses a cell phone to coordinate an escape or an act of violence may be guilty of aiding,[105] attempting,[106] soliciting,[107] or conspiring,[108] to commit the underlying offense of escape from a correctional facility or officer,[109] assault,[110] or rioting.[111]

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[103] *See* Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).
[104] RCC § 22E-3403.
[105] RCC § 22E-210.
[106] RCC § 22E-301.
[107] RCC § 22E-302.
[108] RCC § 22E-303.
[109] RCC § 22E-3401.

(6) *The CCRC recommends replacing the phrases "capable of" and "designed or intended" in subsections (F) – (I) with the phrase "designed or specifically adapted for." The revised language creates a more objective basis for identifying contraband—rather than making the person's subjective intent the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.*

- This change improves the clarity, consistency, and proportionality of the revised definition.

"Class B contraband"

(1) *The CCRC recommends replacing the phrases "capable of" and "designed or intended" with the phrase "designed or specifically adapted for." This clarifies that an everyday item that could foreseeably be used unlawfully (e.g., spoon or straw) is not contraband* per se.

- This change improves the clarity, consistency, and proportionality of the revised definition.

"Coercive threat"

(1) *The CCRC recommends deleting the words "explicit or implicit" from the definition of "coercive threat." Instead, specific offenses that include coercive threats will specify whether explicit and implicit coercive threats are included.*

- This change improves the clarity of the revised statute.

(2) *PDS at App C. 268-269, recommends redrafting the commentary to clarify that coercive threats predicated on exposing secrets only includes threats to reveal secrets that would have constituted blackmail.*

- The RCC incorporates this recommendation by amending the commentary to clarify the scope of coercive threats as recommended by PDS. However, the commentary also will clarify that there is at least one type of secret that constitutes a coercive threat that arguably would not have constituted traditional blackmail. "Coercive threat" includes exposing a secret, publicizing an asserted fact, or distributing a photograph, video, or audio recording that tends to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. For example, threats to publish sexually explicit photos of an adult film performer may still constitute a coercive threat, even though similar photos are already publicly available. It is unclear whether these types of threats would constitute blackmail under current District law. This change clarifies the RCC commentary.

(3) *USAO, at App C. 277, recommends changing the term "coercive threat" to "coercion" and separately addressing in the definition both a "threat" and "an act."*

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[110] RCC § 22E-1202.
[111] RCC § 22E-4301.

- The RCC does not adopt USAO's proposed language separating a threat from an act because drafting statutes in such a manner is inconsistent with the RCC general approach of including within threats gestures and other conduct. This RCC approach is consistent with the plain language meaning of "threaten" as including menacing a person with a weapon.[112] To separately address an "act" that is "intended to induce the complainant's compliance" may suggest that threats ordinarily do *not* include acts such as gestures, or that a significant difference is intended between a threat that is verbal or non-verbal.[113] The RCC consistently uses threats to include non-verbal conduct.

(4) *USAO, at 278-279, recommends that the term "coercion" should categorically include* facilitate[ing] or control[ing] *a person's access to an* addictive or controlled *substance." USAO also recommends removing the requirements that the substance is a controlled substance, or that the person owns the substance.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Subparagraph (F) of the RCC definition of "coercive threat" includes as one type a threat to: "Restrict a person's access to a controlled substance that the person owns." This language is narrowly tailored to exclude otherwise legal, socially acceptable activities. In contrast, the USAO recommendation to include facilitating or controlling a person's access to addictive substances in the definition of "coercive threats" may improperly criminalize consensual agreements involving addictive substances. For example, the revised forced labor or services offense is defined as causing a person to engage in labor or services by means of a coercive threat. If "coercive threat" were to include facilitating a person's access to an addictive substance, providing beer in exchange for a friend's held in moving a couch would appear to constitute forced labor depending on whether alcohol is deemed an "addictive" substance, an undefined term. Similarly, everyday conduct of a pharmacist dispensing prescription medications would constitute "coercion" under the USAO definition.

(5) *USAO, at 278, recommends categorically including "fraud or deception" in the definition of "coercion."*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear and authorize disproportionate penalties. The RCC decouples fraud and deception from a definition of "coercion" because it is conceptually and factually distinct, but the RCC also consistently and appropriately refers to deception alongside a coercive threat as a way of defeating a person's effective consent. The

[112] See Merriam-Webster online dictionary definition of "threaten" (providing as one of the definitions "to cause to feel insecure or anxious" and listing as the first example of a use of the word, "The mugger threatened him with a gun.") (last visited 12-29-19).

[113] For example, it is unclear what work the phrase "intended to induce" is doing in the USAO's proffered language—for example is "induce" different from "cause" or "intended" imply there is a separate culpable mental state in the definition?— and whether or how such requirement differs from a verbal threat.

RCC separately defines the term "deception" and also defines "effective consent" as consent other than consent induced by physical force, a coercive threat, or deception. The RCC codifies a separate definition because in many contexts, there are meaningful distinctions between obtaining consent through coercive threats, and through fraud or deception. For example, second degree sexual assault is defined as causing a person to engage in or submit to a sexual act by a coercive threat. Under the USAO's suggestion, which appears to be based on a definition of "coercion" limited to human trafficking, using any deception to induce a person to engage in a sexual act would appear to constitute second degree sexual assault.

(6) *USAO at App. C. 278, recommends that the use of force be included in the definition of "coercion."*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear and may authorize disproportionate penalties. The RCC decouples force from a definition of "coercion" because it is conceptually and factually distinct, but the RCC also consistently and appropriately refers to physical force alongside a coercive threat as a way of defeating a person's effective consent. The RCC defines "effective consent" as consent other than consent induced by physical force, a coercive threat, or deception. Including the use of force is unnecessary, and may make the revised definition less clear. The RCC codifies a separate definition because in many contexts, there are meaningful distinctions between obtaining consent through coercive threats, and through physical force. For example, the RCC second degree sexual assault is defined as causing a person to engage in or submit to a sexual act by a coercive threat, whereas first degree sexual assault is defined in terms of use of physical force or certain threats to kill or kidnap. This framework tracks the grading in the current D.C. Code sexual abuse statutes. Under the USAO's suggestion, which appears to be based on a definition of "coercion" limited to human trafficking, it is unclear if using force to induce a person to engage in a sexual act would constitute first or second degree sexual assault. Moreover, the "coercive threat" definition includes a threat that any person will engage in conduct that constitutes any offense against persons. The definition does not require that threats be issued verbally or explicitly; gestures or other forms of conduct may suffice. In any case in which a person coerces another person through the use of force, there is at least an implicit threat of additional or continued use of force.

(7) *USAO, at App. C. 278, recommends including in the definition of "coercion": "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" in the definition of "coercion."*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear. The USAO recommendation,

apparently drawn from the human trafficking context but recommended for the general definition of coercion, does not appear to add to the scope of the definition beyond a very specific type of deception. And, as addressed above, the RCC provides liability in many offenses for deception, which undermines effective consent. In addition to deception, when a person coerce another by making that person believe he or she is property of another, other forms of coercive threats also may have also been used. In particular, people who have been led to believe they are property of another would also presumably believe that failure to comply with their ostensible "owner's" demands would result in some form of bodily injury, or other "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"—types of coercive threats specifically addressed in the revised definition.

"Commercial Sex Act"

(1) *The CCRC recommends adding a definition of the term "commercial sex act" to RCC § 22E-701.*

- The RCC incorporates this recommendation by defining "commercial sex act" in RCC § 22E-701 to mean "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." This change clarifies the revised statute.

"Comparable Offense"

(1) *USAO, App. C at 286, notes the term "comparable offense" appears to be superfluous, as the term is no longer used in the RCC.*

- The RCC does not incorporate this recommendation because, as of the First Draft of Report #39 (August 5, 2019), the definition of "comparable offense" now appears in RCC § 22E-4105, possession of a firearm by an unauthorized person.

"Correctional facility"

(1) *USAO, App. C at 279-280, recommends adding buildings operated by the U.S. Marshal's Service to the definition of "correctional facility," so that people who escape from the cell block at the Superior Court for the District of Columbia are punished as severely as people who escape from the Central Detention Facility and the Central Treatment Facility.*

- The RCC partially incorporates this recommendation by revising the first degree escape from an institution or officer offense[114] to include an escape

[114] RCC § 22E-3401(a).

from a cellblock operated by the U.S. Marshal's Service. The definition of "correctional facility" remains limited to facilities that are correctional in nature. This change reduces a gap in liability.

"Court"

(1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, the language "the Superior Court for the District of Columbia" is substituted in the statutory text.*

- This change clarifies, but does not substantively change, the revised code.

"Dangerous Weapon"

(1) *OAG, App. C at 246, recommends clarifying that the phrase "with a blade over 3 inches in length" modifies the word "knife" but does not modify the word "sword" or the word "razor."*

- The RCC already incorporated this recommendation in the First Draft of Report #39 (August 5, 2019), by reordering the list of sharp force trauma instruments in the definition of "dangerous weapon." The relevant paragraph has been revised to state, "(C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk." This change clarifies the meaning of the revised definition.

(2) *OAG, App. C at 246, recommends revising the sentence in the commentary (p. 205) that states, "The RCC definition, by contrast, clarifies that a person's integral body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon." OAG explains the word "integral" does not appear in the statutory language and is unclear.*

- The RCC already incorporated this recommendation in the First Draft of Report #39 (August 5, 2019) by striking the confusing term "integral." The relevant sentence has been revised to state, "The RCC definition, by contrast, clarifies that a person's body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon." This change clarifies the meaning of the revised definition.

(3) *USAO, App. C at 397-398, recommends revising the definition to include stationary objects, contrary to current District law in* Edwards v. United States.[115] *USAO explains that the RCC "should recognize the moral equivalence of injuring someone with a stationary or non-stationary object."*[116]

- The RCC does not incorporate this recommendation because it may result in confusion and disproportionate penalties. The RCC assault statute[117] and other offenses that provide enhanced penalties for committing the crime by displaying or using a dangerous weapon seek to provide additional punishment beyond the degree of injury suffered, in limited

[115] 583 A.2d 661 (D.C. 1990).
[116] "Morally, running a victim into a spike is as culpable as stabbing him with a dagger." *Id*. at 667.
[117] RCC § 22E-1202.

cases of great concern. Including stationary objects in the definition of dangerous weapon, however, would greatly expand the category of "dangerous weapon" and result in some counterintuitive and disproportionate outcomes. For example, it is not clear how offenses such as carrying a dangerous weapon[118] would be construed if all stationary objects constitute dangerous weapons. Including stationary objects could also make conduct such as a push that causes a person to trip and fall on a hard surface punishable not according to the degree of injury sustained, but equivalent to the display or use of a firearm or knife.

"Deceive" and "Deception"

(1) *USAO, at App. C. 280, recommends deleting subsection (e), which excludes puffing statements, from the definition.*

- The RCC does not incorporate this recommendation because it would make the definition less clear and complete, and may authorize disproportionate penalties. The revised statute in subsection (e) codifies that in cases involving *only* puffing statements as the purported basis of deception, criminal penalties are not warranted. In the civil and criminal contexts, courts have long recognized that puffery does not constitute fraud.[119] Omitting puffing statements from the definition of deception would risk criminalizing a broad array of statements that, while technically misleading, do not warrant criminal sanction. For example, a diner manager who places a sign in the window stating "world's best coffee," could be subject to criminal liability if the coffee is not actually the best coffee in the world.
- The USAO expresses concern that the exception for puffery would preclude liability in security fraud cases, stating that "defendants commonly present their victims with false promises of out-sized investment returns." However, as specified in the RCC, material misrepresentations may still serve as the basis for securities fraud. For example, an executive who overstates a company's earnings in order to deceive investors may still be found guilty of fraud. On the other hand, if puffing statements are included in the definition of deception, securities fraud could conceivably include an executive who falsely promises that "this company will change the world."

"Detection device"

(1) *The CCRC substitutes the phrase "location tracking capability" for "electronic monitoring," to clarify the type of monitoring included in the definition. This revision makes the definition more closely resemble the definition of "monitoring equipment or software."*

[118] RCC § 22E-4102(c).
[119] *See generally*, David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1402 (2006).

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

"District official"

(1) *OAG, App. C at 246-247, recommends excluding specified District of Columbia Excepted Service employees and Council employees from the definition of "**District official."** The RCC definition of "District official" is identical to the definition of "public official" in D.C. Code § 1-1161.01(47). This D.C. Code definition of "public official" establishes who must file a public financial disclosure statement under District Board of Ethics and Government Accountability rules.[120] OAG states that while pay and ethics rules "may be useful for determining who must file a public financial disclosure statement . . . there is no reason why these people are deserving of more protection than other government employees." With OAG's revisions, the RCC definition of "District official" would be limited to paragraphs (A) – (H) of the D.C. Code definition of "public official,"[121] and paragraphs (I) and (J) of the D.C. Code definition of "public official," pertaining to specified District of Columbia Excepted Service employees and Council employees,[122] would be deleted.*

- The RCC incorporates this recommendation by limiting the RCC definition of "District official" to paragraphs (A) – (H) of the D.C. Code definition of "public official" in D.C. Code § 1-1161.01(47). This change improves the clarity, consistency, and proportionality of the revised statutes.

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[120] D.C. Code § 1-1162.24.

[121] D.C. Code § 1-1161.01(47) ("'Public official' means: (A) A candidate; (B) The Mayor, Chairman, and each member of the Council of the District of Columbia holding office under Chapter 2 of this title; (C) The Attorney General; (D) A Representative or Senator elected pursuant to § 1-123; (E) An Advisory Neighborhood Commissioner; (F) A member of the State Board of Education; (G) A person serving as a subordinate agency head in a position designated as within the Executive Service; (G-i) Members of the Washington Metropolitan Area Transit Authority Board of Directors appointed appointed by the Council pursuant to § 9-1107.01(5)(a); (G-ii) A Member or Alternate Member of the Washington Metrorail Safety Commission appointed by the District of Columbia pursuant to Article III.B. of the Metrorail Safety Commission Interstate Compact enacted pursuant to D.C. Law 21-250; (H) A member of a board or commission listed in § 1-523.01(e).").

[122] D.C. Code § 1-1161.01(47) ("(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.").

"Dwelling"

(1) *The CCRC revises the definition to include communal areas secured from the general public, in light of the DCCA's recent opinion in* Ruffin v. United States.[123]

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

"Effective consent"

(1) *The CCRC recommends revising the definition of "**effective consent**" to include "an express or implied coercive threat," as opposed to merely "a coercive threat." With this revision, the definition of "effective consent" would read "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Rather than rely on the commentary, the RCC is codifying "express or implied" directly in statutes to specify that "threats" includes express or implied threats.*

- This change improves the clarity and consistency of the revised statutes.

"Financial Injury"

(1) *PDS, App. C at 270, objects to expanding the definition of "financial injury" to include any natural person as long as the expenditure is "reasonably necessitated by the criminal conduct," on grounds that it is overly broad and vague. PDS offers a hypothetical in which the neighbor of a stalking victim elects to install an improved security system. PDS recommends amending the revised definition to read, "'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…"*

- The RCC does not incorporate this recommendation because it would leave a gap in liability for indirect injury caused to persons other than the complainant. The RCC definition is intended to include expenses that are *reasonably* incurred by a third party as a result of the criminal conduct, even if the third party is not "financially responsible for the complainant as a result of" the criminal conduct. For example, a friend, family member, or social services provider may voluntarily pay for temporary safe housing on behalf of a victim who is indigent.

[123] 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

"Halfway House"

(1) *OAG, App. C at 247, recommends including a cross-reference to D.C. Code § 24-241.01 in the statutory language, to clarify the meaning of the phrase "work release program."*

- The RCC incorporates this recommendation by amending the definition to state, "'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 *under D.C. Code § 24-241.01*." (Emphasis added.) This change clarifies the meaning of the revised definition.

"Image"

(1) *USAO, App. C at 452, recommends amending the definition to include images in any "other format," to accommodate future technologies.*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised definition and does not substantively change its meaning.[124]

"Law enforcement officer"

(1) *The CCRC recommends revising subparagraph (H) of the definition of "**law enforcement officer**" to refer to the officers specified in "subparagraphs (A)-(G)" of the definition instead of "subparagraphs (A), (B), (C), (D), (E), and (F)." Subparagraph (H) of the definition follows the catch-all provision in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute, and that catch-all provision includes Metro Transit police officers.*[125]

- This change improves the clarity and consistency of the revised definition.

(2) *USAO, App. C at 280, recommends adding "deputy marshals" to subsection (H) of the definition of "**law enforcement officer.**" Subsection (H) includes within the definition of "law enforcement officer" any "federal, state, county, or municipal officer" that performs "functions comparable to those performed by the officers" specified in the RCC definition. USAO states that "[a]lthough they may already be included" in the definition, "Deputy U.S. Marshals . . . are*

[124] The word "including" indicates the list of formats is not exhaustive.

[125] D.C. Code § 22-2106(b) ("For the purposes of subsection (a) of this section, the term: (1) "Law enforcement officer" means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (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.").

essential law enforcement officers in the District who frequently interact with defendants, as they operate cellblocks in D.C. Superior Court."

- The RCC does not incorporate this recommendation because it introduces ambiguity into the definition. Deputy U.S. Marshals already are included in the general language in subparagraph (H) and other federal law enforcement positions are not specifically referenced. As is discussed in the commentary to the RCC definition, the RCC definition of "law enforcement officer" largely follows the definitions of "law enforcement officer" in the current assault on a police officer statute (D.C. Code § 22-405) and murder of a police officer statute (D.C. Code § 22-2106). These definitions do not specify any federal law enforcement officers. Singling out Deputy U.S. Marshals in the RCC definition may suggest that other federal law enforcement officers are excluded. The commentary has been revised to note, however, that subparagraph (H) includes Deputy U.S. Marshals, among others.

"Obscene"

(1) *USAO, App. C at 453, recommends striking the phrase "in sex" as redundant.*

- The RCC does not incorporate this recommendation because it may reduce the clarity of the revised statutes. The revised definition incorporates the phrase "prurient interest in sex" from the United States Supreme Court's decision in *Miller v. California*.[126] Some modern English dictionaries define "prurient" to broadly include other immoderate or unwholesome interests and desires.[127]

(2) *The CCRC recommends amending part (B) of the definition to state "Is patently offensive," so that it is grammatically correct*.

- This change does not substantively change the definition or District law.

"Payment card"

(1) *USAO, at App. C. 281, recommends adding the words "whether tangible or digital" to the definition of "payment card."*

a. The RCC incorporates this recommendation by adding the phrase suggested by USAO. This change improves the clarity of the revised criminal code.

"Person" for property offenses.

(1) *OAG, App. C at 257, comments that, while it "has no comments concerning the text of the definition," it is "concerned about its placement in subtitle III." First, OAG states that "people who are unfamiliar with the RCC with look to RCC §*

[126] 413 U.S. 15 (1973).

[127] Merriam-Webster.com, *"prurient"*, 2020, *available at* https://www.merriam-webster.com/dictionary/prurient.

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," particularly given that neither Subtitle II nor Subtitle IV of the RCC have a definition as the first statute. Second, "if people are interpreting offenses that occur in [Subtitle II or Subtitle IV], they will need to know that they should be looking to D.C. Code § 45-605 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."

- The RCC incorporates these comments by moving the definition of "person" for property offenses from Subtitle III to the general definitions statute in RCC § 22E-701 and removing the phrase "Notwithstanding the definition of "person" in D.C. Code § 45-604". This change improves the clarity of the revised statutes.

"Physically Following"

(1) *OAG, App. C at 247, recommends either incorporating or separately defining the meaning of the phrase "close proximity," which is described in the commentary to refer 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."*

- The RCC partially incorporates this recommendation by amending the definition to state, "'Physically following' means maintaining close proximity to a complainant, near enough to see or hear the complainant's activities as they move from one location to another." The commentary clarifies that the government is not required to prove that a person is able to make physical contact with the target of the following. This change clarifies the revised definition.

"Position of trust with authority over"

(1) *The CCRC recommends including in subsection (A) of the definition of "position of trust with or authority over" "or an individual with whom such a person is in a romantic, dating, or sexual relationship." With this change, subsection (A) of the definition would read "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption, or an individual with whom such a person is in a romantic, dating, or sexual relationship." Subsection (A) of the current D.C. Code definition of "significant relationship"*[128] *and subsection (A) of the RCC definition include a "parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption." Subsection (A) establishes a "per se" list of relatives, including these relatives' spouses or domestic partners, regardless of whether these individuals*

[128] D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").

have any responsibility for the complainant. Subsection (C) of the current D.C. Code definition of "significant relationship"[129] *and subsection (C) of the previous RCC version include the spouse, domestic partner,* or *"paramour" of "the person who is charged with any duty for the health, welfare, or supervision of the complainant." To the extent that the specified relatives in subsection (A), for example, a parent, also have a responsibility for the complainant, subsection (A) and subsection (C) overlap for those relatives, and also for those relatives' spouses or domestic partners. However, subsection (C) includes a "paramour" of the person with a responsibility for the health, welfare, or supervision of the complainant and subsection (A) does not. This apparent discrepancy means that the "paramour" of a biological parent that has a responsibility for the complainant would be included in subsection (C) of the definition, but the "paramour" of a biological parent who has no responsibility for the complainant in subsection (A) would not. There is no DCCA case law interpreting the definition of "significant relationship." The RCC definition includes the "paramour" of a biological parent, regardless of the parent's relationship with the complainant in the "per se" list of individuals specified in subsection (A) and also includes the "paramour" of the other individuals in subsection (A).*

- This change improves the clarity of the revised definition and removes a possible gap in liability. The RCC commentary to the definition has been updated to reflect that this is a possible change in law.

(2) *The CCRC recommends replacing "legal or de facto guardian" in subsection (B) of the definition of "position of trust with or authority over" with "person acting in the place of a parent per civil law," a defined term in RCC § 22E-701. "A legal or de facto guardian" is undefined in the current sexual abuse statutes and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. The RCC consistently uses the term "person acting in the place of a parent per civil law," as defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised definition. The RCC commentary to this definition has been updated to reflect that this is a clarificatory change in law.

(3) *The CCRC recommends replacing "paramour" in subsection (B) of the definition of "position of trust with or authority over" with an individual with whom a specified person is "in a romantic, dating, or sexual relationship." "Paramour" is undefined in the current sexual abuse statutes, not everyday language, and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. "Romantic, dating, or sexual relationship" is identical to the language in the current D.C. Code definition of "intimate partner violence"*[130] *and is used throughout the RCC.*

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[129] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include "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 victim at the time of the act." (emphasis added).

[130] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

- This change improves the clarity and consistency of the revised statutes. The RCC commentary to this definition has been updated to reflect that this is clarificatory change in law.

(4) *The CCRC recommends replacing what was previously subsection (C) of the definition of "position of trust with or authority over" ("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") with a revised subsection (B) ("A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") and revised subsection (E) ("A person responsible under civil law for the health, welfare, or supervision of the complainant."). In the previous subsection (C) of the RCC definition, the scope of a person "charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the offense" was unclear and, interpreted broadly, former subsection (C) would include the spouses, domestic partners, and significant others of any individual with any duty or responsibility for the health, welfare or supervision of the complainant, such as doctors, taxi drivers, etc. Substantively identical language exists in the current D.C. Code definition of "significant relationship" and there is no DCCA case law interpreting it.*[131] *The CCRC recommends deleting what was previously subsection (C). A revised subsection (B) ("A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") limits spouses, domestic partners, and significant others to those of a person acting in the place of a parent per civil law. Subsection (E) of the revised definition ("A person responsible under civil law for the health, welfare, or supervision of the complainant.") continues to provide liability for any individual that has a duty under civil law for the health, welfare, or supervision of the complainant.*[132]

- This language improves the clarity, consistency, and proportionality of the revised definition. The commentary to the RCC definition of "position of trust with or authority over" has been updated to reflect that this is a possible change in law.

(5) *The CCRC recommends making "Any person, more than 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant" its own subsection (C) rather than part of subsection (B). This is a category of individual that is a person in a "position of trust with or authority over" that is unrelated to the requirements of parent, guardian, etc. in subsection (B).*

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[131] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include 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 victim at the time of the act.").

[132] Subsection (E) of the revised definition does not specify "at the time of the offense" like current subsection (C) of the definition of "significant relationship" does because the RCC sexual abuse of a minor statute requires that the sexual act or sexual contact occur "while [the actor] is in a position of trust with or authority over the complainant." The language is surplusage.

- This change improves the clarity of the revised definition.

(6) *The CCRC recommends replacing "more than 4 years older" than the complainant with "at least 4 years older" than the complainant in subsection (C) of the RCC definition of "position of trust with or authority over." The current definition of "significant relationship"*[133] *and the previous RCC version of the definition of "position of trust with or authority over" includes certain individuals "more than 4 years older than the complainant." This is a difference of a day in liability compared to the current child sexual abuse statutes*[134] *and several RCC sex offenses that require "at least" a four year age gap between the defendant and a minor complainant.*[135] *There is no DCCA case law interpreting the current definition of "significant relationship" or the intended scope of "more than 4 years older." The revised definition requires a gap of "at least four years older," the same age gap that is in other RCC sex offenses, such as sexual abuse of a minor (RCC § 22E-1302).*

- The change improves the clarity and consistency of the revised statute and removes a possible gap in liability. The RCC commentary to the definition of "position of trust with or authority over" reflects that this is a clarificatory change.

(7) *The CCRC recommends replacing "care" with "health, welfare" in the catch-all provision of the definition of "position of trust with or authority over" and making it a separate subsection (E). With this revision, subsection (E) of the definition would specify a "person responsible under civil law for the health, welfare, or supervision of the complainant" and this language would no longer be part of subsection (D) of the definition. The RCC consistently uses the phrase "person responsible under civil law for the health, welfare, or supervision of the complainant," and the language is in subsection (B) of the current D.C. Code definition of "significant relationship."*[136] *Making this provision a separate subsection clarifies that the individuals listed in subsection (D) of the definition do not have to have a responsibility under civil law for the health, welfare, or supervision of the complainant. The current D.C. Code definition of "significant relationship" is open-ended and defines the term as "includ[ing]" the specified*

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[133] D.C. Code § 22-3001(10)(B) (defining "significant relationship" to include "A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.").

[134] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[135] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be included in the current definition of "significant relationship" because the actor is not "more than four years older" than the complainant.

[136] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include the "person . . . who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

individuals or "any other person in a position of trust with or authority over" the complainant. [137] *There is no DCCA case law interpreting the definition of "significant relationship" and it is unclear whether a job title or specified relationship to the complainant is sufficient, or if a substantive analysis of the relationship between the actor and the complainant is required.*

- This change improves the clarity of the revised definition and its consistency with other RCC statutes. The RCC commentary to this definition has been updated to reflect that this is a possible change in law.

(8) *USAO, App. C at 282, recommends revising subsection (D) of the definition of "position of trust with or authority over" to specifically include a "contractor." USAO states that adding "contractor" "provides a more comprehensive definition of those responsible for the care and supervision of children at schools and other institutions" and that "[m]any organizations do not hire all of their employees directly; rather, they enlist contractors as part of that staffing." USAO states that contractors "have the same interactions with children and responsibilities as many of the direct employees do, it makes no sense to distinguish them for purposes of liability."*

- The RCC incorporates this recommendation by specifically including reference to a "contractor" in the revised definition. A contractor may have extensive or significant contact with the minors at a school or other institution, similar to an employee or volunteer. This change clarifies and may eliminate a gap in liability in the revised statutes. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(9) *USAO, App. C at 282, recommends deleting "under civil law" from the catch-all provision in the definition of "position of trust with or authority over" (now subsection (E)). With this revision, the catch-all provision would read "or other person responsible for the health, welfare, or supervision of the complainant." USAO states that "under civil law" is "unnecessarily confusing, and needlessly requires a comprehension of civil law to interpret criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

[137] D.C. Code § 22-3001(10)(D) ("Any employee 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 any other person in a position of trust with or authority over a child or a minor.*") (emphasis added).

(10) *The CCRC recommends deleting "a school, church, synagogue, mosque" from "a school, church, synagogue, mosque, or other religious institution" in subsection (D) of the definition of "position of trust with or authority over." With this revision subsection (D) will specify a "religious institution." Including specific types of religious institutions is unnecessary and inconsistent with the general references to school, athletic program, etc. in the rest of the subsection.*

- This change improves the clarity of the revised definition. The commentary to the definition specifies that subsection (D) includes a school, church, synagogue, or mosque and that this is a clarificatory change to law.

(11) *The CCRC recommends requiring "has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant" in subsection (D) of the revised definition of "position of trust with or authority over" and deleting the phrase "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff." With this revision, subsection (D) of the revised definition would read "Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program that has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant." Subsection (D) of the current D.C. Code definition of "significant relationship" specifies "any employee or volunteer" of a school, specified institution, etc., "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."*[138] *There is no DCCA case law interpreting the definition of "significant relationship." It is unclear in the current D.C. Code subsection (D) whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. In current law and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring the actor to have significant contact with the complainant or to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal.*

[138] D.C. Code § 22-3001(10)(D) (defining "significant relationship" to include "Any employee 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 any other person in a position of trust with or authority over a child or a minor.").

- This change improves the clarity, consistency, and proportionality of the revised statute. The RCC commentary to this definition has been updated to reflect that this is a possible change in law.

"Possess"

(1) *USAO, App. C at 398, recommends revising the commentary to strike language stating, "Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession." USAO states that, "[i]f 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."*

- The RCC partially incorporates this recommendation by clarifying the revised commentary. Under current District law, a person does not constructively possess an object that they have (temporarily or permanently) lost because they do not have the present *ability* to exercise dominion and control over that object.[139] However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are *somewhere* in a set of drawers constructively possesses their keys. The RCC commentary is updated to clarify this point and to cite the example given.

"Prohibited Weapon"

(1) *The CCRC removes this definition from RCC § 22E-701 because it is no longer used in the RCC.*

"Property"

*(1) USAO, App. C at 281, recommends revising the definition of "**property**" to include "money," "captured or domestic animals," and "documents evidencing ownership in or of property" 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 theft of money and domestic pets)."*

- The RCC partially incorporates this recommendation by adding "money" and "any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed" to subparagraph (E) and

[139] *See* Crim. Jur. Instr. for D.C. 3.104 (2019) ("[A] person may exercise control over property not in his or her physical possession if that person has both the *power* and the intent at a given time to control the property. This is called 'constructive possession.' Mere presence near something or mere knowledge of its location, however, is not enough to show possession." (Emphasis added.)).

"animal" to subparagraph (B). The RCC does not incorporate the modifier "captured or domestic" for an animal as it raises the question of when an animal is "captured," and suggest that an animal must be captured to be something of "value," as is required by the definition. This change improves the clarity and consistency of the revised definition. The commentary to the RCC definition of "property" has been updated to reflect that these are clarificatory changes to current law.

*(2) The CCRC recommends deleting "Debt" in subparagraph (E) of the definition of "**property**."*

- As noted above, the revised definition has been updated to include "money" and "any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed." "Debt" is included in the current definition of "property."[140] The term is not defined statutorily and there is no DCCA case law interpreting it. It is unclear, however, how "debt" can be "anything of value" that is required by the definition of "property." This change improves the clarity and consistency of the revised definition by specifying types of property that satisfy the definition's requirement of "anything of value." The commentary to the RCC definition of "property" has been updated to reflect that this is a possible change in current law.

"Protected person"

(1) OAG, App. C at 247, recommends revising the lead-in language to the definition of "protected person" so that it refers to a "complainant" instead of a "person." OAG states that the definition otherwise consistently uses the term "complainant."

- The RCC incorporates this recommendation by replacing "person" with "complainant" in the lead-in language of the definition. This change improves the clarity and consistency of the revised definition.

(2) The CCRC recommends in subsection (B) of the definition of "protected person" requiring that the actor is under 65 years of age. With this change, subsection (B) of the definition requires that the complainant is "65 years of age or older, when, in fact, the actor is under 65 years of age and at least 10 years younger than the complainant." This change was proposed in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report),[141] but the revised statutory text for the definition omitted the requirement. This change preserves subsection (B) of the definition, and the enhanced gradations in RCC offenses that use the term, for predatory behavior targeting older complainants. It is also consistent with subsection (A) of the

[140] D.C. Code § 22-3201(3).

[141] First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code* (Report), Appendix D - Disposition of Advisory Group Comments & Other Changes to Draft Documents (4-1519).

definition, which requires that the actor be at least 18 years of age when the complainant is under 18 years of age.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *USAO, App. C at 281, recommends removing the requirements for the age of the actor and the age gaps between the actor and the complainant in subsection (A) of the definition of "protected person." With this change, subsection (A) would require only that the complainant is under the age of 18 years, without the additional requirements that the actor is at least 18 years of age and at least four years older than the complainant. USAO states that this change is "consistent with current law" in D.C. Code § 22-3611 (penalty enhancement for committing certain crimes against minors), "which focuses solely on the age and vulnerability of the complainant." USAO compares the current penalty enhancement to the RCC sexual abuse of a minor statute and current child sexual abuse statutes, which generally require at least a four year age gap between the actor and the complainant for liability. USAO states that unlike the RCC sexual abuse of a minor statute and current child sexual abuse offenses, where the four year age gap is "the only thing that makes Sex Abuse of a Minor a crime at all," the penalty enhancements "are already criminal, regardless of any age disparity." There is no discussion specific to the requirement that the actor be at least 18 years of age.*

- The RCC does not incorporate USAO's recommendation because the four year age gap improves the proportionality of the revised definition. The current penalty enhancement for crimes against minors requires that the defendant be at least 18 years of age[142] and that there be at least a two year age gap between the defendant and a complainant under the age of 18 years.[143] As is discussed in the RCC commentary to the definition of "protected person," the RCC increased the required age gap from two years to four years to match the required age gap in several current and RCC sex offenses. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting very young complainants.

(4) USAO, App. C at 281, recommends removing the required 10 year age gap between an actor that is 65 years of age or older and a younger complainant from subsection (B) of the definition of "protected person" so that the subsection requires that the complainant be under 65 years of age or older (subsection B)). USAO states that this change is "consistent with current law" in D.C. Code § 22-3601 (penalty enhancement for committing certain crimes against senior citizens), "which focuses solely on the age and vulnerability of the complainant."

- The RCC does not incorporate USAO's recommendation because the 10 year age gap improves the proportionality of the revised definition. The

[142] D.C. Code § 22-3611(c)(1) (defining "adult" for the purposes of the minor enhancement as "a person 18 years of age or older at the time of the offense.").

[143] D.C. Code § 22-3611(a), (c)(3) ("Any adult, being at least 2 years older than a minor . . . ." and defining "minor" as "a person under 18 years of age at the time of the offense.").

age gap requirement reserves the penalty enhancement for predatory behavior targeting older complainants.

"Safety"

(1) *The CCRC removes this definition from RCC § 22E-701 because it was included in error. This definition of "safety" applies only to the revised offenses of stalking*[144] *and electronic stalking.*[145]

"Serious bodily injury"

*(1) USAO, App. C at 282-283, recommends revising the definition of "**serious bodily injury**" to include as subparagraph (D) a "protracted loss of consciousness." USAO agrees that under current DCCA case law, a brief loss of consciousness alone may not be sufficient for "serious bodily injury," even though the current statutory definition of "serious bodily injury" includes "brief loss of consciousness." However, USAO states that a "protracted loss of consciousness would qualify as a serious bodily injury under current law."*

- The RCC incorporates this recommendation by codifying as subparagraph (D) a "Protracted loss of consciousness." The commentary has been revised to note that this is a clear change to the current statutory definition of "serious bodily injury" and that "protracted" in this subparagraph is intended to have the same scope as "protracted" in subparagraphs (B) and (C) of the definition. This change improves the clarity of the revised definition and its consistency with the RCC definition of "significant bodily injury."

"Sexual act"

(1) *OAG, App. C at 247-248, recommends revising subsection (C) of the definition of "sexual act" to state "an actor's body part, including a hand or finger" to make clear that body parts other than a hand or a finger are sufficient.*

- The RCC incorporates this recommendation by replacing "a hand or finger" with "any body part." The RCC uses "any body part," as opposed to the "actor's" body part to include within the definition instances when the complainant or a third party does the penetration. The commentary to the RCC definition has been updated to reflect that this is a possible change in law. This change improves the clarity of the revised statute and removes a possible gap in liability.

(2) *USAO, App. C at 283-84, recommends replacing the word "desire" with "intent" in subsection (C) of the definition of "sexual act" and what is now sub-subparagraph (B)(ii) of the definition of "sexual contact" so that the definitions require "with the intent to" sexually harass, etc., instead of "with the desire to."*

[144] RCC § 22E-1801.
[145] RCC § 22E-1802.

USAO states that "intent" is used in the current definitions of "sexual act" and "sexual contact." USAO states that "desire" is "ambiguous" and "intent" should be used because it is defined in the RCC and used throughout the RCC.

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the revised statutes. "Intent" is a defined culpable mental state in RCC § 22E-206, and per the rule of construction in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "intent" is included in an RCC offense through the definition of "sexual act" or "sexual contact," that would complicate the interpretation of culpable mental states in that offense and future drafting. Moreover, while the current D.C. Code definitions of "sexual act" and "sexual contact" both refer to "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," the meaning of "intent" in that language is undefined and unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of "purpose" as "conscious[] desire" or "intent" as "practically certain." The RCC references to "desire" in the definitions of sexual act and sexual contact track the higher culpable mental state in the RCC definition of "purpose" without triggering the rule of construction in RCC § 22E-207 that would complicate offense drafting and interpretation. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(3) *USAO, App. C at 283, states that it agrees with the definition of "sexual act" to the RCC definition of "sexual contact." USAO states that this "makes a sexual contact a lesser-included of a sexual act [and] is an appropriate way to codify this principle."*

"Sexual contact"

(1) *USAO, App. C at 283-284, recommends replacing "degrade" in the definition of "sexual contact" with "abuse, humiliate, harass, degrade" so that the definition requires acting with "intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person." USAO states that this language tracks the sexual intent language in subsection (C) of the RCC definition of "sexual act." In addition, USAO states that "[s]exual assault prosecutions often rely on the 'abuse, humiliate, harass, or degrade' intent language" because "[a]bsent evidence of the defendant having an erection or outwardly manifesting sexual pleasure . . . the government may not be able to prove that the defendant's actions were sexually arousing or gratifying" but the government "would be able to show that, at a minimum, the defendant intended to humiliate or harass the victim." USAO gives as an example a scenario where the "defendant grabs the buttocks of a stranger" and the "victim . . . likely feel[s] sexually violated." USAO states that this should be prosecuted as a sex offense.*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute and may authorize disproportionate penalties. After the Advisory Group submitted written comments on the

First Draft of Report #36 – Cumulative Update to RCC Chapters 3, 7, and the Special Part, but before the CCRC reviewed them, the RCC definitions of "sexual act" and "sexual contact" were revised so that subsection (C) of the definition of "sexual act" and the definition of "sexual contact" required the same "desire to sexually abuse, humiliate, harass, degrade, abuse, or gratify any person."[146] The definitions, and, by extension, the RCC offenses that use these terms, are limited to penetration and contact that is sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205).

- Notably, the ALI's most recent revised definition of "sexual contact" requires the purpose of "sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person."[147] In addition, as was noted in the CCRC's First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018), only a small minority of reformed jurisdictions include a non-sexual intent in their definitions of "sexual contact" or a similar term.[148] The ALI's revised definition of "sexual act" does not require an additional intent, but does exclude penetration "when done for legitimate medical, hygienic, or law-enforcement purposes."[149]

"Significant bodily injury"

(1) *USAO, App. C at 284, recommends changing "temporary loss of consciousness" in the definition of "**significant bodily injury**" to either "brief loss of consciousness" or "any loss of consciousness." USAO states that "temporary"*

[146] Subsection (C) of the current D.C. Code definition of "sexual act" and the current definition of "sexual contact" both require an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. Code § 22-3001(8)(C), (9).

[147] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.0(2)(c).

[148] Pages 41-45 of the CCRC's First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018) stated (with citations omitted for the purposes of this appendix):

> At least 24 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (reformed jurisdictions) define "sexual contact" or a similar term that encompasses sexual touching. Twenty-one of these reformed jurisdictions specify an additional intent or purpose requirement or require that the contact can be reasonably construed for a specified intent or purpose. Of these 21 reformed jurisdictions, two jurisdictions include an intent or purpose to abuse and jurisdictions include an intent or purpose to humiliate. None of the 21 reformed jurisdictions specifically include an intent or purpose to "harass," but one of the jurisdictions requires an intent to "terrorize" and two additional reformed jurisdictions require an "aggressive" intent or the purpose of arousing or satisfying "aggressive desires."

[149] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.0(2)(a). This definition was approved by the membership in May 2017.

is "vague" because "[u]nless a victim dies or falls into an irreversible coma, any loss of consciousness is, by definition, temporary."

- The RCC incorporates this recommendation by replacing "temporary loss of consciousness" with "brief loss of consciousness." This change improves the clarity of the revised definition and its consistency with the RCC definition of "serious bodily injury."

(2) *The CCRC recommends revising the definition of "**significant bodily injury**" to replace "caused by" with "sustained during" in the final sentence of the definition. With this revision, the definition would include in the list of "per se" significant bodily injuries "a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation." In the previous version of this definition, "caused by" created ambiguity by suggesting that RCC causation requirements applied (RCC § 22E-204).*

- This change improves the clarity of the revised definition. The commentary to the RCC definition of "significant bodily injury" has been updated to state that there is no requirement that the strangulation or suffocation cause the contusion or other bodily injury to the neck or head.

(3) *USAO, App. C at 284-285, recommends changing "a contusion or other bodily injury to the neck or head caused by strangulation or suffocation" in the definition of "**significant bodily injury**" to "a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation." This would add "petechia" as a specified type of bodily injury sustained during strangulation or suffocation and specify the "eyes and face" in addition to the "neck and head." USAO states that petechiae (plural of petechia) "often develop on a victim's face or neck as a result of strangulation or suffocation" and that although they may be included in "other bodily injury," the definition should specify petechiae to eliminate future confusion and litigation. Similarly, USAO states that "neck and eyes" are likely included in "head," but "specifically listing them reduces potential future confusion and litigation."*

- The RCC partially incorporates this recommendation by including "petechia" in the list of specified injuries to the head or neck sustained during strangulation or suffocation.[150] The RCC does not specify "neck and eyes" because "head and neck" are already specified in the current RCC definition and it may lead to confusion over whether injuries to other parts of the "head and neck are included (e.g. the mouth or tongue). The commentary to the revised definition makes clear that "neck and eyes" are included in the scope of "neck and head."

(4) *The CCRC recommends revising the definition of "**significant bodily injury**" so that the second sentence listing the "per se" injuries begins with "In addition." This revision further clarifies that an injury that constitutes one of the "per se" injuries is sufficient for "significant bodily injury" independent of the first sentence.*

- This change improves the clarity of the revised statute.

[150] As is discussed elsewhere in this Appendix, the RCC definition of "significant bodily injury" replaces "caused by" with "sustained during" in the strangulation or suffocation provision of the definition.

(5) *USAO, App. C at 285-286, recommends including in the definition of "**significant bodily injury**" "a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives." The RCC definition of "significant bodily injury" includes as a per se significant bodily injury "a laceration that is at least one inch in length and at least one quarter inch in depth." USAO states that under current law, lacerations requiring stitches are sufficient proof of significant bodily injury and that there is no size requirement for these types of lacerations. USAO states that "a layperson will likely not know the size of his or her laceration" and "[e]ven 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. USAO states that medical professionals "often do not even measure the depth of a laceration." USAO states that requiring a certain size of laceration means that "every case involving this type of significant bodily injury would require medical testimony" and that "medical testimony should not be required in every case to prove whether a significant bodily injury is present." Including the USAO proposed language, it says, would allow "a layperson to testify about the types of injuries he or she sustained."*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the definition by including comparatively less serious injuries in the list of "per se" significant bodily injuries. The list of "per se" significant bodily injuries in the RCC definition is reserved for injuries that clearly meet the high threshold for "significant bodily injury" under DCCA case law. As is discussed in the commentary to the RCC definition, the RCC definition generally codifies the requirements of this case law— a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. It is possible that a laceration that receives stitches, sutures, etc. does not meet these requirements, so it is not a per se significant bodily injury. In addition, under both DCCA case law[151] and the RCC definition, the fact that medical treatment is received is not dispositive of whether it was "required." DCCA case law does not establish a per se rule that lacerations requiring stitches are sufficient for "significant bodily injury." The case law is limited to fact-specific determinations of a laceration, combined with other evidence of injury or treatment received.[152]

[151] *See, e.g.*, *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required." (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)).

[152] *See, e.g.*, *Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (finding that an injury that was sustained in a "violent group attack" and "[a]s a result, in addition to bruises and abrasions, [the individual] suffered 'gashes to her face' going down to the 'white meat,' and was a bleeding 'mess'" and received nine stitches was sufficient for "significant bodily injury."); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) ("Here,

Although lay persons and medical professionals may not have the measurements of a given laceration, such a laceration may still qualify under the first part of the RCC definition of "significant bodily injury." As with any other injury, medical professional testimony may be helpful or, in some cases, necessary to establish that an injury satisfies the definition.

"Significant Emotional Distress"

(1) *OAG, App. C at 248, recommends redrafting the sentence "It must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living." Although the sentence is taken from a judicial opinion, the meaning of the phrases "the like" and "commonly experienced" are unclear. OAG recommends substituting the phrase "similar feeling" for "the like" and further explaining the meaning of "commonly experienced" in commentary.*

- The RCC incorporates this recommendation by replacing the phrase "the like" with "similar feeling" and clarifying in commentary the meaning of "commonly experienced." The phrase "commonly experienced," borrowed from recent District case law,[153] is explained in the commentary as incorporating a reasonableness standard as to the experience of an average person. For example, per "commonly experienced" unhappiness is not to be assessed by the experience of a chronically depressed person. The word "commonly" is generally understood to mean "of or relating to a community at large."[154] Factfinders are often required to judge reasonableness and community standards.[155]

"Value"

(1) *USAO, App. C at 286, recommends deleting subsection (C) from the definition of "**value**," which establishes a fixed dollar value for a payment card and for an unendorsed check. USAO states that this subsection is "plainly at odds with D.C. law" and, as the RCC commentary acknowledges, has not been adopted in other jurisdictions.*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the definition and risk disproportionate penalties. Under the current statutory definition of "value," the "value" of a payment

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where the injury to the ear required four to six stitches and left a scar and where treatment was sought and administered with reasonable promptness, we have no difficulty in sustaining the trial court's conclusion that the injury [constituted "significant bodily injury"].).

[153] *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019).

[154] Merriam-Webster.com, *"commonly"*, 2018, *available at* https://www.merriam-webster.com/dictionary/commonly.

[155] *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (defining obscenity to require that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest).

card, check, or "other written instrument" is the amount of property "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."[156] The language "can be obtained" is inherently unclear[157] and there is no case law on the meaning of this phrase. A fixed amount provides a fairer and more efficient means of calculating the value of an unused payment card or blank check, and dispenses with litigation over the amount of credit or funds that "can be obtained" by a given card or bank account at the time of the property crime under a banking or credit card institution's policies and practices. The RCC approach also avoids disparate valuation of people's credit cards and checks based on their available credit or size of their bank account.[158] Determining the value of a payment card or check based on the value of property that *could* be obtained through its use may lead to penalties that are disproportionately severe relative to the actual harm because this language equates potential losses to actual losses. For example, stealing a credit card with a limit of $10,000 or a book of checks to an account with $10,000 available would be equivalent to stealing $10,000 in cash, even if the credit card or checks are never used. In the RCC, if the credit cards or checks are used to obtain property, the value of the property obtained determines the gradation of the relevant RCC offense, such as theft, fraud, etc. However, for stealing, without using, a credit card or blank check, the amount fixed by the statute applies per credit card or check. One benefit of this approach is that thefts and other crimes from wealthy persons (who are likely to have higher credit limits and checking balances) are not treated as more serious than equivalent crimes from poor persons.[159] The RCC approach also generally accords

[156] D.C. Code 22-3201(7) ("'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.").

[157] For example, if a defendant steals a credit card with a credit limit of $10,000, the language could support a valuation of the credit card at $10,000 (the amount of property that "can be obtained through its use."). However, it is unclear how the credit card would be valued if, despite the $10,000 credit limit, the owner had charged $7,000 to the account, leaving only $3,000 of credit. If the defendant uses the credit card to buy a $500 pair of shoes, the proposed language could also support a valuation of the credit card at $500 (the amount of property that "has been . . . obtained through its use."). It is also unclear whether the "has been . . . obtained through its use" refers to the actions of the defendant or the owner of the credit card. In the context of a check, it is also unclear how banking institution policies and practices relating to overdraft protection should be considered when evaluating the amount that "can be obtained."

[158] For example, theft of a purse with two payment cards connected to accounts of $300 each would, if aggregated, provide a basis for theft of $600 under current law—graded as fourth degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but in the name of a wealthier person who has credit limits of $15,000 each would, if aggregated, provide a basis for theft of $30,000—graded as third degree theft in the RCC or a 10 year felony under current law.

[159] The USAO comment states that its proposed language "better align[s] 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." The Model Penal Code provision on value does suggest taking the highest of reasonable methods of determining value but, the Model Penal Code—issued in 1962, before

with CCRC public opinion polling of District voters which indicates a marked difference between stealing a credit card with a $5,000 limit and stealing $5,000 cash. [160]

(2) *USAO, App. C at 286, recommends rewriting the definition of "**value**" to mean "the greater of" several alternatives that differ from the alternative means of valuation in the RCC definition.*[161] *USAO's proposed definition would be: "'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 property or services that has been or can be obtained through its use." USAO states that this change "better align[s] the definition" with the Model Penal Code, current federal law, and the "fairly recent amendments to the D.C. Omnibus Public Safety Amendment Act of 2009.*

- The RCC does incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The RCC definition of "value" requires that the fair market value of the property be used unless it "cannot be ascertained," in which case the RCC definition lays out alternative methods of valuation depending on the type of property at issue. Replacing "cannot be ascertained" with "the greater of" would require the prosecution in every instance to determine value using all methods of valuation before comparing the numbers, and may increase an actor's liability based on factors apparently irrelevant to the harm to the complainant. For instance, theft of a complainant's recalled

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widespread use of payment cards—did not address payment cards or suggest that blank checks should be valued at the amount of the account to which they are tied. See MPC § 223.1. Consolidation of Theft Offenses; Grading; Provisions Applicable to Theft Generally ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal.").

[160] See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 4.26 provided the scenario: "Stealing a credit card with an available limit of $5,000, but never using the stolen card." Question 4.26 had a mean response of 4.7, compared to a mean response of 6.2 in that survey for Question 4.24 provided the scenario: "Stealing property (other than a car) worth $5,000."

[161] The RCC definition of "value" is:

A. The fair market value of the property at the time and place of the offense; or
B. If the fair market value cannot be ascertained:
    1. For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;
    2. For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and
    3. For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.
C. Notwithstanding subsections (A) and (B) of this section, the value of a payment card is $[X] and the value of an unendorsed check is $[X].

and highly unusual car (or other object), if evaluated under a "replacement cost," may have a very high valuation because a replacement cannot be found or crafted, even though the complainant's only interest in the car is for transportation and the car has a very low fair market value because it has a dangerous defect. In addition, as noted above, the proposed language for determining the value of credit cards, checks, and other written instruments- the amount of property "that has been or can be obtained through its use"- does not provide a clear, consistent standard for the value of these written instruments.[162]

(3) *The CCRC recommends revising subparagraph (C) of the definition of "value" to specify that it refers to the value of a payment card "alone" or the value of an unendorsed check "alone." This clarifies that (C) establishes the value of a payment card or unendorsed check as an item of property, as opposed to it use in a property crime such as payment card fraud (RCC § 22E-2202) or check fraud (RCC § 22E-2203).*

- This change improves the clarity of the revised definition.

[162] This language appears in the current definition of value (D.C. Code § 22-3201(7) and there is no DCCA case law interpreting it. For example, if a defendant steals a credit card with a credit limit of $10,000, the language could support a valuation of the credit card at $10,000 (the amount of property that "can be obtained through its use."). However, it is unclear how the credit card would be valued if, despite the $10,000 credit limit, the owner had charged $7,000 to the account, leaving only $3,000 of credit. If the defendant uses the credit card to buy a $500 pair of shoes, the proposed language could also support a valuation of the credit card at $500 (the amount of property that "has been . . . obtained through its use."). It is also unclear whether the "has been . . . obtained through its use" refers to the actions of the defendant or the owner of the credit card.

Murder. RCC § 22E-1101.

(1) *OAG at App. C. 248-249, notes that the Commentary on the penalty enhancement for murder 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." OAG suggests that this language should be incorporated into the statute, perhaps as a definition of "harm" that would also help clarify other provisions too. OAG says the question is what, in addition to bodily injury, is encompassed in "harm," but does not recommend specific language.*

- The RCC does not incorporate this recommendation because defining too many terms, particularly frequently used terms, does not improve the clarity of the revised criminal code. The term "harm" as used in this statute accords with the ordinary use of the term, and does not warrant a specified definition.

(2) *USAO at App. C.287, recommends that felony murder be classified as first degree murder with separate provisions in first degree murder addressing both purposeful felony murder and non-purposeful felony murder. USAO says that "deterrence theories that have been recognized by the D.C. Court of Appeals and other courts [] support categorizing Felony Murder as First Degree Murder."*

- The RCC does not incorporate USAO's recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Killing another person with premeditation and deliberation, whether or not the actor was engaged in a felony, makes the actor liable for first degree murder under the RCC just as in the current D.C. Code. When a killing is committed with premeditation and deliberation while engaged in a felony, the RCC authorizes separate punishments for the killing (as first degree murder) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for first degree murder, ensuring each crime is accounted for. Similarly, purposely killing another person without premeditation and deliberation, or doing so knowingly or with extreme indifference to human life makes the actor liable for second degree murder under the RCC, whether or not the actor was engaged in a felony. When a killing is committed purposely, knowingly, or with extreme indifference while engaged in a felony, the RCC authorizes separate punishments for the killing (as second degree murder) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for second degree murder alone, ensuring each crime is accounted for. Consequently, to the extent that a prospective criminal guides his or her behavior by the availability of increased penalties, the RCC first and second degree framework deters commission of another felony during a homicide, or a

homicide during a felony by proportionately increasing the penalties based on the conduct.

- In addition, the RCC grades a negligent (i.e. accidental, unintended) killing of another person during the course of specified major felonies (e.g. sex assault, robbery, or kidnapping) as equivalent to a second degree murder. Normally, a negligent killing is punished in the D.C. Code[163] and the RCC as a low-felony offense. And where a person is killed negligently in the course of another felony, the RCC authorizes separate punishments for the killing (as negligent homicide) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for negligent homicide alone, ensuring each crime is accounted for. But, for a negligent killing during specified major felonies (e.g. sex assault, robbery, etc.), the RCC provides far greater penalties, as if the behavior were purposeful (but not with premeditation or deliberation) or knowing or with extreme indifference to human life. The RCC's major increase in liability for accidental, unintended deaths during specified felonies appropriately recognizes the seriousness of such conduct, even if the death was unintended.
- Under the USAO proposal, any accidental killing that occurs during an enumerated felony would be subject to the same penalty as an intentional murder committed with deliberation and premeditation. This is a disproportionately severe penalty when the actor was merely negligent and had no intent to cause the death of another, or did not act with extreme indifference to human life.. Punishing such killings during a felony equal to second degree murder as in the RCC also may be too severe based on polling of District residents,[164] but the RCC change is a significant decrease from the D.C. Code's treatment of such killings as equal to first degree murder. Beyond retributive measures of proportionality, the CCRC is not aware of any evidence that the penalty difference between second degree murder and first degree murder would deter behavior. To the contrary, general research on deterrence summarized by the Department of Justice's National Institute of Justice indicates there is little effect by increasing imprisonment penalties and, for homicide, there is no apparent deterrence effect of even the death penalty on homicide rates.[165]

(3) *USAO at App. C. 287, recommends removing the requirement for felony murder that the defendant act negligently in causing the death while committing an enumerated felony.*

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[163] See D.C. Code § 50–2203.01, Negligent homicide (punishable by up to 5 years imprisonment). This offense further requires that the actor caused the death of another through operation of a vehicle.

[164] See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluations of various killings during felonies as being significantly less severe, by at least one classification, than a manslaughter scenario described as: "An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)."

[165] See, https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Under the USAO proposal there would be murder liability on the basis of strict liability—when the defendant was not even negligent in causing the death of another—meaning that murder punishment is imposed for even objectively reasonable mistakes and accidents. For example, if in the course of a robbery, the defendant causes a fatal car accident due to the negligence of another driver and despite following all traffic safety laws and regulations, murder liability would be imposed.
- The RCC provides second degree murder liability for causing the death of another during an enumerated felony, but imposes a minimal negligence requirement as to the conduct that causes death.

(4) *USAO at App. C. 288, recommends removing the requirement for felony murder that the lethal act be committed in furtherance of the underlying felony.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Under the USAO proposal, acts unrelated to the predicate felony but coincidentally occurring at the same time would be subject to murder liability. However, acts that are not taken in furtherance of the felony are not inherently dangerous, and do not merit heightened liability for murder based on a merely negligent culpable mental state.
- The RCC provides second degree murder liability for merely negligent conduct only when that conduct is an action in furtherance of the underlying felony. Under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.

(5) *USAO at App. C. 289, recommends including fifth degree robbery and felonies involving controlled substances as enumerated felonies for felony murder.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.

- Under the USAO proposal, robberies that do not involve a weapon or infliction of significant bodily injury and all felony drug trafficking crimes would be eligible for the felony murder exception. The RCC enumerated felonies, similar to those enumerated in the current D.C. Code murder statute, are limited to certain felonies that create an immediate and grave risk to human life.[166] However, as the current D.C. Code does not grade robbery, the RCC's grading of the offense raises the issue of whether some types of robbery are not as inherently dangerous as other types. First through fourth degree RCC robbery involve use of a weapon, or the infliction of significant or serious bodily injury. These forms of robbery are sufficiently dangerous to warrant being enumerated as predicate offenses for felony murder. Fifth degree robbery, however, covers unarmed robberies that only involve threats, physical force, or bodily injury. The type of bodily injury covered by fifth degree robbery is similar to simple assault under current law. Fifth degree robbery, while an offense against persons, does not create a similar inherent risk of death or serious bodily injury to warrant inclusion in the felony murder statute.
- Felony controlled substance offenses also do not inherently involve immediate and grave risks to human life. Criminalizing as murder accidental deaths that occur during the commission of a drug offense authorizes disproportionately severe penalties.
- The RCC continues to authorize serious penalties for killings that occur during unenumerated felonies, although the punishment may be less severe. Under the RCC an actor may still be held liable for recklessly killing someone with extreme indifference under RCC § 22E-1101, Second Degree murder in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct. Also, under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.

(6) *USAO at App. C.290, recommends that a person should be liable for felony murder if the decedent was an accomplice to the underlying felony.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Under the USAO proposal an actor who accidentally kills an accomplice while committing an enumerated felony would be eligible for the felony

[166] Notably, the current list of enumerated felonies in the D.C. Code § 22–2101 murder statute does not include a wide array of serious felonies involving the use of force (e.g. third degree sexual abuse, or forced commercial sex).

murder exception. However, the enumerated offenses do not involve the same inherent risk of harm to fellow participants in the underlying offense as they do to the targets of crime. Applying murder liability to the accidental deaths of accomplices would be contrary to the normal culpable mental state requirements for murder liability and authorize disproportionately severe sentences.

- The RCC continues to authorize serious penalties for unintentional killings to any person, although the punishment may be less severe. Under the RCC an actor may still be held liable for recklessly killing someone with extreme indifference under RCC § 22E-1101, Second Degree murder in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct. Also, under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.

(7) *USAO at App. C.291, recommends that an accomplice to the underlying felony should be liable for felony murder based on the lethal act committed by a co-felon.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties by equivalently punishing conduct of differing seriousness. The RCC murder and other statutes provide felony liability for killing a person, attempting to kill a person, and being an accomplice to (or committing) a felony crime—all of which may apply when a person is an accomplice to a felony in which the co-felon kills someone. However, the RCC does not recommend punishing a co-felon who is not the one who killed the victim and did not assist or encourage (or otherwise act as an accomplice to) the *killing* the same as person who actually committed the lethal act.
- In the USAO hypotheticals, any person who fires shots during a robbery but misses can still be prosecuted for attempted murder, the underlying robbery, and any applicable weapons offenses. The penalties for these offenses, which can be imposed consecutively, are proportionate as applied to a person who does not actually cause the death of another. In contrast, USAO's proposal would allow accomplices to be convicted of first degree murder even when they did not commit a lethal act and had no intent to kill. For example, a lookout for a robbery, who did not know or desire that anyone be injured or killed, could be held liable for murder if his co-felon unexpectedly kills another person during the course of the robbery. Murder liability could apply even if the accomplice actively tried to prevent the use of lethal force. Murder liability in these cases is disproportionately severe relative to the defendants' culpability.
- The RCC position is consistent with the treatment of murder outside the court's common law felony-murder doctrine. For example, USAO notes that if in the course of a robbery, two robbers both fire shots and the first robber hits and kills a person, the second robber should be subject to the same liability as the first robber. However, outside of the felony murder

context, it is well established that a person who unsuccessfully attempts to kill another person may only be convicted of attempted murder. If two people, with intent to kill, shoot at a person, and one shooter misses, he is not subject to the same liability as the shooter who actually hits and kills the person. USAO's recommendation would impose murder liability on defendants who did not actually kill anyone. USAO also notes that in some cases when there is more than one shooter, it may not be possible to determine who actually fired the fatal shot. While this is true, it does not justify holding a person liable for murder without proving that the person actually caused the death of another. Outside of the felony murder context, if multiple people fire shots resulting in the death of another, it may be similarly difficult to determine which person fired the fatal shot. In those cases, murder liability still requires proving that a particular person actually fired the fatal shot. It would be inconsistent to apply a higher standard of proof in cases in which the actors had intent to kill, than in the felony murder context, which does not require intent to kill.

- To date, the CCRC has not issued draft recommendations regarding *Pinkerton* liability, but in some cases the current *Pinkerton* liability rule would allow a person to be liable for the lethal act committed by another in furtherance of a conspiracy. The CCRC plans to review and issue a recommendation on *Pinkerton* liability in 2020 and, at that time the CCRC will review this matter further.

(8) *USAO at App. C.292, recommends removing the language "with extreme indifference to human life" from the murder and manslaughter statutes.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Removing the "extreme indifference" language would be inconsistent with current District law regarding the requirements for "depraved heart" murder.[167]
- Under the USAO proposal the culpable mental state required for murder would be significantly lower than current law. Removing the "extreme indifference" language would eliminate the requirement that the actor disregarded an extreme risk of death. Depraved heart murder treats accidental killings as tantamount to intentionally taking the life of another. This is only justifiable in rare circumstances in which the actor consciously disregarded an *extreme* risk of death or serious bodily injury. This is reflected in DCCA case law, which consistently recognizes that depraved heart murder requires extraordinarily dangerous conduct.[168]

[167] Notably, a sizable minority of American jurisdictions do not recognize depraved heart murder at all, while the Model Penal Code and expert commentators have recommended precisely the language in the RCC. See § 14.4(a)Creation of risk, 2 Subst. Crim. L. § 14.4(a) (3d ed.)

[168] *E.g.*, *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (the defendant led police on a high-speed chase in excess of 90 miles per hour, and turned onto a congested exit ramp causing a fatal collision.). The DCCA noted in *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (*en banc*) that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an *extreme* risk of death or serious bodily injury[.]" (emphasis added). As examples of sufficiently dangerous conduct, the DCCA listed "firing a bullet into a room occupied, as the defendant knows, by several people; starting a

Mere recklessness only requires that an actor disregards a substantial risk of death. Although it is not possible to draw a clear distinction between ordinary recklessness and recklessness with "extreme indifference to human life," some examples may illustrate difference. Causing a fatal crash by driving at 100 miles per hour on narrow residential streets would likely constitute recklessness with extreme indifference to human life. By contrast, causing a fatal crash by driving 10-15 miles per hour over the speed limit on a non-residential street absent other factors would be insufficient to prove "extreme indifference to human life." Removing the "extreme indifference" language and applying murder liability to recklessly causing death would authorize disproportionately severe penalties.

(9) *USAO at App. C. 292-293, recommends that the RCC codify that "mere words" categorically cannot be adequate provocation that mitigate murder to manslaughter.*

- The RCC does not incorporate this recommendation because it may be confusing and authorize disproportionate penalties. While there used to be a general rule in case law nationally that "words alone" cannot mitigate murder to manslaughter, the CCRC is not aware that rule has ever been codified.[169] And, recently, a number of courts that have examined the matter more closely have distinguished between "informational" and "insulting" words rather than provide a categorical bar.[170] Consistent with this modern trend, the RCC commentary notes that words may serve as a reasonable cause for extreme emotional disturbance, it is not intended that any manner of slights or insults will suffice. The mitigation defense only applies if the emotional disturbance had a "reasonable cause as determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be[.]" Words alone can serve as a mitigating factor only if a jury finds that the words were so heinous that they were a reasonable cause. The CCRC recognizes that these cases, if they arise at all, will be extraordinarily rare. Codifying a categorical "mere words" exception may not accurately reflect District case law, the focus of which has been on insulting or offensive language,[171] and as practically implemented may lead to

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fire at the front door of an occupied dwelling; shooting into ... a moving automobile, necessarily occupied by human beings ...; playing a game of "Russian roulette" with another person[.]"

[169] The matter is almost never addressed in statutes one way or another, but where it has been addressed the statute either recognizes that words may be mitigating (see, e.g. Minn. Stat. Ann. § 609.20) or precludes only "insulting words" (see, e.g. Alaska Stat. Ann. § 11.41.115).

[170] § 15.2(b)(6)Words, 2 Subst. Crim. L. § 15.2(b)(6) (3d ed.) ("The formerly well-established rule that words alone (or words plus gestures) will never do for reducing an intentional killing to voluntary manslaughter has in many jurisdictions changed into a rule that words alone will sometimes do, at least if the words are informational (conveying information of a fact which constitutes a reasonable provocation when that fact is observed) rather than merely insulting or abusive words." (internal citations omitted))"

[171] *See, e.g., High v. United States*, 972 A.2d 829, 836 n.5 (D.C. 2009) ("Furthermore, Gaither's words to High could not have amounted to adequate provocation because, as we have long held, "[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation." Nicholson,

confusion over when conduct is "mere words" as compared to words accompanied by some prior conduct or gesture.

(10) *USAO at App. C. 293-294, recommends removing the voluntary intoxication provision from the murder statute, and instead rely on the general voluntary intoxication rule.*

- The RCC does not incorporate this recommendation because it may be confusing. As discussed above, the RCC follows current District law in referencing "extreme indifference to human life" in the revised murder and manslaughter statutes, a higher culpable mental state than mere "recklessness." The general voluntary intoxication rule under RCC § 22E-209, however, only addresses imputation of awareness of a *substantial* risk, as required for ordinary recklessness. Because "extreme indifference" requires awareness of an *extreme* risk of death or serious bodily injury, the general intoxication rule would not allow a fact finder to impute awareness of the requisite degree of risk. Without the revised murder statute's voluntary intoxication provision, there may be confusion as to whether the reference to mere reckless culpable mental states in the general part's intoxication provision applies to murder.

(11) *USAO at App. C. 294, recommends several edits to the mitigation defense provision in the revised murder statute that USAO says are not meant to be substantive.*

- The RCC partially incorporates this recommendation by changing subparagraph (f)(1)(B) to require a belief that deadly force was necessary to prevent *imminent* death or serious bodily injury *to the actor or another person*. These changes clarify the revised statute.
- The RCC does not incorporate the USAO recommended language specifying that the reasonable cause of the extreme emotional disturbance must be "*based on the conduct of another*." The suggested language may be (mis-)understood to categorically preclude the possibility of mitigation based on hearing information about another person's conduct, requiring the actor to prove the conduct underlying the information rather than the actor's reasonable belief in the information.
- This change will improve the clarity of the revised criminal code.

(12) *USAO at App. C. 294, recommends removing any other partial defense to murder as a mitigating defense.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The current D.C. Code murder statutes do not discuss what may constitute a mitigating factor, and while case law has recognized imperfect self-defense and extreme emotional disturbance as mitigating factors, there is no binding case law precluding any other defense. The USAO recommendation would foreclose any other

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supra, 368 A.2d at 565 (words do not constitute adequate provocation because they amount to "a trivial or slight provocation, entirely disproportionate to the violence of the retaliation"); accord West v. United States, 499 A.2d 860 (D.C.1985) (provocation not adequate where unarmed victim walked toward armed defendant while they merely exchanged unpleasant words).").

defense by omitting RCC language in RCC § 22E-1101(f)(1)(C) regarding "Any other legally-recognized partial defense which substantially diminishes either the actor's culpability or the wrongfulness of the actor's conduct." As described in the commentary, an example of conduct that may be considered under the RCC partial defense language would be an actor who kills another person when they have the unreasonable belief that the other person was about to sexually assault them. If lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance under the RCC. Critically, what is at stake here is not of whether there is any criminal liability, but a question of lowering liability from murder to manslaughter. The RCC language provides factfinders an opportunity to decide, based on the facts of the case, whether a legally-recognized partial defense substantially diminishes either the actor's culpability or the wrongfulness of the actor's conduct Omitting any other partial defenses to murder would risk disproportionately severe penalties.

- The commentary will be updated to clarify that this provision should be narrowly interpreted, and only circumstances that significantly reduce an actor's culpability in a manner equivalent to mitigating circumstances already recognized under current law will suffice.

(13) *USAO, App. C. 295, recommends revising the murder statute so that mitigating circumstances are inapplicable to premeditated murder and felony murder.*

- The RCC partially incorporates this recommendation. The RCC murder statute has been re-drafted so the mitigation defense will not apply to felony murder. However, the RCC does not incorporate the USAO recommendation to codify that no mitigation defense can apply to premeditated murder.
- While the DCCA has not specifically ruled whether mitigating circumstances may or may not lower a first degree murder charge involving premeditation to manslaughter, preserving mitigation for premeditated murder in some circumstances is consistent with DCCA case law. Given the DCCA's repeated holdings that premeditation and deliberation may be formed in mere moments,[172] it is possible for a person to intentionally cause the death of another with premeditation and deliberation while also under mitigating circumstances. For example, consider a person who hears an intruder in the hall outside his bedroom in the middle of the night. While hiding, the person makes the decision that if the intruder comes into the bedroom, he will kill the intruder. If the intruder enters seconds later, and the person kills the intruder, the person would have satisfied the elements for premeditated murder. However, it would be unjust to categorically preclude a self-defense claim in such

[172] *See e.g. Perry v. United States*, 571 A.2d 1156, 1160 (D.C. 1990) (holding that evidence for premeditation and deliberation was sufficient when defendant wrestled gun away from police officer, and immediately shot the officer out of anger).

circumstances. Similarly, it would also be unjust to categorically preclude an imperfect self-defense claim if the person unreasonably believed that lethal force was necessary.

(14) *USAO at App. C. 296, 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."*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements "directly applicable" to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

(15) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include 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." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to the revised murder statute, this would change the penalty enhancement under subparagraph (d)(3)(A).*

- The RCC does not incorporate this recommendation, because it would authorize disproportionate penalties. Under USAO's proposal, the defense to the penalty enhancement requires that the actor was negligent as to the complainant's status as a protected person. This requires that the actor should have been aware of a substantial risk that the complainant *is* a protected person. A person who *reasonably* believed that the complainant was *not* a protected person is not negligent as to the complainant's status would therefore not satisfy the requirements of the proposed defense.
- The USAO's proposed defense would apply to actors who believe that the complainant *is* a protected person. Under the RCC, proof of a higher culpable mental state suffices to prove lower culpable mental states. Therefore, a person who desires or is practically certain that the complainant is a protected person would also be negligent as to whether the complainant is a protected person.
- Under USAO's proposal, the protected person enhancement would apply to *less* culpable actors, but not to *more* culpable actors. An actor who reasonably believes that the complainant is *not* a protected person is less culpable than an actor who believes, or desires, that the complainant *is* a protected person. However, under USAO's proposal, the enhancement would apply to the former buy not the latter.

(16) *USAO at App. C. 297, recommends that a prior conviction for murder should be included as an aggravating factor in the revised murder statute.*

- The RCC does not incorporate this recommendation because the RCC general recidivist enhancement's crime of violence provision already authorizes increased penalties for a person based on having committed a prior murder.

(17) *USAO at App. C. 297-298, recommends that killing a person capable of providing information to a law enforcement officer should be included as an aggravating factor in the revised murder statute. USAO argues that the obstruction of justice statute does not necessarily cover this conduct, and that even if it does, the statute of limitations may prevent a conviction for obstruction.*

- The RCC incorporates this recommendation by providing as an enhancement in subparagraph (d)(3)(i): Commits the murder with the purpose of harming the decedent because 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." The CCRC has not yet reviewed and revised the obstruction of justice statute, so it is unclear whether the conduct described in subparagraph (d)(3)(i) is criminalized as obstruction of justice. When it does so, it will consider whether to provide a statutory provision or commentary regarding merger of sentences for obstruction of justice and a murder conviction with the enhancement in subparagraph (d)(3)(i), or take other action to ensure proportionate punishments.

(18) *USAO at App. C. 298, recommends that premeditated murders that occur while the actor committed kidnapping, robbery, arson, rape, or sex offense should be included as an aggravating circumstance.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but does not necessarily authorize such punishment through just one crime when multiple crimes may be charged for the behavior. In the RCC a person who commits a premeditated murder while committing a separate offense may still be convicted of and sentenced consecutively for that separate offense. A separate conviction and penalty for both murder and the other serious felony adequately authorizes a proportionate penalty above the maximum for first degree murder.

(19) *USAO at App. C. 298-299, recommends that drive by or random shootings should be aggravating circumstances for murder.*

- The RCC incorporates this recommendation. This change improves the proportionality of the revised statute.

(20) *USAO at App. C. 299, recommends that the enhancement under RCC § 22E-1101 (d)(3), which relates to infliction of extreme physical pain or mental suffering, should not require that the suffering be for a "prolonged period of time immediately prior to the decedent's death."*

- The RCC does not incorporate this recommendation because it makes the statutory text less clear. As the DCCA has noted, all murders "are to some

degree heinous, atrocious, and cruel"[173] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[174] Omitting the requirement that the pain or suffering be for a prolonged period of time fails to distinguish between ordinary murders and those that warrant a more severe penalty. In most cases, murder requires a degree of violence sufficient to cause significant pain, with the exception of virtually instantaneous killings. The critical question is whether the extreme physical pain or mental suffering of the decedent was prolonged. Additional liability for prior acts of violence against the decedent—for example, an aggravated assault committed hours before the killing—is provided by other RCC criminal statutes, for which an actor may be consecutively sentenced.

(21) *USAO at App. C. 299-300, recommends removing RCC § 22E-1101(e), which provides for a bifurcated trial when an enhancement is charged that is based on prolonged pain or suffering, or mutilation or desecration of the decedent's body. USAO says that "the bifurcation ignores the practical effects that will result from longer trials and repeatedly calling the same witnesses during both phases." USAO also says that "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."*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Regarding the first USAO argument, while it is true that a separate proceeding will require more time from court staff, attorneys, and witnesses, this cost is warranted to prevent the risk of unfair prejudice in determining whether the defendant is guilty of the offense. Second, while some evidence may be relevant to both stages of the bifurcated proceeding, some evidence will only be relevant to determining if the murder involved prolonged pain or suffering, or mutilation or desecration of the decedent's body. This evidence could be unfairly prejudicial in determining whether the defendant actually committed the murder.
- Conviction for aggravated murder makes a person liable for imprisonment throughout the remainder of their lives and is the most severe penalty authorized under District law. Bifurcation of those aggravated murder proceedings that may involve evidence that prejudices the factfinder's decision about murder adds additional cost but is warranted for this most severe punishment. The commentary to the American Law Institute's (ALI) recently issued recommendations has noted that while the Supreme Court to date has only required bifurcated trial proceedings in death

[173] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").

[174] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

penalty cases, "state legislatures should consider the adoption of comparable procedural protections before LWOP [life without parole] penalties may be imposed."[175] The ALI sentencing commentary further notes that: "Bifurcated deliberations avoid over-long instructions at either stage, head off the possibility that 'sentencing instructions' may convey to the trial jury that the defendant's guilt has been assumed in advance, and avoid placing the defendant in the uncomfortable position of contesting guilt at trial while, in the alternative, arguing that he committed the crime in a manner that does not justify an enhanced penalty."[176]

(22) *The CCRC recommends amending RCC § 22E-1101(e) to specify that the same fact finder shall serve at both stages of the bifurcated proceeding.*

- This change resolves a procedural ambiguity as to whether a separate jury must be selected for the second stage of the bifurcated proceedings. This change clarifies the revised statute.

(23) *USAO at App. C. 300, recommends adding a "while armed" penalty enhancement*.

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. A murder committed by means of a dangerous weapon is punished more severely than another murder in the RCC because it will still be subject to liability under separate weapons offenses, with penalties that may be consecutive to the murder sentence. However, providing a more substantial enhancement for committing murder with a dangerous weapon would be disproportionate for several reasons. First, it is not clear that the seriousness of committing murder with a dangerous weapon merits enhancement as compared to murder committed by other means or with other enhancements. Unlike lesser offenses which, when committed with a dangerous weapon, carry a risk of killing a person that merits higher punishment, the punishment for murder already accounts for a completed killing. Also, as compared to deaths that involve torture or a minor complainant, it is not clear that use of a dangerous weapon (that may well speed the death) is of comparable seriousness. Second, as approximately 75% of murders are committed with a dangerous weapon,[177] providing a while-armed enhancement would effectively raise the statutory maximum for a large majority of murders. Third, from court records it appears that under current law (providing a while-armed enhancement for murder) few if any murders were actually enhanced above the statutory maximum they otherwise would have had absent the while-armed enhancement.[178] Fourth, the D.C. Voluntary

[175] American Law Institute Sentencing Recommendations at 162.
[176] American Law Institute Sentencing Recommendations at 501.
[177] From 2009 to 2018, 42 of 45 (87.5%) felony murder convictions, 135 of 151 (89.4%) of first degree murder convictions, and 202 of 301 (67%) of second degree murder convictions had a while armed enhancement. See Appendix D to Advisory Group Memorandum # 28: Statistics on Adult Criminal Charges and Convictions.
[178] Data provided in by the D.C. Sentencing Commission is collected in Appendix D to Advisory Group Memorandum #10 and provides a breakout of charges by the specific type of enhancement applied.

Sentencing Guidelines recommend for current law no distinction between degrees of murder while-armed and those degrees unarmed.

(24) *PDS, at App. C. 269, recommends amending the commentary discussing the rule of imputation of awareness of risk required for depraved heart murder.*

- The RCC incorporates this recommendation by updating the commentary to clarify that in some cases, voluntary intoxication may weigh against finding that a person acted with extreme indifference to human life.

(25) *USAO at App. C. 420-421, "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.*

- The RCC presently sets only the relative penalties for Class 1 felonies and does not establish the absolute penalties, be it a determinate term of years or an indeterminate term such as "life without parole." As the District

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According to this D.C. Sentencing Commission data, from 2010 to 2015 there were a total of 125 first degree "Murder I Armed" convictions that did not have any additional penalty enhancements. Of these 125 convictions, 11 received a life sentence, 9 received indeterminate sentences (under old, pre-2000 laws), and 105 received prison sentences that never exceeded the 60 year maximum authorized for unenhanced first degree murder. Thus, in more than 90% of first degree murder while armed convictions, the sentence was still within the maximum authorized for *unarmed* first degree murder, and the only exceptions were the 11 life sentences for Murder I - Armed . However, whether these 11 life sentences were actually unenhanced is not entirely clear. The Sentencing Commission data divides first degree murder into two categories, labeled "22DC2101-X" and "22DC2101-Y," though it is not clear what these court labels designate and the DC Courts do not have a "data dictionary" that explains their coding system. Notably, all 11 life sentences for first degree murder were under the 22DC2101-Y label. A different dataset obtained by the CCRC uses different coding labels for types of first degree murder that are differentiated by whether the charges were "felony murder" or "other than felony murder," suggesting that the Sentencing Commission "-X" and "-Y" variants of "Murder I Armed" are differentiated by whether a felony was committed in the case. For example, if the 22DC2101-Y label designates felony murder cases, it is possible that even though there is no "enhancement code" the "-Y" coding variant indicates an aggravator under D.C. Code § 22-2104.01(b)(1) for committing the murder in the course of kidnapping or abduction. Or, if the 22DC2101-Y label designates felony murder cases, the defendant could have been convicted of first degree murder and the separate felony and the sentences could run consecutively. Consequently, without further data and analysis of these 11 Murder I-Armed convictions, it is unclear whether the while-armed aggravator was the sole reason for the punishment going above the 60 year authorized maximum for *unenhanced, unarmed* first degree murder.

The D.C. Sentencing Commission data shows that for the same time period there was a total of 178 second degree murder while armed convictions that had no other penalty enhancements. Of these 178 convictions, only 1 count received a life sentence, and no other convictions received a sentence of more than 40 years, the maximum authorized for *unarmed* second degree murder. The one count receiving a life sentence in the data had an unusual code of "1820" which suggests the sentence may have been under an older (pre-2000) District law, but the meaning is unclear. Consequently, without further data and analysis of this 1 Murder II-Armed conviction, it is unclear whether the while-armed aggravator was the sole reason for the punishment going above the 40 year authorized maximum for *unenhanced, unarmed* first degree murder.

The CCRC plans to conduct further research with its dataset on the enhancements and facts at play in the approximately 31 life sentences (by charge, not by case) imposed for murder offenses in Superior Court 2009-2018. For statistics on use of the while-armed enhancement in District murder convictions according to the CCRC dataset, see also Appendix D to Advisory Group Memorandum # 28: Statistics on Adult Criminal Charges and Convictions.

abolished parole in 2000, "life" sentences issued since then are functionally the equivalent of "life without parole" sentences.

- The RCC does not incorporate the recommendation to penalize enhanced second degree murder the same as enhanced first degree murder because it may authorize disproportionate penalties.[179] Under the RCC, enhanced second degree murder is penalized as a Class 3 felony. All but two of the penalty enhancements available for second degree murder involve facts that, if proven, would likely satisfy the premeditation and deliberation requirements for first degree murder.[180] The two enhancements that most reasonably may apply to second degree murder (but not constitute first degree murder) are subparagraph (d)(3)(A) (Commits the murder "reckless as to the fact that that the decedent is a protected person") and subparagraph (d)(3)(F) ("Knowingly mutilates or desecrates the decedent's body"). While such crimes are the most serious in terms of consequences, the lower culpable mental states involved in second degree murder do not merit a punishment equivalent to premeditated and deliberate first degree murders of a protected person or a person whose body is then mutilated or desecrated. As a Class 2/3 felony, a sentence for enhanced second degree murder still authorizes incarceration for most or all a person's adult life.

(26) *CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (d)(3) to state, "in addition to any penalty enhancements under this title applicable per Chapter 8 of this Title . . ." instead of "in addition to any penalty enhancements applicable per Chapter 8 of this Title[.]" Broadening the reference from Chapter 8 to include any general penalty enhancements facilitates*

(27) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (f)(5) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements under Chapter 8 of the Title[.]." Broadening the reference to include any general penalty enhancement, instead just enhancements under Chapter 8, facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

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[179] The USAO recommendation to punish various sex crimes equivalent to enhanced first degree murder and/or enhanced second degree murder are addressed in the corresponding Appendix D1 entries for sex crimes.

[180] For example, sub-subsection ii ("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;") and vii ("In fact, commits the murder after substantial planning.").

- This revision improves the clarity of the revised statute.

Manslaughter. RCC § 22E-1102.

(1) *USAO at App. C. 295, recommends retaining an extreme negligence form of involuntary manslaughter.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. In the RCC, negligently causing the death of another remains criminalized as negligent homicide, per RCC § 22E-1103, but is no longer labeled manslaughter or punished the same as manslaughter. This change improves the proportionality of the revised homicide statutes by more finely grading homicide. Actors who are genuinely unaware of the risk they create, even extreme risks, are negligent and less culpable than those who are consciously aware of the risk they create as required for manslaughter.[181] Requiring awareness of risk, i.e. recklessness, for involuntary manslaughter is consistent with the modern approach under the MPC[182], and has been adopted by a majority of reformed jurisdictions[183], and the proposed Federal Criminal Code.[184] Support among District voters for grading the penalty for a negligent killing lower than a reckless killing is apparent in the CCRC public opinion surveys.[185]

(2) *USAO at App. C. 296, 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."*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements

[181] LaFave, Wayne. Substantive Criminal Law § 15.4(a). Criminal Negligence. Stating that for the "quite serious crime of involuntary manslaughter, a felony in most jurisdictions, actual awareness of risk should be required, excepting perhaps, for reasons of policy, in the case where the defendant's only reason for not being aware of the risk is his state of voluntary intoxication." LaFave further notes that "[t]he modern view, evidenced by the position taken in most of the recent comprehensive criminal codes, is to require for involuntary manslaughter a consciousness of risk—i.e., "recklessness," as does the Model Penal Code."

[182] Model Penal Code § 210.3.

[183] Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060.

[184] Proposed Federal Criminal Code § 1602.

[185] See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluations of various killings during felonies as being significantly less severe, by at least one classification, than a manslaughter scenario described as: "An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)." Question 3.26 provided the scenario: "A law enforcement officer cleans their gun, wrongly believing the gun to be unloaded. The gun accidentally discharges, killing someone standing nearby."). Question 3.26 had a mean response of 8, two classes below the 10.0 milestone corresponding to manslaughter, and the same as the 8.0 corresponding to aggravated assault, currently a 10 year offense in the D.C. Code.

"directly applicable" to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

(3) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include 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." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to the revised manslaughter statute, this recommendation would change the penalty enhancement under subparagraph (d)(3)(A).*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(4) *USAO, at App. C. 421-422, recommends classifying voluntary manslaughter as a class 4 felony instead of a class 5 felony, and involuntary manslaughter as a Class 5 offense instead of a class 7 offense.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. While the RCC at present does not address absolute imprisonment penalties associated with classes, the RCC recommendation of Class 5 for voluntary manslaughter would correspond to according to 240 months or 216 months in Models 1 and 2 in the First Draft of Report #41. The RCC recommendation of Class 6 for involuntary manslaughter would correspond to according to 180 months or 144 months in Models 1 and 2 in the First Draft of Report #41. The RCC's penalty recommendations for manslaughter reflect a significant decrease from the current D.C. Code statutory penalties of 30 years imprisonment for manslaughter of any sort, which are outdated and are far more severe than is proportionate under modern D.C. judicial practice.
    i. For all voluntary manslaughter sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions, the median sentence (50% of sentences were greater) for voluntary manslaughter was 120 months, including enhancements, and for involuntary manslaughter was 60 months, including enhancements. The 75th percentile (25% of sentences were greater) for voluntary manslaughter was 156 months, including enhancements, and for involuntary manslaughter was 72 months, including enhancements. Even the most severe (97.5%) Superior court sentences for voluntary manslaughter (207 months, including enhancements) and involuntary manslaughter (105.6 months, including enhancements) are a fraction of the enhanced burglary penalties authorized by current statute (360 months for

both) and within the Models 1 and 2 in the First Draft of Report #41.

ii. Polling of District voters also suggests that classifying involuntary manslaughter as a Class 7 offense appropriately accounts for the harm and culpability. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[186]

(5) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (d)(3) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements under Chapter 8 of the Title[.]." Broadening the reference to include any general penalty enhancement, instead just enhancements under Chapter 8, facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

[186] Question 3.26 provided the scenario: "Unintentionally killing another driver while speeding and looking at a phone. The driver was aware that driving in such a manner could kill someone." Question 3.26 had a mean response of 8.5, less than one class above the 8.0 milestone corresponding to aggravated assault, currently a 10 year offense in the D.C. Code. The mean 8.5 response is 1.5 less than the milestone 10 offense, which corresponds to voluntary manslaughter. This gap is generally consistent with the RCC's recommendation of a two penalty class gap between voluntary and involuntary manslaughter.

In interpreting the public opinion results, note that there was only one question that specifically related to involuntary manslaughter. Moreover, due to survey design limitations, the survey question did not specify a culpable mental state, other than clarifying that the actor was aware of the risk. It is possible that results would vary if other hypotheticals were presented, and if survey respondents were provided with more nuanced descriptions of the requisite culpable mental state.

RCC § 22E-1103. Negligent Homicide.

(1) *USAO at App. C. 295, recommends retaining a civil negligence standard for the negligent homicide offense.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties and would result in inconsistency in the culpable mental states applicable to homicide offenses. A civil negligence standard only requires a deviation from the ordinary standard of care, whereas the criminal negligence standard under the RCC requires that the actor should have been aware of a substantial risk of death, and that the failure to perceive the risk was clearly blameworthy. Using a civil negligence standard to apply felony homicide liability is disproportionately severe,[187] and is inconsistent with national legal trends.[188] No other offense in the RCC or current D.C. Code Title 22 (as far as the CCRC is aware) applies criminal liability, let alone felony liability, on the basis of civil negligence. Moreover, as neither civil nor criminal negligence require any subjective awareness of risk, lowering the culpable mental state is unlikely to produce any additional deterrent effect.

[187] Commentary to the Model Penal Code acknowledges that even under its heightened criminal negligence standard, criminal liability is controversial. "No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior." Commentary to MPC § 2.02. Although the MPC disagree that negligence is categorically insufficient from criminal liability, the drafters note that even the heightened form of negligence codified in the MPC "should properly not generally be deemed sufficient in the definition of specific crimes[.]" The MPC does not codify a homicide offense predicated on tort negligence.

[188] Only six states provide homicide liability on the basis of civil negligence. Cal. Penal Code § 193; Conn. Gen. Stat. Ann. § 14-222a; Haw. Rev. Stat. § 701-107; Mass. Gen. Laws Ann. ch. 90; § 24G, Nev. Rev. Stat. Ann. § 193.150; Okla. Stat. Ann. tit. 47, § 11-903. The other forty-four jurisdictions do not have an analogous negligent homicide offense; require gross or criminal negligence; or require civil negligence plus an additional aggravating factor, such as intoxication, or violation of a state or local traffic law.

In its comment, USAO notes that Maryland recently adopted a Negligent Homicide offense, and states that it is "consistent with D.C.'s current law that criminalizes both gross negligence and civil negligence." However, this interpretation of the statute is not supported by the text of the statute or relevant case law. Maryland's Negligent Homicide statute requires that the person "cause the death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a criminally negligent manner." Md. Code Ann., Crim. Law § 2-210. The statute specifies that a person acts in a "criminally negligent manner" when "(1) the person should be aware, but fails to perceive, that the person's conduct creates a substantial and unjustifiable risk that such a result will occur; and (2) the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person." *Id.* The Maryland Court of Special Appeals noted that the Maryland General Assembly provided guidance in interpreting this statute by stating that "the term 'gross deviation from the standard of care' was to 'be interpreted synonymously with the term 'gross deviation from the standard of care' under § 2.02(2)(d) of the Model Penal Code." *Beattie v. State*, 88 A.3d 906, 915 (Md. Ct. Spec. App. 2014). Commentary to MPC § 2.02 specifically states that "the requirements established [for criminal negligence] are considerably more rigorous than simple negligence as usually treated in the law of torts." MPC Commentary at 243, n. 31. Maryland's Negligent Homicide offense's *mens rea* requirement is virtually identical to that under the RCC's negligent homicide offense.

- USAO's comment is ambiguous as to whether the RCC's negligent homicide offense should require causing death of another by operating a motor vehicle. While a civil negligence standard is insufficiently culpable to warrant criminal liability under either scenario, a civil negligence standard would be especially problematic of the offense were broadened to include deaths caused by any means.

(2) *USAO at App. C. 296, 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."*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements "directly applicable" to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

Robbery. RCC § 22E-1201.

(1) *USAO, at App. C. 300-301, opposes removing the "stealthy seizure" form of robbery from the revised robbery statute. USAO says that this change creates ambiguity as to when a taking from a person constitutes robbery or mere theft.*

- The RCC partially incorporates this recommendation by adding as a distinct means of committing robbery "removing property held in the hand or arms of the complainant." This change clarifies that seizing an item from a person's grasp, even when non-painful and non-harmful (and so not covered by the revised statute's sub-paragraph (e)(4)(A) concerning "bodily injury") is sufficient for robbery liability. Cases such as suddenly snatching a phone from a person's grasp may involve such small and quick movements that it may be unclear whether the force used by the actor overpowered the complainant (and, consequently, whether the conduct is captured by the revised statute's sub-paragraph (e)(4)(C) concerning "using physical force that overpowers"). This change clarifies that ambiguity.
- However, the RCC does not recommend retaining the District's current statutory provision treating all "sudden or stealthy seizure or snatching" as robbery. Retaining the current statute's language would result in unnecessarily overlapping statutes and disproportionate penalties by categorically treating all pickpocketing and non-violent thefts from persons as the same as violent takings. For example, under the current statute it is robbery to quietly take property lying on a chair nearby the owner while the owner is in a conversation with a friend and does not see the taking. Treating this non-violent conduct as a felony offense, regardless of the value of the property, would be disproportionately severe. The RCC separately criminalizes takings from a person as fourth degree theft.

(2) *USAO, at App. C. 301-302, recommends codifying a separate carjacking statute, instead of including carjacking within the revised robbery statute.*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between offenses. Carjacking is a form of robbery in which the property taken is a motor vehicle. Just as neither the RCC nor the current D.C. Code codify a separate auto-theft offense, there is no need for a separate carjacking offense. Carjacking may involve taking property that is more valuable than the property seized in an ordinary robbery, but this distinction is reflected in the grading distinctions in the revised robbery statute.
- To the extent that carjacking may involve harm in addition to taking a motor vehicle by means of force or threats, separate RCC criminal offenses account for these additional harms. For example, if a person commits carjacking by driving away while a passenger is still in the car, the person could be convicted of both robbery and kidnapping, and the sentences could be imposed consecutively. The RCC classifies robbery in which a motor vehicle is taken as fourth degree robbery. This penalty

gradation properly accounts for the harm imposed by taking a motor vehicle by use of force or threats. Carjacking by displaying or using a dangerous weapon is subject to more severe penalties under the RCC. Committing robbery in which the property taken is a motor vehicle, by means of displaying or using a dangerous weapon is categorized as third degree robbery.

- Polling of District voters also suggests that the harm caused by carjacking is accounted for in the RCC's robbery statute. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[189]
- The RCC's fourth degree robbery offense includes robbery of a motor vehicle, as well as robberies in which the defendant recklessly causes significant bodily injury. Significant bodily injury is defined as "a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer."[190] Significant bodily injuries include broken bones, lacerations requiring stitches, second degree burns, and traumatic brain injuries. The penalty for committing a robbery while causing this degree of injury is sufficient to account for the harm involved in committing a robbery in which a motor vehicle is taken. Under the D.C. Code, there are some minor differences between the robbery and carjacking statutes, in addition to the requirement under carjacking that the property involved be a motor vehicle. For example, the D.C. Court of Appeals has noted two differences between the robbery and carjacking statutes: 1) the robbery offense required "specific intent to steal," whereas the carjacking statute only requires that the actor "recklessly" took the motor vehicle; and 2) unlike the robbery statute, the carjacking statute does not require "asportation." i.e. that the property be carried away.[191] Given these differences, it may have been necessary under the D.C. Code to separately codify each offense.[192] However, the RCC does not maintain these distinctions, and the USAO's comments do not suggest that these distinctions should remain in effect. Accordingly, there is no sufficient rationale for separately codifying a carjacking offense.

[189] Question 1.14 provided the scenario: "Pulling the only person in a car out, causing them minor injury, then stealing it." Question 1.14 had a mean response of 6.2, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code.

[190] RCC § 22-701.

[191] *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997).

[192] It does not appear from the available legislative history, however, that the when the separate carjacking statute was legislatively enacted there was consideration as to whether a person could be convicted of both robbery and carjacking for the same event. This oversight means that, under the DCCA's "elements test" (which generally allows multiple convictions for offenses that each differ by one element from each other, absent a legislative intent to the contrary), a person now can be convicted and sentenced consecutively for robbery and carjacking. Such stacking of convictions and penalties appears to authorize disproportionate penalties.

(3) *USAO, at App. C. 302, recommends amending the robbery statute to include taking property by "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 says that this language would clarify that robbery includes non-verbal threats.*

- The RCC partially incorporates this recommendation by adding a threat of a "sexual contact" to the list of specified threats. This change eliminates a possible gap in liability.
- The RCC does not adopt USAO's proposed language concerning use of conduct that places a person in fear because drafting statutes in such a manner is inconsistent with the RCC general approach of including within threats gestures and other conduct. This RCC approach is consistent with the plain language meaning of "threaten" as including menacing a person with a weapon.[193] To separately address conduct that places a person in "reasonable fear" may suggest that threats ordinarily do *not* include conduct that place a person in reasonable fear, or that a significant difference is intended between a threat that is verbal or non-verbal.[194] The RCC consistently uses threats to include non-verbal conduct, however, the robbery commentary will be updated to further clarify that threats, as required for the robbery statute, do not require verbal communication.

(4) *USAO, App. C. 302, recommends amending the "protected person provisions consistent with recommendations in the General Comments.*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(5) *USAO, at App. C. 302, recommends amending the offense to provide for higher penalty grades when the actor acted "while armed," instead of requiring that the actor "used or displayed" a dangerous weapon or imitation weapon.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known

[193] See Merriam-Webster online dictionary definition of "threaten" (providing as one of the definitions "to cause to feel insecure or anxious" and listing as the first example of a use of the word, "The mugger threatened him with a gun.") (last visited 12-29-19).

[194] For example, it is unclear what work the word "reasonable" is doing in the USAO's proffered language, and whether or how such a reasonableness requirement differs from a verbal threat.

by sight, sound, or touch."[195] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.

- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[196]

(6) *USAO, at App. C. 303, recommends including the words "imitation dangerous weapon" in first, second, and third degree robbery.*

- The RCC incorporates this recommendation by including the words "imitation dangerous weapon" in first, second, and third degree robbery. Inclusion of both dangerous weapons and imitation dangerous weapons achieves separate policy goals. Dangerous weapons produce a heightened risk of serious injury or death while imitation weapons may elicit substantially greater fear in the complainant but do not involve a similar risk of violence. However, the grading of the RCC first, second, and third degree robbery accounts for not only the display or use of a dangerous weapon, but the infliction of varying degrees of bodily injury by means of that weapon. While it would be a rare fact pattern where the use or display of an imitation dangerous weapon causes bodily injury or worse, there is no significant difference in seriousness in such scenarios and they should be graded the same. This change clarifies the revised statute and may improve the proportionality of penalties.

(7) *USAO, at App. C. 303 recommends in the alternative that fourth degree robbery should replace the word "display" with "displays or uses."*

- The RCC incorporates this recommendation by adding the words "or uses" to subparagraph (d)(2)(A)(ii). While there are few fact patterns where "use" of a dangerous weapon or imitation dangerous weapon would not

[195] Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

[196] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

involve a "display" of such a weapon, there is no significant difference in seriousness in such scenarios and they should be graded the same. This change clarifies the revised statute and may improve the proportionality of penalties..

(8) *USAO, at App. C. 303, recommends amending subparagraph (e)(4)(B) to add threats of "sexual contact" as a form of robbery.*

- The RCC incorporates this recommendation by adding a threat of a "sexual contact" to the list of specified threats. This change will improve the clarity and proportionality of the revised criminal code.

(9) *USAO, at App. C. 303-304, recommends in subparagraph (e)(4)(C) replacing the words "overpower" with the words "is sufficient to overpower."*

- The RCC does not incorporate this recommendation because it would make the statute less clear and does not improve the consistency of the revised statutes. The current definition of "force" in the sexual abuse context may have been intended to avoid language that suggests there must be proof that the complainant offered resistance to the actor (a common requirement in older sex assault statutes). However, importing such language into the revised statute is unnecessarily complicated and inherently ambiguous, and such language is eliminated in the RCC revised sexual assault statutes. It is unclear if the degree of force that "is sufficient to overcome" a person is intended to be different in degree from force that "actually overcomes" a complainant, or whether this is primarily intended as an evidentiary provision that, for example, would allow a witness description of a robbery to suffice for prosecution even when the complainant themselves is unwilling to testify. Either way, requiring speculation as to what degree of force would be sufficient to overcome a person would introduce an ambiguous and subjective element into the revised statute—particularly as this "overpowers" element only comes into play in lower gradations that don't involve bodily injuries, threats, or use or display of dangerous weapons.

(10) *PDS, at App. C. 414, recommends that first degree robbery should be classified as a Class 6 felony instead of a Class 5 felony, and moving each subsequent grade of robbery down by one class.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Under PDS's proposal, degrees of robbery generally would be included in the same penalty class as corresponding degrees assault, even though robberies involve both assaultive conduct and theft-type conduct. The hybrid nature of robbery as an offense against persons and a property crime merits more serious punishment than the corresponding assaultive harm alone. Due to the current robbery statute's lack of gradations, it is not possible to evaluate how current District robbery involving assaultive conduct compares to the sentencing for various gradations of assault. However, support among District voters for grading the penalty for a robbery involving assaultive

conduct more seriously than such assaultive conduct alone is apparent in the CCRC public opinion surveys.[197]

(11) *The CRCC recommends adding the word "or" at the end of sub-subparagraph (d)(2)(A)(ii). This change is clarificatory and does not substantively alter the offense. This change clarifies that the elements under subparagraph (d)(2)(A) are alternates, and only one must be proven. This change improves the clarity of the revised statute.*

[197] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.18 provided the scenario: "Robbing someone's wallet by punching them, which caused minor injury."). Question 1.18 had a mean response of 6, two classes above the 4 milestone corresponding to simple assault involving a minor injury, and the same as the 6 milestone corresponding to significant bodily injury assault, currently a 3 year offense in the D.C. Code.

RCC § 22E-1202. Assault.

(1) USAO, App. C at 305, recommends in first degree assault, second degree assault, and third degree assault replacing "by displaying or using an object that, in fact, is a dangerous weapon" with "while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon." USAO, App. C at 272, states that the RCC language is "too limited" and it is "more appropriate" to include the language from the current "while armed" enhancement statute in D.C. Code § 22-4502(a) ("armed with or ha[s[readily available."). USAO states that "[i]n 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 increased risk of danger by introducing a weapon to an offense," even if the defendant does not use or display it. Specifically, for firearms, a firearm "could inadvertently discharge, and a complainant could suffer additional injury as a result" and "the presence of a firearm also increases the changes of the intentional use of the weapon at some point during the offense." USAO states that "it is appropriate to require that the defendant 'knowingly' be armed with or have readily available the weapon." Finally, USAO states that is "appropriate to include both dangerous weapons and imitation dangerous weapons" because if "a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[198] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory

[198] Commentary to the revised assault statute references commentary to RCC § 22E-1203. Menacing.

Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[199]

(2) USAO, App. C at 305, recommends in first degree assault, second degree assault, third degree assault, and fifth degree assault replacing the "protected person" gradations with a negligence standard, for the reasons stated in its General Comments (App. C at 273-274).

- The CCRC does not incorporate this recommendation for the reasons stated in the response to the same comment for the RCC murder statute (RCC § 22E-1101).

(3) The CCRC recommends replacing "an object that, in fact, is" with "what, in fact, is" in the weapons gradations and in the prohibition on negligent discharge of a firearm. With this change, the weapons gradations will require the use or display of "what, in fact, is a dangerous weapon or imitation dangerous weapon" and the prohibition on the negligent discharge of a firearm will require discharging "what, in fact, is a firearm." The reference to "an object" is unnecessary and is not used in the weapons gradations of other RCC offenses.

- This change improves the clarity and consistency of the revised statute.

(4) The CCRC recommends replacing the reference to a firearm "as defined in D.C. Code § 22-4501(2A)" in sixth degree assault. With this change, this provision in sixth degree assault would require negligently causing bodily injury to the complainant by discharging a "firearm" and the RCC definition of "firearm" in RCC § 22E-701 would apply. "Firearm" is a defined term in the RCC and is used in multiple revised offenses.

- *This change improves the clarity and consistency of the revised statute.*

(5) The CCRC recommends including "an imitation dangerous weapon" in paragraphs (a)(3), (b)(2), and (c)(2) so that they prohibit causing the specified type of bodily injury "by displaying or using an object that, in fact, is a dangerous weapon or imitation dangerous weapon." If a defendant uses an "imitation dangerous weapon" to directly cause one of the specified types of bodily injury, e.g., repeatedly hitting a complainant with an imitation firearm, that conduct was already included in the weapons gradations of the RCC assault statute to the extent that the imitation dangerous weapon satisfies subsection (F) of the RCC definition of "dangerous weapon" ("Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."). USAO, App. C. 303, recommended including the words "imitation dangerous weapon" in first, second, and third degree robbery, in part because "if a gun is not recovered, it is

[199] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

impossible to ascertain if the firearm used is real or an imitation, and they often look identical." The RCC incorporated this recommendation into the RCC robbery statute, and the same concerns apply to assault. To the extent that the defendant uses an imitation dangerous weapon to directly cause a specified type of bodily injury, and the imitation dangerous weapon does not satisfy the RCC definition of "dangerous weapon," e.g., hitting the complainant with an imitation firearm one time and causing only "bodily injury," it is consistent and proportionate to include that conduct in the weapons gradation to account for the use of an imitation weapon. If the defendant uses the imitation dangerous weapon to indirectly cause the specified type of bodily injury, e.g., brandishing an imitation firearm and so causing the complainant to fall down stairs, it is consistent and proportionate to include that conduct in the weapons gradations of assault. Including imitation dangerous weapons ensures that, if the other requirements, particularly the causation requirements, of the RCC assault statute are met, whether an object is an imitation dangerous weapon should not determine liability.

- This change improves the clarity and consistency of the revised statute.

(6) USAO, App. C at 304-305, recommends that the assault statute include liability for the use of "force or violence" against the complainant "with the intent to cause bodily injury to the complainant," even if no bodily injury results.[200] USAO states that for these attempted-battery assaults, 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)." USAO states that 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." USAO states that this change "may shield" from assault liability defendants "who, using force or violence, intend to cause physical injury to another but do not achieve that result" and defendants "who actually cause physical injury to the complainant, but which the government is unable to prove at trial," including when the complainant is uncooperative. When the government cannot prove bodily injury, USAO states that the defendant "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)."

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the offense and may authorize disproportionate penalties. The USAO recommendation does not include a definition of the phrase "force or violence" or specify how this phrase differs from the clearly defined definition of attempted assault liability under RCC § 22E-301. Defining the scope of attempted-battery assaults and the meaning of "force or violence" under current District law is a matter in active

[200] Specifically, USAO recommends including in third degree of the RCC assault statute "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," and including in sixth degree "With the intent to cause bodily injury to the complainant, uses force or violence against the complainant." USAO, App. C at 304.

litigation due to the D.C. Code's failure to clearly define the elements of assault and the lack of prior case law on point. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability.[201] The USAO recommendation would increase the penalty for conduct that does not result in bodily injury—defined in the RCC to include the infliction of "physical pain, physical injury, illness, or any impairment of physical condition"—and is inconsistent with the other gradations of the RCC assault statute that require a specified type of bodily injury, disfigurement, or maiming. The RCC offensive physical contact offense (RCC § 22E-1205) or attempted assault provide liability for the use of force or violence when bodily injury does not result or cannot be proven, but do so with penalties proportionate to the harm suffered.

(7) USAO, App. C at 305, recommends re-instating the "assault with intent to commit" offenses (AWI offenses), or, in the alternative, updating D.C. Code § 16-2307 to replace "assault with intent to commit any such offense" with "an attempt to commit any such offense." USAO states that under current D.C. Code § 16-2307, there is "a rebuttable presumption for charging a juvenile defendant as an adult pursuant to Title 16" when the defendant is charged with "'murder, 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 property joinable with such an offense.'"[202] USAO notes that eliminating the AWI offenses "limit[s] USAO's ability to exercise its discretion in charging such individuals pursuant to Title 16." USAO further states that it "submitted a comment on this issue in its May 20, 2019 comments (App. C at 236-237), which is separately addressed in this Appendix in the entries for RCC § 22E-301 (criminal attempt provision).

- The RCC does not incorporate the recommendation to re-instate "assault with intent to" offenses because doing so would reintroduce ambiguity and unnecessarily overlapping offenses, and may authorize disproportionate penalties. In the RCC, liability for the conduct criminalized by the current AWI offenses[203] is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses in a more consistent manner.[204]
- The RCC does not incorporate the recommendation to update D.C. Code § 16-2307 to replace "assault with intent to commit any such offense" with "an attempt to commit any such offense" at this time. After the Advisory Group votes to approve final recommendations, time permitting the CCRC

[201] *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).
[202] USAO, App. C at 305 (quoting D.C. Code § 16-2308(e-2)(1) – (2).
[203] D.C. Code §§ 22-401 (assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery); 22-402 (assault with intent to commit mayhem); 22-403 (assault with intent to commit any other felony).
[204] The commentary to the RCC assault statute (RCC § 22E-1202) discusses this revision in detail.

will include recommendations to the Council and Mayor for conforming amendments such as this one.

(8) USAO, App. C a 305-306, recommends codifying separately from other assaults and offensive physical contact statutes assaults and offensive physical contact on a law enforcement officer. USAO states that there should be a specific RCC offense for "assaulting a police officer, regardless of whether injury results" as there is under the current assault on a police officer statute. USAO notes that, "it appears that that "Resisting Arrest" is a possible or planned RCC statute in Chapter 34 that has not yet been drafted" but says "USAO believes that a person's physical conduct might not qualify as 'resisting arrest' and yet should still be criminalized." USAO gives as a hypothetical "a person [that] pushes or shoves an officer," stating under the RCC, the person would not be guilty of assault, but merely "generic second-degree offensive physical contact." USAO states that the RCC should separately criminalize assault and offensive contact with law enforcement officers "in recognition of officer's special roles and the potential for violence if a person does make offensive physical contact with the officer."

- The RCC partially incorporates this recommendation by revising the offensive physical contact offense to include a "protected person" gradation for each type of prohibited conduct—contact with bodily fluid or excrement and general offensive physical contact. The RCC definition of "protected person" includes a law enforcement officer, in the course of his or her official duties.[205] This change improves the consistency and proportionality of the revised statutes.
- The RCC assault statute already provides liability for physical actions toward law enforcement officers that do not result in bodily injury (defined in the RCC to include the infliction of "physical pain, physical injury, illness, or any impairment of physical condition") whenever such action satisfies the requirements for attempt liability under RCC § 22E-301.[206] The scope of attempted assault liability is the same for law enforcement officers as for other persons, however, even while the penalties differ. In addition, the CCRC does plan to issue recommendations regarding revision of the District's "resisting arrest" statute, § 22–405.01. Together with the revised offensive physical contact offense, there is no apparent decrease in the scope of covered conduct toward law enforcement officers between the current D.C. Code and the RCC.[207] However, unlike the current D.C. Code the RCC reduces overlap between relevant offenses and improves the proportionality of penalties.

[205] RCC § 22E-701.

[206] For this reason, the USAO statement that, "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" appears incomplete or incorrect. 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).

[207] Defining the scope of attempted-battery assaults and the meaning of "force or violence" under current District law is a matter in active litigation due to the D.C. Code's failure to clearly define the elements of

(9) USAO, App. C at 306-307, recommends adding "regardless of whether the arrest, stop, or detention was lawful" to paragraph (g)(2)[208] of the limitation on justification and excuse defenses to assault on a law enforcement officer. Currently, the subsection reads "the use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose." USAO states that the word "legitimate" is undefined in the RCC, and "could lead to unnecessary litigation over whether the police officer's actions were for a 'legitimate' purpose." In addition, USAO states that "legitimate" could "connote that the officer's purpose was also unlawful," which is contrary to current law[209] and that the RCC "should make clear that whether an officer's actions were legitimate *is not related to whether the officer's actions were* lawful*."*

- The RCC incorporates this recommendation by revising paragraph (g)(2) to include "regardless of whether the arrest, stop, or detention is lawful." This change improves the clarity of the revised statute and may reduce a possible gap in liability.

(10) OAG, App. C at 249, comments that it assumes that "appeared reasonably necessary" in paragraph (g)(3)[210] ("The law enforcement officer used only the amount of physical force that appeared reasonably necessary") refers to "how it appeared to the law enforcement officer." OAG comments that "[i]f the Commission wanted something else, the language should be amended and further discussion would be warranted."

- The RCC commentary previously noted that subsection (g) of the assault statute "codifies the requirements in DCCA case law" that "the law enforcement officer's use of force appeared reasonably necessary," and cited to *Nelson v. United States,* 580 A.2d 114, 117 (D.C.1990) *(on rehearing)*.[211] The citation to *Nelson* has been replaced with a citation to *Speed v. United States*, where the DCCA approved a jury instruction for assault on a police officer that stated "[i]n making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary."[212] This changes clarifies the revised commentary.

(11) The CCRC recommends, through use of the phrase "in fact," specifying that strict liability applies to the requirements in paragraphs (g)(2) and (g)(3) of

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assault and the lack of prior case law on point. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[208] The previous version of the RCC assault statute had non-substantive numbering errors in the subsections. The relevant subsection was previously labeled as (g)(B), but has now been corrected to (g)(2).

[209] USAO cites to *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

[210] The previous version of the RCC assault statute had non-substantive numbering errors in the subsections. The relevant subsection was previously labeled as (g)(C), but has now been corrected to (g)(3).

[211] RCC Commentary Subtitle II. Offenses Against Persons, pages 89-90 & n. 144.

[212] The citation now reads "*Speed v. United States*, 562 A.2d 124, 127, 128 (D.C. 1989).

the limitation on justification and excuse defenses to assault on a law enforcement officer. With this change, subparagraph (g)(2) would specify "In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful" and, per the rule of construction in 22E-207, "in fact" would also apply to the requirements in paragraph (g)(3) ("The law enforcement officer uses only the amount of physical force that appears reasonably necessary."). The previous version of the limitation did not specify whether a culpable mental state or strict liability applied to these requirements in paragraph (g)(2) and (g)(3).

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this a clarificatory change to current District law.

(12) The CCRC recommends deleting the jury demandability provisions in subsection (i). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(13) OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor, not be jury-demandable. With respect to the RCC assault offenses, this would make attempts to commit sixth degree assault (a Class B misdemeanor) non-jury demandable.

- The RCC partially incorporates this recommendation to the extent it is consistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, sixth degree assault (a Class B misdemeanor) and attempted sixth degree assault are jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(14) USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for sixth degree assault (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.

The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, sixth degree assault (a Class B misdemeanor) and attempted sixth degree assault are jury demandable. See

the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

RCC § 22E-1203. Menacing.

(1) *USAO, App. C at 307, recommends subsuming the menacing statute into the assault statute. USAO does not raise concerns about the drafting of the revised menacing statute's element, but states it is "concerned that this will result in ADW-intent-to-frighten cases being explicitly treated as lesser cases, and likely subject to lesser penalties…[which] does not represent the dangers created by this offense."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties by punishing conduct of significantly different seriousness the same.
- In criminal law, District courts have recognized "intent-to-frighten assault,"[213] "attempted battery assault,"[214] and "offensive physical contact assault," which includes "non-violent sexual touching assault."[215] District courts have explained that intent-to-frighten assault requires a "menacing" or "threatening" act.[216] The RCC relabels the infliction of apprehension "menacing,"[217] the infliction of physical harm or injury "assault,"[218] the infliction of offensive physical contact "offensive physical contact,"[219] and non-violent sexual touching "sexual assault"[220] and/or "non-consensual sexual conduct."[221] The revised menacing statute accounts for the seriousness of displaying or using a weapon or imitation weapon through the penalty gradation structure, which punishes "gun point cases" as first degree menacing. Subsuming these cases—which do not involve contact, bodily injury, or attempted bodily injury—into the RCC's equivalent of a battery statute would lead to disproportionate penalties.
- In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify first degree menacing—which does not require any bodily injury or an attempt to cause bodily injury—as a Class 9 felony, equivalent to an assault that actually results in significant bodily injury.[222] The RCC grading of assault, detailed in the First Draft of Report #41, provides more serious penalties for assaults with a dangerous

[213] *McGee v. United States*, 533 A.2d 1268, 1270 (D.C. 1988).
[214] *Ray v. United States*, 575 A.2d 1196 (D.C. 1990).
[215] *In the Matter of A.B.*, 556 A.2d 645, 646–47 (D.C. 1989).
[216] *Williamson v. United States*, 445 A.2d 975, 978 (D.C. 1982); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).
[217] RCC § 22E-1203.
[218] RCC § 22E-1202.
[219] RCC § 22E-1205.
[220] RCC § 22E-1301.
[221] RCC § 22E-1307.
[222] "Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. 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; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation. RCC § 22E-701.

weapon that result in any bodily injury (3rd Degree Assault, a Class 8 felony), significant bodily injury (2nd Degree Assault, a Class 7 felony), and serious bodily injury (1st Degree Assault, a Class 6 felony). In contrast, the USAO recommendation would punish conduct that results in bodily injury (of varying degrees) the same as conduct that does not cause any bodily injury and falls short of an attempt to inflict bodily injury.

(2) *USAO, App. C at 307-308 and 415-419, appears to recommend against creation of a right to a jury trial for second degree menacing. USAO states, in relevant part, that it is "unclear how there are any particular, unique constitutional interests created by this offense." USAO further states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, the CCRC generally recommends that the RCC classify all Class A and Class B misdemeanors, and inchoate versions of those offenses, as jury demandable offenses, improving the consistency of the revised statutes. This would include the RCC first and second degree menacing offenses, and inchoate versions of those offenses. The Second Draft of Report #41 provides a general justification of this change.
- In addition to the general RCC approach to jury demandability, the RCC menacing offense particularly merits jury demandability because it, in part, criminalizes a form of speech. Unlike the current "intent-to-frighten" assault statute, the RCC menacing offense includes not only bodily movements but verbal speech. Subject to limited exceptions, such as a "true threats" exception,[223] the exercise of free speech is protected by the First Amendment to the United States Constitution. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[224] The DCCA

[223] See *Virginia v. Black,* 538 U.S. 343, 359–360 (2003).

[224] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
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> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance -

recently noted, "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."[225]

(3) *USAO, App. C at 308, recommends adding a penalty enhancement for first degree menacing of a minor, senior citizen, transportation worker, District official or employee, or citizen patrol member. USAO cites its general comments for all offenses on such penalty enhancements. This apparently refers to USAO recommendations in App. C at 273 that there be a new affirmative defense applying a negligence standard as to the defendant's age.*

- The RCC partially incorporates this recommendation by applying a penalty enhancement for recklessly menacing a protected person.[226] This change improves the proportionality and consistency of the revised statutes.
- The RCC does not adopt a "negligence" standard as to the victim's status as a protected person for the reasons stated in the response to the same comment in the RCC murder statute.[227]

(4) *OAG, App. C at 249, recommends either striking the exclusion from liability for protected speech or providing a specific example of a menacing fact pattern that involves protected speech.*

- The RCC incorporates this recommendation by striking the exclusion from liability language as potentially confusing. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion. This change clarifies but does not substantively change the revised offense.

(5) *OAG, App. C at 249, recommends amending the commentary (p. 94) that explains a communication must be "received and understood" by the intended listener. OAG notes an apparent conflict between this comment and the commentary (p. 95) explaining that it is "not necessary to prove that the communication was perceived as a serious expression of an intent to do harm."*

- The RCC partially incorporates this recommendation by clarifying the commentary. The menacing offense requires that the listener receive and understand, at the most basic level, the *meaning* of the defendant's

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and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[225] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[226] "Protected person" is defined in RCC § 22E-701.

[227] RCC § 22E-1101.

speech.[228] However, the offense does not require that the listener be certain about the *intent* behind the defendant's speech. So long as (1) the defendant intended that the victim perceive the threat as serious[229] and (2) a reasonable person in the victim's circumstances would perceive the threat as serious,[230] it is of no consequence that the listener does not actually believe that the defendant means what was said.[231] The commentary is updated to include this explanation. This change clarifies the revised commentary.

(6) *USAO, App. C at 426, recommends that first degree menacing be reclassified as a Class 7 or Class 8 felony. USAO notes that survey respondents ranked 'threatening to kill someone face-to-face, which [sic.] displaying a gun,' at a mean score of 7.6 [out of 12]."*[232]

- The RCC partially incorporates this recommendation by making first degree menacing a Class 8 felony when committed against a protected person.

[228] Similarly, in the revised criminal threats offense, the verb "communicates" is intended to be broadly construed, encompassing all speech and other messages that are received and understood by another person. RCC § 22E-1205. In *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), the DCCA recognized that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[229] For example, a person who screams a threatening remark out of exasperation without intent to frighten the listener does not commit a menacing offense.

[230] *See Lewis v. United States,* 95 A.3d 1289, 1290 (D.C. 2014) (reversing a conviction where the appellant was expressing frustration over his arrest by yelling derogatory names at the officers and yelling that the officer was "lucky" that appellant had not had a gun on him because he would have "blown [the officer's] partner's god-damned head off.")

[231] Consider, for example, Coworker A approaches Coworker B threatening to "beat him up" in the office. B believes that A would never risk losing A's job by following through on this threat. A, nevertheless, may have committed menacing against B.

[232] Advisory Group Memo #27, at 2.

RCC § 22E-1204. Criminal Threats.

(1) *USAO, App. C at 308 and 415-419, appears to recommend against creation of a right to a jury trial for all degrees of threats, including attempts. USAO also states, in relevant part, "there are no particular constitutional interests creates [sic.] by the Threats statute." USAO further states that in current practice, the government almost always proceeds under an attempted threat theory in misdemeanor cases, resulting in non-jury trials.*

- The RCC partially incorporated this recommendation in the Second Draft of Report #41, concerning jury demandability. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify first degree threats as a Class B misdemeanor and second degree threats as a Class C misdemeanor. In the Second Draft of Report #41, the CCRC recommended that the RCC classify completed and inchoate forms of Class B misdemeanors as jury demandable and classify Class C misdemeanors as non-jury demandable, improving the consistency of the revised statutes.
- Under current District law violation of D.C. Code § 22-407 is punishable by six months and a violation of D.C. Code § 22-1810 is punishable by 20 years, rendering both jury demandable.[233] Only an attempted violation of D.C. Code § 22-407 or D.C. Code § 22-1810—currently punishable by up to 180 days—is non-jury demandable. In contrast with the current threats statutes, the sole manner in which the RCC changes jury demandability is by making the completed form of the revised second degree threats statute non-jury demandable.
- In addition to the general RCC approach to jury demandability, the RCC criminal threats offense particularly merits jury demandability because it criminalizes a form of speech. Subject to limited exceptions, including a "true threats" exception,[234] the exercise of free speech is protected by the First Amendment to the United States Constitution. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[235] The DCCA

[233] *See* D.C. Code § 16-705.

[234] See *Virginia v. Black*, 538 U.S. 343, 359–360 (2003).

[235] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
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> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury

recently noted, "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."[236]

(2) *USAO, App. C at 309, recommends adding a penalty enhancement for threats against a minor, senior citizen, transportation worker, District official or employee, or citizen patrol member.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Notably, the threats offenses under current District law[237] are not subject to a protected person-type enhancement based on the victim's status as over 65 years of age or under 18 years of age, or as a citizen patrol member. Current D.C. Code § 22-3752 provides an enhancement for "threats to do bodily harm" to transportation workers, and there is a separate offense for certain threats to District officials in D.C. Code § 22-851. The RCC brings consistency to the wide array of predicate offenses for various enhancements based on the victim's "protected person" status but does not expand the use of such enhancements for misdemeanors other than simple assault.

(3) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from $250 to $500 consistent with the thresholds for the revised property offenses.[238] This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.[239]*

- This change improves the consistency of the revised offenses.

(4) *The CCRC recommends revising the commentary to reflect an additional change to current District law. Specifically, the revised statute does not include a provision similar to the D.C. Code § 22-407's statement that, "Whoever is convicted…may be required to give bond to keep the peace for a period not exceeding 1 year."*

- This change clarifies the revised commentary.

(5) *The CCRC recommends revising the commentary to note the DCCA's recent opinion in* Roberts v. United States*,[240] which was issued after the most recent draft language was released.*

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demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[236] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[237] D.C. Code §§ 22-407 and 22-1810.

[238] *See, e.g.,* RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).

[239] RCC § 22E-2201.

[240] 216 A.3d 870, 886 (D.C. 2019).

- This change clarifies the revised commentary.

(6) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

RCC § 22E-1205. Offensive Physical Contact.

(1) *USAO, App. C at 309-310, recommends, in the event that "bodily injury" is not eliminated as a requirement from assault, making what is now third degree offensive physical contact "an explicit lesser included offense of sixth degree assault." Specifically, USAO recommends amending what is now third degree offensive physical contact to include as paragraph (c)(4) "Or commits what would be sixth degree assault but for the absence of bodily injury." USAO states that "the line between a sixth-degree assault and [what is now third degree] offensive physical contact will sometimes be hard to delineate" and "will often turn on whether the victim experienced 'physical pain'" as assessed by a factfinder. USAO states that this revision would eliminate the need for USAO to charge both third degree offensive physical contact and sixth degree assault "in every run-of-the-mill assault case."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC assault statute and RCC offensive physical contact statute require different culpable mental states in addition to different types of harm. RCC sixth degree assault requires recklessly causing "bodily injury," defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." What is now third degree of the RCC offensive physical contact offense requires higher culpable mental states—knowingly causing physical contact with the complainant with intent that the physical contact be offensive to the complainant.[241] Including in what is now third degree offensive physical contact a reckless touching without bodily injury would criminalize any physical contact that is done "recklessly," no matter how trivial, such as bumping into someone on Metro.

(2) *USAO, App. C at 310, recommends including a protected person enhancement for both degrees of the RCC offensive physical contact offense. USAO states that conduct that constitutes first degree offensive physical contact "could be a serious offense in certain circumstances" because bodily fluid "can contain transmittable disease, and can lead to serious consequences for a victim" who becomes infected. Second, having a protected person enhancement "reflects the added seriousness of committing these crimes against vulnerable community members." USAO proposes using the language suggested in its General comments, App. C at 273, which applies strict liability to the fact that the complainant is a "protected person" with 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."*

- The RCC partially incorporates this recommendation by expanding the offensive physical contact offense to three gradations, as opposed to two, and codifying a protected person gradation in what is now first degree and

[241] The RCC offensive physical contact offense also requires that "in fact, a reasonable person in the situation of the complainant would regard" the contact as offensive.

second degree of the offense. The protected person gradation applies to each type of prohibited conduct in the revised statute—contact with bodily fluid or excrement and general offensive physical contact. Specifically, first degree offensive physical contact is now reserved for causing a protected person to come into physical contact with bodily fluid or excrement or causing this physical contact with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. Second degree offensive physical contact now prohibits either causing any complainant to come into physical contact with bodily fluid or excrement, or committing third degree offensive physical contact when the complainant is a protected person or with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. Third degree offensive physical contact generally prohibits offensive physical contact against any complainant. This change improves the consistency and proportionality of the revised statute.

- The RCC does not incorporate the recommendation to replace the "protected person" gradations with a negligence standard, for the reasons stated in the response to the same comment for the RCC murder statute (RCC § 22E-1101).

(3) *The CCRC recommends deleting the jury demandability provision (previously in subsection (d)). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(4) *The CCRC recommends classifying second degree offensive physical contact as a Class C misdemeanor, instead of a Class D misdemeanor, and classifying third degree offensive physical contact as a Class D misdemeanor. As is discussed elsewhere in this appendix, offensive physical contact now has three gradations. As a result of this revision, what was previously second degree offensive physical contact (general offensive physical contact with any person) is now third degree. Second degree offensive physical contact now requires making any person come into contact with bodily fluid or excrement, or causing general offensive physical contact with a protected person or other specified complainant. Increasing the severity of second degree offensive physical contact by one class to a Class C misdemeanor is proportionate with the more serious conduct contained in second degree, and making third degree offensive physical contact a Class D misdemeanor is proportionate with the comparatively less serious conduct contained in third degree.*

- This change improves the consistency and proportionality of the revised statute.

(5) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor, not be jury-demandable. This would make attempts to commit first degree offensive physical contact non-jury demandable.*

- The RCC partially incorporates this recommendation to the extent it is consistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. First degree offensive physical contact is a Class B misdemeanor and attempted first degree offensive physical contact would be an inchoate form of a Class B misdemeanor See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(6) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for all degrees of offensive physical contact (including attempts).*[242] *USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC not partially incorporates this recommendation by specifying in the RCC that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer (including offense physical contact). Under this framework, any gradation of offensive physical contact in which the complainant is a law enforcement officer is jury demandable, and for any complainant, first degree offensive physical contact (Class B misdemeanor) and attempted first degree offensive physical contact would be jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

[242] When USAO submitted this comment, the RCC offensive physical contact statute had only two gradations. As is discussed elsewhere in this Appendix, the RCC offensive physical contact statute now has three gradations, but first degree is still classified as a Class B misdemeanor with a maximum term of imprisonment of 6 months.

RCC § 22E-1301. Sexual Assault.

(1) USAO, App. C at 316-317, recommends adding "engages in" to paragraphs (a)(1), (b)(1), (c)(1), and (d)(1) so that the paragraphs prohibit "engages in or causes the complainant to engage in or submit to" the sexual act or sexual contact instead of "causes the complainant to engage in or submit to" the sexual act or sexual contact. USAO states that "it makes more sense to focus on the actions of the defendant than on the actions of the complainant" and that the recommended language "tracks the current law."

- The RCC incorporates this recommendation by adding to paragraphs (a)(1) and (b)(1) that the actor "engages in a sexual act with the complainant" and adding to paragraphs (c)(1) and (d)(1) that the actor "engages in a sexual contact with the complainant." This change improves the clarity and consistency of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(2) USAO, App. C at 317, recommends in first degree and third degree sexual assault replacing "overcomes, restrains, or causes bodily injury" with "is sufficient to overcome, restrain, or cause bodily injury." USAO states that the proposed language is "consistent with current law" where "force" is defined, in relevant part as, "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person" and is "consistent with the current jury instructions."

- The RCC does not incorporate USAO's recommendation because it would retain the ambiguity that exists in the definition of "force" for the current sexual abuse statutes. The current D.C. Code definition of "force" requires "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person."[243] It is unclear whether "as is sufficient" means the force must actually overcome, restrain, or injure the complainant, or whether the force must be sufficient to overcome, restrain, or injure a "reasonable" or "average" person, regardless of the effect on the complainant. However, independent of the current D.C. Code definition of "force," the current first degree sexual abuse statute requires that the defendant's use of force actually cause the complainant to engage in a sexual act or sexual contact.[244] Given this causation requirement, the clarity and consistency of the revised sexual assault statute improves if first degree and third degree require that the force actually overcome, restrain, or cause bodily injury to the complainant. The use of force that

[243] D.C. Code § 22-3001(5) (defining "force" as "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.").

[244] D.C. Code §§ 22-3002(a)(1) (first degree sexual abuse statute stating "if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) (third degree sexual abuse statute stating "if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

does not physically overcome, restrain, or cause bodily injury to the complainant, may be covered by second degree or fourth degree sexual assault if it satisfies the RCC definition of "coercive threat" and causes the complainant to engage in or submit to a sexual act or sexual contact. The commentary to the RCC sexual assault statute has been updated to reflect that the RCC sexual assault statute deletes "as is sufficient" from the current definition of "force" and that it is a clarificatory change.

(3) OAG, App. C at 250, recommends revising first degree sexual assault[245] to replace "by using physical force that overcomes . . . the complainant" with "by using physical force that overcomes resistance." At the July 31, 2019 Advisory Group meeting, OAG stated that its concern was not substantive, but rather grammatical, and that it is unclear in the current drafting what or who must be overcome by the force.[246] OAG stated at the meeting that reordering the relevant language in first degree and third degree sexual assault would address its concern.

- The RCC incorporates this recommendation by re-ordering subparagraphs (a)(2)(A) and (c)(2)(B) to require "By using physical force that causes bodily injury to, overcomes, or restrains the complainant." This change improves the clarity of the revised statute.

(4) The CCRC recommends replacing "the complainant" with "any person" in first degree and third degree sexual assault (subparagraphs (a)(2)(A) and (c)(2)(A)) so that they prohibit "By using physical force that causes bodily injury to, overcomes, or restrains any person." This change makes the scope of these provisions match the scope of subparagraphs (a)(2)(B) and (c)(2)(B), which prohibit threats against "any person." The current D.C. Code first degree and third degree sexual abuse statutes require either the use of "force" against the complainant[247] or certain threats against "any person."[248] However, the current D.C. Code definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim,"[249] which would include causing bodily injury to, overcoming, or restraining any person. Replacing "the complainant" with "any person" in (subparagraphs (a)(2)(A) and (c)(2)(A)) of the RCC sexual assault statute makes it clear that physical harms to any individual that the actor knows cause the complainant to engage in or submit to the sexual act or sexual contact are sufficient for first degree and third degree sexual assault. All other threats not pertaining to physical harm are potentially sufficient for second degree and fourth degree sexual assault if they meet the RCC definition of "coercive threat."

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

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[245] OAG's comment is specific to first degree sexual assault, but also applies to third degree.
[246] *See* Minutes of the July 31, 2019 Advisory Group meeting.
[247] D.C. Code §§ 22-3002(a)(1); 22-3004(1).
[248] D.C. Code §§ 22-3002(a)(2); 22-3004(2).
[249] D.C. Code § 22-3001(5).

(5) The CCRC recommends deleting from first degree and third degree sexual assault what was previously subparagraphs (a)(2)(B) and (c)(2)(B), which prohibited "using a weapon against the complainant." The definition of "force" in the current D.C. Code sexual abuse statutes prohibits "the use or threatened use of a weapon,"[250] but "weapon" is not defined statutorily and there is no DCCA case law interpreting it. It is unclear how a "weapon" in the current D.C. Code definition of "force" differs from a "deadly or dangerous weapon" in the current sexual abuse aggravators.[251] To the extent that a "weapon" is an item that does or may cause a comparatively less serious bodily injury than a deadly or dangerous weapon, first degree and third degree of the RCC sexual assault statute prohibit the use or threatened use of such an item in subparagraphs (a)(2)(B) and (c)(2)(B) (the use of force that causes bodily injury to, overcomes, or restrains the complainant) and subparagraphs (a)(2)(C) and (c)(2)(C) (prohibiting threats of "bodily injury.").

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(6) OAG, App. C at 251, recommends defining "weapon" for first degree and third degree sexual assault, which previously specifically prohibited using a "weapon" against the complainant. OAG recommends defining "weapon" as "an object that is designed to be used, actually used, or threatened to be used, in a manner that is likely to produce bodily injury." OAG notes that while "dangerous weapon" is defined in the RCC, "weapon" is not.

- The RCC does not incorporate this recommendation because, as is discussed above, using a "weapon" is no longer a discrete basis of liability for first degree or third degree sexual assault.

(7) USAO, App. C at 317, recommends in first degree and third degree sexual assault replacing "using a weapon" with "displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon." USAO states that "dangerous weapon" is a clearer term than "weapon," which is undefined in the RCC. USAO recommends including an "imitation dangerous weapon" in these gradations because it may be difficult to prove whether a dangerous weapon is real or imitation and "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." USAO further states that "in fact" should apply to this element, consistent with the weapons gradations in other RCC offenses, such as robbery. Finally, USAO recommends including "displaying or using" because displaying a dangerous weapon "could compel a complainant to submit to a sexual act or contact, and should be criminalized as sexual assault." USAO notes that

[250] D.C. Code § 22-3001(5) (defining "force" as "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.").

[251] D.C. Code § 22-3001(6) ("The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

"displaying or using" is consistent with the weapons gradations in other RCC offense, such as robbery.

- The RCC does not incorporate this recommendation because, as is discussed above, first degree and third degree of the revised sexual assault statute no longer include the use of a "weapon" against the complainant as a discrete basis of liability. The proposed language as it pertains to a "real" dangerous weapon would be sufficient for liability under first degree and third degree sexual assault as either the use of force that causes bodily injury to, overcomes, or restrains the complainant (subparagraphs (a)(2)(B) and (c)(2)(B)) or the use of specified threats, including threats of "bodily injury" (subparagraphs (a)(2)(C) and (c)(2)(C)). The proposed language as it pertains to "an imitation dangerous weapon," may also be sufficient for liability in these subparagraphs if actually used or threatened in a manner that causes the complainant to engage in or submit to conduct, and, if not, may be sufficient for the use of a "coercive threat" in second degree and fourth degree sexual assault.

(8) *The CCRC recommends deleting "unwanted" from "unwanted sexual act" in subparagraphs (a)(2)(B) and (c)(2)(B) of first degree and third degree sexual assault ("By threatening, explicitly or implicitly, to kill, kidnap, or cause bodily injury to any person, or to commit an unwanted sexual act against any person). "Unwanted" is conveyed in the concept of a threat and it is superfluous.*

- This change improves the clarity of the revised statute.

(9) OAG, App. C at 251, recommends revising subparagraph (c)(2)(B) in third degree sexual assault[252] to prohibit "the use of, or threatened use of, a weapon against a third party, as opposed to "using a weapon against the complainant." OAG states that the revision is necessary to account for situations where the complainant is "coerced" into a sexual act or sexual contact because of the use of, or threatened use of, a weapon against a third party.

- The RCC does not incorporate OAG's recommendation because the RCC sexual assault statute no longer has a provision that is specific to the use of a weapon. However, first degree and third degree sexual assault encompass the use or threatened use of a weapon against a third party in subparagraphs (a)(2)(A) and (c)(2)(A) (the use of force against any person) and subparagraphs (a)(2)(B) and (c)(2)(B) (specified threats against any person).

(10) USAO, App. C at 319, recommends replacing threats of "significant bodily injury" with threats of "bodily injury" in first degree and third degree sexual assault (now subparagraphs (a)(2)(B) and (c)(2)(B)). USAO gives as a hypothetical a defendant that threatens to "punch a complainant repeatedly in the face, and the complainant submitted to a sexual act on that basis" and states this should be first degree sexual assault. USAO states that the current D.C. Code definition of "bodily injury" for the sexual abuse statutes is "more limited in certain respects" than the RCC definition of "bodily injury," but notes that the

[252] OAG's comment is specific to third degree sexual assault, but also applies to first degree.

current D.C. Code definition of "bodily injury" also includes "injury involving significant pain" and in that respect is "far more expansive than the RCC's proposed definition of 'significant bodily injury.'"

- The RCC incorporates this recommendation by replacing threatening to cause "significant bodily injury" with threatening to cause "bodily injury" in subparagraphs (a)(2)(B) and (c)(2)(B). This change improves the clarity and consistency of the revised statute and removes a possible gap in liability. The commentary to the RCC assault statute has been updated to reflect this is a change in law.

(11) USAO, App. C at 318, recommends in first degree and third degree sexual assault replacing "threatening" with "threatening or placing in reasonable fear." USAO states that this "tracks current law," which is "an appropriate statement of the law." USAO states that a threat requires a communication, citing the RCC criminal threats statute (RCC § 22E-1204), and states that 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."

- The RCC does not incorporate USAO's recommendation because it would introduce ambiguity into the statute. The current D.C. Code general sexual abuse statutes prohibit "threatening or placing that other person in reasonable fear."[253] The DCCA has not generally discussed the meaning of "placing in reasonable fear" in the current D.C. Code sexual abuse statutes, but has interpreted it to reach implied threats based upon conduct.[254] As is discussed below, first degree and third degree of the RCC sexual assault statute now specifically include implied threats (subparagraphs (a)(2)(B) and (c)(2)(B)), and second degree and fourth degree now specially include implied coercive threats (subparagraphs (b)(2)(A) and (d)(2)(A)). It is unclear what conduct "placing in reasonable fear" prohibits beyond an implied threat. Limiting the sexual assault statute to express or implied threats improves the clarity of the revised statute.

(12) The CCRC recommends specifying that first degree and third degree of the RCC sexual assault statute include both express and implied threats, and that second degree and fourth degree include both express and implied coercive threats. With this change, what is now subparagraphs (a)(2)(B) and (c)(2)(B) specify "By threatening, explicitly or implicitly," and subparagraphs (b)(2)(A) and (d)(2)(A) specify "By a coercive threat, express or implied." The current D.C. Code general sexual abuse statutes prohibit "threatening or placing that other person in reasonable fear."[255] The DCCA has not generally discussed the meaning of

[253] D.C. Code §§ 22-3002(a)(2), 22-3003(1), 22-3004(2), 22-3005(2).

[254] *See, e.g.*, *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

[255] D.C. Code §§ 22-3002(a)(2), 22-3003(1), 22-3004(2), 22-3005(2).

"placing in reasonable fear" in the current sexual abuse statutes, but has interpreted it to reach implied threats based upon conduct.[256] *The RCC previously stated in the commentary to the RCC sexual assault statute that the offense extended to both express and implied threats, but it is clearer to codify this in the statute.*

- This change improves the clarity of the revised statute. Other (non-sex offense) statutes in the RCC have also been updated to refer to both "express or implied" threats to ensure consistency. The commentary to the RCC sexual assault statute has been updated to reflect that the offense includes both express and implied threats and classifies it as a clarficatory change in law.

(13) USAO, App. C at 318, recommends in first degree and third degree sexual assault replacing "sexual act" with "sexual act or sexual contact" so that the gradations include threats to commit a sexual contact against any person. USAO states that a "threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability."[257]

- The RCC does not incorporate USAO's recommendation because it may authorize disproportionate penalties for similar conduct. Expanding first degree and third degree of the RCC sexual assault statute to include threats of a "sexual contact" would create overlap with second degree and fourth degree and risk disproportionate penalties for similar conduct. First degree and third degree of the RCC sexual assault statute prohibit threats to kill, kidnap, or cause bodily injury to any person, as well as threats to cause a "sexual act," as defined in RCC § 22E-701, against any person. Second degree and fourth degree of the RCC sexual assault statute prohibit using a "coercive threat" against the complainant. A "coercive threat" is a defined term in RCC § 22E-701 that includes a threat of a "sexual contact."[258]

(14) USAO, App. C at 319-320, recommends adding to the involuntary intoxication provisions in first degree and third degree of the RCC sexual assault statute that the drug or other intoxicant renders the complainant "substantially incapable, mentally or physically, of declining participation" in the sexual act or sexual

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[256] *See, e.g.*, *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

[257] When USAO submitted this comment, first degree and third degree of the RCC sexual assault statute prohibited threats of an "unwanted" sexual act. As is discussed elsewhere in this Appendix, the CCRC recommends deleting "unwanted" so that first degree and third degree sexual assault prohibit threats to commit a "sexual act."

[258] The RCC definition of "coercive threat" is defined as "a threat, express or implicit, that, unless the complainant complies, any person will . . .: (A) Engage in conduct that, in fact, constitutes: (1) An offense against persons as defined in subtitle III of RCC Title 22E." In addition to this specific provision in the definition of "coercive threat," subsection (G) of the definition includes threats 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 as the complainant to comply."

contact.[259] *USAO states that current law for second degree and fourth degree sexual abuse includes liability if the defendant knows or has reason to know that the other person is "incapable of declining participation" in the sexual act or sexual contact. USAO states that "[i]t is appropriate to attach liability in this situation and it is consistent with current law."*

- The RCC does not incorporate USAO's recommendation because it would introduce ambiguity into the revised statute. The revised intoxication provision includes complainants that are "asleep, unconscious, substantially paralyzed, or passing in and out of consciousness," as well as complainants that are "substantially incapable of communicating unwillingness to engage in" the sexual act or sexual contact. These provisions more clearly refer to common situations and encompass a complainant that is substantially incapable, mentally or physically, of declining participation in the sexual act or sexual contact.

(15) USAO, App. C at 319, recommends revising first degree and third degree of the RCC sexual assault to include as a paragraph (E) "after rendering the complainant unconscious." USAO states that this conduct "may not currently fall within the RCC's proposed definition of sexual assault." USAO gives as a hypothetical a defendant that "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." USAO states that this language is in current law and "should be an option for liability."

- The RCC does not incorporate USAO's recommendation because the RCC sexual assault statute already includes liability for a defendant that engages in a sexual act or sexual contact "after" rendering the complainant unconscious. First degree and third degree of the RCC sexual assault statute include engaging in or causing a complainant to engage in or submit to a sexual act "by using physical force that causes bodily injury to the complainant" (subparagraphs (a)(2)(A) and (c)(2)(A)). The RCC definition of "bodily injury" in RCC § 22E-701 would extend to unconsciousness ("physical pain, physical injury, illness, or any impairment of physical condition."). If the actor renders the complainant unconscious and then later decides to sexually assault the complainant, without the causal connection that first degree and third degree require, there is liability in second degree and fourth degree sexual assault for engaging in a sexual act or sexual contact with an "unconscious" complainant (sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i)). The commentary to the RCC sexual assault statute has been updated to reflect that the RCC sexual assault statute deletes "after rendering [the complainant] unconscious" as a discrete basis of liability as a possible change in law.

[259] When USAO submitted this comment, the involuntary intoxication provision in first degree and third degree of the RCC sexual assault statute specified "mentally or physically" for several of the required effects of the intoxicant. As is discussed elsewhere in this Appendix, the CCRC recommends deleting "mentally or physically" from these provisions.

(16) USAO, App. C at 319-320, recommends adding to second degree and fourth degree sexual assault that the complainant is "incapable, mentally or physically, of declining participation" in the sexual act or sexual contact.[260] *USAO states that current law for second degree and fourth degree sexual abuse includes liability if the defendant knows or has reason to know that the other person is "incapable of declining participation" in the sexual act or sexual contact. USAO states that "[i]t is appropriate to attach liability in this situation and it is consistent with current law."*

- The RCC does not incorporate USAO's recommendation because it would reduce the clarity of the revised statute. The current D.C. Code second degree and fourth degree sexual abuse statutes include as a basis for liability that the complainant is "incapable of declining participation in"[261] the sexual act or sexual contact. This language is not statutorily defined and there is no DCCA case law interpreting it. Second and fourth degree of the RCC sexual assault statute include complainants that are incapable of declining participation in the sexual act or sexual contact due to conditions such as sleep, paralysis, etc. (sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i)), and that are incapable of communicating unwillingness to engage in the sexual act or sexual contact (sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii)). These provisions more clearly refer to the most common situations and encompass a complainant that is incapable, mentally or physically, of declining participation in the sexual act or sexual contact. The RCC sexual assault statute clarifies the physical and mental requirements for being incapable of declining participation in the sexual act or sexual contact.

(17) The CCRC recommends deleting "mentally or physically" from the required effects of the intoxicant in first degree and third degree of the revised sexual assault statute (sub-subparagraphs (a)(2)(C)(ii)(II), (a)(2)(C)(ii)(III), (c)(2)(C)(ii)(II), and (c)(2)(C)(ii)(III)). With this revision, the revised intoxication provision would require, in relevant part, that the intoxicant, in fact, renders the complainant "substantially incapable of appraising the nature of" the sexual act or sexual contact or "substantially incapable of communicating unwillingness to engage in" the sexual act or sexual contact. The previous version of the RCC sexual assault statute added "mentally or physically" to these provisions to mirror the requirements for an incapacitated complainant in second degree and fourth degree of the revised sexual assault statute. However, as is discussed elsewhere in this Appendix, the CCRC now recommends deleting "mentally or physically" from second degree and fourth degree. In the revised intoxication provision, deleting "mentally or physically" keeps the focus on whether the intoxicant rendered the complainant substantially incapable of appraising the

[260] When USAO submitted this comment, second degree and fourth degree of the RCC sexual assault statute specified "mentally or physically" for several of the specified types of incapacitation. As is discussed elsewhere in this Appendix, the CCRC recommends deleting "mentally or physically" from these provisions.

[261] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

nature of or communicating unwillingness to engage in the sexual act or sexual contact, which may be due to combination of mental or physical effects of the intoxicant rather than one or the other.

- This change improves the clarity and consistency of the revised statute.

(18) The CCRC recommends deleting "[m]entally or physically" from "incapable of appraising the nature of" the sexual act or sexual contact from sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) of second degree and fourth degree sexual assault. With this revision, these sub-subparagraphs are limited to certain complainants that are "incapable of appraising the nature of" the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct."[262] This language is not statutorily defined, and there is no DCCA case law on point.[263] The previous version of the RCC sexual assault statute added "mentally or physically" to "incapable of appraising the nature of" in an attempt to clarify the scope. However, this language shifts the focus away from whether a given complainant is incapable of appraising the nature of the sexual or sexual contact, to whether the complainant has a mental or physical condition or disability.[264]

- This change improves the clarity and consistency of the revised statute.

(19) The CCRC recommends including in second degree and fourth degree of the revised sexual assault statute incapacitation that prevents the complainant from "understanding the right to give or withhold consent" to the sexual act or sexual contact. With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be "incapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact]." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct,"[265] as well as "incapable of declining participation in that [sexual act or sexual contact]."[266] The language is not statutorily defined and there is no DCCA case law that interprets the meaning of "the nature of the conduct" or "declining participation." The proposed language clarifies that understanding the right to give or withhold consent is a crucial part of sexual conduct and a complainant's

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[262] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[263] In *In re M.S.*, the DCCA stated in dicta that "incapable of appraising the nature of the conduct" for "an adult victim, the charge might involve proof of the victim's intoxication or general mental incapacity." In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

[264] For example, "physically incapable of appraising the nature of" appears to include within second degree and fourth degree of the RCC sexual assault statute physical characteristics, such as blindness, deafness, or muteness that do not affect a complainant's ability to understand the nature of sexual activity or give meaningful consent. Retaining this language may categorically prohibit defendants from engaging in consensual sexual activity with blind, deaf, or mute individuals.

[265] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[266] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

inability to understand this right can be a basis for liability in second degree and fourth degree of the RCC sexual assault statute.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect that including "understanding the right to give or withhold consent*"* is a clarificatory change to current District law.

(20) The CCRC recommends in second degree and fourth degree sexual assault specifying as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent be due to "an intellectual, developmental, or mental disability or mental illness," which excludes age as the sole cause of a complainant's inability. With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be "[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact] . . . due to an intellectual, developmental, or mental disability or mental illness." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[267] The language is not statutorily defined, but the DCCA has held that the current D.C. Code fourth degree sexual abuse statute categorically merges into the current D.C. Code second degree child sexual abuse statute,[268] in part because "once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct."[269] However, such a conclusive presumption categorically convicts defendants of sexual assault that are themselves under the age of 16 years even if they, due to their young age, are also incapable of appraising the nature of the sexual activity. This is inconsistent with the protected status of persons under the age of 16 years in the current sexual abuse statutes. In contrast, in the RCC, a defendant cannot be found guilty of second degree or fourth degree sexual assault based solely on the complainant's age. If the complainant is under 16 years of age and the defendant is at least four years older, there is no longer a conclusive presumption that the complainant is incapable of appraising the nature of the sexual activity. In the case of any complainant under the age of 18 years, the complainant's young age is no longer the sole basis for determining whether that complainant is incapable of appraising the nature of the sexual activity.[270] A defendant of any

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[267] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[268] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017) ("[W]e hold that it is impossible to commit second-degree child sexual *166 abuse without also committing fourth-degree sexual abuse. Therefore, appellant's fourth-degree sexual abuse adjudications merge into his second-degree child sexual abuse adjudications.").

[269] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

[270] A complainant's young age may be highly relevant in assessing whether the complainant has an intellectual, developmental, or mental disability or mental illness that makes the complainant incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, although this entry focuses on the young age of a

age that engages in sexual activity with a complainant under the age of 18 years may still have liability under other provisions of the RCC sexual assault statute, and the young age of the complainant remains a basis for liability under the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). Age also remains the basis of liability for the RCC sexual abuse of a minor statute (RCC § 22E-1302), which would entirely overlap with the second and fourth degree sexual assault statutes without this change. Notably, the American Law Institute's most recent draft revised sexual assault statute exclude age as a basis of liability for sexual assault of a vulnerable person.[271]

- This change improves the clarity, consistency, and proportionality of the revised sexual assault and sexual abuse of a minor statutes, and reduces unnecessary overlap. The commentary to the RCC sexual assault statute has been updated to reflect this discussion of adding "an intellectual, developmental, or mental disability or mental illness" as a specific basis of liability and classifies it as a change to current District law.

(21) The CCRC recommends in second degree and fourth degree sexual assault specifying as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent be due to "a drug, intoxicant, or other substance." With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be "[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact] . . . due to a drug, intoxicant, or other substance." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[272] *This language is not statutorily defined, and there is no DCCA case law on point. However, the DCCA has stated in dicta that "incapable of appraising the nature of the conduct" for "an adult*

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complainant, the age of an older complainant may not be the sole basis of determining whether that complainant is incapable of appraising the nature of the sexual conduct or of understanding the right to give or withhold consent to the sexual conduct. It may, however, be relevant in determining whether an older complainant has an intellectual, developmental, or mental disability or mental illness and otherwise meets the requirements of this provision.

[271] American Law Institute, Council Draft No. 10 (December 13, 2019), § 213.3(2):

> *Sexual Assault of an Impaired Person.* An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
>
> (a) the act is without effective consent because at the time of the act the other person:
>
> (i) has an intellectual developmental, or mental disability or mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; . . .

[272] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

victim . . . might involve proof of the victim's intoxication or general mental incapacity."[273]

- This change improves the clarity, consistency, and proportionality of the revised sexual assault statute. The commentary to the RCC sexual assault statute has been updated to reflect this discussion of adding "a drug, intoxicant, or other substance" as a specific basis of liability and classifies it as a clarificatory change to current District law.

(22) The CCRC recommends including in second degree and fourth degree of the revised sexual assault statute certain types of incapacitation if "the actor has no similar serious disability or illness." With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require that the complainant be "[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact]. . . due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct,[274] *"incapable of declining participation in" the sexual act or sexual contact,*[275] *and "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.*[276] *The language is not statutorily defined, and there is no DCCA case law interpreting these provisions when the defendant has a similar disability or illness as the complainant. The proposed language excludes from liability defendants that have a "similarly serious" disability or illness as the complainant for second degree or fourth degree sexual assault. There may still be liability under other provisions of the RCC sexual assault statute or the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This approach is consistent with the American Law Institute's most recent draft revised sexual assault of a vulnerable person statute.*[277]

- This change improves the consistency of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect

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[273] In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

[274] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[275] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

[276] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

[277] American Law Institute, Council Draft No. 10 (December 13, 2019), § 213.3(2):

> *Sexual Assault of an Impaired Person.* An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
>
> (b) the act is without effective consent because at the time of the act the other person:
>
> (j) has an intellectual developmental, or mental disability or mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; . . .

that requiring that the defendant not have a mental disability as the complainant is a possible change to current District law.

(23) The CCRC recommends in second degree and fourth degree sexual assault deleting "mentally or physically" from sub-subparagraphs (b)(2(B)(iii) and (d)(2)(B)(iii). With this change, these sub-subparagraphs would specify that the complainant must be "[i]ncapable of communicating unwillingness to engage in" the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[278] *This language is not statutorily defined, and there is no DCCA case law on point. The previous version of the RCC sexual assault statute added "mentally or physically" to "incapable of communicating unwillingness to engage in" in an attempt to clarify the scope. However, this language shifts the focus away from whether a given complainant is incapable of communicating unwillingness to engage in the sexual or sexual contact, to whether the complainant's inability is due to a mental or physical condition or disability.*

- This change improves the clarity and consistency of the revised statute.

(24) USAO, App. C at 320, recommends removing what was previously sub-subparagraphs (e)(1)(B)(i) and (e)(1)(B)(ii) of the effective consent defense that place requirements on the ages of the parties and the relationship between them: "(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." USAO states that "this exception should not exist here" because 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." In the alternative, App. C at 322, USAO recommends removing the age gap requirements in these subsections.

- The RCC does not incorporate USAO's recommendation because it would lead to inconsistency with the RCC sexual abuse of a minor statute. These sub-subparagraphs limit situations in which young complainants can give effective consent under the RCC sexual assault statute and codify the DCCA holding in *Davis v. United States*.[279] These situations mirror the

[278] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

[279] The DCCA held that in a prosecution under the current D.C. Code general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code Ann. § 22-3001(3). "Adult" is not statutorily defined in the current D.C. Code sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current D.C. Code child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of

requirements for liability in the RCC sexual abuse of a minor statute so that if there would be liability under the RCC sexual abuse of a minor statute, the minor cannot give effective consent to that conduct under the RCC sexual assault statute. Although sexual conduct with minors is criminalized under the sexual abuse of a minor statute, it could also be charged under the general sexual assault statute. For example, a 20 year old defendant that uses a firearm to cause a 15 year old complainant to engage in a sexual act could be charged under either first degree sexual assault or second degree sexual abuse of a minor. The RCC does not incorporate USAO's recommendation to strike the age gap requirements in subparagraphs (e)(1)(B)(i) and (e)(1)(B)(ii) because, with the exception of the 4 year age gap in subsection (e)(1)(B)(ii), these subparagraphs follow current law.[280]

(25) The CCRC recommends in subsection (e) applying strict liability (with the language "in fact") to the element that the actor has the complainant's effective consent. With this change, subsection (e) requires either that "the actor has, in fact, the complainant's effective consent to the actor's conduct or the actor reasonably believes that the complainant gives effective consent to the actor's conduct." The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to the fact that the actor had the complainant's effective consent.

- This change improves the clarity of the revised statute.

(26) The CCRC recommends in subsection (e) applying strict liability (with the language "in fact") to the requirements of the affirmative defense in paragraph (e)(2) (the actor's conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon), (e)(3) (age requirements for the actor and the complainant), and (e)(4) (age requirements for the actor and the complainant). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.

- This change improves the clarity of the revised statute.

(27) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense (previously paragraph (e)(2)). The RCC has a general*

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consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

[280] The current D.C. Code child sexual abuse statutes and the RCC sexual abuse of a minor statute prohibit sexual conduct when the complainant is under the age of 16 years and the actor is at least four years older. D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years."); RCC § 22E-1302(a), (b), (d), (e) (prohibiting a sexual act of sexual contact when the complainant is under 16 years of age and the actor is at least four years older). Subparagraph (e)(1)(B)(i) retains these age and age gap requirements.

The current D.C. Code sexual abuse of a minor statutes prohibit sexual conduct when the complainant is under the age of 18 years and the actor is at least 18 years of age and in a "significant relationship" with the complainant. D.C. Code §§ 22-3009.01, 22-3009.02, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years."). Third degree and sixth degree of the RCC sexual abuse of a minor statute retain these requirements, but, as is discussed in the commentary to the offense, require a four year age gap to match the age gap in the child sexual abuse statutes.

provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).

- This change improves the clarity and consistency of the revised statute.

(28) The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (f)(5) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

(29) OAG, App. C at 251, recommends replacing "sexual conduct" with "sexual act or sexual contact" in what is now subparagraph (f)(5(A)) of the sexual assault penalty enhancement for causing the "sexual conduct" with the use or display of a dangerous weapon or imitation dangerous weapon). OAG notes that "sexual conduct" is not a defined term in the RCC.

- The RCC incorporates OAG's recommendation in subparagraph (f)(5)(A), as well as the penalty enhancement in subparagraph (f)(5)(C) (causing serious bodily injury during the sexual act or sexual contact). This change improves the clarity of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

(30) The CCRC recommends replacing "an object that, in fact" was with "what is, in fact" is in the weapons penalty enhancement. With this change, the weapons penalty enhancement will require the use or display of "what is, in fact, a dangerous weapon or imitation dangerous weapon." The reference to "an object" is unnecessary and is not used in the weapons gradations of other RCC offenses.

- This change improves the clarity and consistency of the revised statute.

(31) USAO, App. C at 321-322, recommends replacing the penalty enhancement in subparagraph (f)(5)(A) with "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 states that it is "more appropriate to include language from the current 'while armed' enhancement" and that the RCC's language, which requires displaying or using a dangerous weapon or imitation dangerous weapon, is "too limited" because "[e]ven 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." USAO states that a firearm could inadvertently discharge or intentionally discharge, resulting in injury.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC does not enhance the penalty for sexual assault when the defendant merely possess or carries a dangerous weapon or imitation dangerous weapon, without using or displaying it to cause the sexual act or sexual contact. Possessing or carrying a dangerous weapon or imitation dangerous weapon is subject to punishment under an array of separate RCC weapons offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the sexual assault penalty enhancement specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[281] Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[282]

(32) USAO, App. C at 321, recommends deleting "that were present at the time of the offense" from the accomplice penalty enhancement (now in subparagraph (f)(5)(B) ("The actor knowingly acted with 1 or more accomplices that were present at the time of the offense."). First, USAO states that it is unclear whether "present 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," such as kidnapping and assaulting a complainant. Second, USAO states that "present" is unclear because it could require a physical presence, or be read to include remote presence, such as a telephone.

[281] Commentary to the revised sexual assault statute references commentary to RCC § 22E-1203 (Menacing).

[282] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

Finally, USAO states that the revised penalty enhancement is contrary to current law, which does not have a requirement that the accomplice be present at the time of the offense.

- The RCC partially incorporates this recommendation by revising the penalty enhancement to require that the accomplices "were physically present at the time of the sexual act or sexual contact." The current D.C. Code penalty enhancement merely requires that the defendant "was aided or abetted by 1 or more accomplices"[283] and there is no DCCA case law interpreting this language. Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. This change improves the clarity and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(33) USAO, App. C at 321-322, recommends removing "during the sexual conduct" from the serious bodily injury penalty enhancement (now subparagraph (f)(5)(C) ("The actor recklessly caused serious bodily injury to the complainant during the sexual conduct."). USAO states that the current D.C. Code penalty enhancement requires that the complainant "sustained serious bodily injury as a result of the offense" and that the RCC "inappropriately limits this enhancement." USAO gives as a hypothetical a defendant that "viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time." USAO states that under the RCC penalty enhancement, the defendant would not have caused serious bodily injury during the sexual act and the penalty enhancement would not apply. In addition, USAO states that "'during the offense' is vague under current law" because it could apply "solely to the sexual act or sexual contact, or . . . to the totality of the actions leading to the forced sexual act or sexual contact," such as kidnapping and assaulting a complainant. USAO states it is unnecessary to state "during the offense" because "[i]t is clear that this enhancement can only apply when it relates to a sexual offense." USAO does not recommend a substitute for the removed "during the sexual conduct" language.

- The RCC partially incorporates USAO's recommendation by amending the penalty enhancement to state: "The actor recklessly causes serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact." This language includes within the penalty enhancement USAO's hypothetical of a defendant that "viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time." The commentary to the RCC sexual assault statute has been updated to reflect that this is a possible change in law. This change clarifies and may improve the proportionality of the revised statutes.

(34) USAO, App. C at 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(i) removing the requirement that the actor be at least four

[283] D.C. Code § 22-3020(a)(4).

years older than a complainant under the age of 12 years. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that that an age gap should not be added because the RCC sexual assault statute "only deals with sexual acts/contacts involving force or violence." As such, USAO states the age gap "is not a relevant consideration" because 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." USAO compares the age gap in the penalty enhancement to the four year age gap required in the RCC sexual abuse of a minor statute and current law for complainants under 16 years of age, noting that in these offenses, the age gap requirement "serve[s] a very different purpose," "exclud[ing] 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 RCC does not incorporate USAO's recommendation because the four year age gap improves the proportionality of the revised statute. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting very young complainants. An actor that commits sexual assault against a complainant under the age of 12 years when there is less than a four year age gap still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor's conduct.

(35) The CCRC recommends deleting the second "in fact" from sub-subparagraph (f)(5)(D)(i) so that the provision requires "The complainant is, in fact, under 12 years of age and the actor is at least 4 years older than the complainant." Given the revised rule of construction in RCC § 22E-207, strict liability applies to every element following "in fact" until a new culpable mental state is specified.

- This change improves the clarity of the revised statute.

(36) USAO, App. C at 322, recommends removing the penalty enhancement in sub-subparagraph (f)(5)(D)(ii) ("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."). USAO states that this is "consistent with current law" and that it relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion of deleting this enhancement.

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The current D.C. Code sexual abuse penalty enhancements do not have an enhancement for a complainant that is under the age of 16 years when the actor is at least four years older,[284] but do when "the victim was under the age of 12 years"[285] and when "the victim was under the age of 18 years at the time of the offense and the actor had a

[284] D.C. Code § 22-3020.
[285] D.C. Code § 22-3020(a)(1).

significant relationship to the victim."[286] The RCC added this penalty enhancement to parallel the requirements for liability in second degree and fifth degree of the RCC sexual abuse of a minor statute (RCC § 22-3020) and the current child sexual abuse statutes,[287] which prohibit a sexual act or sexual contact with a complainant under the age of 16 years when the actor is at least four years older. The penalty enhancement improves the proportionality of the revised statute and its consistency with the RCC sexual abuse of a minor statute.

(37) USAO, App. C at 322, recommends in sub-subparagraph (f)(5)(D)(iii) of the penalty enhancements replacing the "recklessly" culpable mental state with strict liability ("in fact") for the fact that the complainant is under 18 years of age and the fact that the actor is in a position of trust with or authority over the complainant. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that "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." USAO states that "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,"[288] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[289] USAO states that this latter type of evidence "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." USAO states that it "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." However, 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." In the alternative, USAO recommends keeping strict liability for "offenses involving

[286] D.C. Code § 22-3020(a)(2).

[287] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

[288] USAO further states that 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."

[289] USAO states that this evidence "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."

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." There is no discussion specific to the element that the actor was in a position of trust with or authority the complainant.

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves a complainant with a specified type of mental or physical incapacitation. Unlike the RCC sexual abuse of a minor statute (RCC § 22E-1302), the offense does not base liability on the ages of the parties or the relationship between them. The "recklessly" culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant's age and the fact that the actor is in a position of trust with or authority over the complainant, yet still chooses to use force, threats, engage with an incapacitated complainant, etc. The penalty enhancement does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[290] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[291] Requiring recklessness as to the age of the minor is not

[290] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[291] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of

inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[292] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[293] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[294]

(38) USAO, App. C at 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iii) removing the requirement that the actor be at least four years older than the complainant so that the penalty enhancement would apply if the complainant was under 18 years of age and the actor was in a "position of trust with or authority over" the complainant. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that "the important consideration is the power dynamic between the defendant and the complainant, not the age differential" and that the "focus is on the relationship between the parties, and the defendant violating the trust that was put into him or her."

- The RCC does not incorporate USAO's recommendation because the four year age gap improves the proportionality of the revised statute. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting young complainants. An actor that is at least 18 years of age and in a position of trust with or authority over a complainant that is under 18 years when there is less than a four year age gap still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor's conduct.

(39) USAO, App. C at 322, recommends deleting the penalty enhancement: "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." USAO states that this is "consistent with current law" and that it relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion of deleting this enhancement.

- The RCC accepts this recommendation by deleting this penalty enhancement. The CCRC independently makes this recommendation, discussed below. This change improves the consistency of the revised statute with the RCC sexual abuse of a minor statute.

(40) The CCRC recommends deleting the sexual assault penalty enhancement in what was previously subparagraph (g)(4)(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

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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."

[292] D.C. Code § 22-1834.

[293] D.C. Code § 22–1839.

[294] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

years of age or older and at least 4 years older than the complainant." This penalty enhancement codified a revised version of the general penalty enhancement for crimes against minors in D.C. Code § 22-3611.[295] *However, it is inconsistent with RCC sexual abuse of a minor statute (RCC § 22E-1302), which only imposes liability for sexual conduct with a complainant under 18 years if the defendant was at least 18 years of age, at least four years older, and in a position of trust with or authority over the complainant.*

- This change improves the consistency of the RCC sexual assault and sexual abuse of a minor statutes and improves the proportionality of the penalties. The commentary to the RCC sexual assault statute has been updated to reflect this is a change in law.

(41) *The CCRC recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iv) requiring that the actor is under 65 years of age. With this change, the penalty enhancement requires that the complainant is 65 years of age or older, and, in fact, the actor is under 65 years of age and at least 10 years younger than the complainant. This change was proposed for the RCC definition of "protected person" in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report),*[296] *but the revised statutory text for the definition omitted the requirement. The CCRC recommends making this change in the definition of "protected person," discussed elsewhere in this appendix, and in this sexual assault penalty enhancement. This change preserves the penalty enhancement for predatory behavior targeting older complainants.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(42) USAO, App. C 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iv) removing the requirement that the complainant be at least 10 years younger than a complainant that is 65 years of age or older so that the penalty enhancement would apply if the complainant were 65 years of age or older. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that an age gap should not be added because the RCC sexual assault statute "only deals with sexual acts/contacts involving force or violence." As such, USAO states the age gap "is not a relevant consideration" because 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." USAO compares the age gap in the penalty enhancement to the

[295] D.C. Code § 22-3611(a) ("Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both."). The RCC increased the required age gap to 4 years and expanded the crimes to which the enhancement applies, *see* RCC Commentary to the definition of "protected person" in RCC § 22E-701.

[296] First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code* (Report), Appendix D - Disposition of Advisory Group Comments & Other Changes to Draft Documents (4-1519).

four year age gap required in the RCC sexual abuse of a minor statute and current law for complainants under 16 years of age, noting that in these offenses, the age gap requirement "serve[s] a very different purpose," "exclud[ing] 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 RCC does not incorporate USAO's recommendation because the 10 year age gap improves the proportionality of the revised statute. The 10 year age gap requirement reserves the penalty enhancement for predatory behavior targeting older complainants. An actor that is less than 10 years younger than an elderly complainant still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor's conduct.

(43) USAO, App. C at 322, recommends in the penalty enhancement for complainants that are 65 years of age or older in sub-subparagraph (f)(5)(D)(iv) replacing the "recklessly" culpable mental state for the age of the complainant with strict liability ("in fact") for the fact that the complainant is 65 years of age or older. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that "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." USAO states that "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,"[297] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[298] USAO states that this latter type of evidence "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."

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves a complainant with a specified type of mental or physical incapacitation. Unlike the RCC sexual abuse of a minor statute (RCC § 22E-1302), the

[297] USAO further states that 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."

[298] USAO states that this evidence "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."

offense does not base liability on the ages of the parties or the relationship between them. The "recklessly" culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant's age and the fact that the actor is in a position of trust with or authority over the complainant, yet still chooses to use force, threats, engage with an incapacitated complainant, etc. The penalty enhancement does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[299] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[300] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[301] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[302] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[303]

[299] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[300] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[301] D.C. Code § 22-1834.

[302] D.C. Code § 22–1839.

[303] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

(44) USAO, App. C at 322, recommends in the penalty enhancement for a vulnerable adult (subparagraph (g)(4)(E)) replacing the "recklessly" culpable mental state for the fact that the complainant is a vulnerable adult with strict liability ("in fact."). USAO states that this is "consistent with current law" and relies on the rationale in its General Comments (App. C at 313-316). However, there is no discussion specifically about the sexual assault penalty enhancement for a vulnerable adult.

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves an incapacitated complainant. The "recklessly" culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant's status as a "vulnerable adult," yet still chooses to use force, threats, engage with an incapacitated complainant, etc. There is no current sexual abuse aggravator for a "vulnerable adult" so it is not possible to compare the RCC penalty enhancement to current law.

(45) USAO, App. C at 275-276, recommends codifying a sex offense repeat offender penalty enhancement to the RCC's repeat offender penalty enhancement statute (RCC § 22E-606). Specifically, USAO recommends adding a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims." USAO is "concerned" that the misdemeanor recidivist penalty enhancement and the non-crime of violence felony penalty enhancement in RCC § 22E-606 require two or more prior convictions. USAO is also "concerned" that this enhancement "only applies to the number of prior convictions, rather than to the total number of victims." USAO states that the proposed provision 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." USAO states that "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 crime of violence felony recidivist enhancement.

- The RCC does not incorporate this recommendation because it is would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. The 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.[304] The RCC general provision provides a

[304] The current D.C. Code sexual abuse aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims . . . ." D.C. Code § 22-3020(a)(5). The

uniform penalty enhancement for an actor who has a prior crime of violence, felony, or misdemeanor crime of violence conviction. It is inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. Notably, while the statistical evidence available to the CCRC is limited as to the operation of specific enhancements,[305] Superior Court statistics for 2009-2015 indicate only five instances during those six years where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum—and in all five instances the aggravator concerned the relationship of the actor to the complainant, not priors or multiple victims.[306]

(46) USAO at App. C. 420-421, "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.

- The RCC does not incorporate the recommendation because it may authorize disproportionate penalties by punishing offenses of differing seriousness the same.[307] The USAO recommendation would authorize punishments more severe than first degree murder (acting with premeditation and deliberation) for enhanced first degree sexual assault, first degree sexual abuse of a minor (presumably including enhanced first degree sexual abuse of a minor), and enhanced second degree sexual abuse of a minor. In contrast, under the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree sexual assault is a Class 4 felony and enhanced first degree sexual assault is a Class 3 felony. These rankings are proportional in relation to the rankings of the most serious RCC homicide offenses—enhanced first degree murder as a Class 1 felony, first degree murder as a Class 2 felony, enhanced second degree murder as a Class 3 felony, and second degree murder as a Class 4 felony.

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plain language of the enhancement is unclear and there is no case law clarifying the issue. One possible interpretation of the current aggravator is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[305] The CCRC analysis of court statistics provided in Advisory Group Memo #28 do not differentiate between non-while armed enhancements.

[306] See Advisory Group Memo #10 Appendix C - Sentencing Commission Statistics on District Penalty Enhancements (6-7-17). According to the analysis provided by the Sentencing Commission, four life sentences were given for First Degree Child Sexual Abuse, D.C. Code § 22-3008, and one sentence of 408 months was given for First Degree Sexual Abuse, D.C. Code § 22-3002, based on the aggravator in D.C. Code §22-3020(a)(2) enhancement ("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).

[307] The USAO recommendation for homicide crimes is addressed in the corresponding Appendix D1 entries for homicide crimes.

- While the RCC at present does not address absolute imprisonment penalties associated with classes, the RCC recommendation of Class 3 for enhanced first degree sex assault and enhanced first degree sexual abuse of a minor would correspond to 480 months or 384 months in Models 1 and 2 in the First Draft of Report #41. The RCC recommendation of Class 4 for first degree sex assault, first degree sex abuse of a minor, and enhanced second degree sex abuse of a minor would correspond to according to 360 months or 288 months in Models 1 and 2 in the First Draft of Report #41. The RCC's penalty recommendations reflect a significant decrease from the current D.C. Code statutory penalties of up to life imprisonment for enhanced forms of first degree sexual abuse and first degree child sexual abuse, which appear to be more severe than is proportionate under modern D.C. judicial practice. Note that, as the District abolished parole in 2000, "life" sentences issued since then are functionally the equivalent of "life without parole" sentences.
    i. For all first degree sexual abuse and first degree child sexual abuse offense sentences reviewed in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (covering a 10 year span), even the most severe (97.5%) Superior court sentences for first degree sexual abuse (444 months, including enhancements) and first degree child sexual abuse (234.6 months, including enhancements) are well below the life without parole penalties authorized by current statute and within the Model 1 and/or 2 in the First Draft of Report #41.
- Support among District voters for grading the penalty for sexual assault lower than first or second degree homicide is apparent in the CCRC public opinion surveys.[308]
- The RCC presently sets only the relative penalties for Class 1 felonies and does not establish the absolute penalties, be it a determinate term of years or an indeterminate term such as "life without parole." However, the CCRC data in sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions indicates that in the relevant 10 year time range, there were 6 first degree child sexual abuse convictions, one second degree child sexual abuse conviction, one misdemeanor sexual abuse, and no first degree sexual abuse convictions that received a life sentence. However, as the record for misdemeanor sexual abuse evinces, it is possible that some of the life

[308] See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluation of sexual assault involving serious bodily injury as being significantly less severe, by at least one classification, than a manslaughter scenario described as: "An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)." Question 2.16 provided the scenario: "Forcing submission to sexual penetration by inflicting serious injury.."). Question 2.16 had a mean response of 8.7, over class below the 10.0 milestone corresponding to manslaughter, and nearer the 8.0 corresponding to aggravated assault, currently a 10 year offense in the D.C. Code.

sentences in this court data was a clerical error. The CCRC plans to conduct further research with its dataset on the enhancements and facts at play in the 7 life sentences (by charge, not by case) imposed for child sex offenses in Superior Court 2009-2018. Notably, data provided in by the D.C. Sentencing Commission was collected in Appendix D to Advisory Group Memorandum #10 and provides a breakout of charges by the specific type of enhancement applied. According to this D.C. Sentencing Commission data (which evaluates dispositions at different points in a case and includes resentencing), from 2010 to 2015 there were a total of 4 life sentences given for first degree child sexual abuse under the enhancement for the victim being a minor with whom the actor had a significant relationship (per D.C. Code § 22-3020(a)(2)). Correspondence with USAO identified at least two sex offense cases sentenced 2009-2018, one in 2011 and another in 2015, that resulted in one or more life sentences. Subsequent agency research of public records indicates that one of these two cases involved a person convicted of numerous counts of child sex offenses which included 6 life sentences for first degree child sexual abuse and one for second degree child sexual abuse. In the second case identified by USAO in the ten-year timespan, the person was convicted of guilty on 23 counts of sexual abuse, assault, robbery, kidnapping and other charges. As the data evaluated by the CCRC, the Sentencing Commission, and the public records is taken at different points in time, a direct comparison of these life sentences is not possible. However, based on these several sources, it appears that there have been life sentences imposed by Superior Court judges in the past ten years for first and second degree child sexual abuse, but to the best of our knowledge these sentences were in cases involving so many convictions and serious charges that had the person convicted received a low number of years for each conviction the aggregate punishment would be equivalent to life imprisonment. A maximum sentence in accord with the RCC recommendations for sex offenses would have no practical effect on the imprisonment these offenders received and they would still be imprisoned for the rest of their lives.

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

(1) USAO at App. C. 420-421, "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.

- The RCC does not incorporate the recommendation because it may authorize disproportionate penalties by punishing offenses of differing seriousness the same.[309] The USAO recommendation would authorize punishments more severe than first degree murder (acting with premeditation and deliberation) for enhanced first degree sexual assault, first degree sexual abuse of a minor (presumably including enhanced first degree sexual abuse of a minor), and enhanced second degree sexual abuse of a minor. In contrast, under the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree sexual assault is a Class 4 felony and enhanced first degree sexual assault is a Class 3 felony. These rankings are proportional in relation to the rankings of the most serious RCC homicide offenses—enhanced first degree murder as a Class 1 felony, first degree murder as a Class 2 felony, enhanced second degree murder as a Class 3 felony, and second degree murder as a Class 4 felony.
- Further details and rationale regarding this recommendation are listed in the Appendix D1 entry above regarding the identical USAO recommendation for enhanced first degree sex assault.

(2) *The CCRC recommends classifying enhanced first degree sexual abuse of a minor as a Class 3 felony, enhanced second degree sexual abuse of a minor as a Class 4 felony, enhanced third degree sexual abuse of a minor as a Class 5 felony, enhanced fourth degree sexual abuse of a minor as a Class 5 felony, enhanced fifth degree sexual abuse of a minor as a Class 6 felony, and enhanced sixth degree sexual abuse of a minor as a Class 7 felony. Enhanced first degree sexual abuse of a minor and enhanced second degree sexual abuse of a minor have the same penalty classifications as enhanced first degree sexual assault and enhanced second degree sexual assault, which is consistent with the classification of the unenhanced gradations of these offenses. The enhanced gradations for third degree, fourth degree, fifth degree, and sixth degree sexual abuse of a minor are one penalty class higher than the equivalent unenhanced gradations in sexual abuse of a minor.*

- This change improves the consistency and proportionality of the revised statute.

(3) USAO, App. C at 324, recommends adding "engages in" to paragraphs (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1) so that the paragraphs prohibit "engages in or causes the complainant to engage in or submit to" the sexual act or sexual contact, as opposed to "causes the complainant to engage in or submit to" the

[309] The USAO recommendation for homicide crimes is addressed in the corresponding Appendix D1 entries for homicide crimes.

sexual act or sexual contact." USAO states that this is consistent with the current first degree child sexual abuse statute that prohibits "engages in a sexual act with that child or causes that child to engage in a sexual act" (D.C. Code § 22-3008). USAO states "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." USAO gives as a hypothetical if "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." USAO states that liability should "still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant."

- The RCC incorporates this recommendation by adding to paragraphs (a)(1), (b)(1), and (c)(1) that the actor "engages in a sexual act with the complainant" and adding to paragraphs (d)(1), (e)(1), and (f)(1) that the actor "engages in a sexual contact with the complainant." The commentary to the RCC sexual abuse of a minor statute has been updated to include this change in the discussion of the "causes the complainant to engage in or submit to" language. This change improves the clarity and consistency of the revised statute.

(4) The CCRC recommends including in the reasonable mistake of age defense a "written" statement that the complainant made to the actor about the complainant's age in addition to oral statements. As previously drafted, the reasonable mistake of age defense was limited to certain "oral" statements, which could lead to inconsistent liability dependent on the form of communication the complainant uses.

- This change improves the consistency and proportionality of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this is a change to current law.

(5) The CCRC recommends replacing "supported by" with "based on" in subparagraphs (g)(2)(A)(ii) and (g)(2)(B)(ii) so that the actor's reasonable belief must be "based on" an oral or written statement of age. The basis of the actor's belief must be an oral or written statement of age and "supported by" is potentially confusing.

- This change improves the clarity of the revised statute.

(6) USAO, App. C at 323, recommends deleting the reasonable mistake of age defense. USAO relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age." USAO states that "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,"[310] as well as "extremely

[310] USAO further states that 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,

prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[311] *USAO states that this latter type of evidence "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." USAO also notes that, as the RCC commentary recognizes, reasonable mistake of age is not "well-recognized or uniformly adopted by other jurisdictions." USAO states that it "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." However, 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." In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is 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 actor is in a position of trust with or authority over the complainant.*

- The RCC does not incorporate USAO's recommendation because it would authorize disproportionate penalties for consensual sexual conduct when the defendant reasonably believes the complainant is a certain age and the complainant actually is at least 14 years old. The RCC reasonable mistake of age defense has three requirements: 1) the defendant's belief must be "reasonable"; 2) the defendant's belief must be based on an oral statement of age that the complainant makes to the defendant; and 3) the complainant must be 14 years of age or older,[312] regardless of the defendant's mistake. In these limited situations, the RCC does not impose liability for consensual sexual conduct because the defendant is unaware that what he or she is doing is wrong due to the age of the complainant. The RCC sexual abuse of a minor statute retains strict liability as to age for any complainant that is under the age of 14 years. Given the narrow requirements of the defense, the RCC reasonable mistake of age defense does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape

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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."

[311] USAO states that this evidence "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."

[312] Although there are two reasonable mistake of age defenses with differing requirements, overall, they require that the complainant is, in fact at least 14 years of age. First degree, second degree, fourth degree, and fifth degree sexual abuse require that the complainant either be under 12 years of age or under 16 years of age. The reasonable mistake of age defense for these gradations, codified in [ ], requires that the complainant, in fact, be at least 14 years of age or older. Strict liability remains for complainants that are under the age of 14 years, regardless of the defendant's mistake. Third degree and sixth degree require that the complainant be under the age of 18 years. The reasonable mistake of age defense, codified in [ ], requires that the complainant is, in fact, 16 years of age or older.

Shield Laws,"[313] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[314] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[315] The RCC does not incorporate the alternative recommendation because it would lead to inconsistency.[316] The RCC reasonable mistake of age defense improves the proportionality of the revised statute.

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[313] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[314] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[315] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[316] In the alternative, 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 actor is in a position of trust with or authority over the complainant." USAO, App. C at 315. The RCC sexual abuse of a minor statute does retain strict liability for a complainant under the age of 14 years when the actor is not in a position of trust with or authority over the complainant. The RCC reasonable mistake of age does not apply to the gradations of the offense for a complainant under the age of 16 (first degree, second degree, fourth degree, or fifth degree) unless the complainant actually is 14 years of age or older. Thus, if a complainant under 14 years of age, strict liability applies. The alternative recommendation to require strict liability for a complainant that is under the age of 18 when an actor is in a position of trust with or authority over the complainant would give complainants that are 16 years of age or older, but under 18 years of age, less autonomy in their sexual decision-making than complainants under the age of 16 years, solely because the actor is in a position of trust with or authority over the complainant.

(7) USAO, App. C at 323, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, that the reasonable mistake of age defense be limited to an oral statement the complainant made "to the defendant." The reasonable mistake of age defense as previously drafted required an "oral statement by the complainant about the complainant's age" without specifying the recipient. USAO states that the "only relevance of the complainant making an oral statement about the complainant's age is if the defendant was aware of that statement." USAO states that "[g]iven 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."

- The RCC incorporates this recommendation by revising subparagraphs (g)(2)(B) and (g)(3)(B) to require that the reasonable belief is supported by an oral or written statement "that the complainant made to the actor about the complainant's age." This change improves the clarity and consistency of the revised statute.

(8) USAO, App. C at 323, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, that the reasonable mistake of age defense be revised to include as an additional requirement that the "actor had not had a reasonable opportunity to observe the complainant." USAO states that this is consistent with the current sex trafficking of children statute (D.C. Code § 22-1834(b)) and the federal sex trafficking of children statute (18 U.S.C. § 1591(c)), under which the government need not prove the defendant's knowledge or recklessness as to the complainant's age if the defendant had a "reasonable opportunity to observe the complainant."

- The RCC does not incorporate USAO's recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute and the other provisions of the RCC reasonable mistake of age defense. The RCC sexual abuse of a minor statute requires that a "sexual act" or "sexual contact" occur. Unlike the current D.C. Code child sex trafficking statute,[317] where a business or individual can traffic a complainant without ever seeing the complainant, it is very likely that the defendant in the RCC sexual abuse of a minor statute will have an opportunity to observe the defendant. In addition, as is discussed above, the RCC reasonable mistake of age defense has been limited to an oral or written statement of age that the complainant makes to the defendant, which also makes it likely that the defendant will have an opportunity to observe the complainant. Finally, the reasonable mistake of age defense requires that the defendant's belief be "reasonable," and a fact finder may consider whether the defendant had a reasonable opportunity to observe the complainant in assessing whether the belief was "reasonable." The

[317] D.C. Code § 22-1834(a) ("It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.").

proposed recommendation would negate the defense and is inconsistent with the other requirements of the statute.

(9) USAO, App. C at 323-324, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, the reasonable mistake of age defense be revised to specify that strict liability ("in fact") applies to the actual age of the complainant. USAO states that "it believes that it is the RCC's intent to have strict liability in these situations" and that adding "in fact" clarifies this.

- The RCC incorporates USAO's recommendation by specifying strict liability in paragraphs (g)(2) and (g)(3) of the reasonable mistake of age defense , which applies to each element in subparagraphs (g)(2)(A) – (g)(2)(C) and subparagraphs (g)(3)(A)-(g)(3)(C), including the actual age of the complainant. This change clarifies the revised statute.

(10) *The CCRC recommends specifying strict liability ("in fact") in paragraphs (g)(2) and (g)(3), which, per the rule of construction in RCC § 22E-207, applies to each element in subparagraphs (g)(2)(A) – (g)(2)(C) and subparagraphs (g)(3)(A)-(g)(3)(C). With this change, it is clear that there is no culpable mental state for the fact that the actor has a reasonable belief that the complainant is a certain age, that the reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant's age, or the actual, required age of the complainant. For example, the actor need not "know" that his or her belief is reasonable. The previous version of the reasonable mistake of age defense did not specify whether a culpable mental state or strict liability applied to these requirements.*

- This change improves the clarity of the revised statute.

(11) The CCRC recommends in subparagraphs (g)(2)(A), (g)(2)(C), (g)(3)(A), and (g)(3)(C) of the reasonable mistake of age defense replacing "at the time of the offense" with "at the time of the sexual act or sexual contact." This is consistent with a revision made to the RCC sexual assault penalty enhancements.

- This revision improves the clarity of the revised statute.

(12) *PDS, App. C at 270-271, objects to the limitations placed on the affirmative defense of reasonable mistake of age. PDS states that "[a]bsent 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 age will always be a "she said, he said" issue and an issue of credibility. In addition, PDS states that an oral statement "might be one aspect of whether the actor's belief that the complainant was 16 (or 18) or older was reasonable." PDS gives as examples of evidence that might make an actor's belief reasonable: the actor and complainant may have met at a bar that "cards" every patron; the actor may have asked if the complainant were a certain age and the complainant nodded in assent; or that the complainant may have shown the actor a fake ID. PDS also gives as examples evidence that make an actor's belief unreasonable despite a complainant's oral statement of age, such as meeting the complainant outside a middle school. PDS states 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" and that "[i]n 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."

- The CCRC partially incorporates PDS' recommendation to strike the limitations on the reasonable mistake of age defense by including within the offense written statements of age by the complainant to the actor. This revision is discussed further above in this Appendix. Although the defendant's belief must be based on an oral or written statement of age, a jury may also be able to consider the types of evidence PDS raises in determining whether the defendant's belief is "reasonable."

(13) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[318] to all sex offenses in RCC §§ 22E-1301-1307, including sexual abuse of a minor. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with is 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."

- The RCC partially incorporates USAO's recommendation by codifying in the RCC sexual abuse of a minor statute the RCC sexual assault penalty enhancements that do not overlap[319] with the elements of the RCC sexual abuse of a minor offense or are not inapplicable to the offense[320]: 1) the

[318] D.C. Code § 22-3020(a)(1) – (a)(6) ("(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.").

[319] The RCC sexual assault penalty enhancements that overlap with the elements of the RCC sexual abuse of a minor statute, and are not included as penalty enhancements in the RCC sexual abuse of a minor offense, are: 1) the complainant was under the age of 12 and the actor was at least 4 years older; 2) the complainant was under the age of 16 years and the actor was at least 4 years older; and 3) as it pertains to third degree and sixth degree sexual abuse of a minor, that the actor was in a position of trust with or authority over the complainant.

[320] The RCC sexual assault statute has penalty enhancements for elderly complainants and a complainant that is a "vulnerable adult," which are inapplicable to the RCC sexual abuse of a minor statute.

use or display of a dangerous weapon or imitation dangerous weapon; 2) acting with one or more accomplices; 3) causing serious bodily injury to the complainant; or 4) for first degree, second degree, fourth degree, and fifth degree, the actor knew that he or she was in a position of trust with or authority over complainant.[321] Notably, while the statistical evidence available to the CCRC is limited as to the operation of specific enhancements,[322] Superior Court statistics for 2009-2015 indicate only five instances during those six years where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum—and in all five instances the aggravator concerned the relationship of the actor to the complainant, not priors or multiple victims.[323] This change improves the consistency and proportionality of the revised statutes.

(14) USAO, App. C at 324, recommends in third degree and sixth degree of the RCC sexual abuse of a minor statute removing the four year age gap between the actor and the complainant. With this change, third degree and sixth degree of the RCC sexual abuse of a minor statute would require only that the defendant is at least 18 years of age, the complainant is under 18 years of age, and the actor is in a position of trust with or authority over the complainant. USAO states that this change is "consistent with current law" and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). USAO states that 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." In addition, USAO states that the RCC noted that 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."[324]

- The RCC does not incorporate USAO's recommendation because it would be inconsistent with the liability requirements for a complainant that is under the age of 16 years. The current D.C. Code child sexual abuse statutes[325] and the RCC sexual abuse of a minor statute require at least a four year age gap between an actor and a complainant under the age of 16 years. The current D.C. Code sexual abuse of a minor statutes do not require a four year age gap when the complainant is under the age of 18

[321] USAO separately raises, and the entry in this appendix for the RCC sexual assault statute separately addresses, the aggravator for prior convictions in the current D.C. Code sexual abuse statutes.

[322] The CCRC analysis of court statistics provided in Advisory Group Memo #28 do not differentiate between non-while armed enhancements.

[323] See Advisory Group Memo #10 Appendix C - Sentencing Commission Statistics on District Penalty Enhancements (6-7-17). According to the analysis provided by the Sentencing Commission, four life sentences were given for First Degree Child Sexual Abuse, D.C. Code § 22-3008, and one sentence of 408 months was given for First Degree Sexual Abuse, D.C. Code § 22-3002, based on the aggravator in D.C. Code §22-3020(a)(2) enhancement ("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).

[324] USAO, App. C at 315, quoting RCC, App. J at 261-63.

[325] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

years and the actor is at least 18 and in a "significant relationship" with the complainant.[326] Third degree and sixth degree of the RCC sexual abuse of a minor statutes added a four year age gap to parallel the age gap requirement in the child sexual abuse statutes. The four year age gap avoids criminalizing otherwise consensual sexual conduct between an actor that is at least 18 years of age and a complainant that is between 16 years and 18 years of age solely because the actor is in a position of trust with or authority over the complainant. Finally, while RCC Appendix J noted that 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,"[327] this is also due, in part, to the fact that only a narrow minority of reformed jurisdictions have liability at all for sexual conduct with complainants under 18 years of age.[328]

(15) OAG, App. C at 251, recommends removing the reference to "domestic partnerships" in the marriage or domestic partnership defense. OAG states that, due to the current and RCC definition of "domestic partnership," the District only recognizes domestic partnerships where the parties are at least 18 years old—either domestic partnerships registered in the District or domestic partnerships that are "substantially similar" to District domestic partnerships. OAG states that since the RCC sexual abuse of a minor statute requires the complainant to be under 18 years of age, "there is never a situation where a person will be able to use the domestic partnership defense."

- The RCC does not incorporate OAG's recommendation because it may lead to inconsistencies with the District law governing domestic partnerships. It appears possible for the District to recognize a domestic partnership in another jurisdiction even if the parties are not at least 18 years of age. The RCC marriage and domestic partnership defense and the RCC definition of "domestic partnership" are substantively identical to the defense[329] and definition[330] in the current D.C. Code sexual abuse statutes.

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[326] D.C. Code §§ 22-3008, 22-3009, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

[327] RCC App. J at 258-260.

[328] RCC App. J noted, with footnotes omitted here:

> At least 14 of the 29 reformed jurisdictions have gradations in their sex offenses for a complainant under the age of 18 years when the actor is in a position of trust with or authority over the complainant. Five of these 14 reformed jurisdictions require an age gap between the actor and the complainant in at least one of the offenses or gradations and one jurisdiction makes the age gap an affirmative defense. An additional jurisdiction narrows the offense not by an age gap requirement, but by requiring that the actor use the position of authority to coerce the complainant.

[329] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.").

[330] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). The current D.C. Code sexual abuse statutes use the D.C. Code § 32-701(4) definition of "domestic

> Under the current D.C. Code definition of "domestic partnership," the District does require individuals to be at least 18 years of age in order to register a domestic partnership in the District, but "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."[331] It appears possible that the Mayor could recognize a relationship in another jurisdiction as "substantially similar" to a domestic partnership in the District even if the individuals were not at least 18 years of age.[332] In addition, the current definition of "domestic partnership" states that "the Mayor shall broadly construe the term 'substantially similar' to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District,"[333] and has a provision that requires the Mayor in certain circumstances to recognize relationships in other jurisdictions as domestic partnerships, regardless of how they are treated in those jurisdictions.[334] The RCC marriage and domestic partnership defense is consistent with current District law.

(16) USAO, App. C at 324-325, recommends adding a paragraph (g)(4) that states "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." USAO

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partnership." D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4).").

[331] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). D.C. Code § 32-701(4) defines "domestic partnership" as the "relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)." Under D.C. Code § 32-702(a), individuals must be at least 18 years old to register a domestic partnership in the District. However, under D.C. Code § 32-702(i), "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."

[332] Consider, for example, if the individuals entered into the relationship in the other jurisdiction when one or both individuals was 17 and-a-half years of age and the individuals seek to register the relationship in the District just shy of an 18th birthday. Or consider if one or both individuals was significantly younger than 18 years of age when they entered the relationship in the other jurisdiction, but at the time of seeking to register in the District, the relevant party or parties are 18 years of age or well older than 18 years of age.

[333] D.C. Code § 32-702(i)(1).

[334] D.C. Code § 32-702(i)(1) requires the Mayor to "establish and maintain a certified list of jurisdictions" that are recognized as having substantially similar domestic partnerships. However, in the event of a jurisdiction that is not on this list,

> (2) If the Mayor has not yet certified, pursuant to paragraph (1) of this subsection, that the laws of a jurisdiction permit the establishment of relationships substantially similar to domestic partnerships established by this chapter, and if the laws of that jurisdiction prescribe that the relationship, regardless of the term or phrase used to refer to the relationship, has all the rights and responsibilities of marriage under the laws of that jurisdiction, the relationship shall be recognized as a domestic partnership in the District and the Mayor shall include that jurisdiction in the certified list required under paragraph (1) of this subsection.

D.C. Code § 32-702(i)(2).

states that this is "implied" in the RCC sexual abuse of a minor statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense." USAO states that this is consistent with current law.

- The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexual abuse of a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. However, the commentary to the RCC sexual abuse of a minor statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(17) The CCRC recommends in paragraph (g)(1) of the marriage or domestic partnership defense replacing "at the time of the offense" with "at the time of the sexual act or sexual contact." This is consistent with a revision made to the RCC sexual assault penalty enhancements.

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this is a clarificatory change to current District law.

(18) The CCRC recommends in paragraph (g)(1) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, paragraph (g)(1) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact." The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this a clarificatory change to current District law.

(19) The CCRC recommends deleting the burden of proof requirements for the affirmative defenses (previously paragraph (g)(3)). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).

- This change improves the clarity and consistency of the revised statute.

RCC § 22E-1303. Sexual Abuse by Exploitation.

(1) OAG, App. C at 251-252, recommends changing the name of the offense from "sexual exploitation of an adult" to "sexual exploitation." OAG states that the offense title is "misleading" because the offense applies to certain students that are under the age of 20 years.

- The RCC partially incorporates this recommendation by changing the name of the offense to "sexual abuse by exploitation." The reference to "sexual abuse" is consistent with "abuse" in the RCC "sexual abuse of minor" offense (RCC § 22E-1302). Like the RCC sexual abuse of a minor offense, the sexual abuse by exploitation offense criminalizes otherwise consensual sexual conduct due to the relationship between the parties. This change improves the clarity of the revised statute.

(2) USAO, App. C at 325-326, recommends adding "engages in" to paragraphs (a)(1) and (b)(1) so that they prohibit "engages in or causes the complainant to engage in or submit to" the sexual act or sexual contact, as opposed to "causes the complainant to engage in or submit to" a sexual act or sexual contact. USAO states that this is consistent with the current sexual abuse of a ward statutes,[335] which prohibit "engages in" a sexual act or sexual contact, and the current sexual abuse of a patient or client statutes,[336] which are limited to "engages in" a sexual act or sexual contact. USAO states "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." USAO gives as a hypothetical if "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 prisoner to engage in the conduct." USAO states that liability should "still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant."

- The RCC incorporates this recommendation by adding to paragraph (a)(1) that the actor "engages in a sexual act with the complainant" and adding to paragraph (b)(1) that the actor "engages in a sexual contact with the complainant." This change improves the clarity and consistency of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to include this change in the discussion of the "causes the complainant to engage in or submit to" language. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect this is a possible change in law.

(3) The CCRC recommends replacing "In one or more of the following ways" in paragraphs (a)(2) and (b)(2) with "In one or more of the following situations." "In one or more of the following situations" clarifies that there is no a causation requirement between the sexual act or sexual contact and the prohibited scenarios-i.e., when the actor is a specified individual at a secondary school, etc.

[335] D.C. Code §§ 22-3013; 22-3014.
[336] D.C. Code §§ 22-3015; 22-3016.

- This change improves the clarity of the revised statute.

(4) USAO, App. C at 325, recommends adding "or other person of authority" to the list of specified secondary school employees (subparagraphs (a)(2)(A) and (b)(2)(A)). With USAO's recommendation, the statute provisions would read "The actor is a teacher, counselor, principal, administrator, nurse, coach, or security officer, or other person of authority in a secondary school." USAO states that such a catch-all is included in the current sexual abuse of a secondary education student statutes[337] and that it is important to have a catch-all "for any individuals [the RCC] list may inadvertently fail to include." As a hypothetical, USAO states that "a doctor at the school would not be included in this list," but "a nurse would."

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the statute and risk disproportionate penalties. The current D.C. Code sexual abuse of a secondary education student statutes prohibit sexual activity between certain students that are under the age of 20 years and certain "teacher[s], counselor[s], principal[s], coach[es], or other person[s] of authority in a secondary school."[338] From the current D.C. Code statutes, the RCC sexual abuse by exploitation statute retained "teacher," "counselor," "principal," and "coach," but deleted the "other person of authority in a secondary school" catch-all. The RCC sexual abuse by exploitation statute also codified three additional types of actors, "administrator," "nurse," and "security guard." As a result, the RCC sexual abuse by exploitation statute is limited to five types of actors (teacher, counselor, principal, administrator, nurse, coach, or security officer) that are uniquely positioned in a secondary school such that a sexual relationship with a student under the age of 20 years can be deemed inherently coercive. Other individuals at a secondary school that engage in sexual activity with students that are at least 18 years of age, but under the age of 20 years,[339] may face liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) if the actor uses his or her position to coerce the complainant. In addition, under USAO's hypothetical of a doctor that engages in sexual activity with a student under the age of 20 years, there may be liability under subparagraphs (a)(2)(C) and (b)(2)(C) of the RCC sexual abuse by exploitation offense pertaining to health professionals. A "doctor" is not typically an employee at a school, but a "nurse" is, justifying its inclusion in the secondary education student provision of the RCC sexual abuse by exploitation offense.

[337] D.C. Code §§ 22-3009.03; 22-3009.04.
[338] D.C. Code §§ 22-3009.03; 22-3009.04.
[339] If the student is under the age of 18 years, there is liability under third degree or sixth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302) if the actor is in a "position of trust with or authority over" the complainant and if the actor is at least 18 years of age and at least four years older than the complainant.

(5) OAG, App. C at 252, recommends defining the term "clergy" in the sexual abuse by exploitation offense, as opposed to stating the intended scope in the commentary. OAG recommends defining "clergy" as "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."

- The RCC partially incorporates this recommendation by replacing a "member of the clergy" in subparagraphs (a)(2)(C) and (b)(2)(C) with "a religious leader described in D.C. Code § 14-309." The discussion in the commentary of the intended broad scope of this provision remains unchanged. D.C. Code § 14-309 refers to 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."[340] This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this definition is part of a change in law.

(6) USAO, App. C at 326, recommends adding "medical or therapeutic" to sub-subparagraphs (a)(2)(C)(i) and (b)(2)(C)(i) so that the provisions prohibit falsely representing that the sexual act or sexual contact is for a "bona fide professional, medical, or therapeutic purpose," as opposed to a "bona fide professional purpose." USAO states that the current sexual abuse of a patient or client statutes provide liability for 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."[341] USAO states the revised statute should be "consistent with current law" and this revision would "ensure that the medical and therapeutic purposes are expressly included" in the revised statute.

- The RCC incorporates this recommendation by adding a "medical" or "therapeutic" purpose to sub-subparagraphs (a)(2)(C)(i) and (b)(2)(C)(i). This change improves the clarity of the revised statute.

(7) USAO, App. C at 325, recommends replacing the "recklessly" culpable mental state that applies to sub-subparagraphs (a)(2)(A)(i)(I), (b)(2)(A)(i)(I), (a)(2)(A)(i)(II), and (b)(2)A)(i)(II) with strict liability ("in fact."). USAO further recommends applying strict liability to subparagraphs (a)(2)(A) and (b)(2)(A).[342] With these changes, these provisions would require that the actor is "in fact" a specified member of a secondary school and that the complainant is "in fact" an enrolled student in the same secondary school as the actor or that the complainant "in fact" receives services or attends programming at the same secondary school as the actor. USAO states that this change is "consistent with

[340] D.C. Code § 14-309.
[341] D.C. Code §§ 22-3015(a)(1); 22-3016(a)(1).
[342] Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraphs (a)(1) and (b)(1) applies to all elements in subparagraphs (a)(1)(A) and (b)(1)(A) until the "recklessly" culpable mental state is specified in those subparagraphs.

current law" and relies on the rationale in its General Comments to RCC Chapter 13, App. C at 313-316, which is specific to removing the requirement of recklessness as to the complainant's age.

- The RCC does not incorporate this recommendation because requiring strict liability for these elements may authorize disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[343] but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[344] Given the heightened responsibility that comes with the specified secondary school positions in subparagraphs (a)(2)(A) and (b)(2)(A), a "knowingly" culpable mental state is proportionate. This heightened responsibility makes proportionate the lower culpable mental state of "recklessly" for the requirements pertaining to the complainant—that the complainant is an enrolled student in the same secondary school as the actor or that the complainant receives services or attends programming at the same secondary school as the actor. The "knowingly" and "recklessly" culpable mental states improve the proportionality of the revised statute.

(8) *USAO, App. C at 325, recommends replacing the "recklessly" culpable mental state that applies to sub-subparagraphs (a)(2)(A)(i)(II) and (b)(2)(A)(ii) with strict liability ("in fact.") With these changes, these sub-subparagraphs would require that the complainant "in fact" is under the age of 20 years. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states "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." USAO states that "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,"[345] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[346] USAO states that this latter type of evidence "would not only serve to embarrass a victim*

[343] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[344] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[345] USAO further states that 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."

[346] USAO states that this evidence "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."

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." USAO states that it "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." However, 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."

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual abuse by exploitation statute criminalizes sexual activity with complainants that are adults, i.e., over the age of 18 years, solely because of the school-based relationship between the actor and the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[347] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[348] In addition, although the current D.C. Code sexual abuse of a secondary education student statutes do not specify any culpable mental states, the strict liability statute in current D.C. Code § 22-3012 does not appear to apply to them.[349] There is no DCCA case law on the current D.C. Code sexual abuse of a secondary education student statutes, making it unclear whether requiring a "recklessly" culpable mental state for the

[347] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[348] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[349] D.C. Code § 22-3012 states, "In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child." D.C. Code § 22-3012. The current D.C. Code sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall within the specified range of statutes, but it is unclear if the Council intended for D.C. § 22-3012 to apply to the secondary education student statutes or realized that it would. The current secondary education statutes do not use the term "child" or require an age gap, and D.C. Code § 22-3012 has not been revised since the 1994 Anti-Sexual Abuse Act. The secondary education students were codified in 2010.

Similarly, D.C. Code § 22-3011(a) states that "mistake of age . . . is [not] a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403." D.C. Code § 22-3011(a). The current D.C. Code sexual abuse of a secondary education student statutes fall within the specified range of D.C. Code §§ 22-3008 to 22-3010.01, but this appears to be a result of the codification of the misdemeanor sexual abuse of a child or minor statute at D.C. Code § 22-3010.01. The current D.C. Code misdemeanor sexual abuse of a child or minor statute was enacted in 2007, and as part of the legislation, D.C. Code § 22-3011(a) was amended to make D.C. Code § 22-3010.01 the end of the specified range of statutes. Since the current sexual abuse of a secondary education student statutes were not enacted until 2010, it is unclear if the Council intended for § 22-3011 to apply to the secondary education student statutes, or realized that it did.

age of a secondary education student complainant is a change to current law. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[350] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[351] Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[352] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[353] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[354]

(9) *USAO, App. C at 326, recommends adding a subsection that states "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." USAO states that this is "implied" in the RCC sexual abuse by exploitation statute as drafted, but that it*

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[350] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[351] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[352] D.C. Code § 22-1834.

[353] D.C. Code § 22–1839.

[354] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

should be explicitly stated "to eliminate any potential confusion." USAO states that this is consistent with current law in D.C. Code § 22-3017(a).

- The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexual abuse by exploitation statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(10) *The CCRC recommends replacing "at the time of the offense" with "at the time of the sexual act or sexual contact" the marriage or domestic partnership defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this is a clarificatory change to current District law.

(11) *The CCRC recommends in subsection (c) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, subsection (c) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact." The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.*

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this a clarificatory change to current District law.

(12) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense in subsection (c). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-201).*

- This change improves the clarity and consistency of the revised statute.

(13) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[355] to all sex offenses in RCC §§ 22E-1301-1307, including sexual abuse by exploitation. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter,"*

[355] D.C. Code § 22-3020(a)(1) – (a)(6) ("(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.").

which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability." There is no discussion in USAO's comment of how the current penalty enhancements would affect the RCC sexual abuse by exploitation statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC sexual abuse by exploitation statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC sexual abuse by exploitation offense, similar conduct could receive significantly different penalties.[356]

[356] If, for example, a prison guard uses a weapon to coerce an inmate into having sex with the prison guard, that behavior is more proportionately charged as sexual assault.

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

(1) USAO, App. C at 327, recommends replacing "contact" with "conduct" in subsection (a) so that the subsection reads "An actor commits sexually suggestive conduct with a minor when that actor." USAO states that this clarifies the statute.

- The RCC incorporates this recommendation by replacing "contact" with "conduct." This change resolves a typographical error and improves the clarity of the revised statute.

(2) The CCRC recommends replacing "Knowingly touches the actor's genitalia or that of a third person in the sight of the complainant with intent that the complaint's presence cause the sexual arousal or sexual gratification of any person" (previously subparagraph (a)(1)(D)) with the actor "Purposely engages in: (i) A sexual act that is visible to the complainant; (ii) A sexual contact that is visible to the complainant; or (iii) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering, that is visible to the complainant." There are two changes with this revision. First, the scope of prohibited conduct is expanded to include, if visible to the complainant, a sexual act, a sexual contact, and sexualized displays of the genitals, pubic area, or anus. This is consistent with the scope of the RCC indecent exposure statute (RCC § 22E-4206), the one exception being that the sexually suggestive conduct with a minor statute does not require less than a full opaque covering for sexualized displays. Displays of the genitals, pubic area, and anus to a minor complainant may still be sexualized even when there is a full opaque covering (e.g., an erection covered by underwear but visible). Second, the "purposely" culpable mental state replaces "with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person." This previous language was drafted to avoid criminalizing adult sexual conduct in front of a minor in a small living space. However, the "purposely" culpable mental state has the same effect by requiring that the defendant consciously desires that the sexual act, sexual contact, or sexualized display is visible to the complainant.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

(3) The CCRC recommends expanding the prohibited conduct to "engages in with the complainant or causes the complainant to engage in or submit to." The current D.C. Code misdemeanor sexual abuse of a child or minor statute[357] and the previous version of the RCC sexually suggestive conduct with a minor statute were limited to the actor touching or kissing the complainant and there would be

[357] D.C. Code § 22-3010.01(b)(1) – (b)(3) ("(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor."). The fourth type of prohibited conduct in the current statute, "[t]ouching one's own genitalia or that of a third person," has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

no liability for the actor making the complainant touch or kiss the actor or a third party or submit to touching or kissing by a third party. Prohibiting "engages in" or "causes the complainant to engage in or submit to" is consistent with the scope of the other RCC sex offenses.

- This change improves the consistency of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

(4) The CCRC recommends replacing "Touches the complainant inside his or her clothing . . . ; (B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks . . . ; (C) Places the actor's tongue in the mouth of the complainant . . . " (previous subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C)) with "(a) Touching or kissing any person, either directly or through the clothing." This revision simplifies the requirements for touching a minor complainant by removing the focus on where and how the complainant was touched and instead making the defendant's intent the deciding factor. For example, under the current D.C. Code misdemeanor sexual abuse of a child or minor statute[358] and the previous draft of the RCC sexually suggestive conduct with a minor statute, a defendant would not have liability for touching a minor complainant on the complainant's bare foot or licking the complainant's face with the intent to sexually arouse or gratify himself or herself.

- This change improves the clarity of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this is a change in current law.

(5) The CCRC recommends including as a basis for liability engaging in or causing the complainant to engage in or submit to "removing clothing from any person." Under the current D.C. Code misdemeanor sexual abuse of a child or minor statute[359] and the previous draft of the RCC sexually suggestive conduct with a minor statute, there was no liability for this conduct. This is a gap in liability that may encourage defendants to make a minor complainant undress so that the defendants avoid liability by not touching the complainant.

- This change removes a gap in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

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[358] D.C. Code § 22-3010.01(b)(1) – (b)(3) ("(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor."). The fourth type of prohibited conduct in the current statute, "[t]ouching one's own genitalia or that of a third person," has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

[359] D.C. Code § 22-3010.01(b)(1) – (b)(3) ("(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor."). The fourth type of prohibited conduct in the current statute, "[t]ouching one's own genitalia or that of a third person," has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

(6) USAO, App. C at 328, recommends revising what was previously subparagraph (a)(1)(A) to prohibit "Touches the complainant directly or causes the complainant to touch the actor directly, or inside the complainant's or actor's clothing with intent to cause the sexual arousal or sexual gratification of any person." USAO states "it is appropriate to modify the language to include touching that are either direct or inside the clothing" because "if a person is naked, it is unclear whether a touching would be 'inside' the clothing." USAO further states that it is "appropriate to include liability for either the defendant touching the complainant, or the defendant causing the complainant to touch the defendant." USAO gives as a hypothetical a defendant that would face liability for touching a complainant, but not face liability for making the complainant touch the defendant in the same way.

- The RCC incorporates this recommendation by prohibiting in sub-subparagraph (a)(2)(B)(i) "engages in one of the following with the complainant or causes the complainant to engage in or submit to one of the following." This revision is discussed above. This change improves the consistency of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

(7) USAO, App. C at 328, recommends revising what was previously subparagraph (a)(1)(B) by replacing the words "inside his or her clothing" with "directly or through the complainant's clothing." With this change, the subparagraph would read "Touches the complainant directly or through the complainant's clothing." USAO states that although the previous subparagraph followed current law, it is unclear if touching a naked minor would be considered touching "inside or outside his or her clothing." USAO states that it is "equally (or more) culpable to engage in this sexual conduct with a naked child as with a clothed child." USAO states that the proposed language tracks the RCC definition of "sexual contact."

- The RCC incorporates this recommendation by specifying "either directly or through the clothing" in sub-subparagraph (a)(2)(B)(i)(a). The RCC does not specify that the clothing must be the "complainant's" because, as is discussed above, the scope of the offense now includes the complainant touching the actor or a third party in addition to himself or herself.

(8) USAO, App. C at 328, recommends specifying in what was previously subparagraph (a)(1)(B) that the "genitalia, anus, breast, or buttocks" must be "the complainant's." USAO states that without this language, "it could be vague" that the intimate parts belong to the actor.

- The RCC does not incorporate this recommendation because, as is discussed above, the scope of the offense now includes the complainant touching the actor or a third party in addition to himself or herself.

(9) USAO, App. C at 328, recommends specifying in what was previously subparagraph (a)(1)(B) the "complainant's" genitalia, anus, breast, or buttocks so that the provision reads "Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks . . ." USAO states that

this "clarifies that the intimate body parts must belong to the complainant, not to the actor, which could be vague."

- The RCC does not incorporate this recommendation because the sexually suggestive conduct with a minor statute no longer has this provision. In addition, the sexually suggestive conduct with a minor statute has an expanded scope, prohibiting causing the complainant to engage in or submit to touching or kissing any person, which would include touching the actor. This scope is consistent with the scope of the other RCC sex offenses and improves the clarity and consistency of the revised statute.

(10) OAG, App. C at 252-253, recommends deleting "with intent to cause the sexual arousal or sexual gratification of any person" from what was previously subparagraph (a)(1)(C) of the sexually suggestive conduct with a minor statute, which prohibited the actor from placing his or her tongue in the mouth of a minor. OAG states that there may be legitimate reasons for an actor to engage in the other prohibited conduct with a minor, making it necessary to include the sexual intent requirement for those subsections (subsections (A), (B), and (D)). However, "it is less apparent when a person would have a legitimate reason [to] place their tongue in a minor's mouth." In lieu of striking the intent language, OAG states the commentary should be revised to include examples of legitimate reasons why a person would put their tongue in a minor's mouth.

- The RCC does not incorporate this recommendation because it would lead to inconsistent liability. The RCC sexually suggestive conduct statute as now drafted no longer has a separate subparagraph for placing the tongue in the mouth of a minor. Instead, all forms of touching or kissing are broadly prohibited in sub-subparagraph (a)(2)(B)(i)(a) and there are appropriate non-sexual reasons for an actor to kiss a minor.

(11) USAO recommends replacing the culpable mental state of "recklessly" with strict liability ("in fact") for the ages of the complainants. With this change, what is now sub-paragraph (a)(1)(A) would require that "the complainant is, in fact, under 16 years of age," and what is now sub-subparagraph (a)(1)(B)(i) would require that "the complainant is, in fact, under 18 years of age." USAO states that this change "is consistent with current law" and "relies on the rationale" in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states "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." USAO states that "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,"[360] as well as "extremely prejudicial, and otherwise

[360] USAO further states that 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,

inadmissible, evidence not specifically covered by the Rape Shield Act."[361] *USAO states that this latter type of evidence "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." USAO states that it "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." However, 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." In the alternative, USAO recommends keeping strict liability for sexually suggestive conduct with a minor when the complainant is 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 actor is in a position of trust with or authority over the complainant.*

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[362] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[363] A "recklessly" culpable mental state is proportionate given the comparatively less serious conduct that the sexually suggestive conduct statute prohibits. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[364]

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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."

[361] USAO states that this evidence "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."

[362] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[363] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[364] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow

which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[365] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[366] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[367] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[368]

(12) USAO, App. C at 327, recommends replacing the culpable mental state of "knowingly" with strict liability ("in fact") for the fact that the actor is in a "position of trust with or authority over" a complainant that is under 18 years of age. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the "knowingly" culpable mental state as to the element of "position of trust with or authority over."

- The RCC does not incorporate this recommendation because requiring strict liability for this element risks disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[369] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, a "knowingly" culpable mental state is proportionate. The "knowingly" culpable mental state improves the proportionality of the revised statute.

(13) USAO, App. C at 327, recommends adding as a basis for liability that the actor "Engages in or causes the complainant to engage in or submit to a sexual act or sexual contact." USAO states that this would make sexually suggestive conduct

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categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[365] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[366] D.C. Code § 22-1834.

[367] D.C. Code § 22–1839.

[368] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[369] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

with a minor a lesser included offense of second degree and fifth degree sexual abuse of a minor. USAO states that the current misdemeanor sexual abuse of a child or minor statute "is frequently treated for plea purposes as a lesser charge to First and Second Degree Child Sexual Abuse" and this change "allows this current practice to continue." In addition, USAO states [a]ssuming 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."

- The RCC incorporates this recommendation by requiring in subparagraph (a)(2)(C) "Knowingly engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact." This change improves the consistency and proportionality of the revised statute.

(14) The CCRC recommends in subsection (b) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the prohibited conduct. With this change, subsection (b) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the prohibited conduct." The previous version of the defense did not specify whether a culpable mental state or strict liability applied.

- This change improves the clarity of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this a clarificatory change to current District law.

(15) *The CCRC recommends deleting the burden of proof requirements in the affirmative defense in subsection (b). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(16) OAG, App. C at 251, recommends removing the reference to "domestic partnerships" in the marriage or domestic partnership defense. OAG states that, due to the current and RCC definition of "domestic partnership," the District only recognizes domestic partnerships where the parties are at least 18 years old—either domestic partnerships registered in the District or domestic partnerships that are "substantially similar" to District domestic partnerships. OAG states that since the RCC sexually suggestive conduct with a minor statute requires the complainant to be under 18 years of age, "there is never a situation where a person will be able to use the domestic partnership defense."

- The RCC does not incorporate OAG's recommendation because it may lead to inconsistencies with the District law governing domestic partnerships. It appears possible for the District to recognize a domestic partnership in another jurisdiction even if the parties are not at least 18 years of age. The RCC marriage and domestic partnership defense and the RCC definition of "domestic partnership" are substantively identical to the

defense[370] and definition[371] in the current D.C. Code sexual abuse statutes. Under the current D.C. Code definition of "domestic partnership," the District does require individuals to be at least 18 years of age in order to register a domestic partnership in the District, but "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."[372] It appears possible that the Mayor could recognize a relationship in another jurisdiction as "substantially similar" to a domestic partnership in the District even if the individuals were not at least 18 years of age.[373] In addition, the current D.C. Code definition of "domestic partnership" states that "the Mayor shall broadly construe the term 'substantially similar' to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District,"[374] and has a provision that requires the Mayor in certain circumstances to recognize relationships in other jurisdictions as domestic partnerships, regardless of how they are treated in those jurisdictions.[375] The RCC marriage and domestic partnership defense is consistent with current District law.

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[370] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.").

[371] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). The current sexual abuse statutes use the D.C. Code § 32-701(4) definition of "domestic partnership." D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4).").

[372] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). D.C. Code § 32-701(4) defines "domestic partnership" as the "relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)." Under D.C. Code § 32-702(a), individuals must be at least 18 years old to register a domestic partnership in the District. However, under D.C. Code § 32-702(i), "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."

[373] Consider, for example, if the individuals entered into the relationship in the other jurisdiction when one or both individuals was 17 and-a-half years of age and the individuals seek to register the relationship in the District just shy of an 18th birthday. Or consider if one or both individuals was significantly younger than 18 years of age when they entered the relationship in the other jurisdiction, but at the time of seeking to register in the District, the relevant party or parties are 18 years of age or well older than 18 years of age.

[374] D.C. Code § 32-702(i)(1).

[375] D.C. Code § 32-702(i)(1) requires the Mayor to "establish and maintain a certified list of jurisdictions" that are recognized as having substantially similar domestic partnerships. However, in the event of a jurisdiction that is not on this list,

> (2) If the Mayor has not yet certified, pursuant to paragraph (1) of this subsection, that the laws of a jurisdiction permit the establishment of relationships substantially similar to domestic partnerships established by this chapter, and if the laws of that jurisdiction prescribe that the relationship, regardless of the term or phrase used to refer to the relationship, has all the rights and responsibilities of marriage under the laws of that jurisdiction, the relationship shall be recognized as a domestic partnership in the District

(17) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[376] to all sex offenses in RCC §§ 22E-1301-1307, including sexually suggestive conduct with a minor. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC sexually suggestive conduct with a minor statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC sexually suggestive conduct with a minor offense, similar conduct could receive significantly different penalties.[377]

(18) *USAO, App. C at 329, recommends adding a subsection that states "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." USAO states that this is "implied" in the RCC statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age." USAO states that this is consistent with current law in D.C. Code § 22-3011(a).*

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and the Mayor shall include that jurisdiction in the certified list required under paragraph (1) of this subsection.

D.C. Code § 32-702(i)(2).

[376] D.C. Code § 22-3020(a)(1) – (a)(6) ("(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.").

[377] If many of the RCC sexual assault penalty enhancements applied to the prohibited conduct in the RCC sexually suggestive conduct with a minor offense, that offense would be more proportionately charged as attempted sexual assault, attempted sexual abuse of a minor, or another RCC offense against persons. For example, if a defendant recklessly caused serious bodily injury during the offense, that would be more proportionately charged under the RCC assault statute.

- The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexually suggestive conduct with a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(19) *The CCRC recommends replacing "at the time of the offense" with "at the time of the prohibited conduct" in the marriage or domestic partnership defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

- This revision improves the clarity of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this is a clarificatory change to current District law.

(20) *The CCRC recommends deleting the jury demandability provisions in what was previously subsection (e). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(21) *USAO, App. C 415-419, appears to recommend against creation of a right to a jury trial for sexually suggestive conduct with a minor (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, the RCC sexually suggestive conduct with a minor statute is a Class A misdemeanor with a maximum term of imprisonment of one year, as opposed to 180 days in current law for the misdemeanor sexual abuse of a child or minor statute.[378] The increased penalty in the RCC as compared to current law is justified by the sexual nature of the offense with certain complainants under the age of 18 years. Under both current law and the RCC approach to jury demandability, an offense with a maximum term of imprisonment of one year is jury demandable. The Second Draft of Report #41, recommends a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor which is sex offender registration offense, which would include attempted sexually suggestive conduct with a minor.

[378] D.C. Code § 22-3010.01.

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

(1) *The CCRC recommends deleting 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." When the actor successfully persuades or entices the complainant to go somewhere, this provision overlaps with the RCC kidnapping offense (RCC § 22E-1401), and when the actor does not succeed, this provision overlaps with the RCC attempted kidnapping offense under the general RCC attempt statute (RCC § 22E-301). The RCC kidnapping and RCC attempted kidnapping offenses have higher penalties than the RCC enticing statute and providing separate liability in the RCC enticing statute risks disproportionate penalties for similar conduct. Consequently, the revised statute deletes prior subparagraph (a)(1)(B) and relies on the more severe RCC kidnapping statute for the conduct of relocating (or attempting to relocate) the complainant to commit a sex crime.*

- This revision reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes. The commentary to the RCC enticing statute has been updated to reflect this change to District law.

(2) *The CCRC recommends replacing "Knowingly persuades or entices, or attempts to persuade or entice" in what was previously paragraph (a)(1)(A) with "Knowingly commands, requests, or tries to persuade." With this change, what is now paragraph (a)(1) reads "Knowingly commands, requests, or tries to persuade the complainant to engage in or submit to a sexual act or sexual contact." "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). With this change, the RCC solicitation statute and the RCC enticing statute differ primarily in the required culpable mental state—enticing requires "knowingly" and solicitation requires "purposely." The RCC enticing statute has a set penalty, which is proportionate to the inchoate nature of the offense and the lower "knowingly" culpable mental state, whereas the penalty for the RCC solicitation offense depends on the penalty of the underlying offense. This change also removes from the RCC enticing statute "attempts to persuade or entice" as a completed form of the offense. In the current D.C. Code enticing statute, the scope of "attempts" to persuade or entice is unclear, but generally this conduct is covered by the revised statute's language "tries to persuade." To the extent the "attempts" language in the current D.C. Code enticing statute prohibits conduct broader than "tries to persuade," liability (though with a reduced penalty) would remain in the revised offense to the extent the under the general RCC attempt statute (RCC § 22E-301) covers such conduct.*

- This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC enticing statute has been updated to reflect that this is a possible change in law.

(3) *The CCRC recommends in subparagraph (a)(3)(B) referring to the "purported age of the complainant" as opposed to "the complainant purports to be" a certain age. With this change, subparagraph (a)(3)(B) will require that the actor "is reckless as to the fact that the purported age of the complainant is under 16 years of age." The revised language is consistent with the reference in paragraph (a)(3) to the "purported age of the complainant."*

- This change improves the clarity and consistency of the revised statute.

(4) *OAG, App. C at 253, comments that the phrase "purported age" in what is now paragraph (a)(3) makes it appear that "the minor must actually state his or her age (whether it is their actual age or not)." OAG states that "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," as when, for example, "a minor refers to their elementary or middle school" and 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."*

- The provision in now paragraph (a)(3) is specific to when the complainant is a law enforcement officer. The language "purports to be" is necessary because a law enforcement officer is likely not, in fact, going to satisfy the age requirements for complainants in the enticing statute. The commentary to the RCC enticing statute has been updated to further clarify that "purports to be" does not mean that the law enforcement officer has to state an actual purported age.

(5) *USAO recommends replacing the culpable mental state of "recklessly" with strict liability ("in fact") for the ages of the complainants. With this change, what is now subparagraph (a)(2)(A) would require that "the complainant is, in fact, under 16 years of age," what is now sub-subparagraph (a)(2)(B)(i) would require that "the complainant is, in fact, under 18 years of age," and what is now subparagraph (a)(3)(B) would require that the "the purported age of the complainant is, in fact, under 16 years of age."). USAO states that this change "is consistent with current law" and "relies on the rationale" in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states "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." USAO states that "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,"[379] as well as "extremely prejudicial, and otherwise*

[379] USAO further states that 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."

inadmissible, evidence not specifically covered by the Rape Shield Act."[380] *USAO states that this latter type of evidence "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." USAO states that it "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." However, 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." In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is 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 actor is in a position of trust with or authority over the complainant.*

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[381] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[382] A "recklessly" culpable mental state is proportionate given the inchoate nature of the offense and that the actor may engage with the complainant through text message, phone calls, or social media. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[383] which the RCC does

[380] USAO states that this evidence "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."

[381] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[382] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[383] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current D.C. Code and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor,

not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[384] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[385] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[386] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[387]

(6) *USAO, App. C at 329, recommends replacing the culpable mental state of "knowingly" with strict liability ("in fact") for the fact that the actor is in a "position of trust with or authority over" a complainant that is under the age of 18. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the "knowingly" culpable mental state as to the element of "position of trust with or authority over."*

- The RCC does not incorporate this recommendation because requiring strict liability for this element risks disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[388] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, a "knowingly" culpable mental state is proportionate. The "knowingly" culpable mental state improves the proportionality of the revised statute.

(7) *USAO, App. C at 329, recommends deleting the four year age gap between an actor that is at least 18 years of age and in a position of trust with our authority over a complainant under the age of 18 years. With this change, for complainants under the age of 18 years, the RCC enticing statute would require only that the actor is at least 18 years of age and in a position of trust with or authority over*

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on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[384] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[385] D.C. Code § 22-1834.

[386] D.C. Code § 22–1839.

[387] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[388] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

the complainant. USAO states that this change is "consistent with current law" and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). There, USAO states that the "important consideration is the power dynamic between the defendant and the complainant, not on the age differential."

- The RCC does not incorporate USAO's recommendation because it would be inconsistent with the liability requirements for a complainant that is under the age of 16 years. The current D.C. Code[389] and RCC enticing statutes require at least a four year age gap between an actor and a complainant under the age of 16 years. The current D.C. Cod enticing statute does not require a four year age gap when the complainant is under the age of 18 years and the actor is in a "significant relationship" with the complainant.[390] The RCC enticing statute added a four year age gap to parallel the age gap requirement for complainants under the age of 16 years. The four year age gap avoids criminalizing otherwise consensual sexual conduct between an actor that is at least 18 years of age and a complainant that is between 16 years and 18 years of age solely because the actor is in a position of trust with or authority over the complainant.

(8) *The CCRC recommends replacing "at the time of the offense" with "at the time of the sexual act or sexual contact" in the marriage or domestic partnership affirmative defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this is a clarificatory change to current District law.

(9) *The CCRC recommends in subsection (b) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, subsection (b) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact." The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.*

- This change improves the clarity of the revised statute. The commentary to the RCC enticing statute has been updated to reflect that this a clarificatory change to current District law.

(10) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense in subsection (b). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

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[389] D.C. Code §§ 22-3010(a) ("Whoever, being at least 4 years older than a child . . . ."; 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

[390] D.C. Code §§ 22-3010(a) ("Whoever . . . being in a significant relationship with a minor . . . ."); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

(11) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[391] to all sex offenses in RCC §§ 22E-1301-1307, including enticing. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC enticing statute is an inchoate offense that is limited to commanding, requesting, or trying to persuade a complainant without the use of force, threats, or coercion. Much more severe penalties are available under other RCC statutes for purposely soliciting a child for sex act or sexual contact.[392]

(12) *USAO, App. C at 330, recommends adding a subsection that states "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." USAO states that this is "implied" in the RCC enticing statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age." USAO states that this is consistent with current law codified at D.C. Code § 22-3011(a).*

- The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC enticing statute suggests that consent is a defense. Codifying a provision that

[391] D.C. Code § 22-3020(a)(1) – (a)(6) ("(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.").

[392] For example, if a defendant tries to persuade a complainant that is under the age of 12 years to engage in or submit to a sexual act or sexual contact, that conduct, if done "purposely," is more proportionately charged under the RCC solicitation statute, as first degree or fourth degree sexual abuse of a minor statute. The penalty for solicitation under the RCC is one-half the maximum punishment applicable to that offense. Applying the RCC solicitation statute results in more proportionate penalties than increasing the enticing statute by one class of severity with an enhancement.

explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC enticing statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

(1) The CCRC recommends replacing "arranges for a sexual act or sexual contact between: (A) The actor and the complainant; or (B) A third person and the complainant" with "Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact." The scope of "arranges" is unclear in the current D.C. Code arranging statute. Requiring that the defendant knowingly gives "effective consent" for the complainant to engage in or submit to a sexual act or sexual contact encompasses arranging, but the requirements are clearer. The language is also consistent with a provision in the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) and RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809).

- This change improves the clarity of the revised statute. The commentary to the RCC arranging statute has been updated to reflect that this is a change in law.

(2) The CCRC recommends replacing the age requirements for the actor, the complainant, and a third party with the requirements that the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and the complainant is under the age of 18 years. The current D.C. Code arranging statute does not specify any culpable mental states.[393] The RCC uses a "knowingly" culpable mental state to be consistent with other RCC sex offenses and because a "purposely" culpable mental state would make the statute duplicative with accomplice liability. However, the "knowingly" culpable mental state essentially allows accomplice liability to be imposed with a lower culpable mental state than otherwise would be required. This lower culpable mental state is justified if the defendant has a responsibility for the complainant under civil law. The phrase "as a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is identical to the language used elsewhere in the RCC. This language focuses on the relationship between the defendant and the complainant instead of the various age requirements in the current D.C. Code and RCC arranging statutes, which can lead to counterintuitive results.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC arranging statute has been updated to reflect that this is a change in law.

(3) OAG, App. C at 253, recommends renumbering the statutory language in the RCC arranging statute to clarify the requirements for liability in what was previously paragraphs (a)(1), (a)(2), and (a)(3). Specifically, OAG states that, as previously drafted, the statute suggested that paragraphs (a)(1), (a)(2), and (a)(3) all had to be met for liability, or, in the alternative, that meeting only one of these paragraphs was sufficient. OAG states that it appears that the RCC intended to require what was previously paragraph (a)(1) to be met and then either (a)(2) or (a)(3), and provides a recommendation for reorganizing and renumbering these paragraphs

[393] D.C. Code § 22-3010.02.

- The RCC does not incorporate this recommendation because the requirements for liability have been simplified, addressing OAG's concern.

(4) *OAG, App. C at 253, states that, as previously drafted, it would not be an offense for a 17 year old to arrange for a 12 year old to have sex with a 30 year old, "which could encourage juveniles to run prostitution rings for adults as the youth would not be committing an offense" even though the harm to the 12 year old is the same regardless of the age of the defendant. OAG recommends revising what was subparagraph (a)(3) to read "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," as opposed to "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."*

- The RCC does not incorporate this recommendation because the age of the actor is no longer a factor in determining liability. As drafted now, an actor that is under the age of 18 may have liability under the arranging offense if the actor is also "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant." If an actor that is under the age of 18 years does not have such a responsibility under civil law, as in OAG's hypothetical of a 17 year old arranging for a 12 year to have sex with a 30 year old, there may be liability under other RCC sex offenses and types of liability (e.g., solicitation, accomplice, conspiracy), depending on the actor's culpable mental state, whether there was force, etc., and if the sexual act actually occurred.[394]

(5) *USAO, App. C at 330, recommends replacing the culpable mental state of "knowingly" with strict liability ("in fact") for the fact that the actor is in a "position of trust with or authority over" a complainant that is under the age of 18. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the "knowingly" culpable mental state as to the element of "position of trust with or authority over."*

[394] If a 17 year old actor "knowingly" arranges for a 12 year old to have sex with a 30 year old that 17 year may have liability under second degree of the RCC sexual abuse of a minor statute (knowingly causes a complainant under 16 years of age to engage in or submit to a sexual act and the actor is at least four years older than the complainant). If the actor uses force, specified threats, or involuntary intoxication to arrange for the sex, there would be liability under first degree of the RCC sexual assault statute (knowingly causes the complainant to engage in or submit to a sexual act by specified means). If the actor uses threats other than those specified in first degree sexual assault, there may be liability under second degree sexual assault for knowingly causing the complainant to engage in or submit to a sexual act by a "coercive threat."
If the sex does not actually occur, or if the actor does not satisfy the "knowingly causes" requirement in the RCC sexual abuse of a minor statute or RCC sexual assault statute, there may be liability under the RCC enticing offense (knowingly "commands, requests, or tries to persuade" the complainant to engage in or submit to a sexual act or sexual contact) or attempt liability under RCC § 22E-301 as applied to the RCC sexual assault or RCC sexual abuse of a minor statute. There may also be conspiracy liability (RCC § 22E-303) or solicitation liability (RCC § 22E-302), if the actor has a "purposely" culpable mental state and otherwise satisfies the heightened requirements of those offenses.

- The RCC does not incorporate this recommendation because the arranging statute no longer requires "position of trust with or authority over" as an element.

(6) *USAO, App. C at 329, recommends deleting the four year age gap between an actor that is at least 18 years of age and in a position of trust with our authority over a complainant under the age of 18 years. USAO states that this change is "consistent with current law" and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). There, USAO states that the "important consideration is the power dynamic between the defendant and the complainant, not on the age differential."*

- The RCC does not incorporate this recommendation because the arranging statute no longer requires an age gap between the actor and the complainant.

(7) *USAO recommends replacing the culpable mental state of "recklessly" with strict liability ("in fact") for the ages of the complainants. USAO states that this change "is consistent with current law" and "relies on the rationale" in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states "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." USAO states that "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,"[395] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[396] USAO states that this latter type of evidence "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." USAO states that it "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." However, 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." In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is under the age of 14 when the actor is not in a*

[395] USAO further states that 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."

[396] USAO states that this evidence "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."

position of trust with or authority over the complainant or under the age of 18 when the actor is in a position of trust with or authority over the complainant.

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[397] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[398] A "recklessly" culpable mental state is proportionate given the inchoate nature of the offense and that the actor may engage with the complainant through text message, phone calls, or social media. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[399] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[400] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C.

[397] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[398] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[399] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[400] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

Code sex trafficking of children statute[401] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[402] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[403]

(8) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[404] to all sex offenses in RCC §§ 22E-1301-1307, including arranging. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC arranging statute is an inchoate offense that is limited to giving effective consent for the complainant to engage in or submit to sexual conduct. Much more severe penalties are available under other RCC statutes for being an accomplice to a child sex act or sexual contact.[405]

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[401] D.C. Code § 22-1834.

[402] D.C. Code § 22–1839.

[403] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[404] D.C. Code § 22-3020(a)(1) – (a)(6) ("(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.").

[405] For example, if a defendant gives effective consent for a complainant that is under the age of 12 years to engage in or submit to a sexual act or sexual contact and the sexual act or sexual contact does not occur, that conduct, if done "purposely," is more proportionately charged under the RCC solicitation statute, as first degree or fourth degree sexual abuse of a minor. The penalty for solicitation under the RCC is one-half the maximum punishment applicable to that offense. Applying the RCC solicitation statute results in more proportionate penalties than increasing the arranging statute by one class of severity with an enhancement. Accomplice liability or conspiracy liability may result in punishment equal to the same or half of that of the predicate offense, e.g., first degree or fourth degree sexual abuse of a minor.

(9) *USAO, App. C at 330-331, recommends adding a subsection that states "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." USAO states that this is "implied" in the RCC arranging statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense." USAO states that this is consistent with current law codified at D.C. Code § 22-3011(a).*

- The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC arranging statute suggests that consent is a defense and it is unclear whether the prohibition on consent as a defense in current law applies to the current D.C. Code arranging statute.[406] Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach.

[406] Current D.C. Code § 22-3011(a) states, in relevant part, that consent is not a defense to "a prosecution under §§ 22-3008 to 22-3010.01." The current D.C. Code arranging statute is codified at D.C. Code § 22-3010.02, which falls outside the range of statutes specified in D.C. Code § 22-3011(a). D.C. Code § 22-3011 was enacted in 1995 as part of the original Anti-Sexual Abuse Act. It was amended in 2007 to reflect the codification of the sexual abuse of a minor statutes and misdemeanor sexual abuse of a child or minor statute, but was never amended to address the arranging statute, which was enacted in 2011. Indeed, the same legislation that enacted the arranging statute in 2011 also amended D.C. Code § 22-3011 to include a reference to domestic partnerships in the marriage or domestic partnership defense in D.C. Code § 22-3011(b). It seems likely that the failure of D.C. Code § 22-3011(a) to include the arranging statute is a drafting error, but it is ultimately unclear.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(1) The CCRC recommends adding to what is now paragraph (a)(1) that the actor "engages in a sexual act with the complainant" and adding to what is now paragraph (b)(1) that the actor "engages in a sexual contact with the complainant." With this change, paragraphs (a)(1) and (b)(1) would prohibit an actor from engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. This change makes the RCC nonconsensual sexual conduct offense consistent with the other RCC sexual assault offenses that have been revised to include "engages in" language.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC nonconsensual sexual conduct offense has been updated to reflect that this is a possible change in law.

(2) USAO, App. C at 331, recommends replacing the "recklessly" culpable mental state with a "knowingly" culpable mental state for the prohibited conduct (engaging in or causing the complainant to engage in or submit to the sexual act or sexual contact). With this change, what is now paragraphs (a)(1) and (b)(1) would require that the actor "knowingly" engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact. USAO states that this change makes the offense "consistent with the other sexual assault provisions" and that it is "appropriate for the defendant to be required to act 'knowingly' with respect to his actions."

- The RCC incorporates this recommendation by requiring in what is now paragraph (a)(1) "[k]nowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act" and in subparagraph (b)(1) "[k]nowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact." This change improves the clarity of the revised statute and its consistency with the other RCC sexual assault offenses. The commentary to the RCC nonconsensual sexual conduct offense has been updated to reflect that this is a possible change in law.

(3) USAO, App. C at 331-332, recommends replacing the "recklessly" culpable mental state as to the complainant's lack of consent with "negligence." USAO states that the current misdemeanor sexual abuse statute "essentially assigns a negligence standard" to this element because it requires "have knowledge or reason to know." USAO disagrees with the RCC's assessment of Owens v. United States, *90 A.3d 1118 (D.C. 2014), given a 2019 DCCA opinion interpreting the District's current stalking statute (*Coleman v. United States*, 202 A.3d 1127 (D.C. 2019). USAO quotes* Coleman: *"The 'should have known' language [in the District's current stalking statute] 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*." *USAO states that a negligence standard in the RCC nonconsensual sexual conduct statute "is consistent with the plain language of the current*

misdemeanor sexual abuse statute, the jury instructions on misdemeanor sexual abuse…and with case law defining misdemeanor sexual abuse [citing Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)*]."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties to allow a conviction, particularly a felony conviction that per the RCC requires sex offender registry, on the basis of negligence. In addition, the current D.C. Code misdemeanor sexual abuse statute requires "*should* have knowledge or reason to know,"[407] not "have knowledge or reason to know."[408] The current D.C. Code misdemeanor sexual abuse language does not appear to fit neatly into either category of mental state discussed in *Owens* ("reason to believe") or *Coleman* ("should have known."). The commentary to the RCC nonconsensual sexual conduct statute has been updated to reflect this discussion and the DCCA's opinion in *Coleman v. United States*.

(4) USAO, App. C at 332, recommends deleting subsection (c), which excludes from liability "deception that induces the complainant to consent to the sexual act or sexual contact," but includes "deception that as to the nature of the sexual act or sexual contact." USAO states that this provision is "confusing and may inadvertently exclude conduct that should be criminalized." The RCC nonconsensual sexual conduct offense requires lack of "effective consent," and RCC § 22E-701 defines "effective consent" to include consent other that consent induced by "deception."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Subsection (c) excludes from liability the use of deception "that induces the complainant to consent to the sexual act or sexual contact." But for the exclusion, as defined in RCC § 22E-701, "deception" could include statements such as, "I'm a prince." It would be disproportionate to penalize deceptive statements that induce consent the same as deception as to the nature of the sexual act or sexual contact. As is noted in the commentary to this offense, criminalizing sexual conduct by deception is largely disfavored in current American criminal law,[409] with the exceptions of falsely represented medical procedures and impersonation of a woman's husband.[410]

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[407] D.C. Code § 22-3010.01.

[408] As is noted in the commentary, however, District case law and District practice consistently construe the language in the current misdemeanor sexual abuse statute as "know or should have known," without discussion of the discrepancy with the statutory language ("*should* have knowledge or reason to know") (emphasis added).

[409] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that "[r]ape-by-deception" is almost universally rejected in American criminal law.").

[410] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that "sex falsely represented as a medical procedure, and impersonation of a woman's husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.") (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998).

(5) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[411] to all sex offenses in RCC §§ 22E-1301-1307, including nonconsensual sexual conduct. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability." There is no discussion in USAO's comment of how the current penalty enhancements would affect the RCC nonconsensual sexual conduct statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC nonconsensual sexual conduct statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC nonconsensual sexual conduct offense, similar conduct could receive significantly different penalties.[412]

(6) OAG, App. C at 405, recommends that the penalty for nonconsensual sexual conduct "to be raised to be commensurate" with first degree arranging for sexual conduct with a minor.[413] OAG states that first degree nonconsensual sexual conduct is a class 9 felony, second degree nonconsensual sexual conduct is a class A misdemeanor, and arranging for sexual conduct with a minor is a class 8 felony. OAG states that "[n]othwithstanding 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."

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[411] D.C. Code § 22-3020(a)(1) – (a)(6) ("(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.").

[412] For example, if a defendant uses physical force, resulting in bodily injury to the complainant, that behavior is more proportionately charged as first degree or third degree sexual assault.

[413] As there is only a single gradation of the RCC arranging offense, it appears that OAG means to recommend increasing the penalty of first degree nonconsensual sexual conduct (a class 9 felony), to be a class 8 felony like the arranging statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. As the OAG comment recognizes, the RCC arranging for sexual conduct with a minor statute applies to complainants under the age of 18 years. The RCC arranging statute does not require a sexual act or sexual contact to occur, but it is proportionate to penalize the offense a class higher than nonconsensual sexual conduct, which could apply to adults or complainants under the age of 18 years. In addition, as is discussed in this appendix entry for the RCC arranging statute, the offense now applies to any person under the age of 18 years if the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant. There is no such requirement in the nonconsensual sexual conduct statute and this further justifies the higher penalty for arranging. More generally, both the RCC nonconsensual sexual conduct and arranging for sexual conduct with a minor statutes are, like their corresponding statutes in the current D.C. Code, designed to be broad, low level offenses that sweep in conduct that falls somewhat short of the stricter requirements and penalties for sexual assault, sexual abuse of a minor, and other RCC felony sex offenses. The latter are, in the RCC and current D.C. Code, among the most serious crimes. The proportionality of the penalty for RCC nonconsensual sexual conduct must be considered against this constellation of more severe RCC offenses criminalizing a narrower but overlapping scope of conduct.

(7) *USAO, App. C 415-419, appears to recommend against creation of a right to a jury trial for nonconsensual sexual conduct (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree of the RCC nonconsensual sexual conduct offense is a Class 9 felony and second degree of the RCC nonconsensual sexual conduct offense is a Class A misdemeanor. Although the precise statutory maxima for RCC offenses has not been set, the maximum term of imprisonment for a Class 9 felony and a Class A misdemeanor in the RCC will satisfy jury demandability requirements under current law. The Second Draft of Report #41, confers a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor which is a sex offender registration offense, which would include attempted first degree and attempted second degree nonconsensual sexual conduct. Because the facts involved in a charge for nonconsensual sexual conduct may turn not only on the actor's intent and credibility, but judgments about what constitutes effective consent in a sexual situation, allowing community norms to be brought to bear in the form of a jury appears particularly appropriate.

RCC § 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age.

(1) USAO, App. C at 332, recommends moving RCC § 22E-1309 and RCC § 22E-1310 (Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age) to the same location in the D.C. Code as the mandatory reporting laws in D.C. Code § 4-1321.01, et. seq. USAO states that this would be a change from the statutes' current location in the D.C. Code (Chapter 30 of Title 22; Sexual Abuse). USAO states that this would "reduce confusion about mandatory reporting obligations."

- The RCC does not incorporate this recommendation at this time, reserving the question as to relocation of these statutes until other reform recommendations are finalized. After the Advisory Group votes to approve final recommendations, time permitting the CCRC will include recommendations to the Council and Mayor for conforming amendments, but will not recommend moving RCC § 22E-1309 and RCC § 22E-1310 to Title 4 of the D.C. Code. The mandatory reporting laws in current *D*.C. Code § 4-1321.01, *et. seq.*, pertain to abused or neglected children and are broader than the duty to report a sex crime in current D.C. Code § 22-3020.51, *et. seq.*, and RCC § 22E-1309. Keeping the duty to report a sex crime and accompanying civil infraction statutes with the RCC sex offenses may improve the organization and consistency of the RCC.

(2) USAO, App. C at 332, recommends adding "universal" to the heading of this provision. With this change, the heading would read "Universal Duty to Report a Sex a Crime Involving a Person Under 16 Years of Age." USAO states it is "appropriate to clarify that this provision applies 'universally'" because the scope of the 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." USAO states that including "universal" in the heading "provides notice to all adults that they are obligated to report child sex crimes to the authorities."

- The RCC does not incorporate this recommendation because it would create ambiguity with the requirements in the duty to report statute. The duty to report is not, in fact, universal; it excludes individuals in subsection (b). Referring to a "duty" in the statute heading is sufficiently broad to put individuals on notice that they may be subject to the duty to report.

(3) The CCRC recommends in paragraph (b)(3) replacing 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" with a "religious leader described in D.C. Code § 14-309." This change provides greater clarity as to what religious leaders are covered in the RCC duty to report statute and improves the consistency of the revised statute with RCC § 22E-1303, which includes these

religious leaders in the RCC sexual abuse by exploitation statute, and the evidentiary provisions in D.C. Code § 14-309."[414]

- This change improves the clarity and consistency of the revised statute. The RCC commentary to the duty to report a sex crime statute has been updated to reflect that this is a possible change in law.

(4) USAO, App. C at 332-333, recommends including in subsection (b) a new paragraph (b)(4) that states "No legal privilege, except the privileges set forth above in subsection (b) shall apply. USAO states that this is "implied" in the RCC version, but that the statement "clarifies that other privileged relationships do not create an exemption from mandatory reporting." USAO states that this provision is included in current law at D.C. Code § 22-3020.52(c).

- The RCC incorporates this recommendation by adding a new paragraph (b)(2) that states: "No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section." Similarly, the commentary to the RCC duty to report statute has been updated to reflect that subsection (e) accounts for the language "[n]o other legally recognized privilege, except for the following" from current D.C. Code § 22-3020.52(c) and that it is a clarificatory change in law.

(5) USAO, App. C at 333, recommends adding a new subparagraph (b)(3)(E) that states "A confession or communication made under any other circumstances does not fall under this exemption." USAO states that this language is currently codified at D.C. Code § 22-3020.52(c)(2)(B) and that it is "appropriate to include it here to clarify the law."

- The RCC does not incorporate this recommendation because it introduces ambiguity into the revised statute. Nothing in subparagraph (b)(1)(C) of the RCC duty to report statute suggests that confessions or communications that do not satisfy the requirements in sub-subparagraphs (b)1)(C)(i) through (b)(1)(C)(iv) would be privileged, and the new paragraph (b)(2) clearly establishes that no other privileges than those described in subsection (b) apply. Codifying a provision that explicitly states other confessions or communications are *not* privileged is potentially confusing for other provisions that do not similarly list what is "not" included. However, the commentary to the RCC duty to report statute has been updated to reflect that the statute deletes the language "A confession or communication made under any other circumstances does

[414] D.C. Code § 14-309 refers to 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." The current D.C. Code duty to report a sex crime statute (D.C. Code § 22-3020.52(c)(2)(A)) and the previous version of the RCC statute specified 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." The main difference between D.C. Code § 14-309 and D.C. Code § 14-309 appears to be that the latter refers to specified religious leaders that are "authorized to perform a marriage ceremony" in the District, and the current D.C. code statute and the previous RCC version referred to a duly appointed, licensed, ordained, or consecrated minister "of a given religion" in the District.

not fall under this exemption" from current D.C. Code § 22-3020.52(c)(2)(B) and that it is a clarificatory change in law.

(6) The CCRC recommends including three additional offenses in the definition of "predicate crime" in subsection (e): 1) Trafficking in a Commercial Sex Act under RCC § 22E-1604; 2) Commercial Sex with a Trafficked Person under RCC § 22E-1608; and 3) Incest (through the inclusion of any RCC sex offense in RCC Chapter 13). The current D.C. Code duty to report a sex crime statute defines a predicate crime, in relevant part, as including current D.C. Code § 22-1834 (sex trafficking of children) and any sex offense in Chapter 13 of current D.C. Code Title 22.[415] D.C. Code § 22-1834 is specific to sex trafficking of children, but there are two other human trafficking crimes in the current D.C. Code and the RCC that are sex-related and could apply when the complainant is a child, though they do not require the complainant to be a child— Trafficking in Commercial Sex under RCC § 22E-1604, or Commercial Sex with a Trafficked Person under RCC § 22E-1608. The RCC specifically includes these human trafficking offenses, which is consistent with the current D.C. Code duty to report statute including any sex offense in Chapter 30 of Title 22 in its definition of a predicate crime. Similarly, the RCC duty to report statute includes incest. The current incest statute is codified at D.C. Code § 22-1901, and, as a result, is not included in Chapter 30 of current D.C. Code Title 22. The RCC codifies incest as a sex offense in Chapter 13 of Title 22E, which includes incest as a "predicate crime" for the RCC duty to report a sex crime statute.

- This change improves the clarity, consistency, and the proportionality of the revised statute.

[415] D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" for the purposes of the duty to report a sex crime and related statutes as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

RCC § 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age.

(1) USAO, App. C at 332, recommends moving RCC § 22E-1309 (Duty to Report a Sex Crime Involving a Person Under 16 Years of Age) and RCC § 22E-1310 to the same location in the D.C. Code as the mandatory reporting laws in D.C. Code § 4-1321.01, et. seq. USAO states that this would be a change from the statutes' current location in the D.C. Code (Chapter 30 of Title 22; Sexual Abuse). USAO states that this would "reduce confusion about mandatory reporting obligations."

- The RCC does not incorporate this recommendation at this time, reserving the question as to relocation of these statutes until other reform recommendations are finalized. After the Advisory Group votes to approve final recommendations, time permitting the CCRC will include recommendations to the Council and Mayor for conforming amendments, but will not recommend moving RCC § 22E-1309 and RCC § 22E-1310 to Title 4 of the D.C. Code. The mandatory reporting laws in current *D*.C. Code § 4-1321.01, *et. seq.*, pertain to abused or neglected children and are broader than the duty to report a sex crime in current D.C. Code § 22-3020.51, *et. seq.*, and RCC § 22E-1309. Keeping the duty to report a sex crime and accompanying civil infraction statutes with the RCC sex offenses may improve the organization and consistency of the RCC.

RCC § 22E-1311. Admission of Evidence in Sexual Assault and Related Cases.

(1) The CCRC recommends revising the definition of "past sexual behavior" in subsection (g) so that it refers to sexual behavior "other than the sexual behavior" with respect to which an offense under RCC Chapter 13 is alleged. This language is in the current statute and was omitted in error.

- This change improves the clarity of the revised statute.

RCC § 22E-1312. Incest.

(1) PDS, App. C at 449, recommends decriminalizing incest. PDS states that "[c]onsensual 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 the RCC sexual abuse of a minor statute. PDS states that "incest criminalizes consensual sexual conduct between adults [that] may be viewed as socially or morally repugnant," but there is "no clear justification" for criminalizing it. As a hypothetical, PDS states that incest would criminalize consensual sexual conduct between a "similarly aged niece and an uncle by marriage [and] [w]hile 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." PDS states that for a variety of factors, such as the size of families and age differences in marriages, "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, PDS states "an adopted teenage sibling may never share the same house as his or her brother or sister who left home at 18." PDS states that "[r]ather than allowing prosecutions in myriad situations that should be outside the scope of the court system, the RCC should decriminalize this conduct."

- The RCC does not incorporate this recommendation because it may create a gap in liability. The revised incest offense may apply in situations that lie beyond the age requirements of the RCC sexual abuse of a minor statute.[416] In addition, as discussed below, the RCC incest statute adopts PDS's recommendation to replace the terms "aunt," "uncle," "nephew," and "niece" and instead requires "A parent's sibling or a sibling's child by blood," which would exclude the PDS hypothetical of a niece engaging in consensual sexual conduct with her aunt's husband. While an adopted sibling may never share the same house as his or her brother, sexual acts between adopted siblings can still be harmful to familial relationships and adopted siblings are included in the scope of several current and RCC sex offenses if certain requirements are met.[417]

[416] First degree and second degree of the RCC sexual abuse of a minor statute require a sexual act when the complainant is under the age of 16 years and the defendant is at least four years older than the complainant. If a defendant is within this four year age gap, these gradations of the RCC sexual abuse of a minor statute would not criminalize sexual conduct with a complainant under the age of 16 years—for example, a defendant sibling that is 17 years old when the complainant is 15 years old. Similarly, third degree of the RCC sexual abuse of a minor statute requires a sexual act when the defendant is at least 18 years of age, at least four years older than a complainant under the age of 18 years, and in a position of trust with or authority over the complainant. Third degree sexual abuse of a minor would not criminalize, for example, sexual conduct between specified individuals in the incest statute if there is less than a four year age gap between the individuals or the defendant is not at least 18 years of age.

[417] Current District law includes adopted siblings in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). The current D.C. Code sexual abuse of a minor statutes prohibit an actor that is 18 years of age or older and in a "significant relationship"

(2) PDS, App. C at 449-450, recommends deleting the terms "legitimately or illegitimately" from the statute. PDS states that the RCC does not define these terms.

- The RCC incorporates this recommendation by deleting "legitimately or illegitimately" and revising the commentary accordingly.

(3) PDS, App. C at 450, recommends using the terms "sibling," "half-sibling," and "step-sibling" rather than "binary gendered terms" of "brother" and "sister." PDS further recommends replacing "aunt, uncle, nephew or niece" with "a parent's sibling or sibling's child."

- The RCC incorporates the recommendation for the use of "sibling" and "half-sibling" by replacing "brother [or] sister, or brother or sister by adoption" with "A sibling, by blood or adoption" in subsection subparagraph (a)(2)(C).
- The RCC incorporates the recommendation for the use of "step-sibling" by codifying as a new subparagraph (a)(2)(E) "A step-sibling, while the marriage creating the relationship exists."
- The RCC incorporates the recommendation for replacing "aunt, uncle, nephew, or niece" by replacing "aunt, uncle, nephew, or niece" with a "parent's sibling or a sibling's child by blood."

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with a person under the age of 18 years from engaging in a sexual act with that younger person. D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). The current D.C. Code misdemeanor sexual abuse of a child or minor statute (D.C. Code § 22-3010.01) and the current D.C. Code enticing a minor statute (D.C. Code § 22-3010) also require that the defendant be in a "significant relationship," but prohibit different conduct and have different requirements.

The RCC sex offenses in Chapter 13 of the RCC have a similar scope as current law through the definition of "position of trust with or authority over" in RCC § 22E-701.

Kidnapping. RCC § 22E-1401.

(1) *OAG at App. C. 254, says that the commentary to the revised kidnapping statute should be clarified as to whether the offense includes causing another person to believe the complainant will not be released, even if the actor does not intend for anyone to have that belief.*

- The RCC incorporates this comment by updating the commentary to clarify that the actor must intend for a person to believe that the complainant will not be released. This change clarifies the revised statute's commentary.

(2) *The CCRC recommends re-drafting the exclusion to liability to include persons who reasonably believe they are acting at the direction of a close relative. This change improves the clarity and may improve the proportionality of the revised statutes.*

- This revision will distinguish between the revised kidnapping statute and the revised parental kidnapping statute. The parental kidnapping offense is a less serious offense intended to cover taking children by relatives or persons acting at the direction of relatives, with intent to interfere with another custodian's right to custody. Due to the lesser harm and danger to the complainant, parental kidnapping is subject to less severe penalties than ordinary kidnapping. The prior draft kidnapping statute included an exclusion to liability for close relatives, but the exclusion did not specifically include persons who reasonably believed they are acting at the direction of relatives. Such drafting is unclear as to the liability of persons acting at the direction of a close relative, who may be considered agents of such close relatives. Without this revision to the revised kidnapping statute, a person who takes a child acting at the direction of a relative may be liable for both kidnapping and parental kidnapping. This change improves the proportionality of the revised code, and eliminates unnecessary overlap between the two offenses.

(3) *USAO at App. C. 333, recommends replacing the words "any felony" to the words "any criminal offense," in subparagraphs (a)(3)(C) and (b)(3)(C). USAO also recommends replacing the words "commit a sexual offense defined in Chapter 13 of this title" with the words "Commit any criminal offense" in subparagraphs (a)(3)(E) and (b)(3)(E).*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. The revised kidnapping statute is intended to cover restraints of movement that cause, or create heightened risk of, significant harm to the complainant. In addition to criminalizing intent to commit a sexual offense, the revised statute also includes restraining a person with intent to inflict bodily injury upon the complainant. Including intent to commit *any* offense would be overbroad, and include cases in which there is not sufficiently greater harm or increased risk of harm to the complainant to warrant kidnapping liability. Misdemeanors are generally less serious, and restraining a person to facilitate commission of a misdemeanor does not create the same inherent

risk of harm to the complainant as facilitating commission of a felony. For example, a person who locks a store employee in a back room for several minutes in order to shoplift goods has not caused, or created risk of, significant harm to warrant a kidnapping conviction.[418] The RCC provides liability for restraining a person's freedom of movement in connection with any sex offense as kidnapping (or aggravated kidnapping, depending on the circumstances of the complainant). The RCC provides liability for restraining a person's freedom of movement in connection with a non-sex offense misdemeanor under RCC § 22E-1402, the general criminal restraint statute, which is subject to a lower penalty classification.

(4) *USAO, at App. C. 334, recommends amending the exclusion to liability under subsection (c) to include a requirement that the actor did not commit a sex offense against the complainant, or threaten to commit a sex offense against the complainant.*

- The RCC partially incorporates this recommendation by requiring that the actor "Does not cause or threaten to cause bodily injury to the complainant, and does not cause or threaten to cause the complainant to engage in a sexual contact or sexual act." This change improves the clarity and proportionality of the revised statutes.

(5) *USAO, at App. C 334 recommends replacing the words "has been affirmed" with "becomes final" in the merger provision in subsection (e).*

- The RCC does not incorporate this recommendation. Instead, the words "has been affirmed" will be replaced with the phrase "the appeal from the judgment of conviction has been decided." This language is consistent with the general merger provision in RCC § 22E-214.[419]

(6) *USAO, App. C. 272, recommends that throughout the RCC, when a penalty enhancement or grade of an offense requires that the actor "used or displayed" a dangerous weapon or imitation dangerous weapon, the offense or enhancement instead should only require that the actor committed the offense "while armed."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a

[418] In the case USAO cites, *Gooch v. United States*, 297 U.S. 124 (1936), the appellants, while heavily armed, seized two law enforcement officers in order to avoid arrest for an unspecified offense, inflicted serious injuries to one of the officers, and drove both officers across state lines from Texas to Oklahoma. On these facts, there are at least two possible theories of liability under the revised kidnapping statute: 1) if the unspecified offense was a felony, then the restraint would constitute intent to facilitate commission or flight from a felony; 2) since the appellants were heavily armed, drove the officers out of state, and inflicted serious bodily injury on one of the officers, there would have been intent to cause a person to believe the officers would not be released without having suffered significant bodily injury.

[419] RCC § 22E-214 will also be amended to change the words: "The judgment appealed from has been decided" to "The appeal from the judgment of conviction has been decided."

dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[420] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.

- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[421]

(7) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include 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." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to this statute, this recommendation would change the element in sub-subparagraph (a)(2)(B)(i) under aggravated kidnapping.*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

[420] Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

[421] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

Criminal Restraint. RCC § 22E-1402.

(1) *USAO, App. C. 272, recommends that throughout the RCC, when a penalty enhancement or grade of an offense requires that the actor "used or displayed" a dangerous weapon or imitation dangerous weapon, the offense or enhancement instead should only require that the actor committed the offense "while armed."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[422] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[423]

(2) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include an affirmative defense that "the accused was negligent as to the fact that the victim was a protected person at the*

[422] Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

[423] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

time of the offense." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to this statute, this recommendation would change the element in sub-subparagraph (a)(2)(B)(i) under aggravated criminal restraint.

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(3) *The CCRC recommends re-drafting the exclusions to liability under (c)(1), (c)(2)(B)(ii), and (c)(2)(C)(ii) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(4) *The CCRC recommends re-drafting the exclusion to liability under subparagraph (c)(2)(C) to include persons who reasonably believe they are acting at the direction of a close relative. This change improves the clarity and may improve the proportionality of the revised statutes.*

- This revision will distinguish between the revised criminal restraint statute and the revised parental kidnapping statute. The CCRC recommends this change for the same reasons discussed in the identical change to the revised kidnapping statute.

Blackmail. RCC § 22E-1403.

(1) *OAG, at App. C. 436-437, recommends revising the blackmail statute to require an "intent to extort." OAG raises concerns that, as drafted, the blackmail statute may criminalize speech that is protected under the First Amendment.*

- The RCC partially incorporates this recommendation by amending the blackmail defense under subsection (c) to address OAG's concerns with respect to overbreadth. The CCRC recommends replacing the words "Take reasonable action to correct the wrong that is the subject of the accusation" with "take or refrain from reasonable action *related* to the wrong that is the subject of the accusation[.]"[424] The revised wording broadens the scope of conduct that falls within the defense. There may be some reasonable demands that are related to the wrong, even if they do not specifically *correct* the wrong that is the subject of the accusation.[425] This change addresses the two hypothetical cases of protected speech in OAG's comments: first, a person who threatens to publicize a business's editorial practices unless the business changes those practices; second, threatening to run ads against an elected official unless the official changes his or her stance on a given issue. In both cases, the actor's purpose was to cause another person to take reasonable action that is related to the wrong that is the subject of the accusation or assertion, and would therefore not be criminalized.
- In addition, commentary to the revised blackmail statute clarifies that the offense does not include threats to reveal *any* information that is embarrassing or harmful to reputation. The commentary notes that "[t]hreats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail." Although publicizing unsavory editorial practices or running political advertisements against a public official may be embarrassing, these types of threats would not necessarily be sufficiently embarrassing or harmful to a person's reputation to constitute blackmail.
- Other reform jurisdictions have codified analogous offenses that criminalize causing a person to act or refrain from acting by threatening to reveal secrets that subject a person to hatred, contempt, or ridicule, that include a defense similar to that codified in the revised blackmail

[424] *See*, *State v. Jorgenson*, 934 N.W.2d 362, 375 (Minn. Ct. App. 2019), review granted (Dec. 17, 2019) (In holding that Minnesota's coercion statute, which is similar to the RCC's blackmail offense was facially unconstitutional, the Minnesota Court of Appeals noted that the offense did not include "an affirmative defense of protected speech similar to the Model Penal Code"[.]"

[425] For example, the defense would apply to a person who threatens to run negative political advertisements about a public official if he or she does not vote for a bill, even if the advertisements do not specifically address the bill at issue.

statute.[426] Such drafting has withstood constitutional challenges and is clearer than reference to an undefined intent to "extort."

(2) *USAO, at App. C. 462 recommends redrafting subsection (a)(1) to read "Purposely causes or intends to cause another person to do or refrain from doing any act." USAO says that liability should depend "on the defendant's intent and actions, rather than what those actions actually cause a complainant to do."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and expand the scope of the offense to include constitutionally protected speech.
- Lowering the culpable mental state for blackmail would exacerbate concerns (including those raised by OAG) with respect to criminalization of protected speech, and conduct that does not warrant criminalization would constitute blackmail. For example, when a person threatens to report a crime, he or she may know that as a result the person engaging in the crime will engage in or refrain from some act, such as destroying evidence or going into hiding. Mere knowledge that the threat to report criminal activity will cause the other person to act is not sufficient to warrant criminal liability. Although "intent and action" may be sufficient for attempt liability, the RCC generally requires that the actor actually cause the prohibited result in order for complete liability to apply.

(3) *USAO, at App. C. 463, recommends amending subparagraph (a)(2)(E) to read "Impair the reputation of another person, including a deceased person[.]" Under USAO's proposal the revised blackmail statute would include threats to impair the reputation of living, as well as deceased, persons.*

- The RCC does not incorporate this recommendation because it is inconsistent with other RCC blackmail language, may authorize disproportionate punishments, and may expand the scope of the offense to include constitutionally protected speech. With respect to living persons, the RCC blackmail statute already separately includes threats to accuse a person of a crime, or to "[e]xpose 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 . . . [h]atred, contempt, ridicule, or other significant injury to personal reputation[.]" This more specific language limits the ways in which reputational harm may constitute a crime, eliminating the overlap in the current D.C. Code provisions' multiple references to reputational harms,[427] Expanding blackmail liability to reach any impairment of reputation also would exacerbate concerns (including those raised by OAG) with respect to criminalization of protected speech, and conduct that does not warrant criminalization would constitute blackmail.

[426] E.g. Alaska Stat. Ann. § 11.41.530; Ky. Rev. Stat. Ann. § 509.080; 18 Pa. Stat. and Cons. Stat. Ann. § 2906; N.J. Stat. Ann. § 2C:13-5. See also, § 20.4(a)Statutory extortion or blackmail, 3 Subst. Crim. L. § 20.4(a) (3d ed.) (noting that most blackmail and extortion statutes "threats to expose some disgraceful defect or secret of the victim which, when known, would subject him to public ridicule or disgrace").

[427] D.C. Code § 22-3252 (a)(2)-(4).

(4) *The CCRC recommends replacing the words "impair the reputation of a deceased person" with the words "significantly impair the reputation of a deceased person."*

- This change clarifies that threats to impair a deceased person's reputation trivially is not sufficient for blackmail. This makes the offense more consistent with respect to threats to impair the reputation of living and deceased persons.
- Requiring that the threat would significantly impair a deceased person's reputation also addresses OAG's concern with criminalizing protected speech. For example, threatening to reveal that a deceased politician had been a rude and demanding employer may impair that person's reputation without doing *significant* injury to that person's reputation.

RCC § 22E-1501. Criminal Abuse of a Minor.

(1) *USAO, App. C at 334-335, recommends deleting paragraphs (a)(1), (b)(1), and (c)(1), which require that the defendant is "[r]eckless 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" and requiring elsewhere in the offense that the complainant "in fact" is under 18 years of age. With this change, the RCC criminal abuse of a minor statute would require only that the complainant, in fact, be under the age of 18 years, and that the defendant engaged in the prohibited conduct. USAO states that requiring a relationship between the defendant and the complainant is "a change from current law and is not warranted." USAO refers to the current child cruelty statute, which does not require a relationship between the parties, "both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate." USAO gives as hypotheticals "if a stranger walks up to a child and tips over the child's stroller, 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."*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between criminal offenses and may authorize disproportionate penalties. The current D.C. Code child cruelty statute's provisions concerning physical injury are unclear,[428] but appear to completely overlap with the District's current misdemeanor assault, felony assault, and aggravated assault statutes, which authorize maximum terms of imprisonment of 180 days, three years, or 10 years depending on the severity of the resulting injury, if any, and the defendant's culpable mental states.[429] It is difficult to precisely compare the current D.C. Code child cruelty and assault statutes, but to the extent the offenses overlap, the child cruelty statute authorizes significantly higher penalties than the current assault statutes. (The current child cruelty statute has a maximum term of imprisonment of 15 years for creating a grave risk of bodily injury to a child and in doing so recklessly causes "bodily injury."[430]) The RCC

[428] The primary ambiguity is the scope of the phrase "Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child" in second degree child cruelty, D.C. Code § 22–1101(b)(1).

[429] D.C. Code §§ 22-404(a)(1) (assault statute authorizing a maximum term of imprisonment of 180 days for "Whoever unlawfully assaults, or threatens another in a menacing manner."); 22-404(a)(2) (felony assault statute authorizing a maximum term of imprisonment of three years for "Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another."); 22-404.01(a)(1), (a)(2), (b) (aggravated assault statute authorizing a maximum term of imprisonment of 10 years for a person who "(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). 22-404.01.

[430] D.C. Code § 22-1101(a) ("A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby

reduces unnecessary overlap between assault and criminal abuse of a minor statutes by limiting the latter to instances where the actor has a special duty of care toward the complainant—but higher penalties remain for both assaults of minors generally and minors to whom the actor has a duty of care.

- The RCC criminal abuse of a minor statute generally authorizes higher penalties for assaultive conduct compared to the RCC assault offense, but improves the proportionality of the higher penalties by requiring that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant under the age of 18 years. The RCC, through "protected person" gradations in various offenses against persons, authorizes enhanced penalties when the complainant is under the age of 18 years if the defendant is at least 18 years old and at least four years older. These "protected person" gradations provide a penalty enhancement for certain offenses against persons when there is no relationship between the defendant and the complainant.
- Under USAO's hypotheticals of a stranger tipping over a child's stroller or a neighbor hitting a child, there is an enhanced penalty available under the RCC assault statute if the requirements for the offense and the "protected person" gradations are met (such as being a minor). Notably, such a penalty enhancement for bodily injury assault against a minor or other defined "protected person" is a new recommendation in the RCC that does not exist for simple assault in current law.[431] By providing such protected person enhancements, however, the RCC proportionately penalizes assaults against young complainants when there is no relationship with the defendant, as compared to the RCC criminal abuse of a minor statute where a relationship is required. The key differences between the RCC criminal abuse of a minor and RCC assault statutes are that the former includes some non-physical injuries, the precise grading and penalties vary (although both provide enhancements as compared to physical injuries to a non-minor), and there is a distinct label for harms caused by parents, caretakers, and others who have a responsibility for the complainant under civil law for the health, welfare, or supervision of the minor complainant.

(2) *USAO, App. C at 335, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) if the RCC criminal abuse of a minor statute retains the*

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causes bodily injury."); (c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than $10,000 or be imprisoned not more than 15 years, or both."). "Bodily injury" is undefined for the current child cruelty statute, but DCCA case law suggests that it is a low standard for physical harm. *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[431] Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant. These specified crimes include aggravated assault, felony assault, and first degree child cruelty, but not misdemeanor assault. D.C. Code §§ 22-3611(c)(2); 23-1331(4). As is discussed in the RCC commentary to the definition of "protected person" in RCC § 22E-701, the RCC increases the required age gap to four years, but keeps the other age and age gap requirements the same.

requirement that the defendant has a "responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(3) *The CCRC recommends adding electronic stalking (RCC § 22E-1802) to the list of offenses included in third degree criminal abuse of a minor. The list of offenses already includes stalking (RCC § 22E-1801). Electronic stalking is a recently revised offense with a similar scope of conduct and the same penalty.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(4) *USAO, App. C at 335, recommends including in what is now paragraph (c)(2) that the defendant commits "assault, per RCC § 22E-1202," "kidnapping, per RCC § 22E-1401," and both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact.*[432] *USAO states that assault is "implicitly included" in what was previously subparagraph (c)(2)(C) ("recklessly causes bodily injury to the complainant"), but it should be expressly included to "eliminate confusion." USAO states that since criminal restraint is included in the list of offenses in what is now paragraph (c)(2), kidnapping should be included as well. Finally, USAO states that a "primary distinction" between assault and what is now third degree offensive physical contact is "whether the complainant suffered 'bodily injury.'" USAO states "[p]articularly 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" and a "third-party witness may not be able to either ascertain or testify beyond a reasonable doubt that the a child was in 'physical pain.'" As a result, USAO states that "what appears to be a clear assault on a child may only be prosecutable" as what is now third degree offensive physical contact.*

- The RCC partially incorporates the recommendation to include assault in the list of specified offenses in paragraph (c)(2) by including sixth degree assault under RCC § 22E-1202(f). Sixth degree assault requires recklessly causing bodily injury to a complainant and is identical to what previously

[432] When USAO submitted its comment, the RCC offensive physical contact offense had two gradations. As is discussed elsewhere in this appendix, the RCC offensive physical contact offense now has three gradations because it includes two "protected person" gradations.

subparagraph (c)(2)(C). The RCC does not include first degree, second degree, or third degree assault because they have higher penalties than third degree criminal abuse of minor and including them would authorize a lower penalty for substantially similar conduct. The RCC does not include fourth degree assault in paragraph (c)(2) because it now has the same penalty as third degree criminal abuse of a minor (Class 9 felony) for the same conduct (recklessly causing significant bodily injury). The RCC does not include fifth degree of the RCC assault statute in paragraph (c)(2) because it already includes higher penalty based on the victim's status as a minor.

- The RCC does not incorporate the recommendation to include kidnapping in the list of specified offenses in paragraph (c)(2). Both kidnapping and aggravated kidnapping in the RCC have higher penalties than third degree criminal abuse of a minor. Including them in third degree criminal abuse of a minor would authorize a lower penalty for the same conduct.
- The RCC incorporates the recommendation to include both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact—by including the offensive physical contact offense in the list of specified offenses in paragraph (c)(2).

(5) *The CCRC recommends deleting what was previously subparagraph (c)(2)(B) ("Purposely causes significant emotional distress by confining the complainant."). An actor that purposely causes significant emotional distress by confining the complainant has likely committed criminal restraint, which is included in the list of offenses in paragraph (c)(2) of the statute. To the extent that an actor purposely causes significant emotional distress by confining the complainant and does not satisfy the requirements of the RCC criminal restraint statute, there may still be liability under the provisions of the statute that prohibit causing serious mental injury (subparagraphs (a)(2)(B) and (b)(2)(A)) or the RCC criminal neglect of a minor statute that prohibit creating a risk of serious mental injury. This change ensures that the revised criminal abuse of a minor statute retains the high threshold for psychological harms that exists in current law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *USAO, App. C, at 336 recommends in subparagraph (c)(2)(B) changing the culpable mental state from "purposely" to "knowingly" and deleting the words "by confining." With these changes, subparagraph (c)(2)(B) would require that the defendant "knowingly causes significant emotional distress" to the complainant instead of "purposely causes significant emotional distress by confining the complainant." USAO states that "knowingly" is the appropriate culpable mental state because "purposely" is a "mens rea that is too high." USAO states that under the current child cruelty statute, the only culpable mental states are intentionally, knowledge, or recklessness. USAO states it is unclear why confinement "is the only way to cause significant emotional distress under the statute" and that "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."

- The RCC does not incorporate this recommendation because, as is discussed above, the CCRC recommends deleting subparagraph (c)(2)(B).

(7) *USAO, App. C at 336, recommends requiring in subparagraph (c)(2)(C) "or engages in conduct that creates a grave risk of causing bodily injury to the complainant." With this change, subparagraph (c)(2)(C) would require "recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant." USAO states that this conduct is included in second degree of the current child cruelty statute "and should be included here." USAO states that the RCC commentary states that this conduct could be prosecuted as an attempt, or criminal neglect of a minor, 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. In addition, USAO states that creating a "grave risk" of causing a 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 current law."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and would be inconsistent with the related criminal neglect of a minor statute. The RCC criminal abuse of a minor statute requires that the complainant experience a specified type of harm and generally has higher penalties than the RCC criminal neglect of a minor statute, which is limited to risk creation. It would be both inconsistent with the other provisions in the RCC criminal abuse of a minor statute and disproportionate to include mere risk creation in the statute. The commentary to the RCC criminal abuse of a minor statute recognizes that not every instance of creating a risk of bodily injury will be covered by the criminal neglect of a minor statute or attempted criminal abuse of a minor. The commentary to the RCC criminal abuse of a minor statute has been updated to reflect that the RCC criminal neglect of a minor statute does not include the risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars.

(8) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for third degree criminal abuse of a minor ("likely including attempts."). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, third degree of the RCC criminal abuse of a minor statute is a Class 9 felony. Although the precise statutory for RCC offenses has not been set, the maximum term of imprisonment for a Class 9 felony in the RCC will satisfy jury demandability requirements

under current law, as will the maximum term of imprisonment for an attempted Class 9 felony. Although it is difficult to precisely compare the current D.C. Code child cruelty statute to third degree of the RCC criminal abuse of a minor statute, to the extent they overlap, there is a jury trial under current law for completed first degree and second degree child cruelty[433] and attempted first degree child cruelty.[434] To the extent that third degree of the RCC criminal abuse of a minor statute overlaps with those offense, the RCC is not changing current law for jury demandability, but it is for attempted second degree child cruelty.

(9) *The CCRC recommends reducing the penalty classification for second degree criminal abuse of a minor from a Class 7 felony to a Class 8 felony, and reducing the penalty classification for third degree criminal abuse of a minor from a Class 8 felony to a Class 9 felony. First degree criminal abuse of a minor remains a Class 6 felony, which is the same classification as first degree of the RCC assault statute. As it pertains to "serious bodily injury," first degree criminal abuse of a minor has a lower culpable mental state ("recklessly") than first degree assault ("recklessly, with extreme difference to human life."). The fact that the defendant must have a responsibility for the health, welfare, or supervision of the complainant under the criminal abuse of a minor statute justifies the equivalent penalty, despite the lower culpable mental state. As it pertains to recklessly causing "significant bodily injury," however, keeping second degree criminal abuse of a minor a Class 7 felony is disproportionate to the penalty for fourth degree assault (recklessly causes significant bodily injury to any complainant), which is a Class 9 felony. A Class 8 felony (still higher than the equivalent bodily injury in assault) is more proportionate for second degree criminal abuse of a minor. Third degree criminal abuse of a minor, which has been revised to include sixth degree assault (Class B misdemeanor) and all gradations of the offensive physical contact offense (Class B misdemeanor and lower), similarly is more proportionately classified as a Class 9 felony (still higher than the equivalent bodily injury in assault).*

- This change improves the proportionality of the revised statute.

(10) *OAG, App. C at 255, state that footnote 26 on page 296 of the Commentary say, "If an accused reasonably believed that the complaining witness was not a minor,*

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[433] D.C. Code § 22-1101(c)(1), (c)(2) ("(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than $10,000 or be imprisoned not more than 15 years, or both. (2) Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

[434] Under D.C. Code § 22-1803, the penalty for an attempt, unless otherwise statutorily specified, is 180 days if the offense is not a "crime of violence" or 5 years maximum for a "crime of violence." "Crime of violence" is defined in D.C. Code § 22-1331(4) and includes first degree child cruelty. Thus, attempted first degree child cruelty would have a maximum term of imprisonment of five years and be jury demandable. Attempted second degree child cruelty would have a maximum term of imprisonment of 180 days not be jury demandable.

D.C. Code § 22-1101(c)(1), (c)(2) ("(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than $10,000 or be imprisoned not more than 15 years, or both. (2) Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

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." OAG states that the commentary is "equating 'reasonableness' with 'disregarding a substantial risk.'" OAG state that "it is not sure if that is a correct analysis of the proposed element" because a "reasonable belief that the person was not under 18 does not necessarily negate recklessness- not if the person believes that the other person is a minor, but also knows of (and disregards) a significant risk that that is not true." OAG does not recommend any changes to the footnote.

- The RCC incorporates this recommendation by amending the footnote to add at the end a cross-reference to: "See RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element." Other footnotes in the RCC commentary have been likewise clarified with the addition of this reference. This change improves the clarity of the revised commentary.

RCC § 22E-1502. Criminal Neglect of a Minor.

(1) *USAO, App. C at 336-337, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a "responsibility for the health, welfare, or supervision of the complainant who is under 18 years of age." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(2) *The CCRC recommends deleting the jury demandability provisions in subsection (g). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(3) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for third degree criminal neglect of a minor ("including attempts."). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, third degree of the RCC criminal neglect of a minor statute is a Class B felony. In the Second Draft of Report #41, the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, third degree criminal neglect of a minor (a Class B misdemeanor) and attempted third degree criminal neglect of a minor are jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(4) *USAO, App. C at 427, recommends increasing the proposed penalties for criminal neglect of a minor. Specifically, USAO recommends that first degree and second degree of the RCC criminal neglect of a minor statute be classified as Class 6 felonies and that third degree of the RCC criminal neglect of a minor statute be classified as a Class 7 felony. USAO states that first degree and second degree of the RCC criminal neglect of a minor statute "have a higher standard than" first degree of the current child cruelty statute, because they require a risk of serious*

bodily injury, death, or significant bodily injury, whereas first degree of the current child cruelty statute prohibits "creates a grave risk of bodily injury to a child, and thereby causes bodily injury." USAO recognizes that first degree child cruelty requires actual injury and the RCC criminal neglect of a minor statute does not, but states that given the overlap of first degree and second degree of the RCC criminal neglect of a minor statute with first degree child cruelty, the RCC gradations should have the same statutory maximum penalty as first degree child cruelty —15 years imprisonment. USAO also states that it is "concerned" that knowingly abandoning a child in third degree of the RCC criminal neglect of a minor statute be "appropriately punished." USAO states that under current law, this is second degree cruelty to children with a maximum term of imprisonment of 10 years.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. First degree and second degree of the RCC criminal neglect of a minor statute are limited to creating a risk of a specified type of harm—there need not be any resulting (actual) harm, and if there were such harm it would constitute the more severely punished offense of RCC criminal abuse of a minor. Ranking these offenses as a Class 6 felony would penalize a risk of harm the same as causing actual harm (serious mental injury or serious bodily injury) in first degree criminal abuse of a minor. Similarly, ranking third degree of the RCC criminal neglect of a minor statute as a Class 7 felony would rank knowingly abandoning the complainant the same as causing actual harm (serious mental injury or significant bodily injury) in second degree criminal abuse of a minor. Requiring harm for the RCC criminal abuse of a minor statute and limiting the RCC criminal neglect of a minor statute to risk creation improves the consistency and proportionality of the revised statutes.

(5) *The CCRC recommends reducing the penalty classification for second and third degree of the criminal neglect of a minor offense by one class. Specifically, the CCRC recommends reducing second degree criminal neglect of a minor from a Class 9 felony to a Class A misdemeanor, and reducing third degree Criminal Neglect of a Minor from a Class A misdemeanor to a Class B misdemeanor. As is discussed in this Appendix for the RCC criminal abuse of a minor offense, second degree criminal abuse of a minor is now a Class 8 felony and third degree criminal abuse of a minor is now a Class 9 felony. Reducing the penalty classification by one class for second and third degree criminal neglect of a minor keeps the penalties proportionate as compared to the criminal abuse of a minor offense. The reduced penalties for creating a risk of physical harm in the criminal neglect of a minor statute are also proportionate compared to the RCC assault statute.*[435]

[435] Fourth degree assault prohibits recklessly causing significant bodily injury and is a Class 9 felony. Second degree criminal neglect of a minor, which prohibits recklessly creating a risk of significant bodily injury, is now one penalty class lower, a Class A misdemeanor. Sixth degree assault prohibits recklessly causing bodily injury and is a Class B misdemeanor. Third degree criminal neglect of a minor, which

- This change improves the proportionality of the revised statutes.

prohibits abandonment and recklessly failing to provide and would entail risk of bodily harm, is now a Class B misdemeanor.

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

(1) *USAO, App. C at 337, recommends deleting paragraphs (a)(1), (b)(1), and (c)(1), which require that the defendant is "[r]eckless 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" and requiring elsewhere in the offense that the complainant "in fact" is a vulnerable adult or elderly person. With this change, the RCC criminal abuse of a vulnerable adult or elderly person statute would require only that the complainant, in fact, be a vulnerable adult or elderly person, and that the defendant engaged in the prohibited conduct. USAO states that requiring a relationship between the defendant and the complainant is "a change from current law and is not warranted." USAO refers to the current D.C. Code § 22-933, the criminal abuse of a vulnerable adult or elderly person offense, which does not require a relationship between the parties, "both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate."*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between criminal offenses and may authorize disproportionate penalties. The current D.C. criminal abuse of a vulnerable adult statute's provisions concerning physical injury are unclear,[436] but appear to completely overlap with the District's current misdemeanor assault, felony assault, and aggravated assault statutes, which authorize maximum terms of imprisonment of 180 days, three years, or 10 years depending on the severity of the resulting injury, if any, and the defendant's culpable mental states.[437] It is difficult to precisely compare the current criminal abuse of a vulnerable adult and assault statutes, but to the extent the offenses overlap, the criminal abuse of a vulnerable adult statute authorizes higher penalties than the current assault statutes. (The current criminal abuse of a vulnerable adult statute has a maximum term of imprisonment of 180 days for committing the offense with no specified amount of harm required, 10 years for causing "serious bodily injury" or "severe mental distress," and 20 years for causing

[436] The primary ambiguity is the scope of the phrase "Inflicts or threatens to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means" in D.C. Code § 22–933(1).

[437] D.C. Code §§ 22-404(a)(1) (assault statute authorizing a maximum term of imprisonment of 180 days for "Whoever unlawfully assaults, or threatens another in a menacing manner."); 22-404(a)(2) (felony assault statute authorizing a maximum term of imprisonment of three years for "Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another."); 22-404.01(a)(1), (a)(2), (b) (aggravated assault statute authorizing a maximum term of imprisonment of 10 years for a person who "(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). 22-404.01.

"permanent bodily harm" or "death."[438]) The RCC reduces unnecessary overlap between assault and criminal abuse of a vulnerable adult statutes by limiting the latter to instances where the actor has a special duty of care toward the complainant—but higher penalties remain for both assaults of vulnerable adults generally and vulnerable adults to whom the actor has a duty of care.

- The RCC criminal abuse of a vulnerable adult or elderly person statute generally authorizes higher penalties for assaultive conduct compared to the RCC assault offense, but improves the proportionality of the higher penalties by requiring that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant. The RCC, through "protected person" gradations in various offenses against persons, authorizes enhanced penalties for a complainant that is a "vulnerable adult" or a complainant that is 65 years of age or older when the defendant is at least 10 years younger. These "protected person" gradations provide a penalty enhancement for certain offenses against persons when there is no relationship between the defendant and the complainant.
- Notably, none of the District's current assault statutes have a penalty enhancement for a "vulnerable adult" and the District's current penalty enhancement for complainants over the age of 65 years is limited to aggravated assault, and does not apply to either misdemeanor or felony assault.[439] The RCC penalty enhancement for bodily injury assault against a vulnerable adult or other defined "protected person" is a new recommendation in the RCC. The RCC proportionately penalizes assaults against vulnerable adults and elderly complainants when there is no relationship with the defendant, as compared to the RCC criminal abuse of a vulnerable adult or elderly person statute where a relationship is required. The key differences between the RCC criminal abuse of a vulnerable adult and RCC assault statutes are that the former includes some non-physical injuries, the precise grading and penalties vary (although both provide enhancements as compared to physical injuries to a non-vulnerable adult or non-elderly person), and there is a distinct label for harms caused by parents, children, caretakers, and others who have a

[438] D.C. Code §§ 22-933; 22-936(a), (b), (c) ("(a) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person shall be subject to a fine not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (b) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury or severe mental distress shall be subject to a fine of not more than the amount set forth in § 22-3571.01, imprisoned up to 10 years, or both. (c) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes permanent bodily harm or death shall be subject to a fine of not more than the amount set forth in § 22-3571.01, imprisoned up to 20 years, or both."). The terms "serious bodily injury" and "permanent bodily harm" are not statutorily defined for the current criminal abuse of a vulnerable adult or elderly person statute and there is no DCCA case law interpreting these terms for the current statute.

[439] D.C. Code § 22-3601(b).

responsibility for the complainant under civil law for the health, welfare, or supervision of the vulnerable adult or elderly complainant.

(2) *USAO, App. C at 337, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a "responsibility for the health, welfare, or supervision of the complainant who is under 18 years of age." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(3) *The CCRC recommends adding electronic stalking (RCC § 22E-1802) to the list of offenses included in third degree criminal abuse of a vulnerable adult or elderly person. The list of offenses already includes stalking (RCC § 22E-1801). Electronic stalking is a recently revised offense with a similar scope of conduct and the same penalty.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(4) *USAO, App. C at 337-338, recommends including in what is now paragraph (c)(2) that the defendant commits "assault, per RCC § 22E-1202," "kidnapping, per RCC § 22E-1401," and both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact.*[440] *USAO states that assault is "implicitly included" in what was previously subparagraph (c)(2)(C) ("recklessly causes bodily injury to the complainant"), but it should be expressly included in subparagraph (c)(2)(C) to "eliminate confusion." USAO states that since criminal restraint is included in the list of offenses in what is now paragraph (c)(2), kidnapping should be included as well. Finally, USAO states that "it is important to have a provision" for what is now third degree offensive physical contact because "[l]ike 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." USAO states that "[e]ven if it is likely that the complainant suffered bodily injury, the government may not be able to prove it beyond a reasonable doubt."*

- The RCC partially incorporates the recommendation to include assault in the list of specified offenses in paragraph (c)(2) by including sixth degree assault under RCC § 22E-1202(f). Sixth degree assault requires

[440] When USAO submitted its comment, the RCC offensive physical contact offense had two gradations. As is discussed elsewhere in this appendix, the RCC offensive physical contact offense now has three gradations because it includes two "protected person" gradations.

recklessly causing bodily injury to a complainant and is identical to what previously subparagraph (c)(2)(C). The RCC does not include first degree, second degree, or third degree assault because they have higher penalties than third degree criminal abuse of a vulnerable adult or elderly person. Including these assault gradations in paragraph (c)(2) would authorize a lower penalty for substantially similar conduct. The RCC does not include fourth degree assault in paragraph (c)(2) because it now has the same penalty as third degree criminal abuse of a vulnerable adult or elderly person (Class 9 felony) for the same conduct (recklessly causing significant bodily injury). The RCC does not include fifth degree of the RCC assault statute in paragraph (c)(2) because it already includes higher penalty based on the victim's status as a vulnerable adult or elderly person.

- The RCC does not incorporate the recommendation to include kidnapping in the list of specified offenses in paragraph (c)(2). Both kidnapping and aggravated kidnapping in the RCC have higher penalties than third degree criminal abuse of a vulnerable adult or elderly person. Including them in third degree criminal abuse of a vulnerable adult or elderly person would authorize a lower penalty for the same conduct.
- The RCC incorporates the recommendation to include both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact—by including the offensive physical contact offense in the list of specified offenses in paragraph (c)(2).

(5) *The CCRC recommends deleting what was previously subparagraph (c)(2)(B) ("Purposely causes significant emotional distress by confining the complainant."). An actor that purposely causes significant emotional distress by confining the complainant has likely committed criminal restraint, which is included in the list of offenses in paragraph (c)(2) of the statute. To the extent that an actor purposely causes significant emotional distress by confining the complainant and does not satisfy the requirements of the RCC criminal restraint statute, there may still be liability under the provisions of the statute that prohibit causing serious mental injury (subparagraphs (a)(2)(B) and (b)(2)(A)) or the RCC criminal neglect of a vulnerable adult or elderly person statute that prohibit creating a risk of serious mental injury.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *USAO, App. C, at 338 recommends in subparagraph (c)(2)(B) changing the culpable mental state from "purposely" to "knowingly" and deleting the words "by confining." With these changes, subparagraph (c)(2)(B) would require that the defendant "knowingly causes significant emotional distress" to the complainant instead of "purposely causes significant emotional distress by confining the complainant." USAO states that "knowingly" is the appropriate culpable mental state because "purposely" is a "mens rea that is too high." USAO states that under the current criminal abuse of a vulnerable adult statute, the only culpable mental states are intentionally or knowledge. USAO states it is*

unclear why confinement "is the only way to cause significant emotional distress under the statute" and that "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."

- The RCC does not incorporate this recommendation because, as is discussed above, the CCRC recommends deleting subparagraph (c)(2)(B).

(7) *USAO, App. C at 336, recommends requiring in subparagraph (c)(2)(C) "or engages in conduct that creates a grave risk of causing bodily injury to the complainant." With this change, subparagraph (c)(2)(C) would require "recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant." USAO states that this language is consistent with USAO's proposed change to the criminal abuse of a minor statute. In addition, USAO states that the current criminal abuse of a vulnerable adult statute includes "threaten[ing] to inflict physical pain or injury," which means no infliction of bodily injury is required, and that this change is "consistent with current law."*

- The RCC does not incorporate this recommendation for the reasons stated above for this recommendation in criminal abuse of a minor. In addition, while the current criminal abuse of a vulnerable adult or elderly person includes threats to inflict pain or injury, the RCC criminal abuse of a vulnerable adult or elderly person statute specifically includes committing threats in paragraph (c)(2) of third degree.

(8) *The CCRC recommends reducing the penalty classification for second degree criminal abuse of a vulnerable adult or elderly person from a Class 7 felony to a Class 8 felony, and reducing the penalty classification for third degree criminal abuse of a vulnerable adult or elderly person from a Class 8 felony to a Class 9 felony. First degree criminal abuse of a vulnerable adult or elderly person remains a Class 6 felony, which is the same classification as first degree of the RCC assault statute. As it pertains to "serious bodily injury," first degree criminal abuse of a vulnerable adult or elderly person has a lower culpable mental state ("recklessly") than first degree assault ("recklessly, with extreme difference to human life."). The fact that the defendant must have a responsibility for the health, welfare, or supervision of the complainant under the criminal abuse of a minor statute justifies the equivalent penalty, despite the lower culpable mental state. As it pertains to recklessly causing "significant bodily injury," however, keeping second degree criminal abuse of a vulnerable adult or elderly person a Class 7 felony is disproportionate to the penalty for fourth degree assault (recklessly causes significant bodily injury to any complainant), which is a Class 9 felony. A Class 8 felony (still higher than the equivalent bodily injury in assault) is more proportionate for second degree criminal abuse of a vulnerable adult or elderly person. Third degree criminal abuse of a vulnerable adult or elderly person, which has been revised to include sixth degree assault (Class B misdemeanor) and all gradations of the offensive physical contact offense (Class B misdemeanor and lower), similarly is more proportionately classified as a Class 9 felony (still higher than the equivalent bodily injury in assault).*

- This change improves the proportionality of the revised statute.

(9) *The CCRC recommends deleting the burden of proof requirements for the defense. The RCC has a general provision that addresses the burden of proof for all defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(10) *The CCRC recommends applying strict liability to the requirements of the defense. The language "in fact" in subsection (d), per the rule of construction in RCC § 22E-207, applies to the elements in paragraph (d)(1) and paragraph (d)(2). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*

- This change improves the clarity of the revised statute.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

(1) *USAO, App. C at 338-339, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a "responsibility for the health, welfare, or supervision of the complainant." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(2) *USAO, App. C at 427, recommends increasing the proposed penalties for criminal neglect of a vulnerable adult or elderly person. Specifically, USAO recommends that first degree and second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute be classified as Class 6 felonies and that third degree of the RCC criminal neglect of a vulnerable adult or elderly person statute be classified as a Class 7 felony. USAO relies on its reasoning for this recommendation in the RCC criminal neglect of a minor statute, discussed above.*

- The RCC does not incorporate this recommendation for the reasons discussed above for this recommendation in the RCC criminal abuse of a minor statute.

(3) *The CCRC recommends reducing the penalty classification for second and third degree of the criminal neglect of a vulnerable adult or elderly person offense by one class. Specifically, the CCRC recommends reducing second degree criminal neglect of a minor from a Class 9 felony to a Class A misdemeanor, and reducing third degree criminal neglect of a vulnerable adult or elderly person offense from a Class A misdemeanor to a Class B misdemeanor. As is discussed in this Appendix for the RCC criminal abuse of a vulnerable adult or elderly person offense, second degree criminal abuse of a vulnerable adult or elderly person offense is now a Class 8 felony and third degree criminal abuse of a vulnerable adult or elderly person offense is now a Class 9 felony. Reducing the penalty classification by one class for second and third degree criminal neglect of a vulnerable adult or elderly person offense keeps the penalties proportionate as compared to the criminal abuse of a vulnerable adult or elderly person offense. The reduced penalties for creating a risk of physical harm in the criminal neglect of a vulnerable adult or elderly person statute are also proportionate compared to the RCC assault statute.*[441]

[441] Fourth degree assault prohibits recklessly causing significant bodily injury and is a Class 9 felony. Second degree criminal neglect of a vulnerable adult or elderly person, which prohibits recklessly creating a risk of significant bodily injury, is now one penalty classification lower, a Class A misdemeanor. Sixth

- This change improves the proportionality of the revised statutes.

(4) *The CCRC recommends deleting the burden of proof requirements for the defense. The RCC has a general provision that addresses the burden of proof for all defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(5) *The CCRC recommends deleting the jury demandability provisions in subsection (g). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(6) *The CCRC recommends applying strict liability to the requirements of the defense. The language "in fact" in subsection (d), per the rule of construction in RCC § 22E-207, applies to the elements in paragraph (d)(1) and paragraph (d)(2). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*

- This change improves the clarity of the revised statute.

degree assault prohibits recklessly causing bodily injury and is a Class B misdemeanor. Third degree criminal neglect of a vulnerable adult or elderly person, which prohibits recklessly failing to provide and would entail risk of bodily harm, is now a Class B misdemeanor.

Forced Labor or Services. RCC § 22E-1601 & Forced Commercial Sex. RCC § 22E-1602.

(1) *OAG at App. C. 255, and USAO at App. C. 339, notes that the terms "labor" and "debt bondage" are not defined under RCC § 22E-701, and recommends that the terms should be defined.*

- The RCC incorporates this recommendation. This change will improve the clarity of the revised criminal code.

(2) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(3) *OAG at App. C. 255, recommends striking the word "ordinary" from the exclusion from liability for threats of employment actions. OAG says that if employment actions are legal, they should still be exempted from liability even if they are not ordinary.*

- The RCC incorporates this recommendation by deleting the word "ordinary." This change will improve the proportionality of the revised criminal code.

(4) *USAO, at App. C. 339 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation because the USAO proposed change would change current District law in a way that is unclear and inconsistent with the RCC general approach to ensuring penalty enhancements help deter targeting certain protected categories of persons.
- First, it is unclear whether or why USAO is recommending elimination of a recklessness requirement as to the age of the complainant for human trafficking offenses. The USAO general comments at App. C 313-315 do not discuss the current human trafficking statutes directly and appear to be based solely on arguments about how proving recklessness as to age would circumvent the District's Rape Shield laws or change evidentiary practices around closely related types of information "not specifically covered by the Rape Shield Act." These Rape Shield evidentiary arguments at App. C 313-315 do not appear applicable to forms of human trafficking offenses (such as RCC § 22E-1601, Forced Labor or Services) that do not involve sexual conduct as an element. Furthermore, the USAO "general comments" at App. C 272-274, which preface all USAO comments on the First Draft of Report #36, assert what appears to be a somewhat contradictory position about the mental state as to the appropriate mental state as to a minor complainant's age. Without

distinguishing human trafficking or sex offenses, USAO App. C at 274 recommends that there be a new affirmative defense applying a negligence standard as to the defendant's age.[442] Lastly, none of the USAO comments address the fact that the one place where current D.C. Code human trafficking offenses refer to age as an element or enhancement, it is to require proof the actor was "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years."[443] The USAO recommendation for strict liability (or negligence), thus appears to be a change in law.

- Considering the USAO Comments at App. C 313-315 as applied to human trafficking offenses that involve sexual conduct and complainant's age as elements, the USAO evidentiary arguments that requiring recklessness as to age undermines Rape Shield laws are problematic for the reasons described in response to USAO comments as to offenses under Chapter 13. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[444] which the

[442] USAO App. C at 274 ("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.").

[443] D.C. Code 22-1834. See Commentary regarding RCC § 22E-1605. Sex Trafficking of Minors:

> "First, the revised sex trafficking of minors statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be 'knowing or in reckless disregard of the fact that the person has not attained the age of 18 years,' but does not define the culpable mental state terms. However, subsection (b) of the current statute further states that 'In a prosecution… in which the defendant had a reasonable opportunity to observe the person recruited, enticed… or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years.' Consequently, the current statute's drafting is ambiguous as to whether 'recklessness' always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct, and recklessness as to the complainant's age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant." (internal citations omitted).

[444] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and the evidence is "constitutionally required to be admitted" D.C. Code § 22-1839. In addition, even if evidence is constitutionally required to be admitted, the evidence may only be admitted in accordance with the procedures specified in D.C. Code § 22-3022(b). It is unclear whether the hypothetical evidence offered by the USAO in its comments would be constitutionally required to be admitted. Current D.C. Code § 22-1839 does not define "past sexual behavior." However, the

RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[445] Of particular note, the current D.C. Code § 22-1834 Sex trafficking of Children statute *already* combines a recklessness standard with a robust Rape Shield law in § 22–1839.

- Second, the USAO proposal may lead to disproportionate penalties insofar as the recommendation would provide enhanced penalties for conduct involving minors when the actor either could not have reasonably known that the complainant was a minor (in the case of strict liability) or should have known (but didn't) that the complainant was a minor. Human trafficking offenses are among the most serious in the RCC (and current D.C. Code), with age-based enhancements providing a substantial increase in liability of about 5-15 years.

(5) *USAO, at App. C. 339, recommends adding a comma in paragraph (c)(2) after the words "provide services." USAO recommends adding the comma to clarify that the enhancement will apply if the actor holds the complainant, or causes the person to provide labor, for more than 180 days.*

- The RCC incorporates this recommendation by adding commas as suggested. This change improves the clarity or the revised statute.

(6) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (c)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

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current rape shield statutes under Chapter 30 and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[445] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

Forced Commercial Sex. RCC § 22E-1602.

(1) *USAO, at App. C. 339-340 recommends adding a comma after the words "provide commercial sex acts" to clarify that the enhancement will apply if the actor holds the complainant, or causes the person to provide commercial sex acts, for more than 180 days.*

- The RCC incorporates this recommendation. This change improves the clarity of the revised statute.

(2) *CCRC recommends replacing the words "with another person" with "other than with the actor." This change is not intended to substantively change the offense. The words "with another person" were intended to clarify that the offense does not include intent to cause the complainant to engage in a commercial sex act with the actor. However, that language could be interpreted to exclude masturbation. The words "other than with the actor" clarify that the offense includes masturbation.*

- This change improves the clarity of the revised statute.

(3) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(4) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 22E-1603. Trafficking in Labor or Services.

(1) *USAO, at App. C. 340, recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1). USAO says that "[t]hese changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1).*

- The RCC does not incorporate this recommendation because it would change current law in a way that is inconsistent with the organization of current and RCC offenses, appears to be unnecessary, and may make the revised statute less clear. Although USAO's comment says that, "[t]hese additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise," the plain language of the RCC (and present D.C. Code statute) already covers such conduct in a more direct and clear manner. First, it is unclear what it means to "advertise . . . a person." If the word "advertise" is intended to cover cases in which a person advertises human beings for sale for the purposes of forced labor, that person would be liable under the other statutory language for "recruit[ing]," "provid[ing]," "obtain[ing]," or "maintain[ing]" a person. Alternatively, accomplice or conspiracy liability may apply to a person who advertises on behalf of another party who actually recruits, obtains, transports, etc. persons, knowing they will be caused to provide labor or services by means of coercive threat or debt bondage. Second, it is also unclear what conduct constitutes "patronizing" a person, with intent that as a result the person will be caused to provide labor or services by means of a coercive threat or debt bondage. The term could include receiving the labor or services of a person. But, if the person who performed labor or services did so due to coercive threats or debt bondage, then the patron may be prosecuted under the forced labor or benefitting from human trafficking statutes, depending on the specific facts of the case. Lastly, as described in the Appendix D1 entry regarding RCC § 22E-302, Solicitation, the RCC general solicitation statute has been revised to apply to all offenses against persons, including human trafficking offenses. Consequently, adding the word "solicits" is unnecessary.

(2) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(3) *USAO, at App. C. 340 recommends that the penalty enhancement based on the age of the complainant should be re-drafted to require only strict liability instead of recklessness as to the complainant's age. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(4) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 22E-1604. Trafficking in Commercial Sex.

(1) *USAO, at App. C. 340, recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).*
- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(2) *USAO, at App. C. 340-341 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*
- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(3) *USAO, at App. 341, in subsection (c), recommends changing the words "before applying to" to "in addition to" which USAO says is non-substantive and intended to conform with the language of other penalty enhancements in Chapter 16.*
- The RCC incorporates this recommendation by using the "in addition to" language suggested. This change clarifies and improves the consistency of the revised statutes.

(4) *CCRC recommends replacing the words "with another person" with "other than with the actor." This change is not intended to substantively change the offense. The words "with another person" were intended to clarify that the offense does not include intent to cause the complainant to engage in a commercial sex act with the actor. However, that language could be interpreted to exclude masturbation. The words "other than with the actor" clarify that the offense includes masturbation.*
- This change improves the clarity of the revised statute.

(5) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*
- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(6) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any*

general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

RCC § 22E-1605. Sex Trafficking of a Minor.

(1) *USAO, at App. C. 341, recommends changing the name of the offense "sex trafficking of minors" to "sex trafficking of a minor." USAO also suggests that language in subsection (a) of the statute be updated to refer to state "An actor commits the offense of sex trafficking of a minor when that actor[.]" USAO notes that this recommendation is not intended to substantively change the offense.*

- The RCC incorporates this recommendation. This change makes the label of the offense consistent with other RCC offenses involving minors.

(2) *USAO, at App. C. 340, recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(3) *USAO, at App. C. 341-342 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(4) *USAO, at App. C. 342, recommends deleting the words "with another person" from paragraph (a)(2). USAO, at App. C. 342, recommends including "masturbation" in the definition of "commercial sex act."*

- The RCC partially incorporates this recommendation by amending the phrase "with another person" to "other than with the actor." The words "other than with the actor" clarify that the offense includes masturbation. The term "commercial sex act" is defined as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received, by any person." Masturbation, insofar as it involves penetration of the anus or vulva, or touching clothed or unclothed genitalia, with desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, constitutes a "commercial sex act" if performed in exchange for anything of value. The requirement that the commercial sex act be "with another person" is intended to exclude cases in which the actor has intent that the complainant engage in a commercial sex act *with the actor*. An actor who acts with intent that the minor will engage in a commercial sex act with the actor may be liable under separate sex offenses codified in Chapter 13.

(5) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

RCC § 22E-1606. Benefitting from Human Trafficking.

(1) *OAG at App. C. 255-256, recommends changing the statutory language to codify language in the RCC commentary that a person's participation in a group must in some way be related to the group's violation of a human trafficking statute.*

- The RCC incorporates this recommendation by adding as an element to the first and second degrees of the statute a subparagraph (4) that states: "In fact, the actor's participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense." This change clarifies the revised statute.

RCC § 22E-1607. Misuse of Documents.

(1) *OAG, at App. C. 256, recommends that the commentary should clarify that the words "in order to" do not introduce a new mental state.*

- The RCC incorporates this recommendation by stating in the commentary that the words "in order to" do not introduce a new mental state. This change clarifies the RCC commentary.

(2) *OAG, at App. C. 406, recommends that the misuse of documents offense be divided into two penalty gradations, with the first degree version requiring intent to maintain the performance of a commercial sex act, and second degree version requiring intent to maintain labor or services. OAG also recommends that the penalties for misuse of documents should be the same as for benefitting from human trafficking.*

- The RCC partially incorporates this recommendation by dividing the misuse of documents offense into two penalty grades, based on whether the actor had intent to cause a person to engage in commercial sex acts, or labor or services. This change improves the proportionality of the revised criminal code.
- However, the RCC does not incorporate OAG's recommendation that the two grades of misuse of documents be the same as for the corresponding penalties for benefitting from human trafficking because doing so may authorize disproportionate penalties. Misuse of documents is a semi-inchoate offense, and does not require that any person actually provided labor or services, or engaged in a commercial sex act. In contrast, the higher penalty classification for benefitting from human trafficking requires that a person was actually coerced into providing labor or services, or engaging in a commercial sex act. Notably, under the RCC, a person may be liable for both benefitting from human trafficking and misuse of documents and sentenced consecutively for these crimes.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

(1) *USAO, at App. C. 342 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(2) *The CCRC recommends re-drafting paragraphs (a)(2) and (b)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

RCC § 22E-1611. Civil Action.

(1) *The CRCC recommends replacing the word "and" with "or" in subsection (a). This change clarifies that an individual who was the victim of any of the statutes listed in subsection (a) may bring a civil action. This change clarifies the revised statute.*

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses

(1) *OAG, at App. C. 257, recommends amending the limitation on liabilities and sentencing statute only to bar convictions for conduct that occurs while the person is being trafficked. USAO, at App. C. 342, recommends deleting RCC § 22E-1612.*

- The RCC partially incorporates the OAG recommendation by requiring the person to have been subjected to human trafficking by the principal "within the past 3 years prior to either the conduct constituting the offense by the principal, or the formation of the conspiracy. However, the RCC does not incorporate the USAO recommendation because it may authorize disproportionate penalties. Victims of human trafficking offenses may still have diminished culpability even after the initial trafficking offense has been completed due to the principal's ongoing influence over the victim. However, recognizing that such influence may diminish over time when the victim is no longer being trafficked, the revised statute has a three year time limitation. Notably, a prior victim of human trafficking remains liable as: 1) a principal engaged in human trafficking; 2) as an accomplice or co-conspirator when the principal was not the perpetrator of the original trafficking offense; or 3) as a principal, accomplice, or co-conspirator for another offense against persons in the RCC.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 249 n. 7, recommends either striking the exclusion from liability for protected speech or providing a specific example of a stalking fact pattern that involves protected speech. USAO, App. C at 311, states, "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."*

- The RCC incorporates this recommendation by striking the exclusion from liability language as potentially confusing. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(2) *USAO, App. C at 310, recommends requiring knowledge instead of purpose, stating, "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."*

- The RCC does not incorporate this recommendation because reducing the culpable mental state to knowingly would criminalize new behavior in a new way that may authorize disproportionate penalties. The USAO comment does not provide a rationale for why knowledge is more appropriate than purpose. A purposeful culpable mental state appears to be the requirement under the current stalking statute in D.C. Code § 22-3133 which states: "It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual…" A key rationale for providing stalking liability for the negligent infliction of emotional harm—a uniquely low standard in the D.C. Code—is that punishment for such a result is warranted because the actor "purposely" engaged in targeted conduct against the victim.[446]
- Requiring mere knowledge may criminalize behavior that is innocent, constitutionally protected under the First Amendment, or both:
    - Consider, for example, a person who communicates to a large audience via television broadcast or an upload to YouTube. That person may be practically certain that the complainant will watch the broadcast, and negligent as to the fact that the complainant will be distressed by the content, but not consciously desire that the complainant watch.
    - Consider also a divorced couple attending a family event, such as a wedding or a funeral. One former spouse may be practically

[446] See the National Center for Victims of Crime, *Model Stalking Statute Revisited* (2007) at 34.

certain that they are maintaining close proximity to the other as they move from the church to the reception hall, and negligent as to the fact that their very presence is distressing, but not consciously desire to physically follow them.[447]

(3) *USAO, App. C at 310-311, recommends eliminating the requirement that communications occur after receiving notice that the contact is unwelcome. USAO notes that: "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."*

- The RCC partially incorporates this recommendation by eliminating the phrase "after knowingly receiving notice from the complainant, directly or indirectly, to stop such communication" and instead requiring that the person is negligent as to the fact that the contact is without the complainant's effective consent. The USAO comment appears to assume, without objection, that an actor should have known their actions are unwelcome and requiring negligence as to the fact that the contact is without the complainant's effective consent codifies this point. This change eliminates an unnecessary gap in liability.

(4) *USAO, App. C at 311, recommends providing liability for "using another individual's personal identifying information" in the stalking statute.*[448]

- The RCC partially incorporates this recommendation by amending the statute to include "falsely personating" the complainant as a predicate for stalking liability and adding a statutory reference to conduct that constitutes "identity theft" in the reordered subparagraph (a)(1)(D). The revised stalking statute makes it unlawful to assume a victim's likeness and communicate to other people on the victim's behalf (e.g., falsely posing as the complainant in an online forum and making statements that intentionally or negligently inflict fear or emotional stress on the complainant). RCC § 22E-2205 (Identity Theft) makes it unlawful to use personal identifying information not only to obtain property or to avoid payment, but to transfer the information to a third person to facilitate their fraudulent use of the information to obtain property (e.g. posting another's credit card or social security number online). However, identity theft liability does not require intentional or negligent infliction of fear or emotional distress.[449] The revised stalking statute does not provide liability for mere use of "personal identifying information" because, as defined in the RCC (and current D.C. Code), that term broadly includes information not only such as account numbers, credit cards, credit ratings,

[447] "Physically following" is defined in RCC § 22E-701.

[448] *See* D.C. Code § 22-3132(8)(C).

[449] To the extent that the actor commits identity theft as part of stalking those convictions would merge per RCC § 22E-214, consistent with the Council's prior statement that it did not intend for there to be multiple punishments for identity theft and stalking based on the same conduct. *See* Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (June 29, 2009) at Page 46.

and passwords, but readily available information such as a person's name and home address.[450] Many common uses of a person's name or address (e.g. publication of the name or home address of a person who wishes to remain anonymous) and constitutionally protected speech (e.g. stating in a public place that a named person is immoral or blameworthy) would appear to fall within the scope of stalking if mere use of identifying information is predicate conduct. This change eliminates an unnecessary gap in liability.

(5) *USAO, App. C at 311, recommends removing the exclusion from liability for speech concerning political matters and other matters of public concern to a complainant engaged in their official duties when the complainant is a government official, candidate for elected office, or employee of a business.*[451] *USAO states that the exclusion from liability should not permit a government official to be stalked or harassed in their personal space (e.g., a work call while at home). USAO also notes that "government official" is undefined and "employee of a business that serves the public" could include virtually all businesses, and therefore virtually all employees.*

- The RCC partially incorporates the recommendation regarding government officials and candidates for elected office by limiting the exception for "a government official" to a "District official," a defined term, when the District official is engaged in their official duties and the communication alleged to constitute stalking concerns a political or public matter. The location of such a public official—at an office, on the street, or at home—is irrelevant so long as the limitations of the exclusion are met. Harassing calls to District official's personal cell phone or home when the official is not on duty would not be subject to the exclusion under its plain terms. Moreover, while the USAO comment refers to physically following or physically monitoring,[452] the statutory language makes clear that the exception applies only to "a communication."
- The RCC partially incorporates the recommendation to narrow the scope of the exclusion for businesses and employees when those complainants are engaged in their official duties and the communication alleged to constitute stalking concerns a political or public matter.

(6) *USAO, App. C at 311, recommends removing the exclusion from liability for a journalist, law enforcement officer, professional investigator, attorney, process server,* pro se *litigant, or compliance investigator.*[453] *USAO says that the exclusion is unnecessary because the exclusion from liability for protected activity "encompasses the constitutional concerns that could otherwise be implicated by this statute, and is an appropriate catch-all…"*

- The RCC does not incorporate this recommendation because it would make the revised statute less clear. As the commentary explains, "Even if

[450] RCC § 22E-701.
[451] RCC § 22E-1801(b)(2). [Previously numbered RCC § 22E-1206(b)(2).]
[452] "Physically following" and "physically monitoring" are defined in RCC § 22E-701.
[453] RCC § 22E-1801(b)(3). [Previously numbered RCC § 22E-1206(b)(3).]

the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[454] Without a clear exclusion, such legitimate activities may be deemed stalking."[455] It is not inconceivable that a person would otherwise be accused of stalking for conduct that is within the scope of their professional duties or legal obligations.[456]

- The RCC strikes the prior language in favor of the exclusion articulated in paragraph (b)(2) for conduct that is "[a]uthorized…by a court order or District statute, regulation, rule, or license; or carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty."

(7) *USAO, App. C at 311-312, 415-419, and 426, recommends eliminating the right to a jury trial for attempted stalking. USAO states that it is appropriate to do so, explaining, "There is no particular interest in attempted stalking being jury demandable, as jury trials involve considerable resources that non-jury trials do not."*

- The RCC does not incorporate this recommendation, which predates the RCC's updated jury demandability recommendation. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify enhanced stalking as a Class 9 felony and unenhanced stalking as a Class A misdemeanor. In the Second Draft of Report #41, the CCRC recommends that the RCC classify all completed and inchoate Class A misdemeanors as jury demandable offenses, improving the consistency of the revised statutes.
- As the DCCA recently explained in *Coleman v. United States*,[457] the Council "found it 'highly appropriate that a jury of [the defendant's] peers…judge whether the behavior is acceptable or outside the norm and indicative of escalating problems.'"[458] The court went on to explain, "The

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[454] Many of the professional activities excepted in the RCC stalking statute, e.g. a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[455] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.

[456] *See, e.g.,* Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, REASON (August 22, 2019).

[457] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).

[458] *Id*. at 1134 (citing D.C. Council, Comm. on Pub. Safety & Judiciary, Rep. on Bill 18-151, at 33 (June 26, 2009), http://lims.dccouncil.us/Download/22306/B18-0151-CommitteeReport1.pdf (Committee Report)).

> The current version of the stalking statute was enacted as part of the Omnibus Public Safety and Justice Amendment Act of 2009, D.C. Law 18-88, 56 D.C. Reg. 7413 (Dec.

Council expressly set the maximum penalty for stalking at a level that guaranteed the defendant's right to a jury trial…(explaining that the penalty of twelve months for first-time stalking offenders was established 'so that a defendant will have a right to a jury of [his] peers')."[459] In fact, the Council has long recognized a heightened need to provide jury when "the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt."[460] Additionally, in another recent opinion, the DCCA noted, "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."[461]

(7) *OAG, App. C at 250, and USAO, App. C at 312, recommend that the penalty enhancement for violation of a court order be broadened to include a court order or condition of release that either restricts or prohibits contact with the complainant. OAG and USAO explain that a person may be subject to a court order or condition of release that permits limited contact with the complainant under specified circumstances and does not prohibit contact categorically.*

- The RCC partially incorporates this recommendation by specifying that the enhancement applies when the person's conduct violates a court order or condition of release prohibiting or restricting contact with the complainant. This change eliminates an unnecessary gap in liability.[462]

(8) *USAO, App. C at 312, recommends that the repeat offender enhancement clarify that it applies to a person with "one* or more*" convictions for stalking within 10 years. (Emphasis added.)*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute and does not further change District law.

(9) *USAO, App. C at 312, recommends that the "requirement that the defendant 'recklessly disregarded' the complainant's age be removed." USAO cites its general comments for all offenses on such penalty enhancements, but does not specify the general comments to which it is referring.*

- The RCC does not incorporate this recommendation because the USAO recommendation may authorize disproportionate penalties.

10, 2009). Citing the 'subjective nature' of stalking, the Council's Committee on Public Safety and the Judiciary deemed it an offense for which 'the community, not a single judge, should sit in judgment…'

[459] *Id*. (Internal citations omitted.)

[460] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

[461] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[462] Violation of a court order or condition of release is separately punishable as contempt. *See, e.g.,* D.C. Code §§ 16-1005(f); 23-1329(c).

- First, the intended scope of the USAO comment is unclear. The USAO statutory language proposed in App. C at 312 strikes the revised statute's minimum age *and* age differential requirements but does not discuss these changes and instead refers to the USAO general comments. However, the USAO general comments in App. C at 282 do not appear to say anything about a minimum age and, regarding age differential, appear to take a position the opposite of the language recommended for stalking at App. C at 312. The USAO general comments in App. C at 282 state: "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)." In fact, current District law provides for an age differential requirement for the stalking of a minor complainant enhancement.[463] The CCRC does not here address an age-gap requirement on the assumption that USAO did not intend to recommend striking the age-gap requirement from the enhancement for the complainant's status as a minor. The USAO general comments in App. C at 273, however, recommend that there be a new affirmative defense applying a negligence standard as to the defendant's age.
- Second, assuming the USAO intends to recommend a "negligence" standard as to the victim's status as a protected person, the CCRC does not incorporate the recommendation for the reasons stated in the response to the same comment in the RCC murder statute.[464]

(10) *OAG, App. C at 250, recommends revising the sentence in the commentary (p. 130) that states, "The term 'court order' includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim." OAG explains the word "clearly" does not appear in the statutory language and is unclear.*

- The RCC incorporates this recommendation by revising relevant sentence to state, "The term 'court order' includes any judicial directive, oral or written, that restricts contact with the stalking victim." This change clarifies the revised commentary.

(11) *OAG, App. C at 250, recommends revising the repeat offender penalty enhancement to clarify that the prior stalking conviction could be in any jurisdiction.*

- The RCC incorporates this recommendation by specifying that enhancement applies to any person who "Has one or more prior convictions within 10 years before the offense for: (i) Stalking under RCC § 22E-1801 or a comparable offense; or (ii) Electronic Stalking under RCC § 22E-1802 or a comparable offense." This change clarifies the revised statute and does not further change District law.

[463] D.C. Code § 22-3134(b) ("A person who violates § 22-3133 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both, if the person: …(3) At the time, was at least 4 years older than the specific individual and the specific individual was less than 18 years of age;).
[464] RCC § 22E-1101.

(12) *OAG, App. C at 250, recommends specifying that a defendant is strictly liable for causing more than $2,500 in financial injury.*[465] *OAG notes that the other penalty enhancements include the defined term "in fact"*[466] *to indicate that no culpable mental state applies.*

- The RCC incorporates this recommendation by revising the relevant subparagraph to state, "The person, in fact, caused more than $5,000 in financial injury." (The threshold amount has been increased from $2,500 to $5,000 as noted below.) This change clarifies the revised offense.

(13) *USAO, App. C at 426, recommends reclassifying enhanced stalking as a Class 8 felony. USAO states, "Stalking is serious behavior that can be linked to lethal behavior."*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty.

(14) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from $2,500 to $5,000, consistent with the thresholds for the revised property offenses.*[467] *This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.*[468]

- This change improves the consistency of the revised offenses.

(15) *The CCRC recommends adding the phrase "the complainant" to subparagraphs (a)(1)(A) and (a)(1)(B),*[469] *to improve the grammar in the offense definition.*

- This change clarifies, but does not substantively change, the revised offense.

(16) *The CCRC recommends revising the phrase "Purposely, on 2 or more separate occasions, engages in a course of conduct directed at a complainant…" to instead read: "Purposely engages in a course of conduct directed at a complainant that consists of 2 or more occasions…," so that it is clear the person does not have to engage in two separate courses of conduct.*

- This change clarifies the revised statute and does not further change District law.

(17) *The CCRC recommends replacing the reference to "a criminal harm involving a trespass, threat, taking of property, or damage to property" with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*

- This change clarifies the revised statute and does not further change District law.

(18) *The CCRC recommends amending the penalty enhancement provision to include an enhancement for a prior conviction for electronic stalking. The RCC electronic stalking offense,*[470] *which was recently issued in the First Draft of*

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[465] RCC § 22E-1801(e)(2)(D).
[466] RCC § 22E-207.
[467] *See, e.g.,* RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).
[468] RCC § 22E-2201.
[469] [Previously numbered (a)(1)(C).]
[470] *See* RCC § 22E-1802.

Report #42 (November 20, 2019), replaces certain components of the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.

- This change eliminates an unnecessary gap in liability.

(19) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

RCC § 22E-1802. Electronic Stalking.

(1) *PDS, App. C at 446, recommends creating two degrees of electronic stalking, differentiating between harm that is intentionally caused and harm that is negligently caused. PDS states, "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.*

- The RCC does not incorporate this recommendation because it may result in inconsistency with the revised stalking offense[471] and disproportionate penalties. The revised statute follows current District law in providing liability for persons who may be acting with beneficent intentions, but nonetheless actually cause emotional harm to another by their behavior. While it is highly unusual in American jurisprudence to provide criminal liability for unintentional wrongdoing, modern stalking statutes in several jurisdictions besides the District provide liability based on negligence. The District's decision in 2009 to provide a low culpable mental state requirement for stalking may be necessary to address some unique fact patterns involved in stalking-type behavior—e.g., involving a person who is unreasonably mistaken about the complainant's love for him or her, following the complainant without knowing that such behavior causes the complainant harm. In the revised statute, negligent and intentional conduct are not treated equally. The lower culpable mental state requirement in subparagraph (a)(2)(B) is paired with a requirement of actual harm, while the higher culpability requirement of subparagraph (a)(2)(A) is inchoate. Consequently, the two means of committing electronic stalking are relatively balanced in the overall seriousness of the conduct.

(2) *PDS, App. C at 446, recommends defining the term "derivative image" in the statutory text. PDS does not propose a particular definition but notes the examples given in the commentary.*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[472] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(3) *USAO, App. C at 454, recommends defining the term "course of conduct" to mean "actions taken on two or more occasions," so that it is clear the person does not have to engage in two separate courses of conduct.*

- The RCC partially incorporates this recommendation by revising the phrase "Purposely, on 2 or more separate occasions, engages in a course of

[471] RCC § 22E-1801.

[472] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

conduct directed at a complainant…" to "Purposely engages in a course of conduct directed at a complainant that consists of 2 or more occasions…" This change clarifies the revised statute and does not further change District law.

(4) *USAO, App. C at 454, requests that the RCC clarify the exclusion from liability in subparagraph (b)(2)(A) for persons who are a party to the communication that is being recorded. USAO states, "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."*

- The RCC incorporates this recommendation by clarifying in the statutory text that the exclusion from liability applies to audio recordings only. This change clarifies the revised statute.

(5) *USAO, App. C at 454-455, recommends revising the commentary to refer to "engaging in" a pattern of misconduct instead of "causing" a pattern of misconduct. USAO also recommends striking the word "uninterrupted," stating, "Stalking behavior may be interrupted, as a defendant engaging in stalking will engage in activities other than stalking during the course of the stalking."*

- The RCC partially incorporates this recommendation by substituting the phrase "engage in" for "cause" and revising the footnote that accompanies the phrase "uninterrupted purpose." The footnote now explains that it is the purpose, not the conduct, that must be uninterrupted. This change clarifies the revised commentary.

(6) *USAO, App. C at 455, recommends eliminating the right to a jury trial for attempted electronic stalking, consistent with its recommendation for the revised stalking offense.*[473]

- The RCC does not incorporate this recommendation, which predates the RCC's updated jury demandability recommendations. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify enhanced electronic stalking as a Class 9 felony and unenhanced electronic stalking as a Class A misdemeanor. In the Second Draft of Report #41, the CCRC recommends that the RCC classify all completed and inchoate Class A misdemeanors as jury demandable offenses, improving the consistency of the revised statutes.

(7) *USAO, App. C at 455, recommends that the penalty enhancement for violation of a court order be broadened to include a court order or condition of release that either restricts or prohibits contact with the complainant, consistent with its recommendation for the revised stalking offense.*[474]

- The RCC incorporates this recommendation by amending the penalty enhancement provision to state, "The person, in fact, was subject to a court order or condition of release prohibiting or restricting contact with

[473] RCC § 22E-1801.
[474] RCC § 22E-1801.

the complainant." This change eliminates an unnecessary gap in liability.[475]

(8) *USAO, App. C at 455, recommends that the repeat offender enhancement clarify that it applies to a person with "one* or more*" convictions for electronic stalking within 10 years. (Emphasis added.)*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute and does not further change District law.

(9) *USAO, App. C at 455, recommends that the "requirement that the defendant 'recklessly disregarded' the complainant's age be removed," consistent with its recommendation for the revised stalking offense.*[476]

- The RCC does not does not incorporate this recommendation for the reasons stated in the response to the same comment in the RCC stalking statute.[477]

(10) *USAO, App. C at 455, recommends stating 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."*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct takes place or the result happens within its territorial limits.[478] The conduct element of this offense is satisfied as soon as the recording or monitoring occurs. The result element of an offense under subparagraph (a)(2)(B) of this offense is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. In sum, under existing law the District may exercise jurisdiction only if the recording, monitoring, fear, or distress occurs here. However, the USAO recommendation goes further in recommending a statement that "*any harm…stemming from* the defendant's actions" is sufficient for jurisdiction. Consider, for example, a person who is a victim of stalking conduct in California who travels to the District of Columbia months later, while still experiencing significant emotional distress. Such an attenuated connection to the District would not be a sufficient or constitutionally sound basis for jurisdiction.

(11) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

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[475] Violation of a court order or condition of release also is separately punishable as contempt. *See, e.g.,* D.C. Code §§ 16-1005(f); 23-1329(c).

[476] RCC § 22E-1801.

[477] RCC § 22E-1801.

[478] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

(12) *The CCRC recommends broadening the penalty enhancement for violation of a court order to include a court order or condition of release that either* restricts or *prohibits contact with the complainant, consistent with the revision to the stalking offense.*[479]

- This change eliminates an unnecessary gap in liability.

(13) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from $2,500 to $5,000, consistent with the thresholds for the revised property offenses.*[480] *This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.*[481]

- This change improves the consistency of the revised offenses.

(14) *The CCRC recommends specifying that a defendant is strictly liable for causing more than $5,000 in financial injury, consistent with the revision to the stalking offense.* [482]

- This change clarifies the revised offense and does not further change District law.

(15) *The CCRC recommends striking the exclusion from liability for certain types of employment activity in favor of an exclusion for conduct that is "[a]uthorized…by a court order or District statute, regulation, rule, or license; or carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty," consistent with the revision to the stalking offense.*[483]

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

(16) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

(17) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying electronic stalking as a Class A misdemeanor and recommends classifying all Class A misdemeanors, and inchoate versions of those offenses, as jury demandable offenses.*

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[479] RCC § 22E-1801.
[480] *See, e.g.,* RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).
[481] RCC § 22E-2201.
[482] RCC § 22E-1801.
[483] RCC § 22E-1801.

- This change improves the consistency of the revised statutes.

(18) *The CCRC recommends striking the phrase "The person engages in the course of conduct," consistent with the stalking offense.*[484]

- This change improves the consistency of the revised statutes and does not further change District law.

[484] RCC § 22E-1801.

RCC § 22E-1803. Voyeurism.

(1) *OAG, App. C at 430-431, recommends that subparagraph (a)(2) be redrafted to state, "Without the complainant's effective consent to being observed and for the creation of an image."*[485] *OAG explains that it is unclear in the current draft whether "without the complainant's effective consent" refers to the creation of the image or to the viewing of the nude complainant.*

- The RCC partially incorporates this recommendation by revising the explanatory note to clarify that "effective consent" in subsection (a) refers to the creation of the image and "effective consent" in subsection (b) refers to the observation. The proposed statutory language is not incorporated because it may make the statute more confusing. This change clarifies the revised commentary.

(2) *OAG, App. C at 431, and USAO, App. C at 456, recommend amending the penalty enhancement to include actors who are reckless as to the age of the complainant instead of only those who know the age of the complainant. OAG notes that other RCC provisions require mere negligence as to the complainant's age.*[486]

- The RCC incorporates this recommendation by revising the penalty enhancement to require that "the actor is reckless as to the fact that a complainant is under 18 years of age." This change improves the consistency of the revised statutes.

(3) *PDS, App. C at 446, recommends defining the term "derivative image" in the statutory text.*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[487] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(4) *USAO, App. C at 455 recommends criminalizing the observation or recording of any "female breast," as opposed to a "developed female breast." USAO states, "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.'"*

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[485] 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."

[486] 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.

[487] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

- The RCC incorporates this recommendation by deleting the modifier "developed" and clarifying in commentary that the statute would include a woman who is transfeminine or has had a mastectomy. The revised statute's requirement that there be a reasonable expectation of privacy will continue to bar liability for observing or recording an undeveloped female chest (such as a child wearing only a diaper) in many situations. This change clarifies the revised commentary and may eliminate a gap in liability.

(5) *USAO, App. C at 455-456, recommends criminalizing the observation or recording of a person "using a toilet or a urinal." USAO says that using the bathroom is "a very intimate and private experience."*

- The RCC partially incorporates this recommendation by amending the statute to provide liability for observation or recording of a person "urinating or defecating". While it may be rare that a person will observe or record someone urinating or defecating without also observing or recording (or come dangerously close to observing or recording[488]) the person's nude or undergarment-clad genitals,[489] such conduct may occur. To clarify the scope of the statute the revision is limited to the acts of urinating and defecating instead of using more ambiguous language of "using the bathroom" or "using a toilet or a urinal" which may include other actions (e.g., vomiting, disposing of garbage). This change clarifies and eliminates a possible gap in liability in the revised statutes.

(6) *USAO, App. C at 456, recommends criminalizing the observation or recording of a sexual contact. USAO says that sexual contact can be an intimate and private experience. USAO also says that it is strange that voyeurism liability attaches for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attaches for a defendant creating an image of someone else touching that person's genitalia (sexual contact).*

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. Under the revised statute, observing or recording a sexual contact (which would include, for example, someone playfully grabbing their spouse's buttocks) does not amount to an offense unless there is an observation or recording of: nude or undergarment-clad private areas, sadomasochistic abuse, masturbation, a sexual act, urination, or defecation. Rather, the revised offense is limited to the types of exposure and conduct that commonly considered to be most private.

(7) *USAO, App. C at 457, recommends the RCC expressly codify upskirting as a basis for voyeurism liability. USAO provides three examples in which a woman is sitting on the steps of the Lincoln Memorial, sitting with her legs slightly ajar on the Metrorail, or standing on an escalator. USAO does not propose any specific statutory language.*

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[488] *See* RCC § 22E-301, Criminal Attempt.

[489] *See also* RCC § 22E-1802, Electronic Stalking, providing liability where a course of electronic monitoring is intended to cause or causes significant emotional distress.

- The RCC does not incorporate this recommendation because the current language provides liability for "upskirting"-type conduct and an additional, general reference to "upskirting" may render the statute unconstitutionally vague. The general term "upskirting" is undefined and may include behavior that is innocent, constitutionally-protected, or both. The revised statute punishes upskirting in all of the scenarios noted in USAO's comment—the Lincoln Memorial, a Metrorail car, and an escalator—provided that the victim has a reasonable expectation of privacy under the circumstances.

(8) *USAO, App. C at 457, notes that the commentary states, "[c]hasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202." However, because the RCC definition of "assault" requires bodily injury to the complainant, it is unclear how this could constitute an assault.*

- The RCC addresses this comment by revising the footnote to state, "Chasing a woman and lifting her skirt would also be punished as offensive physical contact under RCC § 22E-1205." This change clarifies the revised commentary.

(9) *The CCRC recommends adding the word "or" at the end of subparagraph (b)(1)(A) because it was omitted in error.*

- This change clarifies the revised statute and does not further change District law.

(10) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

(11) *The CCRC recommends specifying in the statutory language that a person must "directly" observe a complainant to commit second degree voyeurism. This clarifies that a person does not commit second degree voyeurism by viewing an image or listening to an audio recording that was previously created.*

- This change clarifies the revised statute and does not further change District law.

RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

(1) *OAG, App. C at 431, recommends clarifying that the defendant has the burden of production and the burden of persuasion for the affirmative defense.*

- The RCC incorporates this recommendation by specifying the burden of proof for all defenses and exclusions in the RCC § 22E-201 in the General Part. This change improves the clarity and consistency of the revised statutes.

(2) *PDS, App. C at 446-447, recommends expanding the affirmative defense to include distributions to a teacher, a counselor, or a person that the defendant reasonably believed had a special responsibility for someone depicted in the image or involved in its creation.*

- The CCRC partially incorporates this recommendation by revising the affirmative defense to include distributions made to a person the actor reasonably believes to be a law enforcement officer, prosecutor, attorney, teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of someone who is depicted in the image or is involved in the creation of the image. The phrase "school counselor" is used instead of the word "counselor," to avoid confusion with other kinds of counselors. This change improves the clarity and consistency of the revised statutes by specifying the mental state applicable to each element of the affirmative defense.

(3) *USAO, App. C at 457, recommends renaming the offense, to clarify that there is no requirement that an actor disclose multiple sexual recordings to be liable for this offense.*

- The RCC incorporates this recommendation by adopting USAO's proposed title. This change clarifies and does not substantively change the revised offense.

(4) *USAO, App. C at 457-458, recommends specifying in the statutory text that a person commits an offense who "causes to be distributed or displayed" or "causes to be made accessible" a sexual recording. USAO notes that current D.C. Code § 22-3531(f)(2) that provides liability for distributing images "directly or indirectly, by any means" and provides an example in which a defendant asks another person to distribute a sexual recording.*

- The RCC does not incorporate this recommendation because it is not necessary to provide liability for the instances cited by USAO and would be inconsistent with the RCC's general provisions on accomplice liability and causing crime by an innocent or irresponsible person. RCC § 22E-210 provides liability for someone who (1) Purposely assists another person with the planning or commission of conduct constituting [an] offense; or (2) Purposely encourages another person to engage in specific conduct constituting [an] offense. RCC § 22E-211 provides liability for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(5) *USAO, App. C at 458, recommends removing the word "developed" from the phrase "developed female breast," and clarifying that a "female breast" means the breast of both a cisgender and a transfeminine woman.*

- The RCC incorporates this recommendation by deleting the modifier "developed" and clarifying in commentary that the statute would include a woman who is transfeminine or has had a mastectomy. This change clarifies the revised commentary and may eliminate a gap in liability.

(6) *USAO, App. C at 458, recommends expanding the revised statute to include recordings of a sexual contact, as defined in the RCC. USAO states, "a sexual contact can be an intimate, private experience…even if nude genitalia are not visible."*

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. Under the revised statute, disclosing a recording of a sexual contact (which would include, for example, someone playfully grabbing their spouse's buttocks) does not amount to an offense unless there is a recording of: nude or undergarment-clad private areas, masturbation, sadomasochistic abuse, a sexual act, urination, or defecation. Rather, the revised offense is limited to the types of exposure and conduct commonly considered to be most private.

(7) *USAO, App. C at 458-459, recommends specifying in the statutory text that an agreement or understanding may be "explicit or implicit." USAO states that a married couple that exchanges nude photos via text messages has an implicit understanding that they will not be shared.*

The RCC incorporates this recommendation by substituting the phrase "explicit or implicit agreement" for the phrase "agreement or understanding." This change is consistent with the RCC definition (and current D.C. Code definition) of consent. However, the CCRC also notes in the commentary that determination of whether there is or is not an understanding or agreement between the actor and complainant is an issue of fact that must be determined by the factfinder in the circumstances of a particular case. Unlike the USAO example, the existence of a marital relationship alone is not a sufficient basis for determining there to be an understanding or agreement not to share photos: "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."

(8) *USAO, App. C at 459, recommends striking the word "sexually" from the phrase "sexually abuse, humiliate, harass, or degrade the complainant." USAO states, "there should be no requirement that the defendant have a sexual intent" and explains, "their intent is frequently to harass or humiliate the complainant, or to seek revenge."*

- The RCC does not incorporate this recommendation it would create inconsistency with the general RCC approach to sexual offenses. The revised statute does not require that the defendant have a sexual intent.

One means of committing the revised offense is for the defendant to intend to "alarm" the complainant. "Alarm" is generally understood to broadly include "disturb," "excite," or "strike with fear."[490] This appears to cover the example raised by USAO regarding a person 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. Alternatively, a second means of committing the offense is to act with intent to "sexually abuse, humiliate, harass, or degrade" the complainant. The use of the modifier "sexually" in the revised statute is consistent with the use of that term throughout the RCC to modify the words "abuse, humiliate, harass, or degrade." For further explanation of this change, see the Appendix D1 entry responding to the USAO comment, App. C at 453-454, recommending the elimination of the modifier "sexually" for the words "abuse, humiliate, harass, or degrade" in the revised definition of "sexual act" and "sexual contact."

(9) *USAO, App. C at 458, recommends that subparagraphs (c)(1)(A) and (c)(2)(B) be joined by the word "and."*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute.

(10) *USAO, App. C at 458, recommends clarifying 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."*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct takes place or the result happens within its territorial limits.[491] The result element of this offense is satisfied as soon as the disclosure occurs and, if the actor or complainant is in the District at that time, there would be jurisdiction. In sum, under existing law the District may exercise jurisdiction only if the disclosure occurs here. However, the USAO recommendation goes further in recommending a statement that "*any harm…stemming from* the defendant's actions" is sufficient for jurisdiction. Consider, for example, a person who is a victim of unlawful disclosure conduct that occurs wholly in California who travels to the District of Columbia months later, while still experiencing significant emotional distress. Such an attenuated connection to the District would not be a sufficient or constitutionally sound basis for jurisdiction.

(11) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no

[490] Merriam-Webster.com, *"alarm"*, 2020, *available at* https://www.merriam-webster.com/dictionary/alarm.

[491] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(12) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(13) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

(14) *The CCRC recommends revising the phrase "by conduct that constitutes" to state, "by committing a District offense that is, in fact," consistent with other revised statutes.*

- This change clarifies the revised statute and does not further change District law.

(15) *The CCRC recommends replacing the phrase "law enforcement agency" with the term "law enforcement officer," which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(16) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1805. Distribution of an Obscene Image.

(1) *OAG, App. C at 432, recommends clarifying in the statutory language that the phrase "sexual or sexualized image" pertains to the image that is eventually distributed, not what the person who was filmed was actually doing. OAG explains, "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)." OAG does not recommend any specific statutory language.*

- The RCC partially incorporates this recommendation by clarifying in a footnote in the commentary's explanatory note that: "The word 'sexualized' in the phrase 'sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering' refers to a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual." This change clarifies the revised commentary.

(2) *OAG, App. C at 432, recommends revising the commentary 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."*

- The RCC incorporates this recommendation by adopting OAG's proposed change to the commentary. This change clarifies the revised commentary and does not further change District law.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying distribution of an obscene image as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(5) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(6) *The CCRC recommends striking the reference to* Parks v. United States*, 294 A.2d 858, 859-60 (D.C. 1972) in the revised commentary as potentially confusing.*

- This change clarifies the revised commentary.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

(1) *OAG, App. C at 432-433, recommends revising the offense element that requires the person to be over 18 years of age and four years older than the complainant to require only that the person is four years older than the complainant. OAG notes that it has "prosecuted teenagers aged 14 to 17 for child sexual assault of children between the ages of 4 and 8 in situations where prior to the sexual assaults the teenager showed the younger child pornography on numerous occasions."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Other RCC offenses, such as sexual abuse of a minor,[492] punish older persons engaging in or attempting to engage in sexual acts and sexual contact with minors (including older minors engaging in or attempting to engage in sexual acts and sexual contact with minors). In contrast, this offense is focused on a separate social harm: traumatizing children by exposing them to materials that are shocking and unforgettable. Critically, a child who possesses (or distributes) obscene materials is a victim of the very trauma the statute aims to prevent. In addition, minors may be particularly unable to recognize and distinguish obscene depictions of sexual behavior (that are unlawful under this statute) from non-obscene depictions (which are lawful) because they are still learning community standards regarding such matters.

(2) *OAG, App. C at 433, recommends broadening the affirmative defense for an employee of a school, museum, library, movie theater to include an employee of any "other venue." OAG says, "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."*

- The RCC incorporates this recommendation by adopting OAG's proposed statutory language. This change improves the proportionality of the revised offense.

(3) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(4) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

[492] RCC § 22E-1302.

(5) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying distribution of an obscene image as a Class B misdemeanor and recommends classifying all Class B misdemeanors as jury demandable offenses.*

- This change improves the consistency of the revised statutes and does not further change District law.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor. [Previously Trafficking an Obscene Image of a Minor].

(1) *USAO, App. C at 459, recommends changing the name of the offense (previously "Trafficking an Obscene Image of a Minor."). USAO states that "not all conduct that falls within the offense constitutes 'trafficking,'" because "'trafficking' implies some level of distribution." USAO does not recommend an alternative name.*

- The RCC incorporates this recommendation by changing the offense name to "creating or trafficking an obscene image of a minor." This change improves the clarity of the revised statute.

(2) *USAO, App. C at 459-450, recommends revising the gradations "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." USAO states that this is "consistent with the gradations for child pornography under federal law pursuant to 18 U.S.C. §§ 2251 and 2252." USAO states that a "defendant should be penalized more severely for creating an image than for distributing an image." USAO states that it "does not oppose also creating gradations of this offense based on the type of sexual conduct depicted in the images."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and lead to inconsistent liability. It is unclear that creating an image is categorically more severe conduct than distributing an image because distributing the image further violates the complainant's privacy. For example, PDS, App. C at 447-448, states that the first category of conduct in the offense—creating an image—is "dissimilar and typically less severe than the other actions encompassed" by the offense because in these other categories of conduct "the minor complainant's privacy is further violated." Given the differences in determining which category of conduct is most severe, the RCC creating or trafficking an obscene image statute instead grades the offense solely based on the type of image at issue. A defendant that creates an image or gives effective consent for the creation of an image will likely have additional liability for the underlying sexual conduct in the RCC sex offenses, which reflects in a more proportionate and consistent way the sexual nature of this conduct.

(3) *PDS, App. C at 447-448, recommends "separating the conduct defined in [subparagraphs (a)(1)(A) and (b)(1)(A); creating, producing, or directing a non-derivative image] into a lesser included offense." PDS states that this "first category of action is dissimilar and typically less severe than the other actions encompassed" by the offense because in these other categories of conduct "the minor complainant's privacy is further violated."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and lead to inconsistent liability. It is unclear that creating an image is categorically less severe conduct than distributing an image because creating the image is a clear and direct form of harm to the complainant's privacy (as compared to more speculative

harms that may arise from downstream distribution of an image that may or may not be viewed by others).[493] For example, USAO, App. C at 447-448, states that "the most serious gradation be for creating an image (production), then for advertising an image, then for distributing an image." Given the differences in determining which category of conduct is most severe, the RCC creating or trafficking an obscene image statute instead grades the offense solely based on the type of image at issue. A defendant that creates an image or gives effective consent for the creation of an image will likely have additional liability for the underlying sexual conduct in the RCC sex offenses, which reflects in a more proportionate and consistent way the sexual nature of this conduct.

(4) *USAO, App. C at 460, recommends replacing "obscene" with "sexually explicit" because "obscene" "can be a vague standard." USAO states that the federal child pornography law uses "sexually explicit" instead of "obscene" and cites to 18 U.S.C. § 2251. USAO states that this change "would create an analogue with federal law for criminalization of child pornography [and] could draw on the case law regarding the definition of 'sexually explicit' that would help guide interpretations" of the RCC statute.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and could lead to inconsistent liability. "Obscene" is a defined term in RCC § 22E-701 that is based on longstanding Supreme Court case law. The USAO reference to "sexually explicit" and citation to 18 U.S.C. § 2251 is unclear as to whether and to what extent USAO wishes the RCC to track federal law. The federal pornography statute in 18 U.S.C. § 2251 and case law on the statute does refer to the noun "sexually explicit conduct," but not a separate "sexually explicit" adjective. Moreover, the term "sexually explicit conduct" is defined in another federal statute[494] in a manner that seems incompatible

[493] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[494] 18 U.S.C. § 2256 (2)(A) ("Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated-- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person; (B) For purposes of subsection 8(B)1 of this section, "sexually explicit conduct" means-- (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;"); 18 U.S.C. § 2256 (8) ("'child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.").

with a replacement of "obscene" for the types of sexual contact and display in the RCC. For example, the federal definition of "sexually explicit conduct" doesn't reach "sexual contact" at all (at least in the way that is defined in the RCC to include clothed body parts). Replacing "obscene" with "sexually explicit" would potentially include within the RCC creating or trafficking an obscene image statute creating, displaying, distributing, selling, or advertising images that include a minor touching another minor's covered buttocks—conduct that while perhaps not to be encouraged frequently occurs among teenagers in public places. In contrast, the reference to "obscene" in the RCC creating or trafficking an obscene image statute is limited to the conduct in second degree—an "obscene" sexual contact and an "obscene" sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than an opaque covering. The high threshold of "obscene" is appropriate to ensure that the revised statute prohibits exploitative images but does not criminalize broadly all images of nudity and common sexual contact.

(5) *PDS, App. C at 446, recommends defining the term "derivative image" in the statutory text. PDS does not propose a particular definition but notes the examples given in the commentary.*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[495] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(6) *USAO, App. C at 460, recommends codifying a definition of "derivative image." USAO states that a separate definition of "derivative image" would "limit potential future confusion."*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[496] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(7) *USAO, App. C at 460, recommends replacing "manufactures" with "produces" in subparagraphs (a)(1)(C) and (b)(1)(C) so they prohibit "displays, distributes, or produces with intent to distribute an image." USAO states that it is "unclear what the difference is between 'manufacturing' and 'producing,' and both terms*

[495] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[496] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

are used" in the RCC statute (subparagraphs (a)(1)(A) and (b)(1)(A) prohibit producing an image, other than a derivative image). USAO says that, "Federal law, by contrast, uses the word 'producing.' 18 U.S.C. § 2251." USAO states that replacing "manufactures" with "produces" "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 the RCC statute.

- The RCC does not incorporate this recommendation because it would create ambiguity in the statute. First, while USAO recommends eliminating "manufacturing" in favor of "producing" and cites to federal pornography statute in 18 U.S.C. § 2251, the term "producing" in that statute is a defined term that actually includes "manufactures."[497] Second, assuming that USAO was not recommending defining "producing" to include "manufacturing," CCRC notes that replacing "manufactures" with "produces" would result in "produces" being used in the RCC statute in two different contexts—producing the creation of a non-derivative image in subparagraphs (a)(1)(A) and (b)(1)(A) and displaying, distributing, or producing with intent to distribute an image in subparagraphs (a)(1)(C) and (b)(1)(C). The RCC commentary to the statute has been updated to reflect that "producing" is intended to include giving financial backing, making background arrangements for a performance such as buying or leasing equipment for a sexual performance or purchasing equipment to film or exhibit a sexual performance.

(8) *USAO, App. C at 460, recommends in subparagraphs (a)(1)(E) and (b)(1)(E) replacing "sells or advertises an image" with "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." USAO states that this wording is "consistent with federal child pornography law" in 18 U.S.C. § 2251(d)(1) and that, as stated in its earlier comments for the RCC creating or trafficking offense, "it is useful to track federal statutory language in this respect."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and would create inconsistent liability. The scope of "makes . . . or causes to be made . . . a notice or advertisement" in the proposed language is unclear, and the proposed language appears limited to written, printed, or published advertisements. Under the RCC statute, an individual that stands on a street corner and discretely informs passerbys that the individual is selling prohibited images would clearly be liable for advertising, whereas it is unclear if this conduct constitutes making a notice or advertisement.

(9) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(4)) an affirmative defense. This is*

[497] 18 U.S.C. § 2256 (3) ("'producing' means producing, directing, manufacturing, issuing, publishing, or advertising;").

consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(10) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(4)(B) add a sentence that states: "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." With this change, an actor that is under the age of 18 years may be prosecuted for creating or trafficking a prohibited image if: 1) the actor is at least 4 years older than the minor complainant who is, or who will be, depicted in the image; or 2) the complainant is 8 years of age or younger. OAG refers to its earlier comments concerning the decriminalization in the RCC of distribution of an obscene image to a minor, App. C at 432-433. OAG states that, in addition, OAG "does not believe that young children are capable of giving effective consent to the distribution of their sexual images." As a hypothetical, OAG states 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 [sic] platform. The 17 year old would not be guilty of this offense if the 8 year old gave effective consent." OAG states that "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.'"*

- The RCC does not incorporate this recommendations because it may authorize disproportionate penalties and lead to inconsistent liability.
- First, as a threshold matter, the RCC provides criminal liability for a 17 year old who engages in a sexual act with an 8 year old or causes an 8 year old to engage in or submit to a sexual act—whether or not an image is created of the act—as first degree sex abuse of a minor, one of the most severely punished offenses in the RCC. Effective consent is not a defense or consideration for this offense. In the OAG hypothetical, if the17 year old caused the 8 year old to engage in the sex act due to grooming (or otherwise), such conduct would be criminal under the RCC, and subject to severe penalties.
- Second, while the RCC does not adopt the OAG recommendation to categorically establish liability for creating or trafficking images for certain complainants under the age of 18 based solely upon the age of the parties, the RCC may provide liability depending on the facts of the case. As is explained further in the commentary, the RCC statute expands the exceptions to liability for persons under 18 years of age that are in the current statute. This expansion is warranted because legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[498] However, establishing per se categories of liability based

[498] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a

solely on age may make the revised statute both over-inclusive—making individuals liable even if their conduct is not blameworthy—and under-inclusive—excluding individuals from liability when their conduct is blameworthy. Age is only one factor in evaluating sexual maturity (physical and psychological) and in evaluating ability to give effective consent to sexual conduct. Instead of per se categories of liability, the RCC creating or trafficking an obscene image statute relies on the RCC definitions of "effective consent" and "consent." As OAG notes, the definition of "effective consent" may not adequately account for the youth of a complainant, particularly a complainant that has been groomed. However, the RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires that the consent "not [be] given by a person who . . . [b]ecause of youth . . . is known to the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct to constitute the offense or to the result thereof." The requirements of the RCC definition of "consent" ensure that complainants under the age of 18 years have liability for creating or trafficking images of other minors only if the minor that is depicted, or will be depicted, is unable to give meaningful consent, and that the defendant knows this.

(11) *USAO, App. C at 460, recommends removing the affirmative defense in paragraph (d)(1) for an image that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. USAO states that the defense "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."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties, lead to inconsistent liability, and unconstitutionally criminalize conduct in some instances. The affirmative defense requires that the "image has, or will have, serious literary, artistic, political, or scientific value, when considered *as a whole*" (emphasis added). Without such a defense, the statute could criminalize the creation,

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contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

sale, or promotion of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. The defense is based in Supreme Court case law[499] and ensures the constitutionality, consistency, and proportionality of the revised statute. In addition, as is noted in the RCC commentary, notwithstanding the defense, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[500]

(12) *PDS, App. C at 448, recommends expanding the affirmative defense in paragraph (d)(2). PDS states that, 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" 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." PDS states that "the current code [D.C. Code § 22-3001] and the RCC [D.C. Code § 22-1301(e)] 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." PDS states that 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." PDS does not recommend any specific revised language.*

- The RCC partially incorporates this recommendation by requiring: 1) in subparagraph (d)(3)(A) that the actor is, in fact, at least 18 years of age; and 2) in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) that the

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[499] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

[500] Depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force, threats, or involuntary intoxication involved, there may be liability for sexual assault (RCC § 22E-1301). If the sexual activity doesn't actually occur, there may still be liability under enticing a minor into sexual conduct (RCC § 22E-1305) or solicitation (RCC § 22E-302) of sexual abuse of a minor or sexual assault of a minor.

actor is in a romantic, dating, or sexual relationship with the complainant, and is not at least 4 years older than a complainant who is under 16 years of age, or is not in a position of trust with or authority over a complainant under the age of 18 years, and at least 4 years older than the complainant. An actor that is under the age of 18 years, regardless of the actor's relationship to the complainant, does not need this defense because the broader affirmative defense for any actor under the age of 18 years in paragraph (d)(2) applies. The changes in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) provide an affirmative defense for an actor that is at least 18 years of age and in a romantic relationship with a complainant under the age of 18 years unless there would be liability under the RCC sexual abuse of a minor statute—either because the complainant is under the age of 16 years and the actor is at least four years older than the complainant, or the complainant is under the age of 18 years and the actor is at least four years older and in a position of trust with or authority over the complainant. Under PDS's hypothetical, of 25 year old that is in a consensual relationship with a complainant under the age of 17 years, there would be no liability because the actor is not in a position of trust with or authority over the complainant.

- It is unclear whether PDS recommends expanding the affirmative defense to include instances where an actor that is over the age of 18 years shares images of a complainant that is under the age of 18 years with the complainant's effective consent. To the extent that PDS makes this recommendation, the RCC does not incorporate it, because an actor that is at least 18 years of age that shares images of a complainant under the age of 18 years, even with that complainant's effective consent, is contributing to the demand for sexually explicit and obscene images of minors.

(13) *PDS recommends expanding the affirmative defense in paragraph (d)(5) to include "or other cultural institution." PDS states that, as currently drafted, the affirmative defense includes a narrow list of civic institutions and commercial establishments that may come in contact with artistic images."*

- The RCC incorporates this recommendation by including "or other venue" as recommended by OAG, discussed below. "Cultural institution" may be unnecessarily narrow and inconsistent with the references to a "school" or "movie theater" in the current defense.

(14) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (d)(5) for an employee of a school, museum, library, movie theater to include an employee of any "other venue." OAG says, "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."*

- The RCC incorporates this recommendation by adopting OAG's proposed statutory language. This change improves the proportionality of the revised offense.

(15) *USAO, App. C at 460-461, recommends in the affirmative defense in subsection (d)(3) limiting the number of images that would qualify for the defense. USAO states that under current law there is a limit of 6 still photographs or 1 motion*

picture that allow a defendant to invoke this defense. USAO recommends that "there be some limit on the amount of images that a person may have to invoke this defense," but does not recommend a specific number.

- The RCC does not incorporate this recommendation because it would reduce the clarity and proportionality of the defense. The defense is meant to facilitate individuals reporting possible illegal conduct or seeking legal counsel from any attorney. The defense has an expanded scope compared to current law, and limiting the number of images or motion pictures would undermine the expanded scope. As the RCC commentary notes, the number of images or motion pictures that a person has may be used by a fact finder to assess whether the defendant had the required intent "exclusively and in good faith" to report possible illegal conduct or to seek legal counsel from any attorney." However, a person who seeks to report possible illegal conduct or legal counsel and forwards two video clips should not be rendered criminally liable because there are "two" versus "one" such clip.

(16) *PDS, App. C at 446-447, recommends expanding the affirmative defense in paragraph (d)(4) to include distributions to a teacher, a counselor, or a person that the defendant reasonably believed had a special responsibility for someone depicted in the image or involved in its creation.*

- The CCRC partially incorporates this recommendation by revising the affirmative defense to include distributions made to a person the actor reasonably believes to be a law enforcement officer, prosecutor, attorney, teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of someone who is depicted in the image or is involved in the creation of the image. The phrase "school counselor" is used instead of the word "counselor," to avoid confusion with other kinds of counselors. This change improves the clarity and consistency of the revised statutes by specifying the mental state applicable to each element of the affirmative defense.

(17) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(18) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(19) *The CCRC recommends replacing the phrase "law enforcement agency" with the term "law enforcement officer," which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(20) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(1) *USAO, App. C at 460, recommends replacing "obscene" with "sexually explicit" for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(2) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(4)) an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(4)(B) add a sentence that states: "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." OAG relies on the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(4) *USAO, App. C at 460, recommends removing the affirmative defense in paragraph (d)(1) for an image that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(5) *USAO, App. C at 460-461, recommends in the affirmative defense in subsection (d)(4) limiting the number of images that would qualify for the defense, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(6) *PDS, App. C at 448, recommends expanding the affirmative defense in paragraph (d)(2) in the manner recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(7) *PDS, App. C at 447, recommends expanding the affirmative defense in paragraph (d)(4) in the manner recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC partially incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(8) *PDS recommends expanding the affirmative defense in paragraph (d)(5) to include "or other cultural institution" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation by including "or other venue" for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(9) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (d)(5) for an employee of a school, museum, library, movie theater to include an employee of any "other venue" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(10) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(11) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(12) *The CCRC recommends replacing the phrase "law enforcement agency" with the term "law enforcement officer," which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(13) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

(1) *USAO, App. C at 461, recommends replacing "obscene" with "sexually explicit" for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(2) *USAO, App. C at 461, recommends in subparagraphs (a)(1)(A) and (b)(1)(A) including a "live broadcast" in addition to a "live performance." USAO states that it is "equally culpable for a person to arrange a live performance as to arrange a live broadcast." USAO gives as a hypothetical "[i]f . . . 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 RCC does not incorporate this recommendation because it creates unnecessary overlap with the RCC creating or trafficking an obscene image of a minor statute. A "live broadcast" is included in the scope of the RCC definition of "image" and arranging a live broadcast falls under the creating or trafficking an obscene image of a minor statute. Under USAO's hypothetical, a defendant that creates a chatroom and livestreams a video of a child engaging in a sexual act, is distributing an obscene image to a minor.

(3) *USAO, App. C at 461, recommends removing the affirmative defense in paragraph (d)(1) for a live performance that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(4) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(5) *The CCRC recommends adding subparagraphs (a)(1)(B) and (b)(1)(B) to the affirmative defense in paragraph (c)(2), which applies to any actor under the age of 18 years. The previous version of this provision (as an exclusion for liability) erroneously omitted this conduct (a person responsible under civil law for the complainant giving effective consent for the complainant to engage in or submit to the creation of a live performance). This matches the scope of the affirmative defense in the RCC creating or trafficking an obscene image statute.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(2)(B) add a sentence that states: "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." OAG relies on the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(7) *OAG, App. C at 435, comments on the affirmative defense in what is now paragraph (c)(4). OAG states that a person who "creates, produces, or directs" a live performance "must have some level of 'control' over its creation" and that "either the employee will never be able to meet the requirements of (d)(4)(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 [defense]. 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." OAG does not make any specific recommendations for revised language.*

- The RCC incorporates this recommendation by limiting this affirmative defense to subparagraphs (a)(1)(C) and (b)(1)(C). A producer or a director will not always some level of control over the creation of a live performance, and it is possible that a live performance will occur outside the presence of an actor, especially when that actor is a producer or director. However, this change is consistent with the scope of the affirmative defense in the RCC creating or trafficking an obscene image of a minor statute which does not apply to creating a prohibited image.

(8) *The CCRC recommends expanding the defense for marriage, domestic partnership, and a romantic relationship in the manner PDS recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute. This change is discussed in detail in this appendix for the RCC creating or trafficking an obscene image of a minor statute.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(9) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (c)(4) for an employee of a school, museum, library, movie theater to include an employee of any "other venue" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(10) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(11) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.
- This change improves the clarity and consistency of the revised statute.

(12) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(1) *OAG, App. C. 434, states that it is unclear in the commentary to this offense "what is meant by the terms 'unnatural' and 'unusual'" in the sentence "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 the sexual activity or the effect on the viewer" (OAG's emphasis). OAG asks: "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"? OAG recommends that the commentary "explain or give examples of what a 'natural' or 'unnatural,' 'usual' or 'unusual' focus on the relevant minor's body parts would be.*

- The RCC does not incorporate this recommendation because it may lead to inconsistency in the revised statutes. The commentary entry cited by OAG appears multiple times in the RCC commentary for a variety of offenses, including: § 22E-1807, Trafficking an Obscene Image of a Minor and 22E-1808, Possession of an Obscene Image of a Minor. In each instance the RCC commentary, paraphrased in OAG's comment, is quoting DCCA case law in Green v. United States, 948 A.2d 554, 562 (D.C. 2008) which in turn cites to federal case law providing an extensive list of factors that are relevant to the analysis of whether an image has an "unnatural" focus on genitalia. The CCRC declines to specify further what may constitute an "unusual" or "unnatural" focus for the RCC § 22E-1810 offense that OAG comments on, or other offenses. Instead, the RCC relies on District and federal case law cited in the commentary to provide further analysis of the relevant standards.

(2) *The CCRC recommends expanding the defense for marriage, domestic partnership, and a romantic relationship in the manner PDS recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute. This change is discussed in detail in this appendix for the RCC creating or trafficking an obscene image of a minor statute.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (c)(4) for an employee of a school, museum, library, movie theater to include an employee of any "other venue" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(4) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(2)) an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(5) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(6) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.
- This change improves the clarity and consistency of the revised statute.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

(1) *PDS, App. C at 449, recommends raising the age for this exemption to age 14. With this change, a person under the age of 14, as opposed to under the age of 12, would not be subject to prosecution for offenses in chapter 18. PDS states "[b]y 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."*

- The RCC does not incorporate this recommendation because it may create a gap in liability and is inconsistent with other RCC and D.C. Code provisions recognizing the age of 12 as a critical age between culpable and non-culpable or enhanced and unenhanced sexual conduct. Different children may reach sexual maturity at different ages and the revised provision merely establishes 12 years old as a floor. The provision does not suggest that prosecution is appropriate in every case or most cases of children ages 12 and 13. Rather, the provision assumes that these cases will be reviewed individually and that charging decisions will be guided by applicable rules and standards.[501] RCC § 22E-1308, "Limitations on Liability for RCC Chapter 13 Offenses," categorically precludes liability for sex offenses (other than first degree and third degree sexual assault) for persons under 12 years of age, in accord with ALI Model Penal Code Sex Assault draft recommendations, and other provisions in current D.C. Code[502] and RCC offenses[503] that recognize the age of 12 as the critical age between enhanced and unenhanced sexual conduct.

[501] E.g., ABA Model Rule of Professional Conduct 3.8, ABA Model Code of Professional Responsibility Canon 7 (Ethical Consideration 7-13), ABA Criminal Justice Standards (Prosecution Function), the U.S. Attorneys' Manual.

[502] *See, e.g.,* D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense;").

[503] *See, e.g.*, RCC § 22E-1302(a), First Degree Sexual Abuse of a Minor ("In fact: The complainant is under 12 years of age;").

RCC § 22E-2002. Definition of "Person" for Property Offenses.

(1) *OAG, App. C at 257, comments that, while it "has no comments concerning the text of the definition," it is "concerned about its placement in subtitle III." First, OAG states that "people who are unfamiliar with the RCC with 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," particularly given that neither Subtitle II nor Subtitle IV of the RCC have a definition as the first statute. Second, "if people are interpreting offenses that occur in [Subtitle II or Subtitle IV], they will need to know that they should be looking to D.C. Code § 45-605 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."*

- The RCC incorporates these comments by moving the definition of "person" for property offenses from Subtitle III to the general definitions statute in RCC § 22E-701 and removing the phrase "Notwithstanding the definition of "person" in D.C. Code § 45-604". This change improves the clarity of the revised statutes.

RCC § 22E-2101. Theft.

(1) *OAG, App. C at 257-258, recommends changing the value requirements for a motor vehicle in second degree theft so that the motor vehicle must have a value of $15,000 or more, but less than $25,000. As previously drafted, second degree theft required either that the property has a value of $25,000 or more, or that the property is a motor vehicle with a value of $25,000 or more. Third degree theft for a motor vehicle merely required that the property be a motor vehicle. OAG states that "there is too wide a gap between a vehicle that is worth $25,000 and [a] vehicle that has almost no value." OAG states that "the value of a car to a theft victim is worth more than its fair market value" and "[c]onsidering 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 valued at $25,000." In the alternative, OAG recommends removing the reference to a motor vehicle in second degree theft because it is superfluous.*

- The RCC incorporates this recommendation by deleting the reference to a motor vehicle in second degree theft. With this revision, second degree of the RCC theft statute requires that the value of any property be $50,000 or more. Third degree theft requires either that the property has a value of $5,000 or more, or be a "motor vehicle" of any value. All motor vehicles, except luxury motor vehicles with a value of $50,000 or more, are included in third degree of the RCC theft statute. This provides greater punishment for lower-value motor vehicles and recognizes that the loss of such a motor effects the complainant beyond the loss of the fair market value.

(2) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree theft to $500; $5,000; $50,000; and $500,000, respectively.*

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree theft has been increased from $2,500 to $5,000. Third degree theft is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. A higher minimum value threshold is justified given the severity of penalties. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[504] Research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the

[504] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated with its property crime and larceny rates.[505] This change improves the proportionality of the revised criminal code.

(3) *USAO, App. C at 343, recommends decreasing the number of gradations for theft because "too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits theft and obtains property worth $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(4) *USAO, App. C at 427, recommends decreasing the monetary thresholds in each gradation of theft. USAO states that it does not oppose the highest gradation of theft 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." Specifically, USAO "proposes eliminating the top gradation of $500,000, and creating only four gradations" and that "car theft be punished more severely than currently proposed." With these changes, USAO states that first degree theft would have a threshold of $50,000 and remain a class 7 felony, second degree theft would be $5,000 or any motor vehicle and remain a class 8 felony, third degree theft would be $1,000 and remain a class 9 felony, and 4th degree would require "any value" and be a misdemeanor.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of theft will very rarely be used. However, the penalties authorized for first degree theft, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years.[506] Setting the $5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[507]

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[505] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

[506] *See,* Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[507] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

(5) *USAO, App. C at 343, recommends deleting subparagraph (b)(4)(B), which establishes that for second degree theft, the property, if it is a motor vehicle, must have a value of $50,000 or more.*[508] *USAO states that this is a "superfluous provision" because subparagraph (b)(4)(A) provides that any property for second degree theft must have a value of $50,000 or more, and any property includes motor vehicles.*

- The RCC incorporates this recommendation by deleting subparagraph (b)(4)(B). This change improves the clarity, consistency and proportionality of the revised statute.

(6) *USAO, App. C at 343-344, recommends that, if the CCRC accepts "USAO's recommendations in the Robbery statute," the CCRC should delete subparagraph (c)(4)(C) and sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii) of the revised theft statute, which contain a gradation for theft from a person or from a person's immediate physical control. USAO, App. C at 300-301, recommends that the RCC robbery statute retains the provision for a sudden or stealthy seizure or snatching that is in the current D.C. Code robbery statute. USAO states that this conduct is "akin to robbery" and should be included in the RCC robbery statute instead of theft. USAO states that the RCC robbery commentary "acknowledges that so-called 'pick-pocketing' can morph into robbery in at least some circumstances."*

- The RCC does not incorporate this recommendation for the reasons described as to why the RCC does not incorporate USAO's recommendation for robbery. The RCC robbery statute does not retain the provision for a sudden or stealthy seizure that is in the current robbery statute and instead includes this conduct as third degree theft. Under the RCC robbery does not include non-violent takings from a person which, instead, are liable as theft. This is discussed further in the entries on the RCC robbery statute in this appendix.

(7) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

[508] USAO's comment uses $25,000 as the value requirement for the motor vehicle provision in second degree theft. That number has since been increased to $50,000, but subparagraph (b)(4)(B) is otherwise unchanged.

RCC § 22E-2102. Unauthorized Use of Property.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unauthorized use of property as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(1) USAO, App. C at 344, recommends replacing "operates a motor vehicle" in paragraph (a)(1) with "operates or uses a motor vehicle." USAO states that, consistent with the current UUV statute in D.C. Code § 22-3215(b), the revised UUV statute should include "use" in addition to "operate," noting that "use" is included in the title of the revised statute.

- The RCC does not incorporate this recommendation because it creates ambiguity in the revised statute and may authorize disproportionate penalties. It is unclear exactly what conduct constitutes "use" of a motor vehicle but does not constitute "operating" it. Possible examples of "use"—but not operation—might include passively sitting in or on a motor vehicle, but it appears that, to the extent a person can "use" a motor vehicle without also operating it, that conduct is more proportionally penalized as third degree trespass involving a motor vehicle (RCC § 22E-2601). The revised statute maintains "use" in the title of the offense as a more plain language and familiar terminology. The commentary to the RCC UUV statute has been updated to reflect that the RCC UUV statute deletes "uses" from the current UUV statute and that it is intended to be a clarificatory change.

(2) USAO, App. C at 344, recommends adding to paragraph (a)(1) "causes a motor vehicle to be operated or used." USAO states that, consistent with the current UUV statute in D.C. Code § 22-3215(b), "it is appropriate to retain liability for someone who 'causes' a motor vehicle to be used or operated."

- The RCC does not incorporate this recommendation because it creates ambiguity in the revised statute. As the commentary to the revised UUV statute states, it is unclear what the "causes" language in the current UUV statute could mean other than codifying liability for aiding and abetting. The RCC addresses accomplice liability for all offenses in RCC § 22E-210. The commentary to the revised UUV statute also notes that "Deleting the language is not intended to change the scope of the revised offense." For the reasons discussed in the commentary, the revised statute eliminates the separate offense of "UUV passenger" recognized in current case law and relies on accomplice liability to cover passengers' misconduct, where appropriate. Against this backdrop, to ensure clarity about the need to establish accomplice liability for a passenger, the revised UUV statute is not drafted to state "causes."

(3) USAO, App. C at 344, recommends including "a provision penalizing the use of a stolen vehicle in the commission of a crime of violence" that is consistent with the provision in the current UUV statute in D.C. Code § 22-3215(d)(2)(A). USAO states that the RCC other jurisdiction research in Appendix J "recognizes that at least some states prohibit the use of a motor vehicle during the commission of a felony." USAO states 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."[509]

- The RCC does not incorporate this recommendation because it is inconsistent with other offenses' penalties and may authorize disproportionate penalties. Under current law and the USAO recommendation, an individual that commits theft of a motor vehicle is not subject to such an enhancement (D.C. Code § 22-3211), but an individual that commits unauthorized use of a motor vehicle or a "joy ride" is (D.C. Code § 22-3215). In contrast, the RCC reserves theft of a motor vehicle for the RCC theft statute and limits the RCC UUV statute to true "joy rides." If an individual uses the motor vehicle during a crime of violence or to facilitate a crime of violence, the defendant will be liable for either theft or UUV, as well as the crime of violence, ensuring that there is added liability for theft of a motor vehicle in conjunction with a crime of violence. To the extent that an actor's UUV in the course of a crime of violence harms a person or comes dangerously close to harming someone, the actor is subject to additional liability for such conduct as an assault or homicide or attempted version of such crime. Notably, while there have been, on average, 3-4 adult convictions annually under the District's current statute for UUV during a crime of violence, nearly all of the sentences for this crime, 89%, have been set to run concurrent with the predicate crime of violence.[510] While data is not currently available as to the facts or other available charges in the three or four instances in the past decade when UUV crime of violence convictions have had an appreciable effect on an actor's imprisonment, these statistics suggest that elimination of the separate UUV crime of violence enhancement will have little or no[511] practical effect on imprisonment outcomes.

(4) USAO, App. C at 427-428, recommends increasing the punishment for the RCC UUV offense. USAO states that under current law UUV is a felony subject to a five year statutory maximum penalty and a 10 year statutory maximum penalty if the defendant caused the motor vehicle to be taken, used, or operated during the course of or to facilitate a crime of violence. USAO states that UUV should be a Class 8 felony, which will have either a five year or a four year maximum term of imprisonment. USAO states that this ranking is consistent with the place of UUV as a Group 8 offense in the D.C. Sentencing Guidelines. USAO states that making UUV a misdemeanor will "substantially decrease deterrence for auto theft." USAO states that despite the separate punishment for auto theft under the RCC theft statute, "it can be difficult in practice to prove that a person stole a car, even when the person did, in fact, steal a car" and that "when a person, in

[509] USAO, App. C at 344.

[510] For a full description of relevant statistics, see Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Notably, most or all of these non-concurrent sentences appear to have occurred in the 2009-2010 years.

[511] In those instances where sentences were not concurrent, it is unclear if other charges were available but dropped (per a plea agreement or otherwise) that would have provided similar or greater liability.

fact, commits carjacking, it may be difficult to prove that the person committed the carjacking." USAO states that "UUV may be the only offense available for prosecution of a person who either carjacked or stole a car."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC UUV offense does not require an intent to deprive the motor vehicle or the use of force against a person, in contrast to the RCC theft offense (which requires an intent to deprive and has a gradation specifically for motor vehicles) or the RCC robbery statute (which requires the use of physical force, threats, or infliction of bodily injury in taking property from another). Correspondingly, the RCC UUV offense carries substantially lower penalties than these other crimes. A misdemeanor penalty is proportionate when the defendant does not have an intent to deprive the motor vehicle or the intent to deprive cannot be proven, or the motor vehicle is not taken by the use of physical force, threats, or infliction of bodily injury.
- Classifying the RCC UUV offense as a class A misdemeanor, in addition, is consistent with the CCRC public opinion surveys of District voters for the penalty for a person driving a vehicle knowing it is stolen, but not being part of the theft,[512] which voters marked as significantly different from being the person to steal the car, which they rated a significantly more serious offense.[513]
- The RCC's penalty recommendations for UUV reflects a significant decrease from the current D.C. Code statutory penalties of 5 years imprisonment, and current court practice, which issues punishments in line with what the public opinion surveys would indicate is proper for *stealing* a car (even though UUV requires only use without authorization). For all UUV sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions, the median sentence (50% of sentences were greater) for UUV was 12 months, including enhancements other than use in a crime of violence or multiple prior convictions. The 75th percentile (25% of sentences were greater) for these UUV offenses was 18 months, the 90th percentile 24 months, the 95th percentile 28 months and the 97.5 percentile was 32 months. What percentage of these convictions could have been charged and convicted as felony under the RCC theft of a motor vehicle is unclear.

[512] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 2.02 provided the scenario: "Driving a car knowing it was stolen, but not being part of the theft." Question 2.02 had a mean response of 4.3, just above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and far below the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). For comparison to a carjacking-type scenario, survey Question 1.14 provided the scenario "Pulling the only person in a car out, causing them minor injury, then stealing it." which received a mean response of 6.2.

[513] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 4.25 provided the scenario: "Stealing a car worth $5,000". Question 4.25 had a mean response of 6.2, just above the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code).

RCC § 22E-2104. Shoplifting.

(1) OAG, App. C at 258, recommends removing the phrase "from one's person" in subparagraph (a)(1)(A), which currently reads "Conceals or holds or carries on one's person." OAG states that, as currently drafted, it is unclear whether "on one's person" only modifies "carries," or whether it also modifies "conceals" and "holds." OAG states that if "on one's person" modifies "conceals," then concealing merchandise in other ways, such as in a shopping cart, would not be covered by the statute. In the alternative, OAG recommends reordering subparagraph (a)(1)(A) so that it reads "carries on one's person, conceals, or holds," although OAG notes that it remains unclear how a person can "carry" something that is not on his or her person.

- The RCC partially incorporates this recommendation by reordering subparagraph (a)(1)(A) to read "Holds or carries on one's person, or conceals." The RCC retains the qualifier "on one's person" because the current shoplifting statute prohibits "possession"[514] and RCC § 22E-701 defines actual possession as to "hold or carry on one's person." This change improves the clarity of the revised statute.

(2) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

[514] D.C. Code § 22-3213(a)(1) ("(a) A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property.").

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(1) OAG, App. C at 258, recommends deleting the word "unlawful" from paragraphs (a)(4) and (b)(4), which state the required number of "unlawful" recordings. OAG states that the word "unlawful" is "virtually self-referential" because "it is both an element of the offense and describes conduct in violation of the offense." In the alternative, OAG recommends using the word "unauthorized" instead of "unlawful" to match the current statute (D.C. Code § 22-3214(b)).

- The RCC incorporates this recommendation by deleting the word "unlawful from paragraphs (a)(4) and (b)(4). This change improves the clarity of the revised statute.

(2) OAG, at App. C, 407, recommends that unlawful creation or possession of a recording be classified as a Class C misdemeanor instead of a Class B misdemeanor. (Although not explicit in the OAG comment, the CCRC presumes that OAG's recommendation was with respect to first degree unlawful creation or possession of a recording.)

- The RCC incorporates this recommendation by changing the penalty classification. This change improves the proportionality of the revised criminal code.

(3) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying first degree unlawful creation or possession of a recording as a Class C misdemeanor and second degree unlawful creation or possession of a recording as a Class D misdemeanor, and generally recommends classifying Class C misdemeanors and Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

(1) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2201. Fraud.

(1) *USAO, at App. C. 345, recommends decreasing the number of gradations of fraud. USAO says that "too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits fraud and obtains property worth $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(2) *USAO, at App. C. 345 recommends replacing the words "that owner" with "an owner." USAO states that the current language creates a gap in law, and may fail to criminalize taking jointly owned property by deception.*

- The RCC incorporates this recommendation by replacing the words "that owner" with "an owner." This change improves the proportionality of the revised criminal code, and closes a gap in law.

(3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree fraud to $500; $5,000; $50,000; and $500,000, respectively.*

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree fraud has been increased from $2,500 to $5,000. Third degree fraud is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[515] A higher minimum value threshold is justified given the severity of penalties. Research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated with its property crime and larceny rates.[516] This change improves the proportionality of the revised criminal code.

[515] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

[516] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

(4) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of fraud, and dividing fraud into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than $500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than $50,000. In addition, USAO recommends that first degree fraud be classified as a Class 7 felony, second degree fraud as a Class 8 felony, third degree fraud as a Class 9 felony, and fourth degree fraud as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree fraud be classified as a Class A misdemeanor. USAO also recommends that 2nd degree fraud should include taking a motor vehicle, regardless of value.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of fraud will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree fraud under current law was less than 2 years.[517] Setting the $5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[518]
- The RCC also does not include obtaining a motor vehicle as a factor in grading the fraud offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person is *defrauded* out of a motor vehicle, the person *expects* to transfer the vehicle to another person and is likely to have planned for the event. The harm, consequently, is fundamentally different between obtaining a car by theft and fraud.

(5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

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[517] *See,* Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[518] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

RCC § 22E-2202. Payment Card Fraud.

(1) *OAG at App. C. 259, recommends re-drafting the words "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" with "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."*

- The RCC incorporates this recommendation using the language suggested by OAG. This change improves the clarity of the revised criminal code.

(2) *USAO, at App. C. 345, recommends reducing the number of penalty gradations of payment card fraud.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree payment card fraud to $500; $5,000; $50,000; and $500,000, respectively.*

- This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.

(4) *The CCRC recommends deleting subsection (f), which establishes jurisdiction for payment card fraud if: 1) The person to whom a payment card was issued or in whose name the payment card was issued is a resident of, or located in, the District of Columbia; 2) The person who was the target of the offense is a resident of, or located in, the District of Columbia at the time of the fraud; 3) The loss occurred in the District of Columbia; or 4) Any part of the offense takes place in the District of Columbia. This subsection is redundant as general principles of jurisdiction would apply in most circumstances specified. To the extent that general principles of jurisdiction would not apply, extending jurisdiction is inappropriate and potentially unconstitutional.*

- The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[519] If any part of the offense occurs in the District of Columbia, District courts would have jurisdiction under the general principles of jurisdiction. However, other provisions of the subsection establish jurisdiction even if the offense occurred entirely outside of the District.
- Deleting this subsection prevents District courts from exercising extraterritorial jurisdiction in a manner that may be unconstitutional.[520]

(5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

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[519] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

[520] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2203. Check Fraud.

(1) *USAO, at App. C. 346, recommends amending the check fraud statute to include "draw[ing]" or "deliver[ing]" a check. USAO notes that it is "concerned that eliminating clearly specified criminal liability for drawing or delivering checks will create a gap in the enforcement of financial crimes."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to attempt liability and may authorize disproportionate penalties. Under the USAO's proposal, attempting to use a fraudulent check would be subject to the same penalties as actually using the check, even though no financial harm has actually occurred.
- USAO notes that forgery and identity theft only require that the actor had intent to obtain property. This distinction is justified due to the fact that both forgery and identity theft require separate wrongful acts. Forgery requires falsification or alteration of a written instrument, and identity theft requires creating, possessing, or using another person's personal identifying information without that person's effective consent. However, there is no separate wrongful act in the check fraud statute.

(2) *USAO, at App. C. 346, recommends lowering the threshold for first degree check fraud from $2,500 to $1,000.*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to grading property offenses and may authorize disproportionate penalties. The RCC generally adopts a $5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[521]

(3) *OAG, at App. C. 405, recommends that check fraud have the same five penalty grade structure as the RCC's general fraud statute. OAG notes that check fraud that causes a loss of more than $50,000 would be subject to a lower maximum penalty than a general fraud that causes loss of more than $50,000.*

- The RCC partially incorporates this recommendation by adding a gradation for loss of $500 or more and classifying the offense gradations the same as theft. An ordinary (non-certified) check is highly unlikely to be offered or accepted as payment for property or services of $50,000 or more, the next penalty gradation. However, should check fraud occurs on that scale, the RCC's general fraud statute may still apply, provided that the actor obtained property by means of deception. The RCC check fraud statute overlaps substantially with the RCC fraud statute.

[521] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2204. Forgery.

(1) CCRC recommends changing the value threshold required for first degree and second degree forgery to $50,000 and $5,000 respectively.

- The RCC generally adopts a $5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[522]
- Adopting a $50,000 value threshold for first degree forgery is consistent with the thresholds for other property offenses that are classified in the same penalty classification.

[522] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

RCC § 22E-2205. Identity Theft.

(1) *OAG, at App C. 259, comments that the language under paragraph (g) which tolls the statute of limitations does not define the term "victim," and that the term could refer either to the person whose identifying information was used, or the person who was defrauded using that information. OAG recommends redrafting paragraph (g) to clarify the term "victim"*

- The RCC incorporates this recommendation by amending paragraph (g) to clarify that the statute of limitation tolls until the person whose identifying information was taken, possessed, or used, knows, or reasonably should have known, of the identity theft. This change improves the clarity of the revised statute.

(2) *USAO, at App. C. 347 recommends decreasing the number of gradations of identity theft.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(3) *USAO, at App. C., recommends re-drafting the identity theft offense to include using personal identifying information with intent to "Identify himself of herself at the time of his or her arrest;" "Facilitate or conceal his or her commission of a crime;" or "Avoid detection, apprehension, or prosecution for a crime." USAO says that although using personal identifying information in this manner would constitute obstruction of justice or false statements, those offenses do not properly account for the harm to the person whose personal identifying information has been misappropriated.*

- The RCC does not incorporate this recommendation at this time because it may authorize disproportionate penalties, but the CCRC will review this matter when recommending revisions to the District's false statements and obstruction of justice offenses. As noted in the RCC commentary and in Advisory Group meetings, there are multiple statutes that address conduct described by USAO which revolve around misuse of another person's identity in connection with another crime. Such misuses of identity appear to be addressed as crimes other than property crimes, with the maximum sentences sufficient to also account for the harm to the person whose identifying information is used.

(4) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree identity theft to $500; $5,000; $50,000; and $500,000, respectively.*

- This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.

(5) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of identity theft, and dividing identity theft into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than $500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than $50,000. In addition, USAO recommends that*

first degree identity theft be classified as a Class 7 felony, second degree identity theft as a Class 8 felony, third degree identity theft as a Class 9 felony, and fourth degree identity theft as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree identity theft be classified as a Class A misdemeanor.[523] *USAO also recommends that 2nd degree identity theft should include taking a motor vehicle, regardless of value.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of fraud will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree identity theft under current law was less than 2 years.[524] Setting the $5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[525]
- The RCC also does not include obtaining a motor vehicle as a factor in grading the identity theft offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person uses identifying information to *defraud* another person out of a motor vehicle, that person *expects* to transfer the vehicle to another person and is likely to have planned for the event. The harm, consequently, is fundamentally different between obtaining a car by theft and identity theft.

(6) *The CCRC recommends deleting subsection (f), which establishes jurisdiction for payment card fraud if: 1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or 2) Any part of the offense takes place in the District of Columbia. This subsection is redundant as general principles of jurisdiction would apply in most circumstances specified. To the extent that general*

[523] USAO had recommended that "proposes that car theft be punished more severely than currently proposed" and that third degree theft should include theft of a motor vehicle, regardless of value. Identity theft requires use of personal identifying information, and it is unclear if USAO's recommendation was for third degree *identity theft* should also include taking a motor vehicle. Even if it do

[524] *See,* Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[525] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

principles of jurisdiction would not apply, extending jurisdiction is inappropriate and potentially unconstitutional.

- The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[526] If any part of the offense occurs in the District of Columbia, District courts would have jurisdiction under the general principles of jurisdiction. However, subsection (f) establishes jurisdiction even if the offense occurred entirely outside of the District, if the person whose personal information was taken is a resident of, or located in, the District of Columbia.
- Deleting this subsection prevents District courts from exercising extraterritorial jurisdiction in a manner that may be unconstitutional.[527]

(7) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

[526] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

[527] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

RCC § 22E-2206. Identity Theft Civil Provision.

(1) *USAO notes that RCC § 22E-2206 includes a typographical error, and reference to § 22E-2206 should be changed to § 22E-2205.*

- The RCC incorporates this recommendation, making the suggested change. This change clarifies the revised statutes.

RCC § 22E-2207. Unlawful Labeling of a Recording

(1) *OAG, at App C. 260, recommends redrafting subsection (c) to clarify that certain "actions not people" are excluded from liability.*

- The RCC incorporates this recommendation by adopting the specific language recommended by OAG. This change improves the proportionality of the revised criminal code.

(2) *OAG, at App C. 260-261, recommends moving the unlawful labeling of a recording statute from the fraud chapter to theft chapter, alongside Unlawful Creation or Possession of a Recording and Unlawful Operation of a Recording Device in a Motion Picture Theater.*

- The RCC does not incorporate this recommendation because it is contrary to the logical organization of the revised statutes. The revised statute is not a theft offense, but a fraud offense.

(3) *OAG, at App. C, 407, recommends that unlawful labeling of a recording be classified as a Class C misdemeanor instead of a Class B misdemeanor. Although not explicit in the OAG comment, the CCRC presumes that OAG's recommendation was with respect to first degree unlawful labeling of a recording.*

- The RCC incorporates this recommendation. This change improves the proportionality of the revised criminal code.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult

(1) *OAG, at App C. 261, recommends codifying a definition for the term "undue influence" as used in the financial exploitation of a vulnerable adult (FEVA) statute.*

- The RCC defines the term "undue influence" in RCC § 22E-2208. The term will be defined in RCC § 22E-701, and § 22E-2208 will include a cross reference.

(2) *OAG, at App C. 261, recommends re-drafting the financial exploitation of a vulnerable adult offense to separately include taking property "without the effective consent of an owner."*

- The RCC does not incorporate this recommendation because it may make the revised statute less clear. The revised statute already specifically criminalizes committing any theft, forgery, extortion, fraud, or identity theft with recklessness that the complainant is a vulnerable adult, and these crimes already account for takings without effective consent of the owner.

(3) *USAO, at App. C. 348, recommends reducing the number of penalty gradations for FEVA.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- While USAO says that by grading the offense based on value, "the proposed statute penalizes defendants less severely when they take advantage of elderly or vulnerable adults who are not wealthy," this is true of any property offense with penalty grades based on value. The USAO recommendation does not appear, however, to grade on harm other than value. Under current law, the same 10 year maximum penalty applies if a person commits FEVA and obtains property worth $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(4) *USAO recommends re-drafting paragraph (e)(2) to include committing arson, check fraud, criminal damage to property, criminal graffiti, payment card fraud, possession of stolen property, reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, and unauthorized use of property to a vulnerable person.*

- The RCC partially incorporates this revision by expanding the list of predicate offenses to include check fraud and payment card fraud. The revised statute does not include crimes such as shoplifting and graffiti recommended for inclusion by USAO. Neither the current D.C. Code FEVA statute, nor the revised statute, is intended to serve as general penalty enhancement for all property offenses committed against a vulnerable adult. Rather, FEVA recognizes that vulnerable adults are particularly vulnerable to certain types of theft and fraudulent behaviors.

RCC § 22E-2210. Trademark Counterfeiting.

(1) *OAG, at App. C. 438-439, recommends replacing the words "commercial sale" with "sale." OAG notes that it is unclear why the word "commercial" is included.*

- The RCC incorporates this recommendation by deleting the word "commercial." This change improves the clarity of the revised criminal code.

(2) *OAG, at App. C. 439, recommends redrafting the exclusion to liability under subsection (c). OAG recommends replacing the words "Nothing in this section shall be construed to prohibit uses of trademarks that are legal under civil law" with "Nothing in this section shall be construed to prohibit the legal uses of trademarks." OAG says that the term "civil law" is not defined in the statute, and it is unclear if the term includes anything other than criminal law, or if the meaning is narrower and only includes uses that are legal under trademark law.*

- The RCC partially incorporates this recommendation by updating the commentary to clarify that "legal under civil law" includes not only uses that are non-infringing under trademark law, but that are legal under general civil law. The exclusion is intended to include uses that are legal under general civil law, and is not limited to uses that are legal under *trademark* law. For example, if a person obtains rights to use a trademark through contract, that use would still be excluded from the statute. However, using the words "legal uses of trademarks" would not be clearer than "legal under civil law."

(3) *OAG, at App. C. 439, recommends amending the commentary to clarify that when use of a wrapper, bottle, or packaging does constitute trademark counterfeiting, the value of the property contained within shall be used to determine the value for grading purposes.*

- The RCC incorporates this recommendation by amending the commentary as recommended by OAG. This change improves the clarity of the revised commentary.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2301. Extortion.

(1) *USAO, at App. C. 349, recommends reducing the number of penalty grades for extortion.*
- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(2) *USAO, at App. C. 349, recommends replacing the words "that owner" with "an owner." USAO states that the current language creates a gap in law, and may fail to criminalize taking jointly owned property by deception.*
- The RCC incorporates this recommendation by replacing the words "that owner" with "an owner." This change improves the proportionality of the revised criminal code, and closes a gap in law.

(3) *The CCRC recommends re-drafting paragraphs (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3) to clarify that the coercive threat may be either explicit or implicit.*
- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(4) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree extortion to $500; $5,000; $50,000; and $500,000, respectively.*
- This change is made for similar reasons described in the identical CCRC recommendation regarding the RCC fraud statute, and to make the penalty thresholds consistent with other property offenses.
- Extortion is distinguishable from other property offenses in that fourth degree extortion is a felony. The fourth degree version of other property offense are misdemeanors. Raising the value threshold for fourth degree extortion from $250 to $500 helps prevent disproportionately severe penalties.

(5) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of extortion, and dividing extortion into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than $500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than $50,000. In addition, USAO recommends that first degree extortion be classified as a Class 7 felony, second degree extortion as a Class 8 felony, third degree extortion as a Class 9 felony, and fourth degree extortion as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree extortion be classified as a Class A misdemeanor. USAO also recommends that 2nd degree extortion should include taking a motor vehicle, regardless of value.*
- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of extortion will very rarely be used. However, the penalties

authorized for first degree fraud, including imprisonment of up to 15 years, should also be very rarely used as this is a property offense.

- The RCC is already consistent with respect to USAO's recommendation as to penalty classifications for extortion in which property taken is $50,000 or more, or $5,000 or more. USAO recommends that extortion in which $50,000 or more is taken should be classified as a Class 7 felony. Under the RCC, extortion in which $50,000 or more is taken, constitutes second degree extortion which is classified as a Class 7 felony. USAO recommends that extortion in which $5,000 or more is taken should constitutes third degree extortion, which is classified as a Class 8 felony. Under the RCC, extortion in which $5,000 or more is taken is classified as a Class 8 felony.
- The RCC also does not include obtaining a motor vehicle as a factor in grading the extortion offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person is *extorted* out of a motor vehicle, the person may expect to transfer the vehicle to another person and is more likely to have planned for the event. The harm, consequently, is different between obtaining a car by theft and fraud.

RCC § 22E-2401. Possession of Stolen Property.

(1) *USAO, at App. C. 350, recommends reducing the number of penalty grades for possession of stolen property.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(2) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2402. Trafficking of Stolen Property.

(1) *USAO, at App. C. 350, recommends reducing the number of penalty grades for trafficking of stolen property.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(2) *USAO, at App. C. 350, recommends replacing the words "property" with the words "total property trafficked," in paragraphs (a)(4), (b)(4), (c)(4), and (d)(4). USAO states that this will clarify that each penalty gradation is determined by the aggregate value of the property, as opposed to a requirement that each individual piece of stolen property trafficked must meet the value threshold.*

- The RCC incorporates this recommendation by amending the statute to refer to "total property trafficked." This change improves the clarity of the revised criminal code.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2403. Alteration of Motor Vehicle Identification Number.

(1) The CCRC recommends changing the value threshold for the motor vehicle or motor vehicle part from $2,500 to $5,000 for first degree alteration of a motor vehicle identification number.

- The RCC generally adopts a $5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[528]

[528] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

RCC § 22E-2404. Alternation of Bicycle Identification Number.

(1) OAG, at App. C. 407, *recommends that alteration of a bicycle identification number be classified as a Class D misdemeanor instead of a Class C misdemeanor.*

- The RCC incorporates this recommendation by changing the penalty classification. This change improves the proportionality of the revised criminal code.

(2) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2501. Arson.

(1) *OAG, App. C at 261, recommends adding two commas to paragraph (a)(1) in first degree arson*[529] *so that it reads "Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building" as opposed to the current text without commas ("Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building.") OAG states, that as currently drafted, it is unclear whether "damages or destroys" modifies both fire and explosion, or just explosion, and that if the Commission intended for "damages or destroys" to modify both, the commas would clarify it.*

- The RCC incorporates this recommendation by adding commas to paragraphs (a)(1) and (b)(1) and subsection (c) so that they require "knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building." This clarifies the revised statutes.

(2) *USAO, App. C at 351, recommends deleting from first degree arson and second degree arson the requirement that a victim of the fire or explosion "is not a participant in the crime." With this revision, first degree arson and second degree arson would both require that the defendant is reckless as to the fact that any person is present in the dwelling or building, and first degree arson would have the additional element that the fire or explosion, in fact, causes death or serious bodily injury to any person. USAO quotes the CCRC's other jurisdiction research 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." USAO states that the commentary "provides no justification for this departure, which serves only to treat the loss of some human life as more important than others" and that "[a]bsent a much clearer justification, USAO urges the Commission" to delete the requirement that the victim be a "person who is not a participant in the crime is present."*

- The RCC does not incorporate this recommendation because it would lead to inconsistent liability within the revised arson statute and with other RCC offenses. The current D.C. Code arson statute is limited to property damage,[530] but District case law requires some endangerment of human life.[531] The revised arson statute is a property crime, but has three gradations that authorize increased penalties based on the seriousness of

[529] OAG's comment is specific to first degree arson, but also applies to second and third degree.

[530] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[531] *See, e.g.*, *Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).

the risk to others against their will. The revised arson statute excludes participants in the crime because such participants are similarly situated to the actor—their presence is unrelated to the risk the fire or explosion poses to the occupants or residents of the dwelling or building. Just as it would be illogical to increase the penalty on an actor for increasing a risk to the actor's own self, it is illogical to increase the penalty on an actor for increasing a risk to an accomplice. While the USAO comment notes that the offense appears "to treat the loss of some human life as more important than others,"—a treatment that the USAO appears to endorse[532]—the more relevant question is whether the arson offense in particular should provide an additional penalty for risk assumed by a co-participant in a crime. The RCC already provides liability under the RCC assault and homicide statutes if a defendant starts a fire or causes an explosion that injures or kills a participant in the crime. Excluding participants from first degree arson and second degree arson is also consistent with the RCC burglary (RCC § 22E-2701), RCC murder (RCC § 22E-1101), and RCC manslaughter (RCC § 22E-1102) statutes. The commentary to the revised arson statute has been updated to reflect this discussion.

(3) *USAO, App. C at 351, recommends including a "vehicle" in first degree arson and second degree arson. With this revision, first degree arson and second degree arson would require that the fire or explosion damage or destroy a "dwelling, building, or vehicle" and that the defendant was reckless as to the presence of another person in the "dwelling, building, or vehicle." USAO quotes the RCC commentary rationale that fires/explosions in or on property "that are not dwellings do not endanger human life the same way as fires in dwellings or buildings." USAO states that 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 gives as a hypothetical "a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device," stating that this person would not be liable under the RCC arson statute.*

- The RCC does not incorporate this recommendation because it would change current law in a way that may authorize disproportionate penalties. The current D.C. Code arson statute does not categorically include motor vehicles. The RCC arson statute is limited to damaging or destroying a "dwelling" or a "building" because, given the RCC definitions of these terms,[533] there is a significant likelihood of a person being present in these structures at the time of a fire or explosion, and such a person may be

[532] See, e.g., the USAO comment on arson recommending higher penalties for arson that results in the death of protected persons.

[533] RCC § 22E-701 (defining "building" as a structure affixed to land that is designed to contain one or more natural persons" and "dwelling" as "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. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling.").

unable to timely become aware of the fire and safely exit the structure. In contrast, it is highly unlikely that a person will be inside a vehicle that is not being used as a "dwelling" at the time of a fire or explosion and be unaware of the fire and unable to safely exit the vehicle. In the absence of such an increased risk, including damaging or destroying such vehicles in the revised arson statute would simply penalize mere property damage more severely than other types of property damage in the RCC criminal damage to property statute (RCC § 22E-2503). Under the RCC a person who engages in the type of conduct hypothesized by USAO—"a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device"—would be liable for resulting harms (or attempts to cause such harms) under RCC offenses against persons such as assault (RCC § 22E-1202) or murder (RCC § 22E-1101) (in addition to liability for the property damage under the RCC criminal damage to property statute (RCC § 22E-2503)). Arson, a property offense, is not an appropriate or sufficient offense for such conduct.

(4) *USAO, App. C at 352, recommends including a protected person enhancement to "this provision" [presumably the first degree of the RCC arson statute which involves a physical harm to another]. USAO states that under D.C. Code § 22-1331(4), arson is a "crime of violence" and is a "serious crime" because it can cause "serious injury or death to a victim." In addition, USAO notes that first degree of the RCC arson statute requires "death or serious bodily injury." USAO proposes using the language suggested in its General Comments, App. C at 273, which applies strict liability to the fact that the complainant is a "protected person" with 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."*

- The RCC does not incorporate this recommendation because it would lead to disproportionate penalties. The RCC arson offense recognizes the general risk to human life that a fire or explosion poses. For both first degree arson and second degree arson, recklessness that a person other than a participant in the crime is present in the dwelling or building is sufficient and although first degree requires death or serious bodily injury, strict liability is sufficient for this element. A defendant that is reckless that a protected person is present in the dwelling or building warrants greater penalties than the RCC arson statute allows. In addition to liability under the RCC arson statute, that defendant may have liability under other RCC offenses like assault (RCC § 22-1202) or murder (RCC § 22E-1101).

(5) *The CCRC recommends, by using the phrase "in fact," specifying strict liability for the requirements in the affirmative defense that the actor "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." As is discussed in the commentary to the RCC arson offense, this affirmative defense is new to District law. Strict liability is appropriate because the affirmative defense requires the existence of specific facts regarding compliance with a highly regulated, technical permitting process.*

- This change improves the clarity of the revised statute.

(6) *The CCRC recommends deleting from the affirmative defense the requirement that the actor prove the affirmative defense by a preponderance of the evidence. The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity, consistency, and proportionality of the revised statute.

RCC § 22E-2502. Reckless Burning.

(1) USAO, App. C at 352, recommends renumbering the paragraphs so that instead of starting with paragraph (3), the offense starts with paragraph (1). USAO states that this appears to be a typographical error.

- The RCC incorporates this recommendation by renumbering the paragraphs so the offense starts with paragraph (1). USAO correctly notes that this was a typographical error. This change improves the clarity of the revised statutes.

(2) OAG, App. C at 261-262, comments that, as currently drafted, paragraph (a)(2) is unclear ("With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building."). OAG states it is unclear whether the offense is satisfied when a person knowingly starts a fire/causes an explosion reckless as to the fact that the fire would damage/destroy a dwelling/building), regardless of whether or not it does, or whether the offense requires that the dwelling/building must be damaged/destroyed. OAG states that 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'" and that if "the intent is the latter, then the Commentary should state that proposition and provide examples of both fact scenarios."

- The RCC incorporates this recommendation by clarifying in the commentary that it must be proven both that the fire or explosion damaged or destroyed the building and that the actor had a reckless culpable mental state as to that result. The commentary also states in a footnote that it would only be an attempted reckless burning if the actor knowingly starts a fire or causes an explosion with recklessness that the fire or explosion would destroy or damage the building or dwelling, but there is no such damage or destruction. This change clarifies the revised commentary.

(3) OAG, App. C at 262, recommends the Commentary for the RCC property offenses be revised so that the phrase "regardless of its occupancy" is struck from a sentence that states 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." OAG states that the reckless burning affirmative defense does not contain this exception. In addition, the phrasing "incorrectly implies that a permit allows someone to burn down a building even if there are people in it."

- The RCC incorporates this recommendation by striking the phrase "regardless of its occupancy" from the commentary. This change clarifies the revised statutes.

(4) USAO, App. C at 352, recommends including a "vehicle" in reckless burning. With this revision, the reckless burning statute would require that the fire or explosion damage or destroy a "dwelling, building, or vehicle." USAO quotes the RCC commentary rationale that fires/explosions in or on property "that are not dwellings do not endanger human life the same way as fires in dwellings or buildings." USAO states that 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."

- The RCC does not incorporate this recommendation for the reasons described for the identical USAO recommendation regarding arson.

(5) *The CCRC recommends, by using the phrase "in fact," specifying strict liability for the requirements in the affirmative defense that the actor "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." As is discussed in the commentary to the RCC reckless burning offense, this affirmative defense is new to District law. Strict liability is appropriate because the affirmative defense requires the existence of specific facts regarding compliance with a highly regulated, technical permitting process.*

- This change improves the clarity of the revised statutes.

(6) *The CCRC recommends deleting from the affirmative defense the requirement that the actor prove the affirmative defense by a preponderance of the evidence. The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-2503. Criminal Damage to Property.

(1) *USAO, App. C at 352, recommends decreasing the number of gradations for criminal damage to property because "too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits malicious destruction of property and the "value" of the property is $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(2) OAG, App. C at 262, comments that it is unclear in the text of the criminal damage to property statute that when the property is only partially damaged there are two ways that the amount of damage can be proven—either by the reasonable cost of repairs or proof of the change in the fair market value of the damaged property. OAG states that this is clear in the commentary, but not the text of the statute, which refers only to the "amount of damage." OAG states that "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,'" which is a defined term in the RCC but is not used in the criminal damage to property offense.

- The RCC codifies "amount of damage" as a defined term in RCC § 22E-701: "'Amount of damage' means: (A) When property is completely destroyed, the property's fair market value before it was destroyed; or (B) When the property is partially damaged, either: (i) If there are repairs, the reasonable cost of necessary repairs, or (ii) If there are no repairs, the change in the fair market value of the damaged property. (C) Notwithstanding subsection (B), if the reasonable cost of repairs has a greater value than the fair market value of the property before it was damaged, the amount of damage is the fair market value of the property before it was damaged." The definition is generally consistent with DCCA case law for the current malicious destruction of property offense and is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity of the revised statutes.

(3) The CCRC recommends changing the value thresholds for fourth, third, second, and first degree criminal damage to property to $500; $5,000; $50,000; and $500,000, respectively.

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree criminal damage to property has been increased from $2,500 to $5,000. Third degree criminal damage to property is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. A higher minimum value threshold is justified given the severity of penalties. This threshold

is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000, a crime that similarly entails loss of property.[534] Also for the crime of theft, research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated with its property crime and larceny rates.[535] This change improves the proportionality of the revised criminal code.

(4) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends fifth degree criminal damage to property as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(5) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends fifth degree criminal damage to property as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

[534] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

[535] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

RCC § 22E-2504. Criminal Graffiti.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends criminal graffiti as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2601. Trespass.

(1) *USAO, App. C at 353, recommends striking the phrase "under civil law" from the offense definition. Alternatively, USAO recommends substituting language from current D.C. Code § 22-3302, which instead requires proof that a trespass was "against the will of the lawful occupant or of the person lawfully in charge thereof" or "without lawful authority." USAO states that the reference to civil law may lead to confusion and inconsistent application of the law.*

- The RCC does not incorporate this recommendation because doing so would make the statute less clear. Even if the phrase "under civil law" were stricken, parties would be required to look to civil law to determine whether a person has a privilege or license or authority to enter or remain on the property. The cross-reference to civil law makes clear that civil law (not another criminal law) is the authoritative source for determining whether a privilege or license exists. Additionally, without the phrase "under civil law," the statute might be misread to apply to any person who was not granted a privilege or license explicitly.
- As discussed in the RCC Commentary, the current D.C. Code phrase "against the will of the lawful occupant or of the person lawfully in charge thereof" that USAO recommends as an alternative broadly captures conduct that is innocent, protected, or both. There are many instances in which a person is allowed to enter or remain on a property over the objection of a lawful occupant or a person who is lawfully in charge. Consider the following examples:
    - Parent 1 (lawful occupant) demands Parent 2 leave the family home. Parent 2 remains.
    - Landlord (lawfully in charge of property) demands Tenant immediately vacate a property without an eviction order. Tenant remains.[536]
    - Special Police Officer bars Tenant from public housing, in violation of lease agreement and District municipal regulations. Tenant returns.[537]
    - Police Officer (lawfully in charge of property) closes a public building early to obstruct Protestor's demonstration, in violation of the First Amendment. Protestor remains.[538]
    - Roommate A (lawful occupant) demands Roommate B's guest leave the common area of an apartment. Roommate B and guest remain.[539]

(2) *USAO, App. C at 353-354 recommends "narrowing the category of offenses entitled to a jury trial to those offenses which impact an individual's*

[536] *See* D.C. Code § 42-3505.01(a).
[537] *See Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).
[538] *See Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988).
[539] *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

constitutional rights." USAO further says that, "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." Specifically, 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 says it "recommends removing trespasses in violation of a DCHA baring notice from the category of offenses entitled to a jury trial." At page 415, USAO also "recommends keeping jury demandability requirements for misdemeanors consistent with current law with current District law." USAO recommends excluding three categories of cases in which constitutional rights are unlikely to be implicated: (1) private areas of public buildings; (2) public buildings after they are closed to the public; and (3) DCHA barring notice violations. USAO recommends superseding United States v. Frey,[540] *by imposing a new temporal and spatial limitation on the jury demandability provision.*

- Assuming USAO's comment at 353-354 is not superseded by its comments at 415, the RCC partially incorporates this recommendation by making trespass of all non-dwellings non-jury demandable. The RCC recommends that first degree trespass (regarding a "dwelling") be a jury demandable Class B misdemeanor, second degree trespass (regarding a "building") be a non-jury demandable Class C misdemeanor, and third degree trespass (regarding "land, a watercraft, or a motor vehicle") be a non-jury demandable Class D misdemeanor. This change clarifies the revised statute and is consistent with the CCRC general approach to jury demandability. See the Second Draft of Report #41, for more details on the CCRC general approach to recommending conferral a right to a jury trial.
- Assuming USAO's comment at 353-354 are superseded by its comments at 415, the RCC does not incorporate the USAO comment because it is inconsistent with the CCRC general approach to recommending conferral a right to a jury trial. The RCC would change District statutory and case law in *United States v. Frey*[541] by categorically making trespass of non-dwelling public buildings non-jury demandable. Notably, while the RCC makes trespasses on public grounds or buildings non-jury demandable, it also significantly decreases the penalties for such conduct from the six months imprisonment authorized under current law.

(3) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor not be jury-demandable. With respect to the RCC trespass offenses, this would make attempts to commit first degree trespass non-jury demandable.*

- The RCC partially incorporates this recommendation by making first degree trespass jury demandable, but second and third degree trespass

[540] 137 A.3d 1000, 1004 (D.C. 2016).
[541] 137 A.3d 1000, 1004 (D.C. 2016).

non-jury demandable. The Second Draft of Report #41, confers a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor in which the complainant is a law enforcement officer or a conviction for a sex offender registration offense. All other Class C, Class D, and Class E misdemeanors the RCC makes non-jury demandable. Consistent with this approach, attempt first degree trespass is jury demandable, unlike the OAG recommendation.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

a. The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying second degree trespass as a Class C misdemeanor, third degree trespass as a Class D misdemeanor, and generally recommends classifying Class C and D misdemeanors as non-jury demandable offenses.

(5) *OAG, App. C at 263, recommends revising the cross-reference to 14 DCMR § 9600, because the D.C. Municipal Regulations are frequently amended and renumbered.*

a. The RCC incorporates this recommendation by adopting OAG's proposed language: "unless the bar notice was lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis." This change improves the clarity of the revised code.

(6) *OAG, App. C at 263, recommends clarifying the following sentence in the commentary (p. 136): "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." OAG explains that a person who surreptitiously remains in a location, knowing they have no privilege or license to be there at that time, commits a trespass offense, even if they are not afforded a reasonable opportunity to leave after being discovered.*

a. The RCC incorporates this recommendation by clarifying in commentary that the "reasonable opportunity" requirement applies only to a person who commits a trespass *by* remaining after a demand to leave. It does not apply to a person who enters unlawfully or to a person who surreptitiously remains. This change clarifies the revised commentary.

(7) *OAG, App. C at 263, recommends removing a reference to* Dist. of Columbia v. Wesby,[542] *in the commentary (p. 139, n. 23). OAG explains that the case discusses indicators of* unlawful *presence but not necessarily* forced *entry.*

a. The RCC incorporates this recommendation by striking the citation to *Wesby* from the relevant footnote. This change clarifies the revised commentary.

(8) *The CCRC recommends revising the commentary to note the DCCA's recent opinions in* Rahman v. United States[543] *and* Foster v. United States[544] *which were issued after the most recent draft language was released.*

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[542] 138 S. Ct. 577 (2018).
[543] 208 A.3d 734 (D.C. 2019).
[544] 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

a. This change clarifies the revised commentary.

(9) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

a. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(10) *The CCRC recommends revising the permissive inference provision to begin with the phrase "In a trial determining a violation under this section."*

a. This change clarifies the revised statute and does not further change District law.

RCC § 22E-2701. Burglary.

(1) *USAO, App. C at 354, recommends "adding a 'while armed' penalty enhancement, consistent with the language proposed in the General Comments, above." In its General Comments, USAO, App. C at 272-273, recommends an enhancement providing additional imprisonment when the person is "armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon."*[545] *USAO explains that the mere presence of a weapon creates a danger that someone will be frightened or injured, intentionally or inadvertently. USAO also notes that the inclusion of imitation firearms ensures that enhancement is available in cases in which the firearm was not recovered and could not be test-fired. USAO also says that it "believes that it is more clear to include this provision as an enhancement, rather than as an offense gradation."*

- The RCC partially incorporates this recommendation, which predates the RCC's weapon offense recommendations, by including in paragraph (d)(4) a penalty enhancement applicable to all grades of burglary when a person "[k]nowingly holds or carries on the actor's person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location." The RCC burglary weapon enhancement is substantially similar to the language recommended by USAO (which in turn follows current D.C. Code § 22-4502(a)), except that the RCC burglary weapon enhancement requires actual possession of the dangerous weapon or imitation dangerous weapon. The narrowing of the RCC burglary weapon enhancement as compared to the "readily available" language in the USAO General Comments (referring to an area very near the actor but not on their person) is at most a slight change, given that, under current law and the RCC, a burglary is completed as soon as the illegal entry is made with the appropriate intent.[546]
- Addition of the burglary weapon enhancement may significantly increase burglary penalties in some cases. However, it should be noted that, contrary to the USAO assertion at App. C at 354 that "under the RCC, a defendant is equally culpable for an armed burglary and an unarmed burglary," even absent the burglary weapon enhancement, committing a burglary with a dangerous weapon is subject to a higher penalty than committing such a crime without a dangerous weapon. In the First Draft of Report #39 (August 5, 2019), the RCC criminalizes carrying a weapon without a license,[547] possessing a weapon with intent to commit burglary,[548] and possessing a weapon in furtherance of a burglary.[549]

[545] *See* D.C. Code § 22-4502(a); Crim. Jur. Instr. for D.C. 8.101 (2019).
[546] It would be a rare fact pattern where a person is making such an entry without holding or carrying the dangerous weapon or imitation dangerous weapon, but having it "readily available" at the time of entry.
[547] RCC § 22E-4102.
[548] RCC § 22E-4103.
[549] RCC § 22E-4104.

Collectively, these offenses punish behavior that creates a dangerous environment by making it easier to commit a crime or to cause an injury (intentionally or inadvertently). Additionally, the first degree menacing offense[550] punishes using a weapon or imitation weapon to create apprehension of immediate harm and the first, second, third, and fifth degree assault offenses[551] punish using a weapon or imitation weapon to inflict a physical injury. In this way the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense.

- This change clarifies and improves the proportionality of the revised statute.

(2) *USAO, App. C at 354, recommends striking the phrase "under civil law" from the offense definition. USAO states that the reference to civil law may lead to confusion and inconsistent application of the law.*

b. The RCC does not incorporate this recommendation because doing so would make the statute less clear. If the phrase "under civil law" was stricken, parties would be required to look to civil law to determine whether a person has a privilege or license or authority to enter or remain on the property. The cross-reference to civil law makes clear that civil law (not another criminal law) is the authoritative source for determining whether a privilege or license exists. Additionally, without the phrase "under civil law," the statute might be misread to apply to any person who was not granted a privilege or license explicitly.

(3) *OAG, App. C at 264, asks why the offense specifies that a building or business yard is "not open to the general public at the time of the offense" when it already requires that the person does not have a privilege or license to enter or remain.*

- The RCC revises the commentary to clarify why the relevant sections are not redundant. Namely, there are instances in which a person is unauthorized to enter a space that is open to the general public. In those cases, burglary liability will not attach. Consider, for example:
    - A person is barred from a grocery store for shoplifting. That person returns to the same grocery store, in violation of the bar notice, with intent to commit theft, during business hours. That person has committed a trespass,[552] but not a burglary.
    - A person is ordered to stay 100 yards away from a former intimate partner. The person sees the former partner at the grocery store, approaches her, and assaults her. That person has committed contempt,[553] but not burglary.
- The RCC revises the statutory language to strike the phrase "without a privilege or license to do so under civil law" in subparagraph (c)(1)(A)

[550] RCC § 22E-1203.
[551] RCC § 22E-1202.
[552] RCC § 22E-2601.
[553] D.C. Code § 16-1005(g).

because the same language is repeated verbatim in paragraph (c)(2). This revision does not substantively change the revised statute.

(4) *OAG, App. C at 406-407, and USAO, App. C at 422-423, recommend that the penalties for Burglary be increased, on grounds that they understate the serious nature of the offense. Both agencies note the sharp decrease from the penalties under current law. OAG notes 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. USAO explains that a burglary with intent to commit a minor crime could be very traumatizing, warranting a penalty far above the penalty for the predicate offense if the predicate offense is a low felony or misdemeanor. USAO offered the following examples: "[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)." OAG does not make a specific recommendation as to how much the penalty for burglary should be increased. USAO "recommends ranking 1st, 2nd, and 3rd Degree Burglary as Class 4, Class 6, and Class 7 offenses, respectively."*

- The RCC partially incorporates this recommendation by providing penalty enhancements where an actor "Knowingly holds or carries on the actor's person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location." The enhanced versions of first, second, and third degree burglary are classified as Class 7, Class 8, and Class 9 offenses, respectively. The enhanced penalties have the net effect of substantially increasing authorized penalties for otherwise low-felony and misdemeanor offenses against persons when committed as part of a burglary, or carrying a dangerous weapon as part of a burglary. The enhanced penalties address the examples provided by USAO—in addition to any liability for attempted sexual assault (a major felony) and weapon possession crimes that appears to be within the scope of the USAO's hypothetical fact pattern.
- The RCC's penalty recommendations for burglary reflect a sharp decrease from the current D.C. Code statutory penalties of 30 years imprisonment for unenhanced first degree burglary (60 years if while-armed) and 15 years imprisonment for unenhanced second degree burglary (45 years if while-armed) which are outdated and far more severe than is proportionate under modern national norms, D.C. judicial practice, or public opinion polling of D.C. voters.
    - Nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when the burglary was the most serious crime (so presumably not concurrent to another penalty).[554] These statistics appear to

[554] U.S. Department of Justice Bureau of Justice Statistics, Time Served in State Prison, 2016, November 2018 at 3.

include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon.

- D.C. court data on burglary sentences pose analysis challenges because such a high percentage of the sentences—60% of first degree burglary and 24% of second degree burglary—run concurrent to another sentence for a more serious crime in the case.[555] For all first degree burglary sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the median sentence (50% of sentences were greater) for first degree burglary, including enhancements, was 60 months, and the 75th quantile (25% of sentences were greater) for second degree burglary, including enhancements, was 30 months. Even the most severe (97.5%) Superior court sentences for first degree burglary (180 months, including enhancements) and second degree burglary (76.5 months, including enhancements) are a small fraction of the enhanced burglary penalties authorized by current statute (720 months and 540 months, respectively).
- Polling of District voters also strongly suggests that while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and worse felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).[556] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC.

- Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own

[555] The CCRC will seek to conduct an analysis of non-concurrently sentenced burglary sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this.

[556] Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.

(5) *The CCRC recommends specifying in first degree burglary that a complainant must either directly perceive the actor or enter with the actor, consistent with the similar provision in second degree burglary.*[557]

- This change improves the consistency of the revised statute.

(6) *The CCRC recommends replacing the reference to "a criminal harm involving a bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property" with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*

- This change clarifies the revised statute and does not further change District law.

(7) *The CCRC recommends adding voyeurism as a predicate for burglary.*[558]

- This change eliminates an unnecessary gap in liability.

(8) *The CCRC revises the definition of "dwelling" to include communal areas secured from the general public, in light of the DCCA's recent opinion in* Ruffin v. United States.[559]

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

[557] Consider, for example, a person who enters the lobby and mailroom of a large residential building, undetected by an resident on the fifth floor. That person commits a second degree burglary but not a first degree burglary.

[558] The CCRC issued a recommendation for voyeurism in the First Draft of Report #42 (November 20, 2019).

[559] 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying possession of tools to commit property crime as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends replacing the reference to "a criminal harm involving the trespass, misuse, taking, or damage of property" with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*

- This change clarifies the revised statute and does not further change District law.

(3) *The CCRC recommends reclassifying this offense as a Class D misdemeanor, so that this inchoate conduct is not punished more severely than a completed third degree trespass under RCC § 22E-2601(c).*

- This change improves the proportionality of the revised offenses.

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

(1) *USAO, App. C at 279-280, recommends adding buildings operated by the U.S. Marshal's Service to the definition of "correctional facility," so that people who escape from the cell block at the Superior Court for the District of Columbia are punished as severely as people who escape from the Central Detention Facility and the Central Treatment Facility.*

- The RCC partially incorporates this recommendation by revising the first degree escape from an institution or officer offense to include an escape from a cellblock operated by the U.S. Marshal's Service. The definition of "correctional facility" remains limited to facilities that are correctional in nature. This change reduces a gap in liability.

(2) *USAO, App. C at 355 and 428, recommends classifying third degree escape from a correctional facility or officer (the failure to report or return to a halfway house) as a felony offense, particularly if the offense for which the person is detained at a halfway house is a felony.*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty, treating behavior of different seriousness the same. In the Second Draft of Report #41, the CCRC recommends classifying first degree escape as a Class 8 felony, second degree escape as a Class A misdemeanor, and third degree escape as a Class C misdemeanor offense. This classification improves the consistency and proportionality of the revised offense.[560] The USAO recommendation would punish failing to report or return the same as a prison break or fleeing an arrest. However, these situations are much more likely to create physical danger to another person due to a hot pursuit than a failure to report to or return to a halfway house.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying third degree escape from an institution or officer as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(4) *The CCRC amends first degree escape from a correctional facility or officer to clarify that a person must be subject to an order* and *leave without permission, consistent with the commentary and the other degrees of the offense. The prior draft erroneously included the word "or" instead of "and."*

- This change clarifies the revised statute.

[560] *See, e.g.,* D.C. Code §§ 24-241.05(b) (punishing a violation of work release as a misdemeanor, prosecutable by the Attorney General for the District of Columbia); 23-1329(c) (punishing a violation of a condition of release as a misdemeanor).

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

(1) *USAO, App C. at 356-357, recommends revising the statute to include people who are being supervised by PSA[561] and CSOSA[562] for offenses that occurred and were prosecuted in other jurisdictions. USAO explains that excluding out-of-state cases "would deprive the government of a means by which it can deter certain offenders from violating their terms of release" and "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."*

- The RCC does not incorporate this recommendation because it may result in overlap between criminal offenses. GPS monitoring is not limited to dangerous or high-risk offenders. Although the District's pretrial release statute[563] requires, in many cases, the least restrictive conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community, there is no such judicial finding required before GPS monitoring is ordered as a condition of probation or required as a sanction for a technical violation. Further, the District has no control over the underlying statutes and procedures that allow for the placement of a detection device in a case that originated out of state. Although a person who is being supervised in an out-of-state case may not be prosecuted in the District for tampering with a detection device, other deterrents exist. First, the person's pretrial release, presentence release, probationary sentence, or supervised release may be revoked by the supervising jurisdiction. Second, the person may be charged in the District with criminal damage to property.[564]

(2) *USAO, App. C at 357-358, recommends requiring an intent (instead of purpose) to tamper with the device. USAO offers hypotheticals in which a person allows a device to lose power or to be submerged in water, not because they desire to interfere with GPS monitoring, but because they want to go out and have fun. USAO notes that an intent requirement is more consistent with national legal trends than purpose.*

- The RCC incorporates this recommendation by requiring only intent to interfere with the device. This change eliminates a possible gap in liability.

(3) *USAO, App. C at 358, recommends codifying a definition of the phrase "interferes with the operation of the detection device," for clarity. USAO proposes, "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*

[561] The Pretrial Services Agency for the District of Columbia does not supervise or monitor out-of-state cases.
[562] "Court Services and Offender Supervision Agency."
[563] D.C. Code § 23-1321(c)(1)(B).
[564] RCC § 22E-2503.

signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate."

- The RCC partially incorporates this recommendation by including in the statute the phrase "emission or detection" instead of "operation." This change clarifies the revised offense.
- Further codification of a definition that refers to "failing to charge" or "allowing the device to lose the power required to operate" is potentially confusing and limits by statute the rules of administration of the device, a matter more properly left to the administering agency. The RCC commentary references failure to charge and loss of power as helpful examples of how the offense might be committed. However, given the likelihood of technology changing over time, the lack of any standard for measuring a partial "failure to charge," differing charging responsibilities for different devices, and the need to defer to agency rules on specifics of how a monitoring device is to used, the RCC does not codify further details.

(4) *USAO, App. C at 358, recommends specifying that information collected by the Pretrial Services Agency for the District of Columbia is admissible on the issue of guilt notwithstanding the confidentiality provision in D.C. Code § 23-1303(d). USAO explains that the confidentiality statute was codified in 1966, long before GPS technology was commonplace. USAO proposes adding a subsection to the offense definition negating the application of the Title 23 statute to this offense.*

- The RCC incorporates this recommendation by amending the revised statute to include a subsection stating: "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 change improves the consistency of the revised statute.

(5) *USAO, App. C at 359, recommends including an extraterritorial jurisdiction provision that extends to people who are under supervision in the District but tamper with the device outside of District lines. USAO explains that jurisdiction is appropriate because an element of the offense—the imposition of the monitoring requirement—has occurred in D.C. USAO also notes that, without this provision, "individuals intent on tampering with their detection devices may be incentivized to do so across jurisdictional lines in the hopes of evading criminal liability." USAO notes that the current identity theft and credit card fraud statutes include similar language.*[565]

- The RCC incorporates this recommendation by amending the revised statute to include a subsection stating: "An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia." This change clarifies the revised offense and may eliminate a gap in liability.

[565] D.C. Code §§ 22-3227.06; 22-3224.01.

(6) *OAG, App. C at 264, recommends revising the statutory language to include children who are on supervised release, probation, or parole, in a District of Columbia delinquency case. OAG notes that the other offense provisions apply to delinquency cases.*

- The RCC partially incorporates this recommendation by adopting language similar to OAG's proposal: "…on supervised release, probation, or parole, in a District case." This revision may change current District law, as described in the revised commentary. This change eliminates an unnecessary gap in liability.

RCC § 22E-3403. Correctional Facility Contraband.

(1) *USAO, App. C at 359, recommends retaining the consecutive sentencing provision that appears in current law.*[566] *USAO says it "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." USAO notes that the current Bail Reform Act statute*[567] *the revised Escape statute*[568] *require consecutive sentences.*

- The RCC does not incorporate this recommendation because it is inconsistent with other RCC and current D.C. Code offenses and judicial discretion at sentencing. As the RCC commentary explains, the consecutive sentencing provision in the current prison contraband statute has two notable features that distinguish it from any other sentencing provision in the D.C. Code or revised code. "First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.[569] Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.[570] Legislative history does not clarify why such an infringement on the court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape." The revised statute does not prohibit a sentencing judge from running a sentence for correctional facility contraband consecutive to another sentence.

(2) *OAG, App. C at 264, recommends classifying civilian clothing as Class B contraband. OAG notes, civilian clothing may be possessed to aid in someone's escape.*

- The RCC not incorporate this recommendation because it may authorize a disproportionate penalty. In the RCC, possession of "a law enforcement officer's uniform, medical staff clothing, or any other uniform" is punished as first degree correctional facility contraband.[571] And, wearing civilian clothing to impersonate a visitor may constitute an attempted escape.[572] However, it would be disproportionate to hold a person criminally liable for possession of a civilian clothing item under circumstances that are unlikely to facilitate an escape. Consider, for example, a person who possesses a single article of clothing—e.g., undergarments, tennis shoes, or a headband. This conduct may subject a

[566] D.C. Code § 22-2603.03(d).
[567] D.C. Code § 23-1327(d).
[568] RCC § 22E-3401(e)(4).
[569] By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the escape. D.C. Code § 22-2601(b).
[570] The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).
[571] RCC § 22E-701 ("Class A contraband").
[572] RCC § 22E-301.

person to disciplinary action[573] but it does amount to a criminal offense under the RCC.

(3) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

c. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

[573] *See* Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).

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

(1) *OAG, App. C at 383, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(2) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[574]

- The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(3) *USAO, App. C at 398, recommends changing the culpable mental state in paragraph (a)(2) from recklessness to strict liability. USAO says: "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* [sic] *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."*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC culpable mental state requirements and current District law, and it may authorize disproportionate penalties. With respect to "explosives"—an undefined term whose ordinary meaning includes household and industrial chemicals—there are many legitimate reasons for a person to possess the items. With respect to firearms, there are many persons legitimately able to possess the items under some legal authority, however that authority does not necessarily extend to assault weapons and firearms specifically described in RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. The USAO recommendation would eliminate a reasonable mistake of fact defense as to the specific nature of a firearm or explosive, contrary to current District law, potentially

[574] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

subjecting persons otherwise authorized to possess ordinary firearms and explosives to felony liability for possession of the item which the person reasonably did not think was a prohibited weapon.[575] In contrast, the RCC requires recklessness (disregard of a substantial and unjustifiable risk) as to the nature of the firearm or explosive being a machine gun. Proof of the defendant's culpable mental state would rely on the same evidence as used throughout the RCC and current D.C. Criminal Code to prove a culpable mental state—e.g. circumstantial evidence that the person had viewed the object and it appeared to be a machine gun, etc.

(4) *USAO, App. C at 398, recommends clarifying prosecutorial authority by revising the commentary (p. 59) to strike the following misstatement of law: "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."*

- The RCC incorporates this recommendation by striking the relevant paragraph from the commentary. This change clarifies the revised commentary.

(5) *The CCRC recommends relocating the merger provision in subsection (d) to a paragraph in the penalties subsection.*

- This change improves the logical organization of the statute and does not substantively change its meaning.

[575] In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted, either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute. *Staples v. United States*, 511 U.S. 600, 614-15 (1994). The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory.

RCC § 22E-4102. Carrying a Dangerous Weapon.

(1) *OAG, App. C at 383, recommends revising the statutory language to clarify that the radius of the gun-free zone is calculated from the property line and not the perimeter of a building. OAG proposes, "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."*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(2) *OAG, App. C at 383-384, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(3) *USAO, App. C at 394-195, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[576]

- The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(4) *PDS, App. C at 412-414, recommends that all Class B misdemeanors be jury-demandable.*

b. The RCC incorporates this recommendation consistent with the CCRC general approach to jury demandability. As of the Second Draft of Report #41, the CCRC recommends classifying all Class B misdemeanors as jury demandable offenses.

(5) *USAO, App. C at 423-424, recommends classifying first degree carrying a dangerous weapon as a Class 7 felony and second degree carrying a dangerous weapon as a Class 8 felony. USAO compares the penalties for the revised offense to the penalties and sentencing guidelines for the offense in current D.C. Code § 22-4504(a).*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties.
- D.C. court data on these sentences poses challenges to analysis because such a high percentage of the sentences—about half—run concurrent to

[576] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

another sentence for a more serious crime in the case.[577] However, for all CDW sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the 75th quantile (25% of sentences were greater) of all imposed sentences (including enhancements) was 24 months or less. Actual time-to-serve was considerably less.

- Polling of District voters also strongly suggests that while carrying a firearm in a public place may warrant felony punishment, without more (e.g. display or use of the weapon), such conduct should be subject to the lowest felony class. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[578] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes.
- Notably, under the RCC, a person who possesses a firearm and has a prior conviction for a crime of violence commits first degree RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person, a Class 8 felony.

(6) *The CCRC recommends reordering the offense elements to clarify that the weapon must be conveniently accessible and within reach and the actor must be in a prohibited location.*

- This change clarifies, but does not substantively change, the revised offense.

[577] The CCRC will seek to conduct an analysis of non-concurrently sentenced burglary sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this

[578] Question 4.11 provided the scenario: "Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime." Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: "Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not involved in any crime." Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code. Question 4.14 provided the scenario: "Carrying a concealed pistol without a license to carry a pistol as required by law while in a school or on a playground. The gun is not involved in any crime." Question 4.14 had a mean response of 6.4, above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.12 provided the scenario: "Carrying a concealed pistol without a license as required by law while walking within 1000 feet (about 3 football fields) of a school or playground. The gun is not involved in any crime." Question 4.13 provided the scenario: "Carrying a concealed pistol without a license to carry a pistol as required by law while walking within 300 feet (about 1 football field) of a school or playground. The gun is not involved in any crime." Questions 4.12 and 4.13 had mean responses of 5.9, just under the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code.

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

(1) *USAO, App. C at 399, recommends eliminating the provision that excludes liability for an attempt to commit an offense under this section. USAO offers a hypothetical in which a person "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."*

- The RCC incorporates this recommendation by striking the exclusion for attempts. This change improves the clarity and reduces a possible gap in liability in the revised statutes.

(2) *The CCRC recommends substituting the noun "item" for "object," consistent with other RCC provisions.*

- This change improves the consistency of the revised statutes and does not further change District law.

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

(1) *USAO, App. C at 399, recommends grading possession of a firearm and possession of an imitation firearm the same. USAO says that, "If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm." USAO raises the hypothetical, that "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" and says 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."*

- The RCC does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties.
- First, where a dangerous weapon or imitation dangerous weapon is used against or displayed to a person (as in the USAO hypothetical), the RCC provides additional punishment for that conduct in its offenses against persons in Subtitle II, regardless of whether it was a real or imitation weapon. For example, the RCC raises the penalty otherwise applicable to an assault causing significant bodily injury from fourth degree to third degree.[579] The separate crime of merely possessing—but not using or displaying—a dangerous weapon in RCC § 22E-4104 is thus 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. And, it is precisely in those instances where a weapon is apprehended (though never displayed or used in the crime) that the distinction between an imitation and a real dangerous weapon is a fact available to the prosecution.
- Second, where a weapon is possessed but not used or displayed (and so makes no impression on the complainant), the difference in actual dangerousness between a real and fake dangerous weapon should be reflected in the RCC penalty. The presence of an actual firearm creates a danger that someone will be fatally injured, intentionally or inadvertently. Polling of District voters also suggests that carrying a fake, concealed firearm in a public place is substantially lower level conduct as compared to a real firearm.[580]

[579] Such a person could certainly be charged with both committing an assault using a dangerous or imitation dangerous weapon and possessing a dangerous weapon during a crime, but at sentencing a conviction would not be entered for more than 1 of these overlapping offenses per RCC § 22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses.

[580] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses. Compare the following. Question 4.11 provided the scenario: "Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime." Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: "Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not

(2) *USAO, App. C at 399-400, supports the RCC's expansion of the revised offense to include as predicates all offenses against persons, but recommends retaining all of the predicate offenses in the current definition of "dangerous crime,"*[581] *including drug offenses, arson, and theft. USAO states, "Arson is a very serious offense that can often result in substantial injury to a person or to property" and that certain types of conduct currently penalized as robbery are punished as theft under the RCC. USAO also says that, because in the RCC "certain types of conduct currently penalized as Robbery would not be included in Subtitle II of the Title 22 of the RCC," USAO "recommends including Theft as an additional offense listed in subsections (a)(2) and (b)(2)."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. RCC § 22E-4104, Possession of a Dangerous Weapon During a Crime provides additional liability for some crimes where the mere presence of an unused, un-displayed dangerous weapon raises the risk to a complainant. Such increased risk occurs when there is a reasonable likelihood that the actor will confront a complainant in a violent encounter. Arson is not included as a predicate crime to RCC § 22E-4104 because, unlike current law, the RCC arson statute generally does not require as an element endangerment of human life or any confrontation with another person and is merely a property crime. If a person is attacking another person by means of fire, there would be liability for assault, homicide, or other offenses against persons which are predicates for RCC § 22E-4104. Regarding the USAO recommendation that the predicate crimes include all thefts, under current law and the RCC, thefts do not require as an element any bad intent or confrontation with another person. Forms of robbery under current law that do not involve a violent confrontation between the actor and complainant have been reorganized as forms of theft in the RCC, but it is consistent with limiting RCC § 22E-4104 to conduct involving a violent encounter that theft not be a predicate offense.
- Regarding drug offenses, while RCC § 22E-4104 does not include such offenses as predicates, the RCC separately includes a penalty enhancement for possessing a dangerous weapon during a drug crime.[582]

(3) *USAO, App. C at 400, recommends eliminating the requirement that the defendant possess the weapon "in furtherance" of the underlying crime and instead only require that the defendant possess the weapon "while" committing the underlying crime. USAO states, "A defendant creates an increased risk of danger by* introducing *a weapon to an offense." (Emphasis added.) USAO also explains, "there is an additional level of risk created when a defendant has a weapon* readily available*" and notes that a firearm could cause someone to be injured, intentionally or inadvertently. (Emphasis added.)*

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involved in any crime." Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code.

[581] D.C. Code § 23-1331.

[582] RCC § 22E-48-904.01b(g)(6)(B).

- The RCC does not incorporate this recommendation because it would introduce an unclear, expansive scope of liability into the revised statutes, and may authorize disproportionate penalties. USAO's proposed language, "while committing" an offense, is unclear and appears to include constructive possession of a weapon far away from the offense. For example, a person who commits a simple assault in one part of the city could be convicted of first degree possession of a weapon during a crime by virtue of having a lawfully registered handgun in their home miles away, even if their possession of the handgun has no connection to the crime and poses not additional threat to the complainant. Even if the dangerous weapon is located near where the crime occurs, the USAO's proposed language also is not restricted to deliberately "introducing" a dangerous weapon into a situation. For example, any assault occurring in or near a location where knives are stored, such as a kitchen, may be subject to liability under the USAO language, given that there is no necessary connection between the weapon and the crime. In contrast, RCC § 22E-4104 requires a link between the possession of the weapon and the crime in some manner. Other RCC crimes provide liability for conduct where an actor brings a dangerous weapon to a location where a crime is committed (e.g. RCC § 22E-4102, Carrying a Dangerous Weapon) or displays or uses a dangerous weapon (see RCC offenses against persons under Subtitle II with gradations that authorize higher penalties for use or display of a weapon).

(4) *USAO, App. C at 400, recommends eliminating the provision that excludes liability for an attempt to commit an offense under this section. USAO offers a hypothetical in which a person "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."*

- The RCC incorporates this recommendation by striking the exclusion for attempts. This change improves the clarity and reduces a possible gap in liability in the revised statutes.

(5) *USAO, App. C at 423-425, recommends classifying first degree possession of a dangerous weapon during a crime as a Class 6 felony and second degree possession of a dangerous weapon during a crime as a Class 7 felony. If the CCRC does not accept USAO's recommendation to include imitation firearms in the first degree of the offense,[583] USAO recommends ranking both first and second degree as Class 6 felonies. USAO compares the penalties for the revised offense to the penalties for the offense in current D.C. Code § 22-4504(b). USAO says it "opposes reducing maximum penalties for firearms offenses at a time when firearms violence is a threat to the public safety of the community." USAO also says the ranking "does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others."*

[583] App. C at 399.

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. As a threshold matter the CCRC recognizes that firearm violence has been a threat to the public safety of the community not only recently but throughout the past century and recent decades. In this timespan, the laws and penalties and crime rates associated with gun violence have varied widely. The CCRC also notes that, while stating the CCRC's recommendation would not adequately deter commission of the offense, USAO also does not assert that either its proposed penalty rankings for the revised offense or the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter either the possession of firearms or the use of firearms during the commission of offenses against others. Unfortunately, neither the current penalties nor prior penalties have, in fact, stopped gun violence. The CCRC wholeheartedly agrees that gun violence is serious and serious efforts to deter[584] gun violence must be taken. However, the relevant question is what the specific penalty should be for this particular offense of possessing a firearm or other dangerous weapon during a crime of violence as compared to other offenses, including the assault, robbery, rape, or homicide itself.
- As described in prior responses (see, e.g., response to USAO comments on § 22E-2701 (Burglary), the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. With respect to dangerous weapon involvement in an offense, the RCC punishes the actual use or display of a weapon by providing gradations with higher penalties for such conduct (or attempted, solicited, or other inchoate conduct) directly in offenses. Other RCC crimes, such as this one, provide liability when a person only possesses (but does not use or display) a dangerous weapon during a predicate crime or possesses a dangerous weapon with intent at some later time to commit a crime. These many overlapping offenses in the RCC are necessary to ensure liability for involvement of a weapon with a crime, whether far removed or directly involved in a crime. However, these many overlapping offenses aim at the same social harm of involving a dangerous weapon with a crime, and so multiple convictions and multiple punishments for such overlapping crimes would be disproportionate.
- With regard to the possession of a dangerous weapon during a crime, the CCRC recommendation recognizes that the degree of additional punishment due to the mere possession of a dangerous weapon during a

[584] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

crime should be less than the display or use of the weapon during the crime. (Indeed, to the extent that penalty differences are a factor in deterring commission of criminal acts, there is a strong social interest in incentivizing those committing crimes to not pull out a gun or knife.) The mere possession crime in RCC § 22E-4104 (and its penalty classification) is not intended to account for the actual use or brandishing of a dangerous weapon, let alone to account for the whole harm done during the crime. At least in the case of serious felonies, the physical injury or sexual intrusion experienced by the complainant almost always far outweighs the means (a dangerous weapon) by which the crime was committed.

- The RCC's penalty recommendations for RCC § 22E-4104 reflect a sharp decrease from the current D.C. Code § 22-4504(b) statutory penalties of 5 (mandatory) to 15 years imprisonment cited by USAO, however that offense is limited to possessing a firearm during a crime of violence. In contrast, RCC § 22E-4104 applies much more broadly and includes minor assaults and other offenses against persons. Yet, even as applied to the possession of firearms during crimes of violence, the statutorily-authorized penalties for D.C. Code § 22-4504(b) appear to be outdated and more severe than is proportionate according to public opinion polling of D.C. voters, and under D.C. judicial practice.
    - D.C. court data on D.C. Code § 22-4504(b) (PFCOV) sentences pose analysis challenges because such an extremely high percentage of the sentences—over 90%—run concurrent to another sentence for a more serious crime in the case.[585] However, for all first PFCOV sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the median sentence (50% of sentences were greater) was 60 months and the 75th quantile (25% of sentences were greater) for was 84 months. That means that between 50-75% of the judicially-imposed sentences were at the 5 year (60-month) mandatory minimum. Even the most severe (97.5%) Superior court sentences for PFCOV (120 months) are far short of the 180-month penalties authorized by current statute.
    - Polling of District voters also strongly suggests that while the mere possession of a dangerous weapon during a crime merits an increased penalty, this increase is quite modest and is almost entirely washed out by the seriousness of the predicate offense for any crime of violence. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).[586] Critically, the polling

[585] The CCRC will seek to conduct an analysis of non-concurrent sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this.

[586] The effect of a dangerous weapon being present during a crime was a primary focus in the design of the CCRC surveys and many questions address such scenarios, including the following questions. Question

questions asked for an assessment of a hypothetical individual's behavior as a whole, not "possessing a dangerous weapon during a crime" specifically, and there would be additional liability for the predicate crimes under the RCC.

1.03 provided the scenario: "Shooting with a gun, causing serious injury." Question 1.03 had a mean response of 9.3, just more than one class above the 8.0 milestone for causing a serious injury by any means (corresponding to aggravated assault, currently a 10-year offense in the D.C. Code). Question 1.16 provided the scenario: "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." Question 1.16 had a mean response of 6.2, just barely above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 1.06 provided the scenario: "Entering an occupied home intending to steal property, but fleeing without being seen, and without taking anything. The person secretly carried a gun, but never displayed it." Question 1.06 had a mean response of 5, well below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code.

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

(1) *OAG, App. C at 384, recommends revising the commentary to clarify the meaning of the phrase "[a] District offense that is* currently *punishable by imprisonment for a term exceeding 1 year, or a comparable offense in another jurisdiction." (Emphasis added.) OAG offers an example in which a person has a conviction for a crime that was (at the time of the conviction) punishable by more than a year but is now (at the time of the unlawful possession) only a misdemeanor. OAG also recommends 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.*

- The RCC partially incorporates this recommendation by revising the statutory language to more straightforwardly refer to the defined term "comparable offense," which includes offenses under prior District law and offenses committed in other jurisdictions.[587] This change clarifies the revised statute.

(2) *OAG, App. C at 384 n. 8, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(3) *USAO, App. C at 394-195, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[588]

- The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(4) *OAG, App. C at 384-385, recommends revising the statutory language to clarify that a person is strictly liable with respect to being subject to an order to not possess any firearms. OAG explains that, relying on RCC § 22E-207, it is concerned that 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.*

- The RCC partially incorporates this recommendation by revising RCC § 22E-207(a) to state, "Any culpable mental state or strict liability specified

[587] RCC § 22E-701 defines the term "comparable offense" to mean "a crime committed 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 corresponding District crime."
[588] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state or strict liability is specified." This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *USAO, App. C at 400-401, recommends eliminating the requirement that an out-of-state conviction is comparable to a District offense that is punishable by more than one year in jail, instead requiring only that the out-of-state conviction be punishable by more than one year. USAO says requiring the offense to be comparable to a District felony "will lead to extensive litigation." USAO also says, regarding identification of a comparable offense, that "it is unclear whether this would be a question of law for a judge or a question of fact for a jury to consider."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Criminal laws vary significantly by jurisdiction. For example, while the District recently decriminalized personal possession of marijuana, possession of similar amounts of marijuana is a felony in some states. Subjecting an actor to criminal penalties in the District under RCC § 22E-4105 because another jurisdiction criminalizes and/or punishes behavior differently would effectively make the values and choices of that jurisdiction applicable to District residents. In contrast, under RCC § 22E-4105, any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District's specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. Measuring a conviction in another jurisdiction by reference to District laws establishes a consistent basis for judging the conduct of criminal offenders and is consistent with current D.C. Code § 22-4503(a)(6).[589]
- The commentary has been updated to clarify that determination of whether a conviction in another jurisdiction is for a "comparable offense" is a matter of law.

(6) *USAO, App. C at 401, recommends eliminating the requirement that an intrafamily offense "requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats." USAO explains that it may not be able to prove that an offense resulted in bodily injury, for example, if a complainant is uncooperative. USAO says that, "[a]t 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.*

- The RCC partially incorporates this recommendation by revising the commentary to clarify that the phrase "offense, as defined in D.C. Code §

[589] Current D.C. Code § 22-4503(a)(6) disallows gun ownership by any person who has "been convicted…of an intrafamily offense, *as defined in D.C. Official Code § 16-1001(8)*, or any similar provision in the law of another jurisdiction." (Emphasis added.)

16-1001(8), that requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats" includes convictions for inchoate (e.g. attempt, solicitation) versions of such an offense. The crimes of attempted assault and menacing, mentioned by USAO in it is comment, fall within the current RCC language and the commentary will be clarified on this point.

- However, the revised statute retains a limitation on predicate intrafamily offenses to those offenses that require as an element some type of violence or threat, rather than property or other crimes. This aligns the RCC unauthorized person criteria with the District's firearm registration requirements, which define 'misdemeanor crime of domestic violence' to require 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'[590] This is narrower than the District's definition of "interpersonal violence"[591] which broadly includes conduct that falls short of "domestic violence" as it is commonly understood—that is, physical *abuse* of a partner or household member.[592] For example, in the District currently a person may be convicted of domestic violence and lose their right to bear arms by stealing from their roommate or by damaging the property of a stranger who, coincidentally, once dated someone that they once dated.[593]

(7) *USAO, App. C at 401, recommends eliminating the requirement that the defendant "know" that they have a prior conviction or open warrant. USAO says that a defendant "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." USAO says "The requirement that a defendant 'know' about this limits the eligible conduct too far."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to culpable mental states and may authorize disproportionate penalties. As recognized in Supreme Court case law and repeated throughout the RCC commentary, an actor is usually required to know the facts that constitute an offense.[594] In RCC § 22E-4105, among the critical facts that may subject a person to felony liability is the person's prior conviction or be subject to a court order.

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[590] *See* 24 DCMR § 2309; *see also United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (holding that Congress incorporated the common-law meaning of "force"—namely, offensive touching—in § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence").

[591] D.C. Code § 16-1001(6). The court does not require the government to prove an interpersonal relationship before assigning a case to a domestic violence calendar or before convicting a person of a domestic violence offense.

[592] Merriam-Webster.com, *"domestic violence"*, 2018, *available at* https://www.merriam-webster.com/dictionary/domesticviolence.

[593] A person may also lose their right to seal their criminal record under D.C. Code § 16-801(9)(A).

[594] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Requiring knowledge regarding these elements is logical because such an actor is on notice (at least constructively) of what makes their otherwise legal (and constitutionally protected) possession of a firearm is now illegal.

- Because no other culpable mental state is mentioned, the USAO recommendation appears to be that a person should be strictly liable as to whether they have a relevant prior conviction or an open warrant. The revised statute does not hold a person strictly liable for possessing a firearm when "there is, in fact, an open warrant" for their arrest. An arrest warrant—which requires only a finding of probable cause—may issue without any notice to the person that they must relinquish their lawfully owned firearms. Consider, for example, a person who is misidentified as the perpetrator of a homicide that they had no reason to know anything about.[595] Under USAO's proposed language, such a person would be guilty unlawfully possessing their otherwise-legal firearm even after being exonerated of the homicide offense. In contrast, the revised offense applies only to a person who is on the run from the law and knows that they are the subject of an arrest warrant.

(8) *USAO, App. C at 402, recommends including conditional pleas in the definition of "prior conviction." USAO explains that it is inconsistent to exclude conditional pleas but include convictions after a trial (which may also be reversed on appeal).*

- The RCC incorporates this recommendation by striking the exclusion for conditional pleas from the definition of "prior conviction" in the revised offense. This change improves the consistency of the revised statutes.

(9) *USAO, App. C at 402, recommends removing the 10-year limitation for prior felony convictions. USAO states, "The nature and seriousness of the crime…is the same, regardless of how much time has passed since the conviction." USAO also notes, "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."*

- The RCC does not incorporate this recommendation because it may compromise the constitutionality of the statute and may authorize disproportionate penalties. Critically, the 10-year limitation does not apply to crimes of violence, which do not have any time limitation. In the RCC (and under the current D.C. Code, excepting drug crimes) there are virtually no offenses other than crimes of violence that carry a 10-year or more imprisonment penalty. Rather, in the RCC, the 10-year limitation applies chiefly to non-violent drug distribution, weapon possession (without use or display) crimes, and property crimes. Whether commission of these lower-level felonies is sufficiently serious to trigger a lifelong ban on a constitutional right to possess a firearm is a live question

[595] *See, e.g.,* Keith L. Alexander, *Authorities said video showed a man committed murder. He spent 13 days in jail before his defense team proved it didn't.*, WASHINGTON POST (November 22, 2019).

undergoing litigation in multiple jurisdictions.[596] However, limiting the timespan of a person's restriction from possessing a firearm is one means of narrowly tailoring the restriction on a person's Second Amendment rights. In part, this is because the passage of time is highly relevant to whether a person is likely to reoffend, with well-established social science research indicating a strong inverse correlation between age and recidivism.[597] The stronger the connection between deprivation of a right to possess a firearm and a government rationale of protecting public safety, the more likely the statute is to withstand constitutional scrutiny in the years to come. In most instances, a person outside the 10-year window (with no other convictions that would subject them to liability for possession of a firearm by an unauthorized person) is not permitted to obtain a firearm registration certificate or a carry license and would still be subject to criminal liability under RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition or RCC § 22E-4102, Carrying a Dangerous Weapon.

(10) *USAO, App. C at 423-424, recommends classifying first degree possession of a firearm by an unauthorized person as a Class 6 felony and second degree possession of a firearm by an unauthorized person as a Class 7 felony. USAO compares the penalties for the revised offense to the penalties for the offense in current D.C. Code § 22-4503. USAO further states that possession of a firearm by an unauthorized person should be punished more severely than carrying a dangerous weapon because it "should be a more serious offense to possess a weapon after having been convicted of a crime than to possess a weapon generally."*

- The RCC partially incorporates this recommendation by classifying first degree possession of a firearm by an unauthorized person as a Class 8 felony and second degree possession of a firearm by an unauthorized person as a Class 9 felony.

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[596] One en banc decision by the 3rd Circuit has held the federal felon-in-possession statute unconstitutional as applied in that case. *Binderup v. Attorney Gen.* U.S., 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017) (No. 16-847). Other federal jurisdictions have generally upheld as applied challenges on a range of facts. The D.C. District Court recently upheld a challenge to the federal felon-in-possession statute but stated:

> "This case thus does not involve some sort of nominal crime that has been labeled a felony, perhaps with the purpose of triggering section 922(g)(1)'s applicability. In such a situation, a lengthy term of imprisonment for a nominal crime—two years in prison for jaywalking or leaving bubble gum on the sidewalk outside the White House, for instance—could be deemed unconstitutional if found to be disproportionate to the underlying conduct such that the crime would no longer qualify for the federal felon-in-possession ban. *See Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) ("[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.... [A] single day in prison may be unconstitutional in some circumstances.")."

Medina v. Sessions, 279 F. Supp. 3d 281, 291 (D.D.C. 2017), aff'd sub nom. Medina v. Whitaker, 913 F.3d 152 (D.C. Cir. 2019), cert. denied sub nom. Medina v. Barr, No. 19-287, 2019 WL 6689673 (U.S. Dec. 9, 2019)

[597] *See,* U.S. Sentencing Commission, The Effects of Aging on Recidivism Among Federal Offenders, December 2017.

- D.C. court data on these sentences poses challenges to analysis because such a high percentage of the sentences—about half—run concurrent to another sentence for a more serious crime in the case.[598] However, for all felon in possession sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the 90th quantile (10% of sentences were greater) of all imposed sentences (including enhancements) was 48 months for those with a prior crime of violence conviction and 36 months for other felons. The 95th quantile (5% of sentences were greater) of all imposed sentences (including enhancements) was 60 months for those with a prior crime of violence conviction and 36 months for other felons. These numbers are significantly below the current D.C. Code penalties of 36 months (mandatory) to 180 months for prior crime of violence convictions and up to 120 months for other felony convictions. The RCC penalty recommendations, while sharply different from the current statutes, reflect only a modest decrease in penalties compared to current court practice.
- Polling of District voters also strongly suggests that while illegally possessing a firearm and having a felony conviction may warrant felony punishment, without more (e.g., display or use of the weapon), such conduct should be subject to the lowest felony classes. Moreover, polling indicates a significant distinction between prior convictions for violent crimes and non-violent crimes. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[599] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, and so the responses would include additional liability for other crimes (e.g. possession of an unregistered firearm).

(11) *The CCRC recommends revising sub-subparagraph (b)(2)(A)(iii) to include any intrafamily offense that requires as an element sexual conduct, as opposed to only those involving "non-consensual" sexual conduct.*

- This change eliminates a possible gap in liability.

(12) *The CCRC recommends revising the pronouns in sub-subparagraph (b)(2)(C)(ii) to clarify the actor may not violate a court order that restrains the actor from*

[598] The CCRC will seek to conduct an analysis of non-concurrent sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this

[599] Question 4.06 provided the scenario: "Possessing at home a loaded pistol that hasn't been registered, as required by law, and having been convicted of non-violent distribution of drugs 15 years ago. The gun is not involved in any crime." Question 4.06 had a mean response of 5.4, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.05 provided the scenario: "Possessing a loaded pistol at home, without registering it as required by law and having been convicted of non-violent distribution of drugs 5 years ago. The gun is not involved in any crime." Question 4.05 had a mean response of 5.8, again below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.04 provided the scenario: "Possessing a loaded pistol at home, without registering it as required by law and having been convicted of a violent robbery 15 years ago. The gun is not involved in any crime." Question 4.04 had a mean response of 6.1, just above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code.

assaulting, harassing, stalking, or threatening any person, provided that the actor had notice and an opportunity to appear before the order was issued.

- This change clarifies the revised statute and does not further change District law.

(13) *The CCRC recommends relocating the provision prohibiting a repeat offender enhancement to the penalties subsection.*

- This change improves the logical organization of the statute and does not substantively change its meaning.

(14) *The CCRC recommends replacing the defined term "gun offense" with a reference to any offense under Chapter 41, to clarify the offense by eliminating an unnecessary cross-reference.*

- This change clarifies the revised statute.

RCC § 22E-4106. Negligent Discharge of Firearm.

(1) *OAG, App. C at 385, recommends expanding the statute to include a second degree for negligent discharge of an air rifle or torpedo. OAG cites to a medical journal that explains, "injuries from air weapons can be serious and even fatal."*

- The RCC does not incorporate this recommendation because it would result in unnecessary overlap between offenses. Recklessly causing an injury by any means is punished as an assault under RCC § 22E-1202. Assaults involving the use of a dangerous weapon—including "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person"[600]—are graded more severely than other assaults. Only firearms, which require either registration or licensure under District law, are a predicate for criminal sanctions for negligent conduct.

[600] RCC § 22E-701.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

(1) *OAG, App. C at 385-386, comments that it "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.*[601]

- The RCC recommends that Alteration of a Firearm Identification Mark be a Class A misdemeanor. Pending further response from OAG or USAO as to how the penalty affects their views of prosecutorial jurisdiction, the RCC maintains assignment of prosecutorial jurisdiction to USAO.

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

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

(1) *The CCRC recommends rephrasing the exception for law enforcement officers to more closely resemble the language in other RCC provisions.*

- This change does not substantively change the revised statute or District law.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

(1) *The CCRC recommends substituting the phrase "passenger area" for "passenger compartment," consistent with the revised possession of an open container or consumption of alcohol in a motor vehicle offense.*[602]

- This change improves the consistency of the revised statute and does not substantively change its meaning.

[602] RCC § 25-1001.

RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol.

(1) *The CCRC recommends revising subsection (b) to apply to a resident of another "state* or subdivision of the United States*," consistent with subsection (a)*.

- This change improves the consistency of the revised statute.

(2) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

RCC § 22E-4111. Unlawful Sale of a Pistol.

(1) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*

- This change improves the proportionality of the revised statute.

RCC § 22E-4112. Unlawful Transfer of a Firearm.

(1) *The CCRC recommends replacing the phrase "licensed dealer" with the phrase "dealer licensed under RCC § 22E-4114" to clarify its meaning, consistent with RCC § 22E-4113.*
- This change improves the clarity and consistency of the revised statute and

(2) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*
- This change improves the proportionality of the revised statute.

RCC § 22E-4113. Sale of Firearm Without a License.

(1) *OAG, App. C at 386, recommends clarifying the meaning of the phrases "retail dealer" and "wholesale dealer," which are undefined.*

- The RCC partially incorporates this recommendation by replacing the phrase "licensed dealer" with the phrase "dealer licensed under RCC § 22E-4114," to eliminate any confusion between "licensed dealer" and other retailers or wholesalers. The phrases "retail dealer" and "wholesale dealer" are not defined in current law, however, there is no indication from District case law or legislative history that they mean something other than their ordinary meanings of "retailer" and "wholesaler." "Retailer" is commonly understood to mean a business that sells small quantities of goods directly to individual consumers and "wholesaler" is commonly understood to mean a business that sells items in bulk to other businesses for resale.[603]

(2) *OAG, App. C at 386, recommends that the commentary (p. 121) be redrafted to say, "'Sells' is an undefined term, intended to include any exchange of a firearm for anything of value," as opposed to "monetary remuneration."*

- The RCC incorporates this recommendation by amending the revised commentary. This change clarifies the revised commentary and eliminates an unnecessary gap in liability.

(3) *The CCRC recommends striking the phrase "to engage in such activity" as superfluous.*

- This change improves the consistency of the revised statutes and does not further change District law.

(4) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*

- This change improves the proportionality of the revised statute.

[603] Merriam-Webster.com, *"retail"*, 2020, *available at* https://www.merriam-webster.com/dictionary/retail; Merriam-Webster.com, *"wholesale"*, 2020, *available at* https://www.merriam-webster.com/dictionary/wholesale;

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

(1) *OAG, App. C at 386-388, recommends revising the statutory language to prohibit the sale of a pistol to an unknown and unidentified purchaser. OAG explains that current law requires "the purchaser is personally known to the seller or shall present clear evidence of his or her identity."*[604]
   - The RCC incorporates this recommendation by revising the statutory language to bar all sales to persons under 21 years of age and persons unknown to the seller who does not present clear evidence of the purchaser's identity. This change improves the clarity and consistency of the revised statutes and eliminates an unnecessary gap in law.

(2) *The CCRC recommends replacing the word "thereof" with the phrase "of a firearm or imitation firearm."*
   - This change clarifies the revised statute and does not further change District law.

(3) *The CCRC recommends revising the statutory language to state "firearm sales" rather than "business" shall occur only in the building designated on the license. Read literally, the word "business" may be understood to include work unrelated to firearm transactions, such as accounting, marketing, and banking.*
   - This change clarifies the revised statute and may improve its proportionality.

(4) *The CCRC recommends striking the word "color" from paragraph (b)(6). It is unclear why current D.C. Code § 22-4510(a)(5) requires a firearms dealer to record this information. "Color" is a protected trait under the District's Human Rights Act.*[605]
   - This change improves the consistency of the revised statute.

(5) *The CCRC recommends removing gendered pronouns from the statutory text.*
   - This change improves the clarity and consistency of the revised statutes and does not further change District law.

[604] D.C. Code § 22-4510(a)(3).
[605] D.C. Code § 2-1401.01 et. seq.

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

(1) *The CCRC recommends revised the statute to prohibit any violation of subsection RCC § 22E-4414(b), as the reference to paragraphs (b)(1) – (6) in the previous draft was a typographical error.*

- This change clarifies the revised statute.

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

(1) *OAG, App. C at 388, recommends either defining or striking the phrase "satisfactory evidence." OAG explains, "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."*

- The RCC incorporates this recommendation by striking the phrase "satisfactory evidence." This change clarifies the revised statute.

(2) *The CCRC recommends amending the definition of "dangerous article" to include firearms and restricted explosives (as defined in RCC § 22E-701) and exclude other dangerous weapons. The RCC defines the term "dangerous weapon" to include "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."*[606] *For example, a motor vehicle, a curling iron, or a bottle of bleach may become a dangerous weapon by virtue of how it is used. The revised statute does not treat these items (which have many uses other than weaponry) as a nuisance that is subject to surrender and destruction.*

- This change clarifies the revised provision and better aligns it with current District law.[607]

(3) *The CCRC recommends amending subsection (c) to include the subheading "Hearing procedures," so that the subsection is not left blank.*

- This change improves the consistency of the revised offenses and does not further change District law.

(4) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

[606] RCC § 22E-701.

[607] D.C. Code § 22-4517 defines "dangerous article" to mean "(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms."

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

(1) *USAO, App. C at 395, recommends revising the statutory language to clarify the burden of proof for each exclusion from liability.*
- The RCC partially incorporates this recommendation by amending RCC § 22E-201 in the General Part to specify the burden of production and proof for exclusions and affirmative defenses throughout the RCC. This change clarifies the revised offense and improves the consistency of the revised statutes.

(2) *USAO, App. C at 402, recommends that the exclusion from liability apply only to military service members in paragraph (b)(1) and Department of Corrections employees in paragraph (b)(6) while they are on duty. USAO states that this recommendation tracks current law.*
- The RCC partially incorporates this recommendation by adding "on-duty" at the beginning of paragraphs (b)(5) and (b)(6). Unlike military members and sworn police officers, special police, campus police, and corrections officers are generally not authorized to carry service weapons or to make arrests outside of the premises they are employed to protect.[608] Notably, however, this may constitute a change in law by contravening prior case law holding that a Department of Corrections employee may carry a firearm whether on or off duty under an application of the last antecedent rule.[609] This change reduces an unnecessary gap in liability.

(3) *The CCRC recommends revising paragraph (b)(4) to strike the phrase "in a location" as potentially confusing.*
- This change clarifies the revised statute and does not further change District law.

[608] *See, e.g.,* D.C. Code § 23-582; 6A DCMR § 1103.

[609] *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972) ("We agree that there would be great legislative merit to a statute which prohibited such persons from carrying a pistol when off duty, unless licensed to do so, however, because of the language of the statute and its legislative history, we are unable to find such to be the congressional intent of the present statute for a number of reasons…"). Notably, *Pritchett* is persuasive, not binding, authority as the ruling occurred after establishment of the D.C. Court of Appeals as the District's highest (and only) appellate court.

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

(1) *USAO, App. C at 403, recommends wholly eliminating the merger provision. No explanation is provided except for subsection (b), which USAO says it "particularly opposes." USAO says there "is necessarily a greater risk of harm introduced to a situation when a firearm is involved." USAO also states with respect to (b)(3), "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." USAO says, "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."*

- The revised statute does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties. As described in prior responses (see, e.g., response to USAO comments on § 22E-2701 (Burglary)), the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. With respect to dangerous weapon involvement in an offense, the RCC punishes the actual use or display of a weapon by providing gradations with higher penalties for such conduct (or attempted, solicited, or other inchoate conduct) directly in offenses. Other RCC crimes provide liability when a person only possesses (but does not use or display) a dangerous weapon during a predicate crime or possesses a dangerous weapon with intent at some later time to commit a crime. These many overlapping offenses in the RCC are necessary to ensure liability for involvement of a weapon with a crime, whether far removed or directly involved in a crime. However, these many overlapping offenses aim at the same social harm of involving a dangerous weapon with a crime, and so multiple convictions and multiple punishments for such overlapping crimes would be disproportionate.
- Regarding the USAO statement that a person should have to be convicted of the specific gradation of an offense that involves a dangerous weapon in order for the sentencing for RCC § 22E-4119 to limit convictions, such a change would permit the "stacking" of weapon and other types of penalty enhancements. For instance, the USAO could charge a form of assault that is enhanced on the basis of the complainant's status (e.g. age), and separately charge a weapon crime, subjecting the actor to an aggregate imprisonment penalty that is far greater than if only one enhancement (weapon or victim status) was achieved. While in principle the stacking of enhancements may appear desirable because it reflects many ways in which a crime may be categorically more serious, in practice the stacking of enhancements can quickly create extremely high punishments that dwarf the predicate conduct. For example, an assault inflicting significant bodily injury is more serious and arguably deserves some greater

punishment if the complainant is over 65 years of age, the complainant is a District public official, the actor has a prior conviction for felony assault, the actor used a dangerous weapon, and the actor committed the crime based on bias toward the complainant. However, raising the imprisonment penalty for each type of enhancement would result in an increase of four or five penalty classes, equating the conduct with the most serious rapes and forms of homicide—and under the current D.C. Code the penalty liability is equal to that of murder.

- To avoid such disproportionate outcomes, the RCC recommends limiting the stacking of penalty enhancements. Individual offenses incorporate (but cap) several types of possible enhancements, while the general enhancements in RCC Chapter 6 (e.g. repeat offender or hate crimes) do stack additional penalties. Within the RCC's authorized range of statutory penalties, limiting stacking as it does, a sentencing judge retains sufficient discretion to weight the seriousness of the conduct taking into account the seriousness of the particular facts of the case which may or may not be captured in statutorily-specified enhancements. The RCC's limited form of stacking produces aggregate penalties within the range of most current court sentencing decisions and better accords with polling of District voters.[610] The RCC seeks to ensure that the totality of criminal punishment an actor faces for conduct is proportionate to that conduct—but that approach requires examining all the relevant crimes an actor may be charged with (and punished for) based on the actor's conduct. Unlike the current D.C. Code, the RCC does not examine just one crime (and its enhancements) to see if the punishment is proportionate to the conduct, because such a comparison misrepresents the total liability an actor faces.

(2) *The CCRC recommends striking as superfluous the phrase "A person may be found guilty of any combination of the following offenses for which the person satisfies the requirements for liability, provided that…"*

- This change clarifies and does not substantively change the revised statute.

[610] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

RCC § 22E-4120. Severability.

(1) *The CCRC recommends striking this provision. The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.4. Severability clauses, states that courts infer severability into District laws, so a severability clause is not necessary. This construction is also explicitly codified at D.C. Official Code § 45-201.*

RCC § 22E-4201. Disorderly Conduct.

(1) *OAG, App. C at 264-265, recommends amending the commentary to cure an explanation that is circular. OAG explains that the commentary defines "abusive speech" to mean "fighting words" and defining "fighting words" to mean "abusive speech."*

- The RCC incorporates this recommendation by revising the commentary to cure the circularity described. The explanatory note now refers only to "abusive speech" and a footnote explains that "abusive speech" has the same meaning as "fighting words" in the *Chaplinsky* line of cases. This change clarifies the revised commentary.

(2) *OAG, App. C at 408, recommends that disorderly conduct be reclassified as a Class D misdemeanor with a penalty of 1 month/10 days.*

- The RCC incorporates this recommendation by reclassifying disorderly conduct as a Class D misdemeanor. This change improves the proportionality of the revised offenses.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying disorderly conduct as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(5) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change clarifies the revised statutes and does not further change District law.

RCC § 22E-4202. Public Nuisance.

(1) *OAG, App. C at 265, recommends clarifying in commentary the meaning of the word "lawful" before the phrase "religious service, funeral, or wedding." OAG offers a hypothetical in which the service runs afoul of a District regulation such as an occupancy limit.*

- The RCC incorporates this recommendation by revising the commentary to clarify that the word "lawful" requires that the gathering or event not violate another District or federal law. Consider, for example, a wedding that is blasting music in violation of the District's noise control regulations.[611] A neighbor who disrupts the event by shouting, "Hey, keep it down!" does not commit a public nuisance offense. The statute also specifies that the actor is strictly liable as to whether the event is lawful. This change clarifies the revised offense.

(2) *OAG, App. C at 265, recommends codifying the definition of "an interruption of quiet enjoyment" that appears in the commentary: "a significant interference with the in-home activities of a person of ordinary sensitivity."*

- The RCC partially incorporates this recommendation by revising the statutory language to clarify that the complainant's enjoyment must be objectively reasonable. The phrase "A person's quiet enjoyment of his or her residence" is amended to, "A person's reasonable, quiet enjoyment of their dwelling…" This change clarifies the revised offense.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying public nuisance as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

[611] 20 DCMR § 2701.

RCC § 22E-4203. Blocking a Public Way.

(1) *OAG, App. C at 265-266, recommends revising the statutory language to clarify that it is the person who must be on public land, not the entrance. OAG offers a hypothetical in which a person stands on a public sidewalk blocking access to the entrance to a drug store on private property.*

- The RCC incorporates this recommendation by adopting OAG's proposed language: "While on land or in a building that is owned by a government…"[612] This change clarifies the revised statute.

(2) *OAG, App. C at 266, recommends revising the commentary to clarify that the police are not required to give a new warning each time they see a person blocking the same public way. OAG cites the legislative history,[613] which explains, "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." The Committee offered an example in which a person is asked by the same officer day after day to move away from blocking a store entrance, and then the officer says, "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 apparently expected that such a person could be arrested without another warning.*

- The RCC incorporates this recommendation by adding the relevant language from the report to a footnote in the commentary. This change clarifies the revised statute.

(3) *OAG, App. C at 266-267, recommends requiring recklessness (instead of knowledge) that the accused's actions constitute a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order. OAG offers a hypothetical in which a person returns to the same location a half an hour after being told to leave, but is not practically certain that their actions are a resumption of the blocking conduct.*

- The RCC does not incorporate this recommendation because the change would be inconsistent with other offenses. Consistent with the revised disorderly conduct offense,[614] blocking a public way requires that a person is practically certain that they are violating the officer's directive. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[615]

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[612] The corresponding commentary is revised 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."

[613] Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 7.

[614] RCC § 22E-4201(a)(2)(D) ("Knowingly continues or resumes fighting with another person after receiving a law enforcement officer's order to stop such fighting.").

[615] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560,

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying blocking a public way as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(5) *The CCRC recommends revising the phrases "such conduct" and "such blocking" to instead state "the blocking."*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

RCC § 22E-4204. Unlawful Demonstration.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful demonstration as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(3) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful demonstration as a Class D misdemeanor and recommends generally classifying all Class D misdemeanors as non-jury demandable offenses.*

- This change improves the consistency of the revised statutes and does not further change District law.

(4) *The CCRC recommends revising the phrases "such conduct" and "such demonstration" to instead state "the demonstration."*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *The CCRC recommends repealing D.C. Code § 10-503.17, because it is identical to language in a federal statute that has been held unconstitutional on First and Fifth Amendment grounds.*[616]

- This change removes a criminal statute that has been held to be unconstitutional.

[616] *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972) (concerning 40 U.S.C. § 193g).

RCC § 22E-4205. Breach of Home Privacy.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying breach of home privacy as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends amending the phrase "looks inside a dwelling" to instead state "observes inside a dwelling, by any means," to clarify that the offense may be committed by remotely accessing a camera inside the dwelling.*[617]

- This change clarifies the revised statute and may eliminate an unnecessary gap in liability.

(3) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

[617] *See, e.g.,* Mark Hanrahan, *Ring security camera hacks see homeowners subjected to racial abuse, ransom demands*, ABC (December 12, 2019); Jessica Holley, *Family says hackers accessed a Ring camera in their 8-year-old daughter's room*, WMC5 Action News (December 10, 2019).

RCC § 22E-4206. Indecent Exposure.

(1) *OAG, App. C at 434, recommends revising the statute so that an actor cannot avoid liability when the complainant is a young child who consents to the actor's indecent exposure. Specifically, OAG suggests the inclusion of language stating: "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." OAG says that its recommendation is consistent with the D.C. Court of Appeals decision in* Parnigoni v. District of Columbia*, holding under a prior District indecent exposure statute that consent by a child under 16 years of age was ineffective by that statute.*[618]

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to consent by young persons, and may create unnecessary overlap with RCC § 22E-1304, Sexually Suggestive Conduct with a Minor.
- First, the RCC definition of "consent" in RCC § 22E-701 excludes apparent consent by a person who "Because of youth, mental illness or disorder, or intoxication, 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." This definition does not set a bright-line age as to the age below which consent is ineffective, as the age at which a person can make a reasonable judgement as to the nature or harmfulness of conduct is a fact-specific inquiry that will vary with many factors, including the type of crime, the complainant, and the information available to the complainant. For example, a 7-year-old may be able to give consent for purposes of some matters (e.g. playing football with a 12-year-old involving what otherwise would be assaultive conduct). Bright-line age limits may improperly shield some persons from liability or fail to protect others. RCC § 22E-1302, Sexual Abuse of a Minor, and several other offenses provide bright-line age limits for sexual contact and sexual acts involving minors, but for non-sex crimes the RCC does not categorically deny minor's ability to give consent.
- Second, RCC § 22E-1304, Sexually Suggestive Conduct with a Minor provides liability (as a sex offense) for adults who cause complainants under 16 to remove clothing with intent to cause the sexual arousal or gratification of any person. The RCC offense expands liability

[618] *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 827 (D.C. 2007) ("But the argument misses the point. O.J. cannot have consented because he was under the age of sixteen when the events at issue took place; such consent is barred by the statute."). The extant version of D.C. Code § 22-1312 stated: "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal in the District of Columbia under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense. Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed $1,000, or both, for each and every such offense."

specifically to removal of clothing, likely encompassing the facts in *Parnigoni* and many scenarios of concern.

(2) *OAG, App. C at 435, recommends striking the requirement in subparagraph (b)(3)(C) that the conduct "[a]larms or sexually abuses, humiliates, harasses, or degrades any person." OAG offers an example in which a crossing guard notices a man masturbating and becomes concerned that school children will see him.*

- The RCC partially incorporates OAG's recommendation by clarifying in commentary that the statute provides liability for OAG's hypothetical because, the word "alarms" includes a person like the crossing guard who is alarmed about the actor's effect on the welfare of other potential viewers. The word "alarm" is generally understood to mean "disturb," "excite," or "strike with fear."[619] This change clarifies the revised commentary.

(3) *USAO, App. C at 462, recommends striking paragraph (b)(3) entirely. USAO states, "[I]t is the defendant's actions, rather than the impact of the defendant's actions, that should create liability for this offense." USAO also states, "[I]t 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."*

- The RCC does not incorporate USAO's recommendation because it may authorize a disproportionate penalty. The scope of the statute includes public restrooms, train compartments, communal areas of multi-unit housing, and unauthorized tents or other dwellings on public land. Eliminating paragraph (b)(3) would categorically criminalize sexual acts, masturbation, and full nudity in these locations even when no one witnesses the conduct (e.g. the only evidence is security camera footage shows the behavior, the actor later admits engaging in the behavior) and no one is offended by the conduct. Such criminalization would particularly affect persons experiencing homelessness and does not distinguish between persons who engage in hidden or consensual activity in a public location and those whose conduct alarms or sexually harasses others.
- The RCC gradations of indecent exposure authorize imprisonment not only for purposely alarming or sexually harassing others, but for doing so recklessly. The USAO comment points out that if "a defendant exposed his genitalia in the middle of a metro car" during rush hour and otherwise meets the requirements as proposed in the RCC, "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." These practical concerns are not unique to indecent exposure, however, and are common to most criminal offenses, particularly low-level conduct where complainants are unwilling,

[619] Merriam-Webster.com, *"alarm"*, 2020, *available at* https://www.merriam-webster.com/dictionary/alarm.

for whatever reason, to report the conduct to law enforcement. If a report is received and law enforcement investigates and witnesses the reported conduct, the officer may themselves be a complainant for purposes of arrest and prosecution. Or, where a person's behavior is due to intoxication, mental illness, or another cause requiring social services, an investigating officer may aid the person in obtaining such services.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying first degree indecent exposure as a Class B misdemeanor, second degree indecent exposure as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(5) *PDS, App. C at 449, recommends raising the age of prosecution. PDS states, "[C]hildren 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."*

- The RCC does not incorporate this recommendation because it may create a gap in liability and is inconsistent with other RCC and D.C. Code provisions recognizing the age of 12 as a critical age between culpable and non-culpable or enhanced and unenhanced sexual conduct. Different children may reach sexual maturity at different ages and the revised provision merely establishes 12 years old as an absolute floor. The provision does not require the arrest or prosecution of children ages 12 and 13 or suggest that prosecution is appropriate in every case. Rather, the provision assumes that these cases will be reviewed individually and that charging decisions will be guided by applicable rules and standards.[620] RCC § 22E-1308, "Limitations on Liability for RCC Chapter 13 Offenses," categorically precludes liability for sex offenses (other than first degree and third degree sexual assault) for persons under 12 years of age, in accord with ALI Model Penal Code Sex Assault draft recommendations, and other provisions in current D.C. Code[621] and RCC offenses[622] that recognize the age of 12 as the critical age between enhanced and unenhanced sexual conduct.

(6) *USAO, App. C at 461, recommends striking the word "sexually" from the phrase "sexually abuse, humiliate, harass, or degrade the complainant."*

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[620] E.g., ABA Model Rule of Professional Conduct 3.8, ABA Model Code of Professional Responsibility Canon 7 (Ethical Consideration 7-13), ABA Criminal Justice Standards (Prosecution Function), the U.S. Attorneys' Manual.

[621] *See, e.g.,* D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense;").

[622] *See, e.g.*, RCC § 22E-1302(a), First Degree Sexual Abuse of a Minor ("In fact: The complainant is under 12 years of age;").

- The RCC does not incorporate this recommendation it would create inconsistency with the general RCC approach to sexual offenses. For further explanation of this change, see the Appendix D1 entry responding to the USAO comment, App. C at 453-454, recommending the elimination of the modifier "sexually" for the words "abuse, humiliate, harass, or degrade. " in the revised definition of "sexual act" and "sexual contact."

(7) *The CCRC recommends revising the exclusion from liability to specify that it applies only to a person who is inside their own individual dwelling unit, to clarify that it does not apply to a person who is located in the communal area of multi-unit housing.*[623]

- This change clarifies the revised statute and may eliminate a gap in liability.

[623] The CCRC revised the definition of "dwelling" to include communal areas secured from the general public, in light of the DCCA's recent opinion in *Ruffin v. United States*, 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

RCC § 22E-4301. Rioting.

(1) *USAO, App. C at 360, recommends requiring the same number of actors to trigger liability for failure to disperse under RCC § 22E-4301 and rioting under RCC § 22E-4302.*

- The RCC revises the commentary to clarify the alignment of the two statutes. The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot. This change clarifies the revised commentary.

(2) *USAO, App. C at 360, recommends the revised rioting statute specifically punish a person who "urges or incites other persons" to engage in rioting, consistent with current D.C. Code § 22-1322. USAO states that, "As written, the RCC no longer includes criminal liability for inciting or urging others to riot." USAO says it "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."*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap in District criminal statutes. The RCC does not create a gap in liability for law enforcement to arrest persons actively encouraging others toward criminal behavior. The revised disorderly conduct statute punishes a person who "[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur."[624] Where a person is actively encouraging others who are present to engage in criminal behavior, they may be also subject to arrest for aiding,[625] attempting,[626] soliciting,[627] conspiring,[628] to commit the underlying offense, be it rioting, assault, criminal damage to property, or another crime. Separately criminalizing urging or inciting a riot may lead to disproportionate punishment of speech that is remote in time or place, hyperbolic, or ineffective.[629]

[624] RCC § 22E-4201(a)(2)(B).
[625] RCC § 22E-210.
[626] RCC § 22E-301.
[627] RCC § 22E-302.
[628] RCC § 22E-303.
[629] Consider, for example, a person in Arizona who publishes a tweet in March stating, "If that candidate wins the election, everyone should riot in D.C.!" That person should not be held criminally responsible for inciting a riot that occurs in November. Consider also a person who stands in the middle of the National Mall, urging people to form riot immediately, without drawing any attention at all. That person should not be held criminally responsible for inciting a riot that never occurred at all.

(3) *USAO, App. C at 360, recommends including both misdemeanor and felony gradations of rioting. USAO notes that approximately half of reform jurisdictions include multiple gradations for rioting (First Draft of Report #36, App. J at 446).*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The unique harm addressed by the rioting statute and not otherwise accounted for by other RCC offenses, stems from the person's criminal behavior occurring in a group context where it has the potential to increase others' criminal behavior. This increased risk, punishable in addition to the punishment from any actual crime or attempted crime (which is punished more directly by other RCC offenses), is relatively low and does not merit a felony gradation. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[630]
- Notably, although approximately half of reform jurisdictions include multiple gradations for rioting, most of these jurisdictions grade based on presence or use of a dangerous weapon[631] and only seven grade the offense based on the infliction of physical injury or substantial property damage.[632] The RCC contains multiple crimes that separately authorize punishment for possession of a dangerous weapon in connection with a crime or property damage or bodily injury.

(4) *USAO, App. C at 361 and 415-419, recommends eliminating the right to a jury trial for a misdemeanor form of rioting.*

- The RCC does not incorporate this recommendation, which predates the RCC's updated jury demandability recommendation, because it is inconsistent with the RCC general approach to jury demandability. First Amendment protections may also apply to conduct that otherwise may constitute rioting.
- As of the Second Draft of Report #41, the CCRC generally recommends that the RCC classify all Class A misdemeanors and inchoate versions of those offenses as jury demandable offenses, improving the consistency of the revised statutes.
- In addition to the general RCC approach to jury demandability, the RCC rioting particularly merits jury demandability because it, in part, is likely to impact demonstrators. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may

[630] Question 2.19 provided the scenario: "Causing $500 of property damage to a store while in a crowd in which at least ten others are also damaging property." Question 2.19 had a mean response of 4.6, less than one class above the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code. Notably, however, in addition to rioting, a person engaged in this conduct could also be charged with fourth degree criminal damage to property, an offense recommended as a Class A felony.

[631] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[632] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

involve the exercise of civil liberties.[633] The DCCA recently noted, "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."[634]

(5) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

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[633] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
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> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[634] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

RCC § 22E-4302. Failure to Disperse.

(1) *USAO, App. C at 361, recommends requiring the same number of actors to trigger liability for failure to disperse under RCC § 22E-4301 and for rioting under RCC § 22E-4302.*

- The RCC revises the commentary to clarify the alignment of the two statutes. The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot. This change clarifies the revised commentary.

(2) *USAO, App. C at 361 and 415-419, recommends eliminating the right to a jury trial for failure to disperse. USAO says that "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."*

- The CCRC incorporates this change by eliminating jury demandability for this offense. As of the Second Draft of Report #41, the CCRC recommends classifying failure to disperse as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- As explained in the commentary, the revised offense is not equivalent and does not replace 18 DCMR § 2000.2. That offense, prosecutable by the Attorney General for the District of Columbia, remains available as a charge.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying failure to disperse as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

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

(1) *OAG, App. C at 379-380, recommends regrading the offense to provide three penalty gradations: first degree for possession of restricted pistol bullets; second degree for possession of a firearm without a registration certificate; and third degree for possession of ammunition without a firearm registration certificate. OAG notes that possession of a restricted bullet is punishable by ten years under current District law.*[635]

- The RCC partially incorporates this recommendation by regrading possession of one or more restricted bullet as first degree. The OAG recommendation to grade possession of restrict bullets separately as a first degree offense would result in a disproportionate penalty by rating the possession higher than a "destructive device"—e.g., an explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device. This change improves the proportionality of the revised statute.

(2) *OAG, App. C at 380, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adopting OAG's proposed language. This change clarifies the revised offense.

(3) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[636]

a. The RCC incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part now specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(4) *OAG, App. C at 390, recommends a conforming amendment to D.C. Code § 7-2501.01(7)(C) that clarifies when the use of lacrimators are not considered destructive devices. OAG proposes, "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-defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to is use."*

a. The RCC partially incorporates this recommendation by revising the possession of an unregistered firearm, destructive device, or ammunition offense to exclude all lacrimators and sternutators (natural and manmade

[635] D.C. Code § 7-2507.06(a)(3)(A).
[636] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

compounds). The exclusion states, "A person does not commit an offense under subsection (a) of this section for possession of a lacrimator or sternutator." This change improves the proportionality of the revised offense.

(5) *PDS, App. C at 392, recommends expanding the exclusion from liability for empty cartridge casings or shells to also include spent bullets. PDS explains, spent bullets, which have legitimate uses for jewelry and crafts, do not present a public safety concern because they cannot be readily reused in a firearm.*

a. The RCC incorporates this recommendation by adopting PDS' proposed exclusion. This change improves the clarity and proportionality of the revised offense.

(6) *USAO, App. C at 395, recommends that the RCC clarify that prosecutorial authority will remain consistent with current law. USAO specifically recommends revising the prosecutorial authority provision to state, 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."*[637] *USAO explains that D.C. Code § 23-101(d) allows USAO to prosecute some OAG charges with OAG's consent.*

a. The RCC does not incorporate this recommendation because it would make the revised statute more ambiguous. The RCC recommendation clearly states that prosecutorial authority lies with the Attorney General. Similar language appears in other current District statutes.[638] The Council has no power, under the Home Rule Act, to alter prosecutorial authority and any misassignment of authority is legally without effect whether or not the RCC (or any Council-passed statute) says it is or provides caveats.

(7) *USAO, App. C at 396, recommends eliminating the right to a jury trial under this section for attempts. USAO states, "[I]t 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."*

a. The RCC does not incorporate this recommendation, which predates the RCC's penalty and jury demandability recommendations, because it is inconsistent with the RCC general approach to jury demandability. In the First Draft of Report #41 (October 3, 2019), the RCC classifies first degree possession of an unregistered firearm, destructive device, or ammunition as a Class A misdemeanor and second degree possession of an unregistered firearm, destructive device, or ammunition as a Class B misdemeanor.[639] In the Second Draft of Report #41, the RCC classifies all Class A and Class B misdemeanors and inchoate versions of those offenses as jury demandable offenses. This improves the clarity and consistency of the revised statutes.

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[637] D.C. Code § 23-101.

[638] *See, e.g.,* D.C. Code §§ 22-2305; 22-1319.

[639] Accordingly, the subsection specifying jury demandability is stricken from the offense definition as unnecessary.

b. The first draft of the revised carrying a pistol in an unlawful manner offense[640] did not include a jury trial provision because it replaces offenses that do not carry any jail time under current law.[641] In the First Draft of Report #41 (October 3, 2019), the RCC classifies carrying a pistol in an unlawful manner as a Class A misdemeanor.

c. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[642] The DCCA recently noted, "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."[643]

(8) *USAO, App. C at 396, recommends disaggregating possession of a firearm and possession of ammunition. USAO states, "Under current law, these are covered by different offenses" and says that "they relate to different conduct, instead of varying levels of the same conduct."*

a. The RCC does not incorporate this recommendation because it would result in a less logical organization of the revised statutes. Under current law, these offenses are covered by the same, multi-grade penalty provision.[644] The offenses are closely related insofar as, generally, a firearm requires ammunition and ammunition requires a firearm to be useful as a lethal weapon.

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[640] RCC § 7-2509.06.

[641] 24 DCMR §§ 2343.1; 2344.

[642] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
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> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[643] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[644] D.C. Code § 7-2507.06.

(9) *USAO, App. C at 396, recommends eliminating the exclusion from liability for possession of a firearm frame, receiver, muffler, or silencer. In the alternative, 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.*

a. The RCC does not incorporate this recommendation because it would create an inconsistent definition and may be confusing. Both the RCC and current D.C. Code offense defines the term "firearm" using meaning specified in D.C. Code § 7-2501.01, which includes frames, receivers, mufflers, and silencers. Consequently, without an exclusion, the revised statute would criminalize the possession of a frame, receiver, etc. as possession of an unregistered firearm. The RCC separately criminalizes possession of a silencer.[645] Specifying "solely" may raise the question: What, in addition, *would* render possession of a receiver or frame criminal—e.g., a frame and a bullet, or a receiver and a frame?

(10) *USAO, App. C at 397, recommends revising the exclusion from liability for participation in a in a lawful recreational firearm-related activity to require proof that the person was traveling to or from a firearm-related activity, possession of the firearm is lawful in the person's jurisdiction of residence, and the firearm is being transported lawfully.*

a. The RCC does not incorporate this recommendation because it would make the statutory language confusing. The RCC exclusion from liability in subparagraph (c)(2)(A) does not concern transportation of a firearm; it concerns using the firearm during an activity. For example, if the District of Columbia had a gun range, gun show, or shooting contest, a person would not be liable for lawfully participating in that activity. The USAO recommendation would require a person who has arrived at the location of a lawful recreational firearm activity to present proof that "the person is traveling to or from a lawful recreational firearm-related activity outside the District."

[645] RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory.

RCC § 7-2502.15. Possession of a Stun Gun.

(1) *OAG, App. C at 381, recommends revising the commentary to clarify 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. OAG proposes adding the following example: "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."*

- The RCC does not incorporate this recommendation because it would change current law in a way that reduces the clarity and proportionality of the revised statute. Current D.C. Code § 7-2502.15(c) prohibits possession of a stun gun in "(1) A building or office occupied by the District of Columbia, its agencies, or instrumentalities" as well as "(3) A building or portion thereof, occupied by a children's facility, preschool, or public or private elementary or secondary school." This language appears to prohibit possession only in the office or building part that is actually occupied by a government agency or a facility serving children. It does not, for example, prohibit possession in "a building occupied by a school*, or a part thereof*." Prohibiting stun guns in the entire location would lead to counterintuitive outcomes. Consider, for example, two locations of the same chain of grocery stores, one occupying the ground floor of a District office building at 1100 Fourth Street, SW and the other occupying the ground floor of a privately-owned building at 490 L Street, NW. Each store has its own private entrance. OAG's proposed language would criminalize possession of a stun gun in the first grocery store and not the second, even though there is no increased risk of danger in that location. In such an instance, the RCC prohibits possession of a stun gun only if that store displays clear and conspicuous signage.[646]
- The statutory language and commentary are revised to clarify the scope of the offense.

(2) *OAG, App. C at 381, recommends prohibiting stun guns within the property line of buildings containing schools, daycare facilities, and the like. OAG says, "These facilities use the grounds around their buildings as extensions of those facilities so that children can get outdoor play and exercise."*

- The RCC partially incorporates this recommendation by amending subparagraphs (a)(2)(A) and (B) to include "[a] building, building grounds, or part of a building" that the person knows is occupied by the District or a facility serving children. For the reasons stated in comment #1 above, the statute does not reach the property line of every building that contains such a protected location. This change clarifies the revised statute.

[646] Consider also a sprawling 10-story shopping center that has a daycare with its own secured entrance in the basement. Under OAG's proposal, criminal liability would attach upon entering the retail portion only.

(3) *PDS, App. C at 393, recommends replacing the term "public youth center" with "public recreation center," a more commonly used term in the District.*

- The RCC incorporates this recommendation by adopting PDS' proposed language. This change improves the clarity of the revised offense.

(4) *The CCRC recommends revising the affirmative defense provision to more closely resemble other RCC provisions. Specifically, the word "actor" is substituted for "the accused," the phrase "a person lawfully in charge" is substitute for "the person lawfully in charge," and the defined term "in fact"*[647] *is inserted.*

- This change improves the clarity and consistency of the revised statute.

[647] RCC § 22E-207.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

(1) *PDS, App. C at 392-393, recommends expanding the exclusion from liability for theatrical performances to also include possession "related to" an "educational or cultural presentation." PDS states, "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."*

- The RCC partially incorporates this recommendation by amending the exclusion to apply to possession as part of any lawful "educational or cultural presentation." The phrase "related to" is not included, however, as the term is vague and subparagraph (b)(2)(B) already specifically excludes liability for transporting the instrument or weapon, provided that it is unloaded and securely wrapped.

(2) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 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.*

- The RCC incorporates this recommendation by stating in RCC § 22E-201, in the General Part, the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(3) *USAO, App. C at 395, recommends that the CCRC clarify that prosecutorial authority will remain consistent with current law. USAO specifically recommends revising the prosecutorial authority provision to state, 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."*[648] *USAO explains that D.C. Code § 23-101(d) allows USAO to prosecute some OAG charges with OAG's consent.*

- The RCC does not incorporate this recommendation because it would make the revised statute more ambiguous. The RCC recommendation clearly states that prosecutorial authority lies with the Attorney General. Similar language appears in other current District statutes.[649] The Council has no power, under the Home Rule Act, to alter prosecutorial authority and any misassignment of authority is legally without effect whether or not the RCC (or any Council-passed statute) says it is or provides caveats.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying carrying an air or spring gun as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(5) *The CCRC recommends reordering the offense elements to clarify that it is the actor that must be outside a building and it is the weapon that must be conveniently accessible and within reach.*

[648] *See* D.C. Code § 23-101.
[649] *See, e.g.,* D.C. Code §§ 22-2305; 22-1319.

- This change clarifies, but does not substantively change, the revised offense.

RCC § 7-2507.02. Unlawful Storage of a Firearm.

(1) *OAG, App. C at 382, recommends revising the offense to include people who possess an unregistered firearm. OAG says, for example, that leaving a firearm in a girlfriend's closet poses the same danger whether the weapon is registered or not.*
- The RCC incorporates this recommendation by striking the limiting language "registered under D.C. Code § 7-2502.07." This change eliminates a gap in liability in the revised statute.

(2) *OAG, App. C at 382-383, recommends revising the offense to include only some (unspecified) premises that are not under the defendant's control. OAG says, for example, that leaving a firearm in a girlfriend's closet may pose an equivalent danger if children can access the firearm in either situation.*
- The RCC incorporates this recommendation by striking the limiting language, "On premises under the actor's control." This change eliminates a gap in liability in the revised statute.

(3) *OAG, App. C at 388-389, recommends redrafting the offense definition to clarify that the word "neither" modifies both sub-subparagraphs that follow.*
- The RCC incorporates this recommendation by revising the statutory language to require that the actor knowingly possesses a firearm that is "(A) Not conveniently accessible and within reach; (B) Not in a securely locked container; and (C) Not in another location that a reasonable person would believe to be secure."

(4) *The CCRC recommends removing gendered pronouns from the statutory text.*
- This change does not further change District law.

RCC § 7-2509.06. Carrying a Pistol in an Unlawful Manner.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying carrying a pistol in an unlawful manner as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends revising the offense to include people who possess a firearm without a license to carry because the unlawful carry method poses the same danger whether the person is licensed or not*.

- This change eliminates a gap in liability in the revised statute.

(3) *The CCRC recommends revising the phrase "Outside a person's home or place of business" to state "Outside* the actor's *home or place of business," to clarify that the offense applies to a person who is inside another person's home or business.*

- This change clarifies the revised statute and does not further change District law.

(4) *The CCRC recommends revising the drafting to clarify that it is the actor (and not the pistol) that must be outside the actor's home or place of business and it is the pistol that must be conveniently accessible and within reach. The words "in a location that is:" are stricken from the first element of the offense. The word "While" is added to the second element of the offense. The phrase "The pistol is" is added to the third element of the offense.*

- This change clarifies, but does not substantively change, the revised statute.

RCC § 16-1022. Parental Kidnapping.

(1) *OAG, at App. C. 30, recommends specifying that certain grades of parental kidnapping are designated as felonies, regardless of the maximum allowable penalty, for the purposes of D.C. Code § 23-563.*

- The RCC incorporates this recommendation by adding to the statute subparagraph (i)(6), which reads: "Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563." This specifies that the provisions under D.C. Code § 23-563 apply to first and second degree parental kidnapping.

(2) *OAG, at App. C 444, notes that the word "complainant" as used in paragraph (d)(3) is ambiguous, and could refer to either the child taken or concealed, or the parent or guardian of the child. OAG recommends replacing the word "complainant" with the words "person taken, concealed, or detained[.]"*

- The RCC incorporates this recommendation by amending the statute using OAG's suggested language. This change improves the clarity of the revised criminal code.

(3) *OAG at App. C. 444, recommends deleting subsection (h), which specifies that the Office of the Attorney General has prosecutorial authority for parental kidnapping. OAG says that "the Council is without authority to designate OAG as [sic] agency to prosecute this offense."*

- The RCC incorporates this recommendation by deleting subsection (h). The CCRC has not independently researched whether there are corresponding historic police or municipal ordinances or regulations that would provide a basis for OAG reliability and relies on the agreement of USAO and OAG regarding this matter.[650] This change improves the clarity of the revised statute.

(4) *OAG, at App. C 444-445, recommends amending the penalty provision concerning reimbursement of expenses by stating: "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."*

- The RCC incorporates this recommendation by amending the statute using OAG's suggested language. This change improves the clarity of the revised criminal code.

(5) *PDS, at App. C. 450, recommends that gradations of parental kidnapping that require taking or concealing out of the District of Columbia, should also require that the actor did so "with the purpose of avoiding detection[.]" PDS notes that merely taking a child across the border briefly to run an errand would increase the severity of the offense.*

[650] This matter was discussed at the agency's February 5, 2020 Advisory Group meeting, which included an attendee from USAO-DC.

- The RCC partially incorporates this recommendation by amending the statute to require that the actor takes or conceals the person outside of the District for more than 24 hours. Under this revision, first, second, and third degree parental kidnapping would not include briefly taking a child out of the District. This change addresses the specific examples offered by PDS. However, taking a person out of the District for more than 24 hours for any reason would subject the actor to higher punishments because it may make recovery of the child substantially more difficult.[651]

(6) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

[651] For example if a person takes a child to California not for the purpose of avoiding detection, but for the purpose of finding a job, that person has still made it substantially more difficult for the child to be recovered.

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying possession of an open container of consumption of alcohol as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(2) *OAG, App. C at 440-441, recommends revising the definition of "public highway" consistent with the definition of "highway" in Title 50 of the D.C. Code (concerning driving while impaired). OAG notes that the District definition includes a parking lot, whereas the federal definition may not.*

- The RCC incorporates this recommendation by amending the definition of "highway" to have the meaning specified in D.C. Code § 50-2206.01. This change improves the consistency of the revised statute.

(3) *OAG, App. C at 441-442, recommends narrowing the exclusion from liability for vehicles that operate on rails to apply to passengers only. OAG explains, "Person's [sic.] 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."*

- The RCC incorporates this recommendation by striking the exclusion from liability for vehicles that operate on rails. Metrorail passengers are sufficiently covered by the exclusion from liability for persons located in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation who are not operating the vehicle. This change eliminates an unnecessary gap in liability in the revised statute.

(4) *OAG, App. C at 442, recommends broadening the revised offense to include persons who are operating* or *in physical control of a motor vehicle, consistent with the District's DUI statute.*[652] *OAG does not define or describe the meaning of the phrase "in physical control."*

- The RCC does not incorporate this recommendation at this time. It is not clear how the plain language proposed by OAG, "in physical control," differs from the current RCC "operation," and the CCRC has not yet reviewed the District DUI statute referenced by OAG's comment or other traffic offenses. However, the agency's initial research indicates that at least some District case law concerning the DUI and other traffic statutes treats the phrase "in physical control" as superfluous to the term "operating."[653] Moreover, the DUI statute is governed by a wide array of

[652] D.C. Code § 50-2206.11.

[653] *See Fadul v. D.C.,* 106 A.3d 1093, 1097 (D.C. 2015) ("However, this court's case law makes it clear that "operating" in this context "means being in actual physical control of the vehicle, capable of putting the vehicle into movement or preventing its movement." *Maldonado v. District of Columbia, 594 A.2d 88, 89*

other (not "operating" or "in physical control") specialized definitions.[654] Until the agency has an opportunity to fully review traffic offenses,[655] it does not define "operating" nor adopt the recommended language.

(5) *OAG, App. C at 442, notes that the revised offense treats public consumption of alcohol differently than public consumption of marijuana under D.C. Code § 48-911.01. OAG states, "[S]hould 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."*

- The RCC has not yet issued a recommendation for a revision to the District's public consumption of marijuana laws and may do so at a later date, if time allows under the Commission's statutory mandate.

(D.C.1991) (internal quotation marks and citations omitted)*"). See also Maldonado v. D.C.*, 594 A.2d 88, 89 (D.C. 1991) ("This court has held that the term "operating," in a prosecution for operating a vehicle after suspension of a driver's license, means being "in actual physical control of the vehicle, capable of putting the vehicle into movement or preventing its movement…" *Houston v. District of Columbia,* 149 A.2d 790, 792 (D.C.1959), cited with approval in *Jackson v. District of Columbia,* 180 A.2d 885, 887 (D.C.1962); *see also United States v. Weston,* 151 U.S. App. D.C. 264, 268 n. 24, 466 F.2d 435, 439 n. 24 (1972).").

[654] D.C. Code § 50-2206.01. Definitions.

[655] The CCRC may develop recommendations for the District's DUI and other traffic statutes at a later date, if time allows under the Commission's statutory mandate

RCC § 48-904.01a. Possession of a Controlled Substance.

(1) *OAG, at App. C. 362-363, recommends that first degree possession of a controlled substance should include all substances in Schedules I and II, instead of the list of substances in paragraph (a)(2).*
- The RCC does not incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The substances listed in paragraph (a)(2) have been taken verbatim from the current definitions of "abusive" or "narcotic" substances. Although some of these substances are in Schedule II, current law designates these specific substances for the most severe penalties when they are distributed, manufactured, or possessed with intent to distribute or manufacture.

(2) *PDS, at App. C. 368, recommends decriminalizing simple possession of all controlled substances.*
- The RCC does not incorporate this recommendation because it would create a gap in law. Support among District voters for maintaining criminal penalties for simple possession of controlled substances is apparent in the CCRC public opinion surveys.[656]

(3) *PDS, at App. C. 368, recommends that if simple possession is not decriminalized, RCC § 48-904.01 (e)(1) should be amended to allow judges to defer further proceedings even if the defendant has been previously convicted of a controlled substance offense in the District or in another jurisdiction, or if the defendant has had proceedings previously deferred under this paragraph.*
- The RCC incorporates this recommendation by codifying a provision to allow judges to defer proceedings under § 48-904.01 (e)(1) even if the defendant has been previously convicted of a controlled substance offense, or if the defendant has previously had proceedings deferred under the paragraph. This change improves the proportionality of the revised criminal code.

(4) *PDS, at App. C. 368-369, recommends that the RCC adopt provisions from D.C. Code § 7-403, which provide 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.*
- The RCC incorporates this recommendation by codifying a provision that allows a person to avoid liability when seeking assistance for a drug overdose. This change will improve the proportionality of the revised criminal code.

(5) *USAO, at App. C. 374, recommends retaining felony penalties for possession of liquid PCP.*

[656] See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 3.01 provided the scenario: "Possessing a small vial of liquid PCP (a controlled substance) for personal use." Question 3.01 had a mean response of 5.3, falling between a class 6 milestone corresponding to causing significant bodily injury (corresponding to felony assault, currently a 3 year offense under the D.C. Code), and a class 4 milestone corresponding to causing a minor bodily injury (corresponding to simple assault, currently a 10 year offense in the D.C. Code).

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. CCRC public opinion surveys suggest that felony penalties for personal possession of liquid is not supported by most District voters.[657] Higher, felony-level penalties are available under the RCC for possession of liquid PCP of any amount when that possession is with intent to distribute.

(6) *USAO, at App. C. 374, recommends using only one penalty gradation for possession of a controlled substance, which would apply to any controlled substance.*

- The RCC does not incorporate this recommendation because it would change current District law in a way that may authorize disproportionate penalties. Adopting this recommendation would risk disproportionately severe penalties. Dividing possession of a controlled substance into penalty grades recognizes distinctions between substances identified as "abusive" or "narcotic," and other controlled substances. Under the USAO's proposal, possession of Schedule V substances with the lowest risk of harm or abuse would be penalized the same as possession of the most harmful substances.

(7) *USAO, at App. C. 375 recommends that subsection (e) cross reference "RCC § 48-901.02" to "D.C. Code § 48-901.02."*

- The RCC does not incorporate this recommendation at this time because it may reduce the clarity of the revised statute's references, but this matter will be reevaluated when recommendations are finalized for the Council and Mayor. The RCC updates its references to definitions across the RCC. All defined terms are included in RCC § 22E-701, including the terms "controlled substance," "immediate precursor," "opium poppy," "person," and "poppy straw." The cross references in subsection (e) are updated accordingly.

(8) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

[657] See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 3.01 provided the scenario: "Possessing a small vial of liquid PCP (a controlled substance) for personal use." Question 3.01 had a mean response of 5.3, falling between a class 6 milestone corresponding to causing significant bodily injury (corresponding to felony assault, currently a 3 year offense under the D.C. Code), and a class 4 milestone corresponding to causing a minor bodily injury (corresponding to simple assault, currently a 10 year offense in the D.C. Code).

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

(1) *OAG, at App. C. 362-363, recommends that first degree possession of a controlled substance should include all substances in Schedules I and II, instead of the list of substances in paragraph (a)(2).*

- The RCC does not incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The substances listed in paragraph (a)(2) have been taken verbatim from the current definitions of "abusive" or "narcotic" substances. Although some of these substances are in Schedule II, current law designates these specific substances for the most severe penalties when they are distributed, manufactured, or possessed with intent to distribute or manufacture.

(2) *OAG, at App. C. 364, recommends that this offense should be subject to an enhancement for committing the offense while armed in addition to one other enhancement.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. While in principle the stacking of enhancements may appear desirable because it reflects many ways in which a crime may be categorically more serious, in practice the stacking of enhancements can quickly create extremely high punishments that dwarf the predicate conduct. For example, distribution of a controlled substance to a minor generally is considered more serious than distribution to a non-minor and arguably deserves a greater statutory punishment. The same is true, however, for other possible aspects of a case such as, for example, if the actor has a prior felony conviction, the actor carried a dangerous weapon, or the actor committed the crime near a school or playground. However, raising the statutorily authorized imprisonment penalty for each type of enhancement would result in an increase of four penalty classes, equating the conduct with offenses such as second degree sexual assault, kidnapping, or sex trafficking of minors when even such a worst case form of drug trafficking is not equivalent to those offenses. To avoid such disproportionate outcomes, the RCC recommends limiting the stacking of penalty enhancements. Individual offenses incorporate (but cap) several types of possible enhancements, while the general enhancements in RCC Chapter 6 (e.g. repeat offender or hate crimes) do stack additional penalties. Within the RCC's authorized range of statutory penalties, limiting stacking as it does, a sentencing judge retains sufficient discretion to weight the seriousness of the conduct taking into account the seriousness of the particular facts of the case which may or may not be captured in statutorily-specified enhancements.[658] The

[658] While the RCC and current D.C. Code codify an array of circumstances that raise the penalty classification of an offense, these circumstances, even when present, may have little bearing on the seriousness of a particular case. Conversely, circumstances in a particular case that are not captured in a statutory enhancement may be highly relevant to seriousness. Statutory enhancements are just one factor in

RCC's limited form of stacking produces aggregate penalties within the range of most current court sentencing decisions and better accords with polling of District voters.[659]

- The RCC seeks to ensure that the totality of criminal punishment an actor faces for conduct is proportionate to that conduct—but that approach requires examining all the relevant crimes an actor may be charged with (and punished for) based on the actor's conduct. Unlike the current D.C. Code, the RCC does not examine just one crime (and its enhancements) to see if the punishment is proportionate to the conduct, because such a comparison misrepresents the total liability an actor faces. Notably, with respect to trafficking a controlled substance, there are an array of separate weapons offenses in the RCC (and current D.C. Code) that can be charged and provide additional liability for a person who carries a firearm when distributing drugs.[660]

(3) *OAG, at App. C. 364 recommends that sub-subparagraph (g)(6)(C)(i) be amended to clarify that the enhancement applies to offenses committed based on the property line, not the building, and by extending the relevant distance from 100 feet to 300 feet by stating: "within 300 feet of the property line of a school, college, university…"..*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change improves the clarity of the revised criminal code.

(4) *OAG, at App. C. 365, recommends that the defense under 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." OAG does not recommend specific language.*

- The RCC incorporates this recommendation by revising the statute as suggested by OAG. Specifically, the defense is revised to state: "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 *and, either the quantity of the controlled substance*

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ensuring proportionate sentencing, and even in the absence of such enhancements judges are provided with a range of possible punishments to determine a proportionate punishment.

[659] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

[660] For this reason, as well as the clear practical effect any factor (whether a statutory enhancement or not) any more serious form of conduct has on a judge's exercise of their discretion in sentencing, the CCRC disagrees with the OAG statement 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." Retributive measures of proportionality aside, whether the existence of an incrementally higher statutory penalty due to a codified penalty enhancement is a specific deterrent on an individual is also questionable. General research on deterrence summarized by the Department of Justice's National Institute of Justice indicates there is little effect by increasing imprisonment penalties. See https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

distributed does not exceed the amount for a single use by the recipient, or recipient intends to immediately use the controlled substance.". This change may eliminate a gap in liability and improves the proportionality of the revised statutes.

(5) *PDS, at App. C. 369, recommends that since the RCC grades penalties based on weight, the statute be amended to specifically address controlled substances contained within edible products. PDS recommends the following language: 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.*

- The RCC incorporates this recommendation by revising the statute as suggested by PDS. Specifically, the statute is revised to state: "For controlled substances that are contained within edible products and that are intended to be consumed as food 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 compound or mixture containing a controlled substance." This change improves the clarity and proportionality of the revised statutes.

(6) *PDS, at App. C. 370, recommends amending the statute to clarify that the weight of non-consumables, such as containers or by product of consuming the substance, should not be included in the weight of the mixture of the controlled substance.*

- The RCC incorporates this change by revising the statute as suggested by PDS. Specifically, the statute is revised to state: "The weight of a non-consumable container in which a controlled substance is stored or carried shall not be included in the weight of the compound or mixture containing the controlled substance." This change improves the clarity and proportionality of the revised statutes.

(7) *PDS, at App. C. 371, recommends that the penalty enhancement for distribution to a person under the age of 18 should require that the defendant was reckless as to the age of the person to whom the controlled substances were distributed.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the consistency and proportionality of the revised statutes.

(8) *PDS, at App. C. 371, recommends amending the commentary with respect to the age-based penalty enhancement to clarify that the enhancement does not apply if the defendant distributes controlled substance to an adult, who then distributes the substance to a person under the age of 18.*

- The RCC incorporates this recommendation by amending the commentary as suggested. This change improves the clarity of the RCC commentary.

(9) *PDS, at App. C. 371, recommends that the words "public youth center" be replaced with "public recreation center." PDS does not intend for this to substantively change the scope of the enhancement.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised statutes.

(10) *PDS, at App. C. 371-372, recommends re-drafting the exclusion to the defense under paragraph (h)(1). PDS recommends changing the words "value or future expectation of financial gain" to "value or expectation of future financial gain[.]" This recommendation is clarificatory, and is not intended to change the scope of the defense.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised criminal code.

(11) *USAO, at App. C. 373, recommends adding the words "a compound or mixture containing [a controlled substance]" to every gradation of controlled substance offenses.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised statutes.

(12) *USAO, at App. C. 375, opposes including a penalty enhancement for possessing a firearm while committing trafficking of a controlled substance instead of a stand-alone offense for the same conduct and offenses against persons.*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC approach to differentiating crimes against persons from other less inherently dangerous crimes, does not logically organize offenses, and may authorize disproportionate penalties.

(13) *USAO, at App. C. 375-376, recommends that if the firearm enhancement is retained in the trafficking offense, the words "in furtherance of and" should be deleted.*

- The RCC does not incorporate this recommendation. Trafficking a controlled substance while possessing a weapon that has no relationship to the offense does not warrant a heightened penalty. Under USAO's proposal, a person packaging a controlled substance with a legally registered handgun in the room would be subject to a penalty enhancement, even if the handgun had no relationship to the offense. The fact that an actor possesses a firearm while trafficking a controlled substance may lead to an inference that the actor may use the firearm at some point, in furtherance of the crime, but the RCC does not presume this fact. Illegally possessing a firearm unconnected to the trafficking crime is subject to liability and consecutive punishment under other RCC offenses.

(14) *USAO, at App. C. 376, recommends removing the defense under § 48-901.01b(h)(1) 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. USAO specifically notes that in some cases, it will be difficult to*

prove that a person intended to distribute a controlled substance in exchange for something of value.

- The RCC partially incorporate this recommendation by narrowing the defense. Specifically, the defense is revised to state: "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 *and, either the quantity of the controlled substance distributed does not exceed the amount for a single use by the recipient, or the recipient intends to immediately use the controlled substance."* This change may eliminate a gap in liability and improves the proportionality of the revised statutes. Notably, under the RCC current law, a person possessing a controlled substance in a quantity consistent with distribution is still free to argue that he intends to consume the substances himself.

(15) *USAO, at App. C. 425, recommends that all gradations of trafficking of a controlled substance be classified as felonies.*

- The RCC does not incorporate this recommendation because it would change current law in a way that may authorize disproportionate penalties. Under the RCC, trafficking of substances that have been designated "abusive" or "narcotic," are all felonies while trafficking substances in schedules that have a lower propensity for harm and addiction, and greater medical benefit constitutes fourth and fifth degree trafficking, which are classified as misdemeanors. This distinction in penalties is warranted by the dangerousness of the controlled substances involved and, in significant part, reflects current law under which trafficking of a Schedule V substance is subject to imprisonment for a maximum of one year.

(16) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (h)(6) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

(1) *USAO reiterates all of its comments and recommendations with respect to trafficking of a controlled substance.*

- The RCC does or does not incorporate recommendations in accordance with changes to the trafficking of a controlled substance statute, and for the reasons stated there.

(2) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (g)(6) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 22E 48-904.10. Possession of Drug Manufacturing Paraphernalia.

(1) *OAG, at App. C. 365-366, recommends amending paragraph (b)(2) to clarify that the exclusion to liability only applies if the actor possessed an item "solely to package or repackage a controlled substance for that person's own use," or with intent to "solely to package or repackage a controlled substance for that person's own use[.]" OAG notes that this will clarify that the exclusion would not apply if a person possesses paraphernalia to package a controlled substance for that person's own use, as well as for other illicit purposes.*

- The RCC incorporates this recommendation by amending the statute as suggested by OAG. This change improves the clarity of the revised statutes.

(2) *PDS, at App. C. 370, recommends amending the offense to exclude possession of items knowing that they have been used to manufacture a controlled substance. PDS argues that many common items can be used to manufacture a controlled substance, and individuals may share homes with people who have used these items for manufacturing.*

- The RCC incorporates this recommendation by deleting the phrase "That has been used to manufacture a controlled substance." Merely possessing items that previously have been used to manufacture a controlled substance, without intent to manufacture additional controlled substances, does not warrant criminalization. Although the RCC often criminalizes possession of various items with intent to use them to commit a criminal offense, the RCC generally does not criminalize possession of items that previously have been used to commit a crime. Logically, a person who has previously actually used an object to manufacture paraphernalia at that time also possessed the object with intent to use the object to manufacture a controlled substance—and so remains liable under the revised statute. Commentary has been updated to clarify that a person who possesses an item and used it to manufacture a controlled substance in the past may still be convicted under this statute. This change improves the proportionality of the revised criminal code.

(3) *USAO, at App. C. 377, says it "opposes decriminalization of drug paraphernalia." (USAO does not provide any specific re-drafting proposal, but presumably recommends that the revised statute be re-drafted to include possession of any items with intent to use the item to ingest or distribute a controlled substance as in current law.) USAO also notes that the draft revised statute did not separately define the term "manufacturing," but if the definition from D.C. Code § 48-901.02 (13) is applied, "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." USAO says that, "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 does not incorporate this recommendation because it may authorize disproportionate penalties. Mere possession of items with intent

to use them to ingest or distribute controlled substances does not warrant criminalization, particularly given the health risks that may arise from use of unsafe objects to ingest or inhale a controlled substance. The RCC maintains criminal penalties for trafficking of drug paraphernalia as provided in RCC § 48-904.11. The RCC will update the revised statute to clarify that the term "manufacture" is defined in RCC § 22-701, and will have the same meaning as under current D.C. Code § 48-901.02 (13). USAO is correct that the revised statute does not criminalize possession of items not intended for use in manufacturing a controlled substance. Substantial criminal penalties remain in other RCC statutes for possession with intent to distribute or distribution of controlled substances.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 48-904.11. Trafficking in Drug Paraphernalia.

(1) *OAG, at App. C. 366, says it is unclear why the revised trafficking of paraphernalia offense includes items intended for use in introducing a controlled substance into the human body, but the revised possession of paraphernalia offense does not.*

- The RCC incorporates this recommendation by amending the commentary to note that trafficking in certain types of paraphernalia, the possession of which is not criminal, reflects the greater seriousness of commercial conduct that may facilitate consumption of controlled substances. This change improves the clarity of the RCC commentary.

(2) *PDS, at App. C. 370, recommends that the exclusions to liability under subsection (c) should include distribution of items that will be used to smoke controlled substances.*

- The RCC incorporates this recommendation by amending the statute to exclude liability for a community organization's distribution of clean supplies for the smoking of a controlled substance. Specifically, the exception for community-based organizations is revised to state: "Is a community-based organization that sells or delivers, or possesses 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 for the ingestion or inhalation of a controlled substance*[.]" Such an effort to reduce the harm of smoking a controlled substance does not warrant criminal punishment. This change improves the proportionality of the revised statutes.

(3) *PDS, at App. C. 370, recommends that the exclusions to liability under subsection (c) should include the transfer or delivery of clean supplies from one user to another user. As currently drafted, the exclusion applies to community-based organizations, or persons authorized by subsection (b) of D.C. Code § 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.*

- The RCC incorporates this recommendation by amending the statute to exclude liability for any sale, distribution or possession with intent to sell or distribute unused hypodermic syringes or needles, regardless of whether the actor is a community based organization or authorized under D.C. Code § 48-1103.01. Specifically, the exclusion for distribution is revised to state: "A person does not commit an offense under this section when that person: . . . Sells, delivers or possesses with intent to sell or deliver an unused hypodermic syringe or needle[.]" This change to decriminalize the sale and distribution of needles and syringes is intended to reduce the harm of using needles and syringes that may transmit HIV, hepatitis, and other diseases. For more information on the public health justification for this change and other jurisdictions' similar efforts, see: https://www.cdc.gov/policy/hst/hi5/cleansyringes/index.html.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

D.C. Code §§ 7-2502.12 and 7-2502.13. Repeal of Possession of Self-Defense Sprays. Repeal of D.C. Code §§ 7-2502.12 (Definition of self-defense sprays) and 7-2502.13 (Possession of self-defense sprays).

(1) *OAG, App. C at 390, recommends a conforming amendment to D.C. Code § 7-2501.01 (7)(C) that clarifies when the use of lacrimators are not considered destructive devices. OAG proposes, "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-defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to is use."*

- The RCC partially incorporates this recommendation by revising the possession of an unregistered firearm, destructive device, or ammunition offense to exclude all lacrimators (natural and manmade compounds). The exclusion states, "A person does not commit an offense under subsection (a) of this section for possession of a lacrimator or sternutator." This change improves the proportionality of the revised statute.

Repeal of D.C. Code § 48-904.03a. Repeal of Maintaining Location to Distribute or Manufacture Controlled Substances.

(1) *OAG, at App. C. 367, recommends that the RCC include a more limited version of the offense that applies to the manufacture of methamphetamine. OAG states that this offense is warranted due to the "dangerousness associated with methamphetamine production[.]"*

- The RCC partially incorporates this recommendation. The RCC includes a new "Maintaining a Place for Methamphetamine Production" offense. The offense makes it an offense to "knowingly maintain[] or open[] any place to manufacture methamphetamine, its salts, isomers, or salts of its isomers." However, the term "manufacturing" is limited by the specific language in the revised statute to exclude maintaining or opening locations with the intent merely to engage in packaging, repackaging, labeling, or relabeling of methamphetamine. These types of manufacturing do not create the safety risks associated with actual production of methamphetamine. Accordingly, the revised offense specifically excludes maintaining or opening a place for only these purposes.

D.C. Code § 48-904.07. Repeal of Enlistment of Minors.

(1) *USAO, at App. C. 377, recommends amending the penalty enhancement under the trafficking of a controlled substance offense regarding trafficking to minors 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. USAO notes that this would ensure that "to the extent conduct prohibited by D.C. Code § 48-904.07 is prosecuted under an accomplice liability theory . . . there would be an enhanced penalty for enlisting a minor to distribute a controlled substance."*

a. The RCC incorporates this recommendation by amending the enhancements to the trafficking of a controlled substance offense to substantially include the language suggested by USAO. Specifically, an additional enhancement is included for: "The actor is, in fact, 21 years of age or older, and the actor engages in the conduct constituting the offense by knowingly enlisting, hiring, contracting, or encouraging any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of the actor."

RCC § 22E-102. Rules of Interpretation.

(1) *OAG, App. C at 464-465 recommends changing the second sentence of paragraph (a) to replace the text "If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined" with "To the extent necessary to resolve ambiguities in the plain statutory text, the structure, purpose, and history of the provision also may be examined." OAG says that its proposed language clarifies "what function the review…serves."*

- The CCRC does not incorporate this recommendation because it would make the revised statutes less clear and contravene longstanding District case law. As described in the commentary, ambiguities in the plain wording of statutory text is just one reason to look more broadly to the text's structure, purpose, and history. Longstanding District (and national) case law recognizes that notwithstanding apparent clarity in statutory text, examination of other sources may be necessary.[1] For example, when otherwise unambiguous text leads to absurd results, examination of other sources is warranted.[2] Courts are concerned about determining legislative intent when interpreting a statute and that is appropriately reflected in the current paragraph (a) of the RCC provision.

[1] *Peoples Drug Stores, Inc. v. D.C.*, 470 A.2d 751, 754 (D.C. 1983) (en banc) ("Although the "plain meaning" rule is certainly the first step in statutory interpretation, it is not always the last or the most illuminating step. This court has found it appropriate to look beyond the plain meaning of statutory language in several different situations. First, even where the words of a statute have a "superficial clarity," a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.").

[2] *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 65 (D.C. 1980) ("However, while (t)he plain meaning of the words is generally the most persuasive evidence of the intent of the legislature ... the plain meaning rule has limitations. It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results. And since the judicial function is to ascertain the legislative intention the Court may properly exercise that function with recourse to the legislative history, and may depart from the literal meaning of the words when at variance with the intention of the legislature as revealed by legislative history. (*District of Columbia National Bank v. District of Columbia*, 121 U.S.App.D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted). *See also Davis v. United States*, D.C.App., 397 A.2d 951 (1979).)").

RCC § 22E-204. Causation Requirement.

(1) *OAG, App. C at 554-556, recommends deleting paragraph (c)(2) which states: "When the result depends on another person's volitional conduct, the actor is justly held responsible for the result."*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties being imposed. If this paragraph is deleted, then reasonably foreseeability would be the only factor in determining legal causation. An actor would be held criminally responsible for any intervening volitional conduct of another as long as that conduct was reasonably foreseeable. This rule would be overbroad and too easily hold people criminally responsible for the acts of others, regardless of whether it is unjust to do so.[3] The OAG recommendation to make reasonable foreseeability the sole basis for determining legal causation for all offenses would go well beyond the DCCA en banc holding in *Fleming* which did not address causation in the felony murder or non-second degree murder context[4] (whereas the RCC provision applies to all offenses), specifically noted that there may be other considerations in establishing proximate cause besides reasonable foreseeability.[5]

(2) *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

[3] For example, A wants to end a romantic relationship with B. B is heartbroken, and tells A that as a result, B will commit suicide. A does not wish for any harm to come to B, but decides to end the relationship anyway. If B then commits suicide, under OAG's proposal, A would be liable for a homicide offense since A's conduct was a but-for cause of B's suicide, and B's volitional conduct was entirely foreseeable.

[4] *Fleming v. United States*, 224 A.3d 213, 228-29 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) ("The causation principles we have discussed in this case are generally applicable in second-degree-murder cases … this model instruction is not designed to address the issue of causation under the felony-murder statute. See *supra* at 226–27 (leaving open whether causation operates differently under felony-murder statute).").

[5] *Fleming v. United States*, 224 A.3d 213, 229 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) ("The instruction also does not address situations in which the decedent was dying anyway and the claim is that the decedent hastened death. Id. at 222. Although the instruction includes bracketed language to flag the issue of temporal attenuation, the instruction does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case. Id. at 224–25. The instruction does not address the unusual situation in which the theory is that the defendant caused death by an omission rather than an action. Finally, the instruction does not attempt to address the issue of "multiple sufficient causes." Id. at 222.").

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.

(3) *PDS, App. C at 574-575, recommends that RCC § 22E-204 be amended to include language which states, "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 RCC at this time partially incorporates this recommendation by amending the commentary to RCC § 22E-205, which defines the culpable mental state requirement for criminal liability, to note a presumption of concurrence. It is generally true that a basic requirement of criminal liability is that the defendant must have the requisite mental state at the time the defendant engages in the conduct constituting the offense.[6] The CCRC does not assume otherwise. As to particular drafting, the CCRC would welcome Advisory Group members' further comments on possible statutory language (PDS' recommendation or otherwise) to codify a concurrence requirement.

[6] *See Fleming v. United States*, 224 A.3d 213, 229–30 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) ("We have said that, "[i]f either the actus reus—the unlawful conduct—or the mens rea—the criminal intent—is *230 missing at the time of the alleged offense, there can be no conviction. Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state." Rose v. United States, 535 A.2d 849, 852 (D.C. 1987) (internal quotation marks omitted). We have recently suggested that the concept of concurrence contains exceptions and presents complications. Dawkins v. United States, 189 A.3d 223, 231 & n.11 (D.C. 2018). At least in general, though, considerations of concurrence would suggest that a defendant's acts that lead to a later death could provide the basis for a conviction for second-degree murder only if, at the time the defendant took those acts, the defendant had the mental state required for second-degree murder: intent to kill, intent to inflict serious bodily injury, or conscious disregard of the risk of death or serious bodily injury. Walker v. United States, 167 A.3d 1191, 1201 (D.C. 2017).").

(4) PDS, App. C at 575-580, recommends that paragraph (c)(2) should be redrafted to state, "*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." In other words, another person's volitional conduct would necessarily negate legal causation, unless the volitional conduct consists of lawful self-defense or defense of others.*

- The RCC does not incorporate this recommendation because the proposed standard would change current District law in a way that may result in disproportionate penalties being imposed. For example, consider if A inflicts significant but not immediately fatal injuries on B, who declines medical care due to religious beliefs, which then results in B's death. PDS's proposed language would categorically preclude finding that A legally caused B's death. This would be the case even if A knew of B's religious beliefs and specifically planned to caused B's death by inflicting non-fatal injuries, knowing that B would refuse necessary medical care. 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.

(5) *USAO, App. C at 591-592, recommends deleting paragraph (c)(2), or alternatively re-drafting paragraph (c)(2) as "When the result depends on another person's volitional conduct, the result is not attenuated by that conduct, or by the passage of time." USAO says that: "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."*

- The RCC does not incorporate USAO's recommendation to delete (c)(2) for the reasons described in the above entry regarding the same comment by OAG, App. C at 554-556.
- The RCC also does not incorporate USAO's proposed alternative drafting proposal at this time. USAO's comments state that legal causation may be negated even when intervening volitional conduct is reasonably foreseeable through principles of "attenuation." However, under the USAO recommended language it would remain unclear when intervening conduct becomes so attenuated as to negate legal causation, or what factors may be relevant in making this determination. By contrast, the RCC causation statute clarifies that this legal causation determination involves a *normative* judgment and the commentary identifies some relevant factors in making this judgment. Although paragraph (c)(2) does not create a clear bright line standard, it still provides fact finders with more guidance than asking them to determine whether the result was too attenuated by intervening volitional conduct.

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.

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

(1) *USAO, App. C at 492-493, recommends that the RCC retain an elements based merger test instead of including a fact-based approach to merger.* USAO's comment specifically raises concerns with paragraph (a)(4), which permits merger of offenses when "one offense reasonably accounts for the other offense[.]"

- The RCC does not incorporate this recommendation—to the extent that USAO is recommending merger only under a *Blockburger* test—because it may result in imposition of disproportionate penalties. However, a premise of the USAO comment appears to be incorrect. To clarify, the RCC's general merger provision under § 22E-214 does *not* include fact-based merger analysis.[7] The merger provisions in § 22E-214, including paragraph (a)(4), shall be applied to statutes in the abstract, based on the elements of the offense and the legislative purpose of the offense, and the specific facts of a given case do not guide merger decisions.
- The RCC merger rules, going beyond the traditional elements based *Blockburger* analysis, are necessary to prevent duplicative convictions and penalties based on a single act or course of conduct. Relying solely on a strict elements-based merger test may improperly allow multiple convictions due to minor or technical distinctions between statutes. For example, the RCC robbery statute includes taking property by communicating "that the actor immediately will cause the complainant or another person present to suffer bodily injury, a sexual act, a sexual contact, confinement, or death[.]" The RCC criminal threats statute requires communicating that "the actor will cause a *criminal* harm . . . with intent that the communication be perceived as a serious expression that the actor would cause the harm[.]" Under a strict (*Blockburger*) elements based merger test, robbery and criminal threats would not merge, since each offense includes elements that the other does not. However, the gravamen of robbery involves not only lost property, but also the threat to physical safety caused by use of force or threats. Permitting a separate criminal threats conviction in any robbery case that involves threat of harm is unnecessarily duplicative.

[7] However, the RCC kidnapping and criminal restraint statutes, RCC § 22E-1401 and § 22E-1402 *do* call for fact-based merger analysis.

RCC § 22E-215. De Minimis Defense.

(1) *USAO, App. C at 494, recommends deleting the de minimis defense defined under RCC § 22E-215. USAO's comments state that whether a defendant's conduct may be characterized as de minimis is best considered at the sentencing phase rather than at the guilt phase of proceedings.*

- The RCC does not incorporate this recommendation because it may result in imposition of disproportionate penalties. As defined under the RCC, *de minimis* conduct is not merely a mitigating factor to be considered at sentencing. Rather, under RCC § 22E-215, the defendant bears the burden of proving by a preponderance of the evidence that the defendant's "conduct and accompanying mental state are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances." The *de minimis* defense is intended to cover a narrow range of conduct for which a criminal conviction would be unduly harsh, despite technically satisfies the elements of an offense. Under this standard, even a lenient penalty at the sentencing is disproportionately severe.
- USAO correctly notes that there is no *de minimis* defense recognized under current District law. However, the DCCA has suggested that the D.C. Council consider adopting a *de minimis* defense. In a concurring opinion, Judge Schwelb wrote, in affirming the appellant's conviction for simple assault, that the conduct in the case was "at most, a *de minimis* and inconsequential violation of the assault statute," such that it was "disproportionate and unjust to saddle [the defendant] with a criminal conviction under all of the circumstances of this case."[8]

[8] *Watson v. United States*, 979 A.2d 1254, 1258 (D.C. 2009).

RCC § 22E-301. Criminal Attempt.

(1) *The CCRC recommends revising paragraph (d)(1) to clarify that the penalty reduction for criminal attempt includes a 50% reduction in both the maximum term of imprisonment and any fines allowable for the target offense. This revision is intended to clarify the applicable penalties for criminal attempt.*

- This change improves the clarity and proportionality of the revised criminal statute.

(2) *The CCRC recommends amending paragraph (d)(1) to clarify that the maximum penalty for criminal attempt is reduced by 50% after application of any penalty enhancements to the target offense.*

- This change improves the clarity and proportionality of the revised criminal statute.

RCC § 22E-302. Solicitation

(1) *The CCRC recommends revising paragraph (d)(1) to clarify that the penalty reduction for solicitation includes a 50% reduction in both the maximum term of imprisonment and any fines allowable for the target offense. This revision is intended to clarify the applicable penalties for criminal attempt.*

- This change improves the clarity and proportionality of the revised criminal statute.

(2) *The CCRC recommends amending paragraph (d)(1) to clarify that the maximum penalty for solicitation is reduced by 50% after application of any penalty enhancements to the target offense.*

- This change improves the clarity and proportionality of the revised criminal statute.

RCC § 22E-303. Criminal conspiracy.

(1) *OAG, App. C at 465, requests the commentary clarify the jurisdictional rules for conspiracies formed within the District to engage in conduct outside the District. OAG asks when conduct would "constitute a criminal offense under the Statutory laws of the District if performed in the District" and "the statutory laws of the District even if performed outside the District." OAG requests that the commentary be updated to provide examples of when paragraph (d)(1) and subparagraph (d)(2)(A) are satisfied, and when paragraph (d)(1) and subparagraph (d)(2)(B) are satisfied.*

- The RCC incorporates this recommendation, and the commentary for RCC § 22E-303 will be updated accordingly.

(2) *The CCRC recommends revising paragraph (d)(1) to clarify that the penalty reduction for solicitation includes a 50% reduction in both the maximum term of imprisonment and any fines allowable for the target offense. This revision is intended to clarify the applicable penalties for criminal attempt.*

- This change improves the clarity and proportionality of the revised criminal statute.

(3) *The CCRC recommends amending paragraph (d)(1) to clarify that the maximum penalty for solicitation is reduced by 50% after application of any penalty enhancements to the target offense.*

- This change improves the clarity and proportionality of the revised criminal statute.

RCC § 22E-401. Lesser Harm.

(1) *OAG, App. C at 597, recommends amending the statutory language to explicitly state, "The criminal actions were taken in response to exigent circumstances." USAO, App. C at 601 – 602, recommends 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.*

- The RCC partially incorporates these recommendations by amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) the actor or another person is in imminent danger of a specific, identifiable harm; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: "The person reasonably believes the conduct constituting the offense is necessary, in both its timing, nature, and degree, to avoid a specific, identifiable harm." The term "imminent" conveys a very similar concept as was intended by the prior draft's commentary entry using the word "exigent" to which OAG refers. The term "imminent" also is more consistent with the lesser harm defense in other jurisdictions.[9] Commentary on the meaning of "imminent" further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.[10] The term "nature" is eliminated from the updated RCC draft as unnecessary and potential confusing, and the "necessary in degree" requirement is maintained (though as a separate term in paragraph (a)(2)(B)). This change improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 597, recommends adding to the statute an exception to the defense when "There is a reasonable legal alternative available to the person that does not involve a violation of the law."*

- The RCC does not incorporate this recommendation because the draft statute has been otherwise changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable,

[9] *See, e.g.,* 2 Subst. Crim. L. § 10.1(d)(5) (3d ed.) ("It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent."); Del. Code Ann. tit. 11, § 463.

[10] *See* Model Penal Code § 3.02 cmt. at 17 (1985) ("[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.").

legal alternative to violating the law,[11] there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defense or be a stand-alone provision. Critically, the reference to "reasonable," if codified independently, is unclear as to whether the actor needs to be aware of the "reasonable" alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.

(3) *OAG, App. C at 598, recommends clarifying the meaning of the phrase "significantly greater" in the statutory text or commentary, to provide additional guidance to factfinders. OAG does not provide proposed language.*

- The RCC does not incorporate this recommendation because it may render the statute less clear and may lead to disproportionate outcomes. As a general matter, the RCC does not provide definitions for words that indicate a quantity of relevance such as "significant," "substantial," "material," or "nontrivial." Whether one harm significantly outweighs another is a fact-sensitive determination that might be further complicated, instead of clarified, by providing universal guidelines for factfinders who must evaluate very different fact patterns.

(4) *OAG, App. C at 598, recommends clarifying the explanatory note for paragraph (a)(1) which 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." OAG asks, "[H]ow can it be both what a reasonable person believes and at the same time not be committed to the private judgment of the person?" and suggests further clarification of how the word "reasonably" functions in the statute.*

- The RCC incorporates this recommendation by revising the commentary to clarify the relationship between a person's subjective judgment about what is necessary and objective considerations. This change clarifies and does not change the meaning of the statute.

(5) *The CCRC recommends amending the commentary to clarify 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.[12] 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.[13]"*

- This change clarifies the revised statute.

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[11] *United States v. Bailey*, 444 U.S. 394, 410 (1980).

[12] Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person's volitional conduct, the actor may be justly be held responsible for the result. However, the term "brings about" only requires that the actor's conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person's volitional conduct, it is not necessary that the actor is justly responsible for the situation.

[13] For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

RCC § 22E-403. Defense of Self or Another Person.

(1) *OAG, App. C at 611 – 612, recommends revising paragraph (c)(4), to clarify that it concerns the officer's conduct prior to the use of force and not the officer's mere presence.*

- The RCC incorporates this recommendation by revising paragraph (c)(4) to add the words "any conduct" so it states: "Whether *any conduct* by the law enforcement officer increased the risk of a confrontation resulting in deadly force being used." This change clarifies the revised statute and does not further change District law.

(2) *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.

(3) *OAG, App. C at 612, recommends specifying in statutory text, "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...'"*

- The RCC does not incorporate this recommendation because the draft statute has been otherwise changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable, legal alternative to violating the law,[14] there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defenses or to be a stand-alone provision. Critically, the reference to "reasonable," if codified independently, is unclear as to whether the actor needs to be aware of the "reasonable" alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision in their self-defense statutes. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.

(4) *OAG, App. C at 612, recommends revising the commentary to state clarify that, apart from menacing speech, a person engaging in speech alone is not normally considered an aggressor. OAG specifically recommends the relevant commentary provision be revised to say: "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).*

- The RCC does not incorporate this recommendation because the statute has been changed in another way that renders it inapplicable. The statutory text now states, "The actor purposely, through conduct other than

[14] *United States v. Bailey*, 444 U.S. 394, 410 (1980).

speech or presence alone, provokes or brings about the situation requiring the defense and, in fact, does not withdraw or make reasonable efforts to withdraw." The corresponding commentary now states, "the defense is available if the actor provokes the danger through speech[15] or presence alone.[16]"

(5) *PDS, App. C at 622 - 623, recommends striking the word "necessary" and bringing the statute it into closer linguistic alignment with current law. PDS states it 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. PDS further states, "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." PDS further states, "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.'" PDS provides specific language per its recommendation.*

- The RCC partially incorporates these recommendations by amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) the actor or another person is in imminent danger of a specified harm; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: "The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from [a specified harm]." Use of the term "imminent" is more consistent with the drafting of the defense in the District's Redbook instructions and statutes in other jurisdictions.[17] Commentary on the meaning of "imminent" further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.[18] The term "nature" is eliminated

[15] Consider, for example, an actor who appears at a political demonstration fighting for racial justice wearing a t-shirt with racist slurs written on it, fully intending and expecting that it will provoke a physical attack. If a demonstrator attacks the actor, the actor still has a right to use the degree of force necessary to protect herself from further assault. While political speech enjoys the greatest protection under the First Amendment, the exercise of other forms of speech does not alone constitute a provocation that bars the speaker from subsequently defending themselves or others if they are attacked and otherwise meet the requirements of the defense.

[16] The phrase "speech or presence alone" does not include menacing under RCC § 22E-1203, criminal threats under RCC § 22E-1204, or the tort of assault, defined as "putting another in apprehension of an immediate and harmful or offensive conduct." *See Madden v. D.C. Transit System, Inc.*, 307 A.2d 756, 767 (D.C. 1973); *Person v. Children's Hosp. Nat Medical Center*, 562 A.2d 648, 650 (D.C. 1989).

[17] *See, e.g.,* § 10.4(d)Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("Most of the modern codes require that the defendant reasonably perceive an 'imminent' use of force…." (citations omitted)).

[18] *See* Model Penal Code § 3.02 cmt. at 17 (1985) ("[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

from the updated RCC draft as unnecessary and potential confusing, and the "necessary in degree" requirement is maintained (though as a separate term in paragraph (a)(2)(B)). This change improves the clarity and consistency of the revised statute.

(6) *PDS, App. C at 623 - 624, recommends amending the statutory language to state, "Retreat is a factor in the reasonableness of the actor's response only when the actor has used or attempted to use deadly force. PDS relies on* Dawkins v. United States*,[19] in which the D.C. Court of Appeals explained, "[I]n 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."*

- The RCC does not incorporate this recommendation because a blanket prohibition on any consideration of the availability of retreat in non-deadly force fact patterns may create a gap in liability. The revised statute does not impose a duty to retreat in deadly force cases, in nondeadly force cases, or in other cases. It does, however, permit the factfinder to consider a person's ability to retreat when assessing the reasonableness of the person's belief that there is an imminent danger. The D.C. Court of Appeals has not squarely addressed this issue of the defendant's ability to retreat in non-deadly force cases.[20] However, the ability to consider the defendant's ability to avoid the criminal conduct (and the defendant's awareness of that ability) may be relevant in non-deadly force cases and fact patterns that have not yet been reviewed or decided by the D.C. Court of Appeals (which, under case law, limits which offenses where self-defense may be raised).[21]

(7) *PDS, App. C at 624, recommends amending subparagraph (b)(1)(B)(i) to include individuals who are located in the common space of multi-unit housing. PDS states that the current formulation provides more protection to individuals who live in single-family housing. PDS further states, "The heightened need to protect*

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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."); § 10.4(d)Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("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 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. But the application of this requirement in some contexts has been questioned.").

[19] 189 A.3d 223, 231-33 (D.C. 2018).

[20] In *Dawkins*, the court stated that there is no duty to disengage from every potential interpersonal conflict and no *duty* to safely retreat before using nondeadly force. However, the court did not hold that a factfinder is prohibited from considering a defendant's ability to retreat (and the defendant's awareness of that ability) before engaging in the conduct constituting the offense.

[21] Consider, for example, person A awaits a bus on a public sidewalk when person B, out for a run, yells "get out of my way" and heads in the direction of person A. Person A does not move aside and, when person B comes within arm's reach, pushes person B to the side and onto the ground, causing bodily injury. If person A is charged with an assault and claims self-defense, the revised statute does *not* allow the government to argue that person A had a duty to retreat. However, the revised statute also does not prohibit the factfinder from considering the feasibility of taking a step to be out of the runner's path when assessing the reasonableness of the A's belief that an assault was imminent.

oneself in one's own home should not be differentiated based on income level and type of home."

- The RCC does not incorporate this recommendation because it may create a gap in liability. The revised defense allows use of deadly force in one's individual dwelling unit to defend against a bodily injury or a sexual contact, assuming all requirements of the defense are met. However, the RCC statute does not permit any person to use deadly force to defend against a bodily injury or a sexual contact in the courtyard or lobby of a residential building. This distinction reflects a distinction between the integrity of a dwelling and a person's special expectation and right to safety in their dwelling. The CCRC appreciates and takes seriously the PDS concern about possible income-based differential impacts of the defense. However, the defense does not differentiate based on income level as the term "dwelling"[22] includes structures such as a tent or a cardboard box[23] and the exclusion of common areas of multi-unit housing encompasses the shared amenities in the District's most extravagant luxury buildings.[24]

(8) *PDS, App. C at 624 – 626, recommends narrowing the exception in paragraph (b)(2) to apply when "[w]hile 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." PDS states the CCRC should "plainly and vehemently disavow" and "repudiate"* Laney v. United States*, 294 F. 412 (D.C. Cir. 1923), and "bring the District's provocation doctrine in line with other jurisdictions."*

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[22] RCC § 22E-701.

[23] *See Jones v. United States*, 172 A.3d 888 (D.C. 2017).

[24] While finding data comparing District luxury to lower-income (including but not limited to public) housing is difficult to locate and varies by the definitions used, it appears the number of affordable housing units in the District is currently comparable to or lower than the number of luxury rental units. One estimate puts the number of multi-family units at 70% of the District's total housing stock, consisting of "120,600 rental apartment units, 64,300 condominium units, and 25,600 units in cooperatives or conversions" as of 2016. *See* D.C. Policy Center, *Taking Stock of the District's Housing Stock* (March 2018) at 11 (available at https://www.dcpolicycenter.org/publications/taking-stock/). Luxury units alone now appear to make up about a third of the District's rental housing market. *See* Jessica M. Goldstein, While construction continues, the D.C. luxury rental market has crashed, Washington Post November 16, 2020) (available at https://www.washingtonpost.com/lifestyle/magazine/while-construction-continues-the-dc-luxury-rental-market-has-crashed/2020/11/16/98f61be4-22ac-11eb-8672-c281c7a2c96e_story.html).
That proportion of luxury units (calculating a third of about 200,000 multi-family units, or about 66,000 units) appears roughly comparable to, or a bit higher than, the number of all affordable housing units. The total number of affordable housing units (defined as public housing, Inclusionary Zoning, federal and local financial subsidies, and land dispositions), including both single-family and units in multi-family buildings, was estimated at 51,960 as of 2018. D.C. Office of Planning, Housing Equity Report: Creating Goals for Areas of Our City (October 2019) (available at https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/Housing%20Equity%20Report%2010-15-19.pdf).

- The RCC partially incorporates this recommendation by revising the exception to apply only when an actor purposely provokes brings about the situation requiring the defense and, as it is no longer necessary, eliminating the prior paragraph (b)(2)(A) allowing conduct by a law enforcement engaged in their duties from bringing about the situation requiring the defense. This change to a "purposely" culpable mental state reflects the standard approach taken in most other jurisdictions.[25] However, this change in culpable mental states further changes District case law as articulated in *Laney* and its more recent progeny. The RCC commentary has been updated to clearly note the RCC departure from the standard in *Laney* and its progeny. The revised defense effectively requires an affirmative act by specifying that the person must bring about the situation by conduct other than speech. As there is no concern that a law enforcement officer acting within the reasonable scope of that role would purposely bring about the situation requiring the defense, the reference to a law enforcement officer is struck from the updated draft. These changes improve the consistency and proportionality of the revised statutes.

(9) *PDS, App. C at 626, recommends changing subparagraph (b)(2)(C) to include a person who withdraws from the conflict but not necessarily the location. PDS states, "An individual may effectively withdraw from a conflict and communicate the withdrawal without leaving…"*

- The RCC incorporates this recommendation by deleting the phrase "from the location" from the statute and the commentary. The term "location" as used here is ambiguous and unnecessary. Notably, the current commentary already states "Efforts to withdraw include communicating a desire to withdraw." This change improves the clarity of the revised statute.

(10) *PDS, App. C at 626, objects to the use of the word "nature" as vague. PDS recommends specific language omitting this term.*

- The RCC incorporates this recommendation, by omitting the term "nature" from the updated RCC draft as unnecessary and potential confusing. This change clarifies the revised statute.

(11) *PDS, App. C at 626, recommends including 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. PDS does not offer a definition of non-deadly force and its scope is unclear.*

[25] § 10.4(e)The aggressor's right to self-defense, 2 Subst. Crim. L. § 10.4(e) (3d ed.) ("Some modern codes specify still other circumstances in which a person, by virtue of his own prior conduct, has lost the right of self-defense he would otherwise have. Most common is a provision that one who provokes the use of force against himself for the purpose of causing serious bodily harm may not defend against the force he has provoked." (citing to twenty-four jurisdictions statutes). Note that many jurisdictions define "intentionally" in a manner similar to the RCC term "purposely," so the term "intentionally" appears frequently in these statutes.

- The RCC does not incorporate this recommendation at this time. However, recommendations for a revised resisting arrest offense and a revised fleeing offense are planned by the CCRC in the future and may address these common fact patterns involving law enforcement officers' use of non-deadly force.

(12) *PDS, App. C at 626 - 627, recommends permitting use of deadly force by a law enforcement officer only in response to an imminent threat. PDS states, "[L]aw 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."*

- The RCC incorporates this recommendation insofar as the defense generally has been changed to require the actor to reasonably believe there is an imminent danger of harm. However, contrary to some of the PDS comments, the RCC declines to adopt an "absolute" standard for imminence with respect to law enforcement officers if that means something different from the general requirements for the defense in subsection (a) and paragraph (b)(1). The meaning of "imminent" in the RCC defense of self or another person statute is the same, is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.[26] This change improves the clarity and consistency of the revised statute.

(13) *USAO, App. C at 633 – 635 states its strong opposition to eliminating the imminence or immediacy requirement for the use of force in self-defense.*

- The RCC incorporates this recommendation by amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) the actor or another person is in imminent danger of a specified harm; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: "The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from [a specified harm]." Use of the term "imminent" is more consistent with the drafting of the defense in the District's Redbook instructions and statutes in other jurisdictions.[27] RCC Commentary on the meaning of "imminent"

[26] *See* Model Penal Code § 3.02 cmt. at 17 (1985) ("[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."); § 10.4(d)Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("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 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. But the application of this requirement in some contexts has been questioned.").

[27] *See, e.g.,* § 10.4(d)Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("Most of the modern codes require that the defendant reasonably perceive an 'imminent' use of force…." (citations omitted)).

further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.[28] This change improves the clarity and consistency of the revised statutes.

[28] *See* Model Penal Code § 3.02 cmt. at 17 (1985) ("[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."); § 10.4(d)Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("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 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. But the application of this requirement in some contexts has been questioned.").

RCC § 22E-404. Defense of Property.

(1) *OAG, App. C at 612, recommends specifying in statutory text, "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...'"*

- The RCC does not incorporate this recommendation because the draft statute has been otherwise been changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable, legal alternative to violating the law,[29] there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defenses or to be a stand-alone provision. Critically, the reference to "reasonable," if codified independently, is unclear as to whether the actor needs to be aware of the "reasonable" alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision in their defense of property statutes. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.

(2) *The CCRC recommends amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) Real or tangible personal property is in imminent danger of damage, taking, trespass, or misuse; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: "The person reasonably believes the conduct constituting the offense is necessary to protect real property or tangible personal property from damage, taking, trespass, or misuse."*

- This change aligns the Defense of Property defense with the Lesser Harm and Defense of Self or Another Person defenses and thereby improves the clarity and consistency of the revised statutes.

[29] *United States v. Bailey*, 444 U.S. 394, 410 (1980).

RCC § 22E-501. Duress.

(1) *OAG, App. C at 614, 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."*

- The RCC does not incorporate this recommendation because it would make the statute less clear and may lead to disproportionate outcomes. The OAG language would narrow the offense to cover communications of an "if this...then that" nature. However, the offense that the actor commits may not be referenced (directly or indirectly) in the communication the actor receives. In fact, the conduct that the actor engages in to avoid the harm may not have been contemplated by the person causing the duress. Consider for example, Person A threatens to sexually assault Person B, who is confined at the D.C. Jail. Person A may intend only to put Person B in a state of fear before committing the act. But, should Person B escape from the D.C. Jail to avoid the sexual assault, the fact that the communication by Person A did not mention or even contemplate Person B's escape should not limit the availability of a duress defense.

(2) *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.[30] 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.[31]" 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.

[30] Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person's volitional conduct, the actor may be justly be held responsible for the result. However, the term "brings about" only requires that the actor's conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person's volitional conduct, it is not necessary that the actor is justly responsible for the situation.

[31] For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

(3) *OAG, App. C at 614, recommends clarifying in commentary how the exception in paragraph (b)(3) applies when a defendant raises multiple defenses at trial.*

- The RCC does not incorporate this recommendation because it is unnecessary; the revised statute now deletes paragraph (b)(3) per another Advisory Group comment (see below).

(4) *OAG, App. C at 614 – 615, recommends specifying in the RCC statutory text, "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...'"*

- The RCC does not incorporate this recommendation because the draft statute has otherwise been changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable, legal alternative to violating the law,[32] there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defenses or to be a stand-alone provision. Critically, the reference to "reasonable," if codified independently, is unclear as to whether the actor needs to be aware of the "reasonable" alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision in their defense of property statutes. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.

(5) *OAG, App. C at 615, recommends noting 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 in the commentary.*

- The RCC incorporates this recommendation by revising the commentary as suggested. This change clarifies the revised commentary.

(6) *PDS, App. C at 628, recommends removal of subsection (b)(3) of the defense that prevents presenting a duress defense to a jury if the conduct constituting the offense is expressly addressed by another available defense. PDS says that, consistent with the Sixth Amendment, all defenses should go to the jury. PDS says the restriction is particularly unjust given that the government is not limited in the various theories of liability it may present at trial.*

- The RCC incorporates this recommendation by removing subsection (b)(3) of the defense. The MPC[33] and other jurisdictions allow a person to raise a duress offense in addition to a lesser harm (aka choice of evils) defense. This change improves the clarity and proportionality of the revised statutes.

(7) *USAO, App. C at 636, recommends limiting this defense to situations where the threatened harm is imminent or immediate.*

[32] *United States v. Bailey*, 444 U.S. 394, 410 (1980).
[33] § 2.09. Duress., Model Penal Code § 2.09.

- The RCC incorporates this recommendation by amending the statutory language to specify only that the actor reasonably believes that the actor or third person is in imminent danger of the communicated harm. This language replaces the prior draft language stating, in relevant part: "The person reasonably believes the conduct constituting the offense is necessary, in both its timing, nature, and degree, to avoid a specific, identifiable harm." The term "imminent" conveys a very similar concept as was intended by the prior draft's "necessary in timing." The term "imminent" is more consistent with the duress defense recognized in prior District law, which alternately uses the terms "imminent" and "immediate" without distinction.[34] New commentary on the meaning of "imminent" further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.[35] The requirements of being necessary in "nature and degree" are eliminated from the updated RCC draft as unnecessary and potential confusing given the reasonable person standard in paragraph (a)(2)—drafting that is consistent with many other jurisdictions' statutes.[36] This change improves the clarity and consistency of the revised statute.

(8) *USAO, App. C at 636, recommends adding a proportionality requirement to the offense. Specifically, USAO recommends the statute include as an element in (a)(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 says that this proportionality language would require that the harm to be avoided be objectively worse than the harm committed. USAO gives the example that, "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 C." USAO notes that RCC subsection (a)(3) may permit government argument that a reasonable person in the situation of person B would not have murdered person C because the harms were so disproportionate. However, USAO recommends inclusion of a proportionality requirement to "eliminate any ambiguity."*

- The RCC does not incorporate this recommendation because the recommended language would change current law to be less clear and potentially disproportionate, and, as noted by USAO, subsection (a)(3) of

[34] *See, e.g., Stewart v. United States*, 370 A.2d 1374, 1377 (D.C. 1977) ("Third, the defendant must establish that he immediately returned to custody once the threat of harm was no longer imminent.").

[35] "[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).

[36] *See, e.g.,* N.Y. Penal Law § 40.00 (McKinney) ("In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.").

the RCC defense already address concerns about extreme disproportionality. While some commentators have explicitly argued that commission of greater harms should still be allowed under a duress offense, the RCC follows the MPC approach in relying instead on the more objective standard in subsection (a)(3) to determine the appropriate degree of harm a person must be willing to withstand before committing what amounts to a crime.[37] The defense is not available in the hypothetical fact pattern USAO offered,[38] because the RCC statute (both the prior and present version) requires that a reasonable person of the same background and in the same circumstances as the actor would comply.

(9) *USAO, App. C at 636 - 637 recommends changing the statute so as to be clearer "that the actor must reasonably believe that the harm will occur."*

- The RCC incorporates this recommendation by the requirement in (a)(1)(B) of the updated offense that the actor reasonably believe "The actor or third person is in imminent danger of the communicated harm." This change improves the clarity of the revised statute.

(10) *USAO, App. C at 637, recommends including the word "death" in subsection (a)(1).*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute and does not change its meaning.

(11) *The CCRC recommends changing the RCC commentary to the duress defense to characterize the scope of "criminal bodily injury, sexual act, sexual contact, or confinement" as a clear change in law. While the DCCA has not squarely addressed the matter, repeated court dicta[39] and the common law have historically held the duress defense limited to "serious bodily injury or death."[40] The change in law is well-supported in the Model Penal Code and other jurisdictions' comparable language.[41]*

- This amendment of the commentary does not further change District law.

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[37] For further discussion, see § 9.7(a)Nature of the defense of duress, 2 Subst. Crim. L. § 9.7(a) (3d ed.).

[38] USAO states, "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."

[39] *See, e.g., Stewart v. United States*, 370 A.2d 1374, 1377 (D.C. 1977) ("First, the defendant must show that his flight from custody (or failure to return following a temporary lawful absence) was necessitated by coercion of such a nature as to induce in the defendant's mind a well-grounded apprehension of immediate death or serious bodily injury.").

[40] *See United States v. Bailey,* 444 U.S. 394, 409 (1980) ("Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.").

[41] *See, e.g.,* Model Penal Code § 2.09; Del. Code tit. 11, § 431.

RCC § 22E-502. Temporary Possession.

(1) *PDS, App. C at 594 – 595, recommends expanding the temporary possession defense to include possessing a weapon in self-defense. PDS offers a number of hypotheticals where temporary possession of a weapon is not culpable.*

- The RCC does not incorporate this recommendation because the RCC's Defense of Self or Another Person Defense (issued after this comment was made and referenced in the PDS comment as another means of addressing the PDS hypotheticals) addresses the core concern raised by this recommendation.
- Notably, however, the RCC defense of self and others statute would not (absent additional facts about protecting oneself or another) provide a defense to the PDS hypothetical where: "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 that hypothetical, if person X is charged with a weapon possession offense, they would appear to have a temporary possession defense to that charge under paragraph (a)(2)(A). However, if person X is charged with criminal restraint or a threats offense for brandishing the pistol at Y, there does not appear to be either a defense of self or others, or a temporary possession defense available. There may, nonetheless, be an execution of public duty defense under RCC § 22E-402 if X reasonably believes the conduct constituting the offense is required or authorized by law to assist a public official in the performance of their official duties.

(2) *PDS, App. C at 595, recommends not limiting the Temporary Possession defense to only weapons and controlled substances offenses and specifically suggests certain obscenity offenses and the possession of an open container of alcohol offense should have such a defense. Instead of listing specific predicate offenses, PDS recommends that the defense apply broadly to "any offense where the gravamen of the criminal conduct is the possession or distribution of contraband."*

- The RCC does not incorporate this recommendation because it is unnecessary and may render the revised statutes less clear. The RCC already separately addresses temporary possession situations in other revised statutes and a general reference to "any offense where the gravamen of the criminal conduct is the possession or distribution of contraband" is unclear. The RCC already separately addresses in specific obscenity statutes, in a more tailored manner that also addresses distribution, good faith efforts to report possible illegal conduct or seek legal counsel from any attorney. The temporary possession defense does not appear necessary for the RCC possession of an open container of alcohol offense given the restrictions in the offense for possession in the passenger area of a vehicle. Finally, while the CCRC supports PDS' goal of ensuring the defense is appropriately updated in the future, as evidenced by PDS' own detailed explanations of which offenses it believes do and do not have such a gravamen, it is difficult to discern what elements of an

offense are significant enough to make its gravamen something beyond possession. The CCR is concerned there would be unnecessary litigation over the scope of the defense and suggests any and all offenses to which the defense applies be listed.

RCC § 22E-503. Entrapment.

(1) *OAG, App. C at 615 – 616, recommends clarifying the scope or applicability of the derivative entrapment defense. OAG says that, contrary to a hypothetical in a footnote to the commentary,[42] "[t]he 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."*

- The RCC incorporates this recommendation by amending the statute to eliminate the prior reference to "directly or indirectly" and better address the role of agents of law enforcement officers and derivative entrapment, including specification of the relationship between the law enforcement officer's scheme and the conduct undertaken by the person derivatively entrapped. The updated statutory language extends derivative entrapment to situations where the law enforcement officer (or their witting cooperator) purposely commanded, requested, etc. an unwitting intermediary to engage in conduct constituting a criminal offense while reckless that that person (the unwitting cooperator) would in turn command, request, etc. one or more additional persons to engage in or assist the conduct specified by the law enforcement officer or their witting cooperator. The person derivatively entrapped must be induced into the conduct constituting the offense by the unwitting intermediary, but—contrary to the D.C. Circuit holding in *U.S. v. Washington*[43]—the inducement by the unwitting intermediary need not be the exact same as the government's inducement to the unwitting intermediary. In the commentary hypothetical, there is no reason why the child participating in the college admissions scheme should be denied the defense because their inducement and role in the scheme is slightly different than that of the parent (unwitting intermediary). If the government or its agent is ultimately reckless as to the involvement of the child in the scheme, there is a strong public policy incentive to ensure that that the defense extends to all victims of such law enforcement wrongdoing. This change improves the clarity and proportionality of the revised statutes.

[42] 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)).

[43] *U.S. v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997) ("After carefully examining case law in this and other jurisdictions, we conclude that a limited form of the "derivative entrapment" theory is recognized in this circuit and extends to cases in which unwitting intermediaries—at the government's direction—deliver the government's inducement to a specified third party.").

(2) *PDS, App. C at 628, recommends defining "predispose" in the text of the statute, using the explanation in the commentary. Specifically, PDS recommends adding the definition: "'Predisposed' means the defendant was ready and willing to commit the offense whenever an opportunity presented itself."*

- The RCC partially incorporates this recommendation by supplanting the statutory language regarding predisposition with the phrase "the actor is merely afforded the opportunity or means to engage in such conduct." With this addition, the exclusion in subsection (b), as a whole, reads: "This defense is not available when, in fact, the actor already was predisposed to engage in the specific conduct constituting the offense and the actor is merely afforded the opportunity or means to engage in such conduct." The RCC commentary continues to note that, change consistent with Supreme Court and District case law, a predisposition requires that a person already was "ready and willing" to commit the offense before the involvement of the law enforcement officer, cooperator, or derivative entrapper. However, the phrase "ready and willing" is arguably no more informative than "predisposed." Supreme Court case law provides a variety of factors that may be relevant to predisposition and codifying "ready and willing" may actually shortcut consideration of these factors. On the other hand, case law is clear that an entrapment defense does not apply when the actor was merely afforded the opportunity or means to engage in such conduct, and that is a common and specific requirement that is codified in many other jurisdictions along with the disposition requirement.[44] This change improves the clarity of the revised statutes.

(3) *The CCRC recommends recharacterizing as a clear change in law (rather than as a possible change in law) in the commentary the burden of proof being on the government to prove the actor already was predisposed to commit the crime. Further CCRC review indicates that the DCCA has treated lack of predisposition as a requirement for which the defense has the burden of proof.[45] The RCC entrapment defense, however, continues its prior recommendation that, once the defense has met its burden with respect to inducement, the government bears the burden of proving predisposition or lack of inducement. This is consistent with the approach in many other jurisdictions nationally.[46]*

- This change clarifies the revised commentary.

[44] *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-206; Utah Code Ann. § 76-2-303.
[45] *Daniels v. United States*, 33 A.3d 324, 328 (D.C. 2011).
[46] John H. Derrick, *Burden of proof as to entrapment defense—state cases*, 52 A.L.R.4th 775.

RCC § 22E-504. Mental Disability Defense.

(1) *OAG, App. C at 616, recommends revising subsection (a) to clarify that paragraphs (a)(1) and (a)(2) are disjunctive. OAG suggests changing subsection (a) to read as a single sentence without subparts.*

- The RCC partially incorporates this recommendation by changing the lead-in language to "lacked substantial capacity either:" at the beginning of each paragraph. This language further emphasizes the disjunctive nature of the defense while avoiding unnecessary duplication of language in paragraphs (a)(1) and (a)(2). This change clarifies the revised statute and does not change its meaning.

(2) *OAG, App. C at 616 – 617, also notes an incongruity between the definition of "mental disease or defect" and the defense in paragraph (a)(2). Namely, a person's failure to recognize the wrongfulness of their conduct does not flow from their inability to regulate and control their conduct. OAG does not recommend specific language for a new or amended definition.*

- The RCC incorporates this recommendation by revising the definition of "mental disability" (previously "mental disease or defect") to state, "In this section, the term "mental *disability*" means an abnormal condition of the mind, regardless of its medical label, that affects mental or emotional processes and *either* substantially impairs a person's ability to regulate and control their conduct, *or substantially impairs a person's ability to recognize the wrongfulness of their conduct*" (emphasis added). This is a modification of the *Durham-McDonald* definition that was repeated in *Brawner*[47] and adopted by the DCCA in *Bethea.*[48] The RCC modification seeks to correct the *Bethea* court failure to supplement the *Durham-McDonald* definition when the *Bethea* court adopted the alternative prong regarding the failure to appreciate the wrongfulness of one's conduct. As the OAG comment highlights, a definition in terms only of volitional conduct is either incomplete or conflicts with the defense language regarding appreciation of the wrongfulness of one's conduct. This change clarifies the revised statute and does not change its meaning.

(3) *PDS, App. C at 628, objects to the use of the word "defect," as antiquated, offensive, and stigmatizing. PDS proposes using the phrase "mental disease or atypical mental condition" instead.*

- The RCC partially incorporates this recommendation by replacing the phrase "mental disease or defect" with the phrase "mental disability." As noted below, the updated statute uses only one term because the temporary or permanent nature of the mental disability is irrelevant to the defense and may cause confusion as to whether the factfinder must have unanimity

[47] *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972) ("We highlight, as most notable of these, our decision to retain the definition of "mental illness or defect" that we evolved in our 1962 *McDonald* opinion en banc.").

[48] *Bethea v. United States*, 365 A.2d 64, 81 (D.C. 1976) ("We specifically retain the McDonald definition of 'mental disease or defect' as an integral part of the ALI standard.").

on the temporal nature of the disability. The term "disability" is commonly understood and has a non-technical meaning. PDS' proposed language is quite rarely used and may be misread to include intoxication. This change improves the clarity of the revised statute.

(4) *PDS, App. C at 628, recommends clarifying in commentary that this defense does not amend D.C. Code § 24-501.*

- The RCC incorporates this recommendation by adding a footnote to the commentary that states, "RCC § 22E-504 does not repeal, replace, or amend D.C. Code § 24-501." As a general rule, the RCC does not change a law unless it so states. This change clarifies the revised commentary.

(5) *PDS, App. C at 628 – 629, recommends revising the statement in the commentary that says, "'mental disease or disability' does not include voluntary intoxication." PDS states that the commentary and accompanying footnote are at odds with the RCC approach to voluntary intoxication and how it "excuses" criminal behavior. PDS states that an actor's mental disease or atypical mental condition is relevant when, pursuant to RCC § 22E-209, a factfinder is considering whether the actor's intoxication negates the existence of a culpable mental state.*

- The RCC incorporates this recommendation by amending the commentary to state that voluntary intoxication cannot serve as the basis for a mental disability defense and noting that this does not preclude the possible relevance of evidence of voluntary intoxication to otherwise establish mental disability.
- In general, voluntary intoxication does not excuse criminal behavior under current law or the RCC. Rather, in some cases,[49] a person's voluntary intoxication inhibits them from acting purposely, knowingly, recklessly, or negligently, as a criminal statute requires. In those cases, a person does not satisfy the elements of the offense, which is different than meeting the elements of the offense and also the elements of an excuse defense. This defense concerns only the latter. Accordingly:
    - When a person raises a defense under RCC § 22E-504, that person's voluntary intoxication does not itself qualify as a mental disability.
    - When a person raises a defense under RCC § 22E-209, evidence of that person's mental disease may be relevant to a factfinder's determination of whether the person's voluntary intoxication negated the existence of a culpable mental state.
    - When a person raises a defense under RCC § 22E-504, evidence of that person's voluntary intoxication may be relevant to a factfinder's determination of whether the person lacked substantial capacity to conform or recognize the wrongfulness of their conduct.

[49] *See* RCC § 22E-209.

- The prior RCC commentary which PDS in part cited read: "'Mental disease or defect' does not include voluntary intoxication.[50]"
- The new RCC commentary entry on this point reads: "Voluntary intoxication alone cannot serve as the basis for a mental disability defense.[51]"
- This change clarifies the RCC commentary.

(6) *PDS, App. C at 629, recommends striking subsection (d) but does not object to including the same language in commentary. PDS says including this language in the statutory text 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 RCC partially incorporates this recommendation by revising the statutory language to state, "This section shall not be construed to *create or limit a court's authority*, on its own initiative, to order a psychiatric examination or to raise a mental disability defense." By characterizing this defense as an affirmative that the defendant must prove, the revised statute does not intend to disturb the court's authority to raise the defense *sua sponte*.[52] This change clarifies the revised statute and does not change its meaning.

(7) *USAO, App. C at 637, recommends clarifying that this commitment occurs when the defendant is "acquitted solely on the ground of mental disease or defect," consistent with D.C. Code § 24-501(d)(1).*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies and improves the consistency of the revised statute and does not change its meaning.

(8) *USAO, App. C at 637, recommends striking the word "civilly" before "committed," to clarify that the commitment is criminal.*[53]

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies and improves the consistency of the revised statute and does not change its meaning.

(9) *USAO, App. C at 637 – 638, recommends revising the definition of "mental disease or defect" (now "disability") to specify that "A 'mental disease' is a*

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[50] *McNeil v. United States*, 933 A.2d 354, 365 (D.C. 2007) ("[w]hen drug or alcohol abuse is proffered as the basis for a mental disease or defect, there is significant tension between the insanity defense and the universally-accepted tenet that voluntary intoxication does not excuse criminal behavior.").

[51] *McNeil v. United States*, 933 A.2d 354, 365 (D.C. 2007) ("[w]hen drug or alcohol abuse is proffered as the basis for a mental disease or defect, there is significant tension between the insanity defense and the universally-accepted tenet that voluntary intoxication does not excuse criminal behavior."). Note, however, that evidence of voluntary intoxication may be relevant under the mental disease or disability defense of RCC § 22E-504 to a factfinder's determination of whether the person lacked substantial capacity to conform or recognize the wrongfulness of their conduct. (Conversely, evidence of mental disease or disability may be relevant under the voluntary intoxication provisions of RCC § 22E-209 to a factfinder's determination of whether the person's voluntary intoxication negated the existence of a culpable mental state.)

[52] *Frendak v. United States*, 408 A.2d 364, 380 (D.C. 1979); *see also Briggs v. United States*, 525 A.2d 583, 594 (D.C. 1987).

[53] *See Brown v. United States*, 682 A.2d 1131 (D.C. 1996).

condition which is capable of either improving or deteriorating; a 'mental defect' is a condition not capable of improving or deteriorating.

- The RCC does not incorporate this recommendation because it may render the statute less clear. As noted above, the RCC has been updated to replace the terms "disease or defect" with the term "disability." Distinguishing between a disease and a defect, or a temporary and permanent state in the statutory text may suggest that a jury must evaluate and agree upon whether the condition is capable of improving or deteriorating. No such finding is required for the defense to apply.

(10) *USAO, App. C at 637 – 638, opposes the revised statute's change to District case law, which currently has a categorical exclusion that abnormal conditions of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish a mental disease or defect (now "disability") under the defense. USAO also raises a concern that a defendant could prove the defense without expert testimony about their mental condition by introducing their criminal history records alone.*

- The RCC does not incorporate this recommendation because this blanket evidentiary exclusion does not reflect a modern medical understanding of psychopathy and personality disorders and may lead to disproportionate outcomes. Courts have interpreted such language regarding repeated criminality and antisocial conduct to exclude psychopaths or those suffering from antisocial personality disorder from the protection of an insanity defense.[54] Such exclusion provisions have been heavily criticized by experts as being unsupported by current medical understanding.[55] Modern medical evidence suggests that psychopathy and many personality disorders may well affect cognitive and volitional functions that fall squarely within the ambit of the insanity defense as formulated in the MPC insanity provision (depending, as with all mental conditions, on severity).[56]
- The inclusion of evidentiary rules, more generally, is unnecessary in the statute and may render the statute less clear. It is unlikely, if not impossible, for a defendant to meet their burden of proving by a preponderance of the evidence that abnormal condition of the mind substantially impaired their ability to control their mental processes and behavior through the admission of criminal records alone. Expert

[54] Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (b)(2) (March 1982).

[55] *See, e.g.,* Ralph Slovenko, *Commentary: Personality Disorders and Criminal Law*, 37 J. Am. Acad. Psych. Law 182, 183 (2009). It is widely suggested among critics of this provision that such categorical exclusions are not based on current medical evidence and seek to reinforce a laymen's understanding of moral culpability against individuals with real mental impairments, supported by scientific evidence.

[56] Joseph Langerman, *The Montwheeler Effect: Examining the Personality Disorder Exclusion in Oregon's Insanity Defense*, 22 Lewis & Clark L. Rev. 1027, 1049-50 (2018). *See also* Robert Kinscherff, Proposition: A Personality Disorder May Nullify Responsibility for A Criminal Act, 38 J. L. Med. & Ethics 745, 748 (2010).

testimony will almost certainly be proffered, if not required, under the District's evidentiary rules.

(11) *USAO, App. C 638 – 639, recommends incorporating the notice requirements in D.C. Code § 24-501(j) into the statute. USAO says that, as currently drafted, "this defense under the RCC would not require this procedural mechanism of notice to the prosecution to invoke this defense."*

- The RCC partially incorporates this recommendation by adding a sentence to the commentary noting that codification of the defense is not intended to change statutorily specified procedures for the insanity defense described elsewhere. The revised statute does not disturb the various procedural provisions in D.C. Code § 24-501 (not just subsection (j)), § 16–2307(h), § 16–2315, or other statutes relevant to the defense, which remain good law. Copying some, but not all, the relevant procedures into the RCC defense would create unnecessary overlap and be confusing. This change improves the clarity of the revised commentary.

RCC § 22E-505. Developmental Incapacity Defense.

(1) *OAG, App. C at 570-571, while agreeing that there should be a cutoff "around the age of 12," recommends that subsection (a) of the RCC defense regarding a minimum age of liability for an offense instead be codified in D.C. Code § 16-2305 as a new subsection (c)(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." OAG states that Title 16 "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 these proceedings work, look to D.C. Code § 16-2301, et. seq., for the statutory framework for delinquency proceedings."*

- The RCC does not incorporate this recommendation because doing so would make the RCC less clear and consistent as to the limits of liability and would result in an illogical ordering of statutes. The developmental incapacity defense bears a close relationship to the mental disease or defect defense and other excuse defenses that recognize a bar to liability based on the lack of moral responsibility of an actor for what they do. It is properly addressed as a defense even if there is a separate limitation on OAG jurisdiction intended to prevent a petition being filed in the first place. As to placement of the defense, while D.C. Code Title 16 Chapter 23 describes a wide range of procedures regarding Family Court proceedings, the law controlling the juvenile delinquency system is by no means confined to that chapter and in many respects the chapter is derivative of criminal law stated elsewhere. For example, while Title 16 Chapter 23 defines a "delinquent act,"[57] the basis for juvenile proceedings, it does so by reference to an "offense under the law of the District of Columbia." But, such offenses are codified not in Title 16 Chapter 23 but in Title 22. While the current D.C. Code does not codify any general defenses, there is no separate case law regarding the requirements[58] of such defenses in juvenile as opposed to adult proceedings. It would be illogical, inconsistent, and confusing to create such a rift between fundamental requirements for liability articulated in criminal law and the juvenile justice system that refers to those offenses.

(2) *OAG at App. C at 571-573 recommends, beyond limiting OAG's ability to file a delinquency petition against children of an unspecified age in family court, that*

[57] D.C. Code § 16–2301(7) ("The term "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. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.").

[58] As noted below, there are different procedures related to the timing, manner, and effect of insanity claims for juveniles versus adults. But, the standard requirements that must be proven are identical even for that defense.

there should not be codified a developmental immaturity defense "at this time," pending further study of the issue. OAG states that: "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." OAG also states that: "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." No additional written comments have been received from OAG regarding this matter since the OAG comments received June 19, 2020.

- The RCC does not incorporate the OAG recommendation (assuming OAG still object to the defense since its further evaluation), because doing so would appear to change District law in way that may violate the fundamental fairness of the proceedings for 12 and 13 year-old children. As described in the commentary to this defense, although long dormant the common law doctrine of *doli incapax* appears to apply in the District, providing a rebuttable presumption that children under age 14 are not liable for misconduct. No evidence to the contrary has been discovered by the CCRC or referenced by OAG to date. Unlike incompetency provisions based on mental disease or defect which the DCCA has found are applicable only at the dispositional (sentencing) stage of delinquency proceedings,[59] there are no comparable statutory provisions addressing a child's incapacity due only to developmental immaturity and no legislative history indicating that Congress intended or believed the District's delinquency system should supplant the prior protections of *doli incapax.* The government's interest in interceding to redress conduct based on ordinary (non-pathological) developmental immaturity is not the same as for conduct based on mental disease or defect. The RCC narrows the applicability of the doctrine by making developmental immaturity an affirmative defense (with a burden of proof on the child) and specifies volitional and cognitive prongs. However, elimination or further diminution of the defense raises issues of fundamental fairness insofar as a child would be held liable in a juvenile proceeding for conduct they lack the cognitive or volitional ability to control. A recommendation on this matter is a necessary adjunct to the CCRC mandate to issue recommendations defining liability criminal offenses and its work to codify all general defenses in the District. The common law doctrine of *doli incapax* precedes the District's current distinctions between (adult) criminal law and juvenile justice and was framed as a rebuttable presumption (not a defense)—the absence of which was an element the

[59] *See Matter of C. W. M.,* 407 A.2d 617, 625 (D.C. 1979) (cited by OAG in its comments).

government has to prove in every case. Particularly given the inattention to the doctrine in current practice, addressing both the criminal and juvenile implications alongside other fundamental principles of liability appears most appropriate for the agency's recommendations.

(3) *OAG at App. C at 573 recommends that, if the RCC retains the developmental incapacity defense, the language be changed in subsection (a)(2)(A) to replace the current reference to a person who "lacks substantial capacity to conform the conduct alleged to constitute an offense to the requirements of the law" to a reference to a person who is "unable to conform his or her conduct to the law." OAG says that the current language is unclear and that "[c]onduct 'constitut[ing] an offense' does not,* by definition, *conform to the requirements of the law."*

- The CCRC partially incorporates the OAG recommendation by modifying subsection (a)(2)(A) to state "conform the actor's conduct to the requirements of the law." The OAG language replacing "lacks substantial capacity" with "unable" would create an inconsistency with the RCC § 22E-504, Mental Disability Affirmative Defense. This change clarifies the revised statutes.

(4) *The CCRC recommends changes to the style of the introductory language to the defense and the formatting in paragraph (a)(2). These changes align the defense with other RCC defenses, including the RCC § 22E-504, Mental Disability Affirmative Defense.*

- These changes improve the clarity and consistency of the revised statutes.

RCC § 22E-601. Offense Classifications.

(1) OAG suggests that commentary for the parental kidnapping statute, RCC § 16-1022 should specifically note that parental kidnapping's designation as a felony offense is an exception to the general definitions of "misdemeanor" and "felony" under RCC § 22E-701.

- The RCC incorporates this recommendation and the commentary for the parental kidnapping statute will be amended to clarify that the designation of the offense as felony is an exception to the general definitions of "misdemeanor" and "felony."

RCC § 22E-604. Authorized Fines.

(1) *OAG, App. C at 527, recommends that a new subsection (d) be added, which states "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."*

- The RCC does not incorporate this recommendation because it would make the statute less clear. Adding this subsection is unnecessary and would raise the question why every general provision does not include a similar caveat that it may not apply in the future if there's a change in law. Subsection (a) of RCC § 22E-604 specifies the maximum allowable fines for each class of felony or misdemeanors "unless otherwise expressly authorized by statute[.]" RCC § 22E-604 already clarifies that the fines under this section do not apply if a specific statute specifies otherwise.

RCC § 22E-606. Repeat Offender Penalty Enhancement.

(1) *OAG, App. C at 527-528 recommends revising the statute with additional language to specify that (a)(2) does not include felony convictions under (a)(1).*

- The RCC does not incorporate the language recommended by OAG because it may substantially narrow the enhancement and provide for disproportionate penalties. OAG is correct to note that (a)(2), by its plain language, includes felonies that are already addressed in (a)(1). However, the inclusion in (a)(2) of the Subtitle II felonies in (a)(1) does not create a conflict or confusion as to the statute's scope. The OAG recommended language, however, would narrow the (a)(2) provision to only Title 22E felonies, omitting felonies under Title 48 or otherwise in the D.C. Code, contrary to the intent of the enhancement and current District law.

(2) *OAG, App. C at 527-528 recommends amending the statute with additional language that states the prior convictions were not on the same occasion as the instant offense in (a)(1) and as with each other in (a)(2).*

- The RCC incorporates the language recommended by OAG except for replacing the suggested phrase "the offense for which the enhancement would apply" with "the offense being enhanced." This change improves the clarity of the revised statutes.

(3) *PDS, App. C at 533 opposes all enhancements based on prior offenses. PDS says that "individuals who have previously been convicted of offenses received sentences for those prior offenses and served the sentence deemed appropriate by the judge." PDS also notes that due to the prior conviction the D.C. Voluntary Sentencing Guidelines will provide for a more severe sentence for the new offense, such that a statutory enhancement counts as a double or triple counting of the prior offense.*

- The RCC does not incorporate the PDS recommendation to eliminate this enhancement. Whether and how the *D.C. Voluntary Sentencing Guidelines* continue to be based on criminal history is not within the ambit of the CCRC. The CCRC is aware of "three-strikes" laws' disproportionate penalties and per the comment below recommends sharply lower penalty enhancements based purely on repeat offenses (as compared to the seriousness of the instant crime, which should be the primary determinant of liability). However, a modest increase in the maximum penalty possible for the instant offense based on prior conduct is warranted.

(4) *PDS, App. C at 533-534 recommends narrowing the penalty enhancement by limiting subsection (a) to cases where the instant offense is a Subtitle II (Offenses against persons) felony offense and the prior convictions were for "the same or comparable felony offense as the instant offense," committed within the prior 10 years, and not committed on the same occasion. PDS also recommends parallel changes to subsection (b). PDS says that, as currently drafted, the enhancement*

simply punishes again for the prior offense as the Sentencing Guidelines do and the judge in the prior case did.

- The RCC partially incorporates the PDS recommendation by limiting subsection (a) to cases where the instant offense is a felony under Subtitle II. 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. However, the RCC does not adopt the further limitations recommended by PDS. This change improves the proportionality of the revised statutes.

(5) *PDS, App. C at 535 recommends lowering repeat offender penalties across all classes, providing:*

(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.

PDS says that this would reduce the unfairness of the enhancement.

- The RCC partially incorporates these changes, amending the enhancement as recommended except making (1)(A) 6 years, (1)(B) 4 years, and retaining fine enhancements. This change improves the proportionality of the revised statutes.

(6) *USAO, App. C at 548-549 recommends including citations to burglary and arson offenses in subsections (a)(1) and (b)(2) of the revised enhancement. USAO recommends all offenses currently categorized as crimes of crimes of violence* crimes of violence under D.C. Code § 22-1331(4) *be treated the same under this enhancement—and arson and burglary are so categorized.*

- The RCC does not incorporate these changes because they may result in disproportionate penalties. While arson and burglary may be felonies, they do not require injury to people—and where arson or burglary involves infliction of bodily injury or some other harm of a person (e.g., threats, sexual harms), those charges may be brought and, as charges in Subtitle II, they are subject to this enhancement as currently drafted. Treating crimes that do not require bodily injury the same as Subtitle II offenses is unwarranted here. See also responses elsewhere in this document to USAO recommendations for more severe penalties for burglary.

(7) *USAO, App. C at 549 recommends the commentary on this statute be revised to state that a conviction under current District law is a "comparable offense."*

USAO says that it "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)." USAO says that: 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." USAO says that the RCC commentary "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."

- The RCC does not incorporate these changes because they would create inconsistency in the revised offenses and may result in disproportionate penalties. USAO is correct to note that due to the differences between the elements of unrevised and revised District statutes, some convictions under the former may not be subject to enhancement as the latter even though the *facts* of those prior convictions under unrevised statutes hypothetically would satisfy the elements of the revised statutes. However, even under the current District repeat offender enhancement the conviction of record often does not reflect what charges may have been brought and proven based on the facts of the case—e.g., due to charge or plea bargaining—and speculating as to whether certain facts would lead to a conviction under a different law is likely to lead to inconsistency in practice. The RCC instead relies on the elements of the offense of conviction to determine whether one offense is comparable to another, improving the consistency of the enhancement. The more basic decision to disallow prior convictions that do not at least meet the elements of revised offenses—be those prior convictions in the District or another jurisdiction—is due to the fact that those prior convictions may reflect profoundly different values and a wide range of facts. For example, a prior felony conviction for simple marijuana possession (no intent to distribute) in another jurisdiction should not be treated as a felony under the revised enhancement. Similarly, a prior District conviction for robbery which may have been based on facts that would sustain only a pickpocketing charge in another jurisdiction or theft from a person under the revised statutes should not be treated as a felony under the revised enhancement.

(8) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty*

enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense."

- This change clarifies the revised statutes.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

(1) *PDS, App. C at 535 opposes any additional liability for offenses committed while on release, including as a pretrial release penalty enhancement under RCC § 22E-607. PDS says that this conduct is already punishable as a form of contempt and the increased penalty is unnecessary and duplicative. PDS says that because the enhancement does not require conviction for the first-in-time offense (the offense for which the actor was on release when the predicate offense subject to the RCC § 22E-607 enhancement was committed), the actor was presumed innocent and should not face additional penalties.*

- The RCC does not incorporate this change because if may make the revised statutes less clear and proportionate. While it is true that the committing a crime while on pretrial release is also punishable as contempt and the RCC § 22E-607 is, strictly speaking, duplicative, the enhancement does provide more specific language and a penalty graduated to the harm caused while on release than other general contempt-type charges.[60]

(2) *CCRC recommends lowering the penalties under the enhancement for commission of class 1 or class 2 offenses to 6 years (from 10 years), class 3 or class 4 offenses to 4 years (from 6 years), class 5 or class 6 offenses to 2 years (from 3 years), class 7 or class 8 offenses to 1 year (from 2 years), class 9 offenses to 180 days (from 1 year), and class A or class B offenses to 60 days (from 90 days). The lower penalties better reflect the limited harm targeted by the enhancement of violating terms of pretrial release, allowing the seriousness of the predicate offense to remain the primary form of liability and punishment.*

- This change improves the proportionality of the revised statute.

(3) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense."*

- This change clarifies the revised statutes.

[60] E.g., compare to D.C. Code § 11–741; § 23-1329(a).

RCC § 22E-608. Hate Crime Penalty Enhancement.

(1) *USAO, App. C at 549-550, recommends changing the words "because of" to "motivated by." USAO says: "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." USAO cites a passage in the legislative history in support of this language: '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.'"*[61] *USAO also notes that at the time of writing, an appellate case was pending before the DCCA on this issue.*

- The CCRC does not incorporate the USAO recommendation at this time, but invites further Advisory Group comment on the RCC draft in light of the recent DCCA opinion in *Lucas v. United States*, 240 A.3d 328 (D.C. 2020). The commentary has been updated to cite *Lucas* in several places.
- In *Lucas,* a three judge panel unanimously held, in an opinion by Chief Judge Blackburne-Rigsby, that, contrary to the interpretation of USAO, the District's bias-related crime enhancement requires "but-for" causation. The court said:

> In sum, we hold that § 22-3701(1) requires that a defendant's bias against a victim due to the victim's protected characteristic must be a but-for cause of the defendant's underlying criminal act. Bias need not be the sole cause, or even the primary cause. And it may interact with several other causes in causing the end result. For purposes of the Bias-Related Crime Act, however, bias against the victim's protected characteristic must be a but-for cause for a factfinder to find that the accused committed the underlying crime.[62]

  The *Lucas* court went on to describe but-for causation using the ordinary language "because of"[63] as used in the RCC draft statute and many other states' statutes. Indeed, the jury instruction
- The *Lucas* court opinion bluntly states that the District's current statutory language raises constitutional concerns.[64] The opinion proceeds at length

[61] *Report from the Committee on the Judiciary, Bill 8-168, the "Bias-Related Crimes Act of 1989.*
[62] *Lucas v. United States*, 240 A.3d 328, 342 (D.C. 2020).
[63] *Lucas v. United States*, 240 A.3d 328, 340–41 (D.C. 2020) ("In adopting a but-for causation standard, we do not restrict a description of such causation to the words 'but for,' but instead recognize that such language reflects a causation standard similar in meaning to language such as "based on," "because of," and "results from." (citation omitted))
[64] *Lucas v. United States*, 240 A.3d 328, 336 (D.C. 2020) ("As the parties note, the District's Bias-Related Crime Act is different from most states' hate-crime laws, in that the "majority of [state] statutes define a hate crime as one in which the actor committed the offense 'because of,' 'by reason of,' or 'on account of' " another person's race or other protected status." Zachary J. Wolfe, Hate Crimes Law § 3:8 (June 2019) (surveying statutes). Instead, the "demonstrates ... prejudice" language of the District of Columbia's Act

to construct an interpretation that avoids constitutional limitations on causation. Notably, while but-for causation is the norm in other jurisdictions' hate crime statutes and throughout District and other jurisdictions' doctrine on causation,[65] the *Lucas* court specifically explored whether an alternative causation standard would be constitutionally permissible.[66] The *Lucas* court found the Council's legislative history "provid[es] little insight as to the Council's intent regarding causation."[67] In the end, however, the court held that under the Supreme Court's opinion in *Burrage v. United States,* 571 U.S. 204, (2014), the District's law "requires but-for causation."[68]

- Whether or not, as a policy matter, it may be desirable to expand liability under the District's hate crime statute, the *Lucas* opinion raises serious doubts about whether the DCCA would uphold the constitutionality of a new statute with a standard lower than "but-for" causation which is most commonly communicated using "because of" language. While legislative intent was considered in the opinion (and deemed unenlightening as to the intended causation standard), the opinion is primarily and explicitly focused on a construction of the statute that is constitutionally sound. Beyond policy considerations, the CCRC would particularly appreciate Advisory Group opinions on whether, in light of *Lucas,* an alternative to but-for causation would meet constitutional standards and be upheld by the DCCA.

(2) *USAO, App. C at 550, opposes removal of marital status, personal appearance, family responsibility, and matriculation as potential bases for a hate crime penalty enhancement. USAO says that while there is no MPD record of these crimes, 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 does not incorporate this recommendation because it makes the reduces the clarity and potentially the proportionality of the revised statutes. As noted in the commentary, prejudice based on these characteristics may be difficult to distinguish from individual dislikes and hatred, and such bias is not ordinarily included in hate crime legislation.

(3) *USAO, App. C at 551, 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." USAO says that, because "the words 'intimating,' 'physically harming,' and 'damaging the property of" are not defined in the RCC[,] [t]his will lead to unnecessary confusion about what these*

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does not expressly require a causal connection between bias and the criminal act and would appear to punish "the fact of being prejudiced," Shepherd, 905 A.2d at 262-63, thus raising constitutional concerns. See R.A.V., 505 U.S. at 391, 112 S.Ct. 2538 (finding hate crime statute that prohibits speakers from expressing views on disfavored subjects places an unconstitutional limit on freedom of expression).").

[65] *Lucas v. United States*, 240 A.3d 328, 340 (D.C. 2020).

[66] *Lucas v. United States*, 240 A.3d 328, 338 (D.C. 2020).

[67] *Lucas v. United States*, 240 A.3d 328, 339 (D.C. 2020).

[68] *Lucas v. United States*, 240 A.3d 328, 340 (D.C. 2020).

terms mean, and whether certain offenses are included within these terms." USAO says that the enhancement should apply to "any offense."

- The CCRC partially incorporates this recommendation by substituting the word "threatening" in the statute in place of "intimidating," a less clear term that is not commonly used in the RCC or current D.C. Code. However, CCRC notes that the RCC hate crime enhancement is already applicable to all crimes in the RCC, consistent with the DCCA holding in *Aboye.*[69] While the current D.C. Code definition of a "Designated act" in current D.C. Code § 22-3701 is confusing, the revised statute takes the approach that any crime may be subject to the hate crime enhancement, although the types of harm are limited to those articulated in subsection (a) of the statute.

(4) *USAO, App. C at 551, recommends amending the commentary in a provision that refers to a person who "…selected the target of the offense because of prejudice…". USAO suggests the sentence instead be "This general penalty provides a penalty enhancement where the defendant committed the offense motivated by prejudice against certain perceived attributes of the target."*

- The RCC partially adopts this recommendation by amending the commentary entry identified to read, in relevant part: "This general penalty provides a penalty enhancement where the defendant committed the offense because of prejudice against certain perceived attributes of the target." Selection in the narrow sense described in *Wisconsin v. Mitchell*, 508 U.S. 476, 479-480 (1993) is not meant to be required under the revised statute. However, the USAO motivating factor language falls short of but-for causation.

(5) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense."*

- This change clarifies the revised statutes.

(9) *The CCRC recommends reordering the list of protected characteristics, adding "in fact" to clarify no mental state is necessary as to the specific cross-referenced definition for "gender identity or expression as defined in D.C. Code § 2-1401.02(12A)," and eliminating the redundant words "of persons" from the phrase "group of persons."*

- This change clarifies the revised statutes.

[69] *Aboye v. United States*, 121 A.3d 1245 (D.C. 2015)

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(1) *The CCRC recommends changes to align the civil provisions with the updated language for the hate crime penalty enhancement in RCC § 22E-608, including changing "menacing" to "threatening," reordering the list of protected characteristics, adding "in fact" to clarify no mental state is necessary as to the specific cross-referenced definition for "gender identity or expression as defined in D.C. Code § 2-1401.02(12A)," eliminating the redundant words "of persons" from the phrase "group of persons," and updating the cross-referenced list of definitions.*

- This change clarifies the revised statutes.

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

(1) *The CCRC recommends replacing the phrase "law enforcement officer or public official" with the term "public official," which is defined to include a law enforcement officer.*

- This change clarifies the revised statute and does not substantively change its meaning.

(2) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense."*

- This change clarifies the revised statutes.

RCC § 22E-701. Generally Applicable Definitions.

"Bodily injury"

(1) *The CCRC recommends replacing "any impairment of physical condition" with "impairment of physical condition" in the definition of "bodily injury." With this change, the definition reads "physical pain, physical injury, illness, or impairment of physical condition." Deleting "any" makes the impairment of physical condition provision consistent with the rest of the definition, which does not specify "any." It also consistent with the RCC de minimis defense (RCC § 22E-215), under which an impairment of physical condition may be so trivial as to satisfy the defense.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

"Coercive threat"

(1) *OAG, App. C at 466, recommends replacing references to RCC Title 22E with the words "this title" in the definition of "coercive threat." OAG states that references to RCC Title 22E will be unnecessary when the RCC is enacted.*

- The RCC adopts this recommendation. This change improves the clarity of the revised statute.

(2) *The CCRC recommends replacing the word "threatens" with the word "communicates." Using the word "communicates" instead of "threatens" is consistent with the revised criminal threats statute and avoids possible inferences that the elements of the criminal threats statute are incorporated into the definition.*[70]

- This change improves the clarity and consistency of the revised criminal code.

"Community-based organization"

(1) *OAG, App. C at 466, recommends re-drafting the definition of "community-based organization" 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.

- The RCC does not adopt this recommendation. The term "community-based organization" is no longer defined in RCC § 22E-701, and instead relies on the definition in D.C. Code § 7-404.

"Comparable offense"

[70] For further discussion on replacing the word "threatens" with "communicates," see Appendix D entry regarding Criminal Threats RCC 22E-1204 at X.

(1) *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.*[71]

- This change clarifies the revised definition and does not substantively change its meaning.

"Consent"

(1) *The CCRC recommends replacing "known" with "believed" in sub-subparagraph (B)(ii) of the definition of "consent." With this change, sub-subparagraph (B)(ii) requires, "Because of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." "Known" ("knowingly") is a culpable mental state in RCC § 22E-205, and per the rule of construction in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "known" is included in an RCC offense through the definition of "consent" that would complicate the interpretation of culpable mental states in that offense and future drafting.*

- This change improves the clarity and consistency of the revised statutes.

(2) *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.*

- This change improves the clarity and consistency of the revised statutes.

"Controlled substance"

(1) *The CCRC recommends including a definition of "controlled substance" in RCC § 22E-701. The prior version of RCC § 22E-701 did not include a definition for "controlled substance," and instead specific offenses that used the term cross-referenced the definition under D.C. Code § 48-901.02.*

- *This change improves the clarity of the revised criminal code, and is not intended to substantively change the meaning of the term "controlled substance."*

"Debt bondage"

(1) OAG, App C at 465, recommends that the word "labor" be deleted from the definition of "debt bondage." OAG notes that the term "labor" is unnecessary, because the definition of "debt bondage" includes the term "services," which includes "labor."

[71] *See* USAO comment at App. C at 527-528.

- The RCC adopts this recommendation. This change improves the clarity of the revised criminal code.

(2) USAO, App. C at 494, recommends that the definition of "debt bondage" be redrafted to read, "the status of condition of a person who provides forced labor, services, or commercial sex acts, for a real or alleged debt."

- The RCC does not incorporate this recommendation because it may lead to disproportionate penalties. USAO's recommendation would require that the person provide *forced* labor, services, or commercial sex acts. This recommendation could potentially limit the scope of debt bondage, and omit cases in which no coercive threat was used to compel a person to perform labor, services, or commercial sex acts to pay off debt. The definition codified in RCC § 22E-701 clarifies that even in the absence of coercive threats, debt bondage includes labor, services, or commercial sex acts under certain defined circumstances. For example, under USAO's hypothetical, if a person is brought to the U.S. to work as a housekeeper and is told that she will have to work for 30 years to repay $1,000 in fees that she will incur, this would constitute debt bondage regardless of whether any actual coercive threats are made.

"Deceive" and "deception"

(1) OAG, App. C at 467, recommends that the definition of "deceive" and "deception" be re-drafted 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) Do not mean puffing statements unlikely to deceive ordinary persons.

- The RCC adopts this recommendation. This recommendation does not substantively change the definition of the terms "deception" and "deceive." This change improves the clarity of the revised definition.

"Demonstrating"

(1) *The CCRC recommends changing the phrase "for the purpose of" to "with the desire to," so as to avoid confusion with the defined term "purpose" in RCC § 22E-206.*

- This change clarifies the revised definition and does not substantively change its meaning.

"Dwelling"

(1) *The CCRC recommends rephrasing the definition so that it is easier to read. It now states, "a structure that is either designed or actually used for lodging or residing overnight…" The prior definition stated, "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…"*

- This change clarifies the revised definition and does not substantively change its meaning.

"Felony"

(2) *OAG, App. C at 528, recommends amending the definition of "felony" to include "First or Second Degree Parental Kidnapping pursuant to RCC § 16-1022 (h)(6)."*

- The RCC incorporates this recommendation.
- This change improves the consistency and clarity of the revised definition.

"Incapacitated individual"

(1) *The CCRC moves to RCC § 22E-701 the definition of "incapacitated individual" that previously was specified in RCC § 22E-408, and provides a standard commentary entry for the definition. The definition reads: "'Incapacitated individual' has the meaning specified in D.C. Code § 21-2011." The revised definition is used not only in the RCC § 22E-408 defenses, but also in the updated kidnapping and criminal restraint statutes.*

- These changes improve the clarity of the revised commentary.

"Labor"

(1) *USAO, App. C at 495, recommends that the definition of "labor" omit the words "other than a commercial sex act."*

- The RCC incorporates this recommendation. This change addresses a possible gap in liability in cases in which an actor compels a person to perform labor, without knowing that the labor is actually a commercial sex

act. This change also ensures that forced labor and trafficking in forced labor are lesser included offenses of forced commercial sex and trafficking in forced commercial sex, respectively. This change improves the proportionality of the revised criminal code.

"Law enforcement officer"

(1) *OAG, App. C at 468, recommends revising the definition to include campus police officers, who serve a similar role to licensed special police officers.*

- The RCC incorporates this recommendation by adding licensed campus police officers to the definition. This change improves the consistency and proportionality of the revised offenses.

(2) *CCRC recommends revising and reordering the definition to include: (A) An officer or member*[72] *of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;*[73] *(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.*

- First, the revision makes clear that a federal law enforcement officer, Metro Transit Police officer, or federal investigator is a law enforcement officer, irrespective of whether they are "performing functions comparable" to the functions of a Metropolitan Police Officer. For example, a federal officer is an officer, even if they are not investigating a local crime.
- Second, the revision does not include a person who performs a comparable function in another state for an agency that does not operate in the District of Columbia. For example, a Maryland probation officer is not a law enforcement officer under the updated definition.
- Third, the revised definition applies only when a civilian employee of the Metropolitan Police Department, special police officer, campus police officer, or employee of the Department of Corrections, Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division is on-duty.[74]

[72] E.g., reserve officer.

[73] E.g., Metro Transit Police, D.C. Housing Authority Police Department, Department of General Services Protective Services Police.

[74] *Compare Dist. of Columbia v. Coleman*, 667 A.2d 811, 818 (D.C. 1995) ("Members of the police force are 'held to be always on duty', and are required to take police action when crimes are committed in their presence") *with Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

- Fourth, the revised definition does not include an express reference to "[a]ny 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." These employees are already covered by the paragraph that applies to an employee of the Department of Youth Rehabilitation Services.
- Fifth, the revised definition uses the conjunction "or" instead of "and," to make clear that a person may qualify under any paragraph.
- These changes improve the logical order, clarity, consistency, and proportionality of the revised statutes.

"Live broadcast"

(1) *The CCRC recommends replacing "by one or more people" in the definition of "live broadcast" with "by an audience, including an audience of one person." With this revision, the definition reads: "a streaming video, or any other electronically transmitted image, for simultaneous viewing by an audience, including an audience of one person." This change makes the definition consistent with the closely-related definition of "live performance."*[75]

- This change improves the clarity and consistency of the revised statutes.

"Motion picture theater"

(1) *The CCRC recommends deleting the definition of "motion picture theater" from the general definitions in RCC § 22E-701 and instead codifying it directly in the only RCC offense in which it appears, Unlawful Operation of a Recording Device in a Motion Picture Theater (RCC § 22E-2106). Including this definition in RCC § 22E-701 could be potentially confusing with other RCC offenses that refer to a "movie theater," such as Creating or Trafficking an Obscene Image of a Minor (RCC § 22E-1807). This is not a substantive change.*

- This change improves the clarity and consistency of the revised statutes.

"Official custody"

(1) *The CCRC recommends codifying the following definition of "official custody":*
"Official custody" means:
(A) Detention for a legitimate police purpose, or detention following or pending:

[75] RCC § 22E-701 defines "live performance" as "a play, dance, or other visual presentation or exhibition for an audience, including an audience of one person."

(i) Arrest or surrender in lieu of arrest for an offense;
(ii) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;
(iii) Commitment as a material witness; or
(iv) Civil commitment proceedings, extradition, deportation, or exclusion;

(B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation.

The term is used in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). This revision is discussed in detail in this Appendix for the RCC sexual abuse by exploitation statute, as well as the commentaries to the definition in RCC § 22E-701 and the RCC sexual abuse by exploitation statute.

- This change improves the clarity, consistency, and proportionality of the revised statutes and removes a possible gap in liability.

"Open to the general public"

(1) *The CCRC recommends revising the commentary to note the DCCA's recent opinion in* Broome v. United States*,[76] which was issued after the most recent draft language was released. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*

- This change clarifies the revised commentary.

"Person acting in the place of a parent per civil law"

(1) *The CCRC adds brief commentary on this phrase that was missing from the prior compilation.*

- These changes improve the clarity of the revised commentary.

"Person with legal authority over the complainant"

(1) *The CCRC recommends amending the definition to mean: "(A) When the complainant is under 18 years of age, the parent, 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 someone acting with the effective consent of such a parent or such a person; or* (B) *When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." This change makes the reference to legal duty in (A) consistent with other RCC language. The change also eliminates from*

[76] 240 A.3d 35 (D.C. 2020).

(B) reference to "engaging in conduct permitted under civil law controlling the actor's guardianship," which is now unduly narrow and confusing given the use of the defined phrase in multiple offenses in the updated RCC (instead of just general defenses). Commentary on this phrase that was missing from the prior compilation but has now been added to reflect the amended definition.

- These changes do not further change District law and improve the clarity and consistency of the revised statutes.

"Position of trust with or authority over"

(1) *The CCRC recommends revising subsection (A) of the definition of "position of trust with or authority over" to include a "great-grandparent." With this revision, subsection (A) of the definition includes a great-grandparent, whether related by blood, adoption, marriage, or domestic partnership, as well as an individual with whom such a great-grandparent is in a romantic, dating, or sexual relationship. The previous version of this definition was limited to grandparents, as is the current D.C. Code definition of "significant relationship."*[77] *Including great-grandparents recognizes that great-grandparents occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). The commentary to the definition of "position of trust with or authority over" has been updated to reflect that this is a change to current District law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(2) *The CCRC recommends replacing "aunt" and "uncle" with a "parent's sibling" in subsection (A) of the definition of "position of trust with or authority over." This is a non-substantive change that improves the consistency of the definition with the RCC incest statute (RCC § 22E-1308).*

- This change improves the clarity of the revised statutes.

(3) *The CCRC recommends revising subsection (A) of the definition of "position of trust with or authority over" to include a "child of a parent's sibling" (first cousin). With this revision, subsection (A) of the definition includes a first cousin, whether related by blood, adoption, marriage, or domestic partnership, as well as an individual with whom such a cousin is in a romantic, dating, or sexual relationship. Neither the previous version of this definition nor the current D.C. Code definition of "significant relationship"*[78] *includes first cousins in the list of "per se" individuals in subsection (A). It is inconsistent to exclude cousins from the definition, especially since the definition includes siblings, which, like cousins, may tend to be closer in age to a minor complainant than the other "per se" relatives listed in subsection (A) of the definition, such as parents, aunts, or uncles. This revision is also consistent with the scope of the RCC incest statute*

[77] D.C. Code § 22-3001(10)(A) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").
[78] D.C. Code § 22-3001(10)(A) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").

(RCC § 22E-1308). The commentary to the definition of "position of trust with or authority over" has been updated to reflect that this is a change to current District law.

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(4) *The CCRC recommends codifying a new subsection (B) in the definition of "position of trust with or authority over": "A half-sibling related by blood, or an individual with whom such a person is in a romantic, dating, or sexual relationship." The previous version of the definition and the current D.C. Code definition of "significant relationship"[79] include a "sibling" by blood, adoption, marriage, or domestic partnership, and it is unclear if "sibling" includes a half-sibling. Including half-siblings by blood recognizes that they occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). The commentary to the definition of "position of trust with or authority over" has been updated to reflect that this is a possible change to current District law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(5) *The CCRC recommends including specified relatives, and their significant others, by marriage or domestic partnership "either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends." The previous version of the definition and the current D.C. Code definition of "significant relationship"[80] specify "related by . . . marriage [or] domestic partnership" and it is unclear whether this includes the specified relatives after the marriage or domestic partnership ends. Including specified relatives after the marriage or domestic partnership ends recognizes that they occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). The commentary to this offense has been updated to reflect that this is a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(6) *USAO, App. C at 495-496, recommends deleting from the definition of "position of trust with or authority over" the requirement that the actor "has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant." USAO states that this language results 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." USAO states that "such an exemption is counterintuitive and inconsistent with the reality of abuse by many individuals in positions of authority." USAO gives as an*

[79] D.C. Code § 22-3001(10)(A) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").

[80] D.C. Code § 22-3001(10)(A) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").

example "a priest at a church, or another religious figure, [that] rarely has supervisory or disciplinary authority over a child, but should fall within the definition." USAO states 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 their community should be able to trust." USAO states that "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." USAO states that the requirement of "significant contact" is "very vague" because the timing, amount, and nature of the contact is unclear.

- The RCC partially incorporates this recommendation by: 1) deleting the requirement in what is now subsection (F) that the actor has "significant contact" with the complainant; and 2) codifying as "per se" categories of a "position of trust with or authority over" the religious leaders in D.C. Code § 14-309 (what is now subsection (D)) and certain persons of authority in secondary schools (what is now subsection (E)). The "per se" religious and educational actors in subsection (D) and subsection (E) match the scope of the religious and educational actors in the RCC sexual abuse by exploitation statute (RCC § 22E-1303) and recognize the significance of the positions these individuals hold. Subsection (D) and subsection (E) are discussed in detail below.
- The RCC does not incorporate the recommendation to delete the requirement that the actor "exercises supervisory or disciplinary authority over the complainant" in subsection (F). In current law and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring the individuals in subsection (F) to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal.

(7) *The CCRC recommends adding as subsection (D) "A religious leader described in D.C. Code § 14-309" to the definition of "position of trust with or authority over." The current D.C. Code definition of "significant relationship" includes "[a]ny employee or volunteer of a . . . church, synagogue, mosque, or other religious institution . . . including a . . . clergy, youth leader, chorus director . . . administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."*[81] *There is no DCCA case law interpreting the current D.C. Code definition of "significant relationship." It is unclear in the current D.C. Code definition whether "any other person in a position of trust with*

[81] D.C. Code § 22-3001(10)(D).

or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. As USAO stated in its comments on this definition, App. C at 496, "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 . . . the harm to the community is particularly potent when a child is abused by a person that their caretakers and their community should be able to trust." Codifying "A religious leader described in D.C. Code § 14-309" as a per se" category of a "position of trust with or authority over" clarifies the revised definition and is consistent with the scope of religious figures included in the RCC sexual abuse by exploitation statute (RCC § 22E-1303).

- This revision improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(8) *The CCRC recommends adding as subsection (E) to the definition of "position of trust with or authority over" "A coach who is not a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer, provided that such an actor is an employee, contract employee, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives services or attends programming." The current D.C. Code definition of "significant relationship" includes "[a]ny employee or volunteer of a school . . . including a teacher, coach, counselor . . . chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."[82] There is no DCCA case law interpreting the current D.C. Code definition of "significant relationship." It is unclear in the current D.C. Code definition whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. As USAO stated in its comments on this definition, App. C at 496, an "educational figure holds, by nature of his/her employment status, a position of trust and authority over [the complainant]." Codifying the educational figures listed in subsection (D) of the definition as a "per se" category of a "position of trust with or authority over" clarifies the revised definition and is consistent with the scope of educational figures included in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). In current law and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring that the actor is at the school at which the complainant is enrolled or at a school where the complainant receives services or attends programming, and, in the case of a coach, that the actor is not also a secondary school student, ensures that the relationship between the actor*

[82] D.C. Code § 22-3001(10)(D).

and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. In addition, the revised definition requires that the actor is "an employee, contract employee, or volunteer," which is consistent with the requirements in subsection (F) of the definition.

- This revision improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(9) *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.*[83] *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,"*[84] *as does the RCC sexual abuse by exploitation statute (RCC § 22E-1303).*

- This change improves the clarity and consistency of the revised statute.

(10) *The CCRC recommends limiting subsection (C) of the revised definition to "current" spouses or domestic partners of a person acting in the place of a parent per civil law. This specification is necessary because subsection (A) of the revised definition, as discussed above, has been revised to include spouses or domestic partners "either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends." Limiting subsection (C) of the revised definition to "current" spouses or domestic partners is consistent with the scope of a "person acting in the place of a parent per civil law" as defined in RCC § 22E-701. The commentary has been updated to reflect that this is part of a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

"Possess"

(1) *The CCRC recommends clarifying in commentary that a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position.*[85]

- This change clarifies the revised commentary.

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[83] Advisory Group Memo #30 (issued 2-19-2020) App. D1 at 86.

[84] *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 . . . .").

[85] For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

"Prior conviction"

(1) *The CCRC recommends clarifying that the term "prior conviction" includes a conviction that is pending appeal but does not include a conviction that has been vacated or reversed. The DCCA's recent opinion in* Blocker v. United States,[86] *which was issued after the most recent draft language was released, noted an ambiguity here but did not resolve it.*

- This change clarifies the revised definition.

"Protection order"

(1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, individual statutes will refer to a temporary protection order under D.C. Code § 16-1004, a final protection order under D.C. Code § 16-1005, or a valid foreign protection order as defined in D.C. Code § 16-1041.*

- This change clarifies, but does not substantively change, the revised code.

"Public official"

(1) *CCRC recommends adding a commentary for the definition of "public official."*

- This change clarifies, but does not substantively change, the revised definition.

"Sexual act"

(1) The CCRC corrects an error in the revised definition of "sexual act" in the Compilation of Draft RCC Statutes by moving "sexually" so that it modifies all the verbs that follow ("with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person."). This correct text was discussed extensively in the commentary to the RCC definition (First Draft of Report #50 – Commentary to Subtitle I General Part), but the statutory language in the Compilation of RCC Statutes was incorrect.

- This change improves the clarity and consistency of the revised statute.

[86] 240 A.3d 35 (D.C. 2020).

RCC § 22E-1101. Murder.

(1) OAG, App. C at 469, recommends re-drafting subsection (c), so that the entire subsection is in the past tense.

- The RCC incorporates this recommendation. Subsection (c) will be re-drafted as follows: "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." This change improves the clarity of the revised statute.

(2) PDS, App. C at 484-485, recommends that the "random shooting" penalty enhancement under subparagraph (d)(3)(H) be omitted.

- The RCC adopts this recommendation and removes this enhancement. Random shootings, in which the actor fires a gun indiscriminately, endanger bystanders who happen to be in the vicinity. To account for this added danger, the RCC included random shooting as a penalty enhancement for murder. However, when the CCRC initially made this recommendation, it had not yet drafted and proposed separate offenses to criminalize discharging a firearm. The proposed discharge offenses[87] provide additional liability for the additional danger of a random shooting. In addition, the term "random shooting" is undefined and is unclear exactly which types of shootings qualify. Random shootings may include firing a gun indiscriminately into a crowd, into any location regardless or whether it is occupied, or may also include shooting a person for no discernable motive. This creates uncertainty as to which types of murders will be subject to the penalty enhancement. Eliminating "random shootings" as an aggravating factor for murder improves the clarity and proportionality of the revised statutes.

(3) PDS, App. C at 485, recommends that the "drive by shooting" penalty enhancement for murder be re-drafted as a "Commits the murder by shooting committed from a vehicle that is being driven at the time of the shooting[.]"

- The RCC adopts this recommendation. This change more clearly specifies the situations in which the penalty enhancement applies, and improves the clarity and consistency of the revised statutes.

(4) USAO, App. C at 496, recommends that felony murder be classified as first degree murder instead of second degree murder.

- The RCC does not adopt this recommendation because classifying felony murder, which includes unintentionally causing the death of another, as first degree murder would authorize disproportionately severe penalties. Under the RCC, first degree murder requires the highest degree of culpability; the actor must *purposely* cause the death of another with premeditation and deliberation. Felony murder, which involves accidentally causing the death of another while committing or attempting

[87] Negligent discharge, RCC § 22E-1406; and endangerment with a firearm, RCC § 22E-4120.

to commit an enumerated felony involves a significantly lower degree of culpability, and does not warrant being equated to purposeful and premediated murder.

- USAO notes that felony murder involves a degree of planning and preparation that is not present with other forms of second degree murder. This is likely true, but it does not follow that felony murder involves a higher degree of culpability. Felony murder may involve planning and preparation to commit *a predicate felony*, not to cause the death of another. Accidentally causing the death of another after planning and preparation to commit a predicate felony is not inherently more culpable than *intentionally* causing the death of another, and does not warrant being classified as a higher degree of murder.
- USAO argues that categorizing felony murder as second degree murder does not provide sufficient penalties, especially in particularly egregious cases. The RCC authorized penalties for second degree murder, which includes *intentionally* killing another person, are sufficiently severe for felony murder. Moreover, additional penalties beyond those authorized for second degree murder are available in the particularly egregious cases the USAO cites to in its written comments.
- USAO's written comments cite to several cases involving particularly egregious facts, as examples of cases in which the penalties for second degree murder would be insufficient. However, in these egregious cases the RCC authorizes penalties in excess of the maximum penalty for second degree murder in two main ways: first there may be alternate grounds for murder liability apart from felony murder; and second, the RCC includes numerous penalty enhancements that account for particularly egregious cases.
    - For example, a case cited by USAO *Ingram v. United States*, demonstrates various means by which the RCC authorizes additional penalties beyond the maximum authorized for second degree murder. In *Ingram*, the USAO states that the defendant struck the decedent, a special needs student, in the head with a bottle, and continued to beat the decedent on the ground with such force that "the beating was causing a nearby air-conditioning unit to vibrate." The defendant then picked up a metal pole and apparently forced it into the decedent's anus. The defendant was acquitted of first degree premeditated murder, but convicted of first degree sexual assault and of first degree felony murder. The USAO notes that since the jury did not find that the defendant acted with premeditation, the defendant in this case could not have been convicted of first degree murder under the RCC. This case is especially heinous, but the RCC accordingly provides for additional penalties beyond the maximum sentence authorized for second degree murder.
    - First, under the facts of *Ingram*, it is likely that there are alternate theories of murder liability, apart from felony murder. Causing the

death of another by means of a continued beating of the severity described in USAO's comments would satisfy the requirements for second degree depraved heart murder under the RCC.

- The availability of alternate grounds for murder liability has significant penalty implications. Under current District law and the RCC, when a person is convicted of felony murder the convictions for murder and the predicate felony merge.[88] However, if there is an alternate basis for murder liability, the murder conviction and the separate felony do *not* merge, and the sentences may be ordered to be served consecutively. Given the facts in *Ingram*, under the RCC a defendant could be convicted of second degree depraved heart murder *and* first degree sexual assault. Arguably, since the defendant in *Ingram* used a metal pole to sexually assault the decedent, depending on the particular facts of the case, the defendant could be convicted of *enhanced* first degree sexual assault.[89]
- Second, the facts described in *Ingram* may satisfy various penalty enhancements for second degree murder specified in the RCC. Under the RCC, second degree murder is subject to a penalty enhancement 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," or "mutilates or desecrates the decedent's body." Forcing a metal pole into the decedent's anus may satisfy either, or both, of these penalty enhancements.
- In addition, second degree murder is also subject to a penalty enhancement if the defendant was "reckless as to the fact that the decedent is a protected person." In *Ingram* the decedent may have been a "protected person" as the term is defined under in the RCC. The term "protected person" includes a "vulnerable adult," which is defined as "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." USAO notes that the decedent was a special needs student who when confronted by the defendant was "distressed, confused, and unable to speak coherently[.]" If the decedent in this case was a

[88] *Norris v. United States*, 585 A.2d 1372, 1374 (D.C. 1991).

[89] Under RCC § 22E-1301, the penalty classification for sexual assault may be increased in severity by one class if "The actor recklessly causes the sexual act or sexual contact by displaying or using an what is, in fact, a dangerous weapon or imitation dangerous weapon[]." The term "dangerous weapon" is defined under RCC § 22E-701, and includes "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." In this case, if evidence presented at trial, including any expert testimony, proves that a metal pole violently thrust into a person's anus is likely to cause serious bodily injury, then it constitutes a dangerous weapon, and the penalty enhancement for sexual assault would apply.

"protected person," and the defendant was aware of a substantial risk that the decedent's status, this provides an additional basis for enhanced penalties.

- Based on the facts of *Ingram* as described by USAO, a defendant could potentially be convicted of both enhanced second degree murder and enhanced first degree sexual assault. If convicted of both, the RCC authorizes the same penalty as the maximum currently authorized for first degree murder under the D.C. Code, 60 years, or possibly more depending on the facts of the case. The RCC recognizes that some murders that occur during the commission of a predicate felony may be egregious, and accordingly provides for heightened penalties. However, the heightened penalties may not be available through a single charge of felony murder as in the current D.C. Code.

(5) USAO at App. C 504 opposes eliminating accomplice liability for felony murder. USAO says that not specifically providing accomplice liability for felony murder and reliance on regular accomplice liability principles for murder, "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 does not cite any social science research or statistics in support of its statement that this change in law would lead to an increase in violence committed by groups of individuals.

- The RCC partially incorporates this recommendation by allowing for accomplice liability for felony murder but also providing a defense for such an accomplice when they do not commit the lethal act and either believe that no participant in the predicate felony intends to cause death or serious bodily injury, or makes reasonable efforts to prevent another participant from causing the death or serious bodily injury of another. In the Second Draft of Report #19 the CCRC proposed this defense as an affirmative defense,[90] but now recommends the burden of proof be that of a defense. Where a person meets the requirements of the defense, a murder charge and penalty does not appear to be warranted though of course the person would remain liable for the predicate felony and, depending on the facts of the case, may be subject to other charges as well. The CCRC continues to review this matter, however, as the deterrence rationale referenced in the court opinion cited by USAO[91] has been called into question by social science analysis[92] and some jurisdictions have

[90] USAO did not provide written comments regarding the changes proposed in the Second Draft of Report #19.

[91] *Wilson-Bey v. United States*, 903 A.2d 818, 835 (D.C. 2006).

[92] Scholars have concluded that the severity of sentences, as measured by sentence length, has a negligible deterrent effect. Bill McCarthy, *New Economics of Sociological Criminology*, 28 ANNU. REV. SOCIOL. 417–442 (2002); National Institute of Justice, *Five Things About Deterrence* 2 (2016). One paper analyzing state-level felony and felony murder data concluded that "Policymakers should draw one conclusion from this paper: the felony-murder rule does not substantially improve crime rates. If the main reason a state retains the rule is to reduce crime, it should reconsider the rule." Malani, Anup, "Does the

eliminated felony murder altogether. This change improves the proportionality of the revised criminal statutes.

(6) USAO, App. C at 545, recommends retaining a 30 year mandatory minimum sentence for first degree murder. USAO notes that a 30 year mandatory minimum is especially appropriate for premeditated purposeful murder, and notes that 32 states impose a mandatory minimum sentence of life or life without parole.

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- The CCRC also notes that USAO does not assert that the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter purposeful premeditated first degree murder.[93]
- USAO's comparisons with other jurisdictions that impose mandatory minima for first degree murder is somewhat misleading because many states allow for parole[94], and because the elements of first degree murder in other jurisdictions do not necessarily correspond to the elements of first degree murder under the RCC.[95]

Felony-Murder Rule Deter? Evidence from FBI Crime Data," (2007) http://www.nytimes.com/packages/pdf/national/malani.pdf

[93] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

[94] Under current law, first degree murder carries a mandatory minimum sentence of 30 years with no possibility of release. By contrast, many states that impose mandatory minimum sentences for first degree murder allow for parole. Even in states that impose a mandatory life sentence, defendants convicted of first degree murder may be eligible for release after they have been imprisoned for fewer than 30 years. For example, USAO cites to Rhode Island as an example of a state with a mandatory minimum life sentence for first degree murder. However, in Rhode Island defendants convicted of first degree murder are eligible for parole after 15 years. 11 R.I. Gen. Laws Ann. § 11-23-2.2.

[95] The elements of first degree murder statutes in other jurisdictions do not necessarily correspond to first degree murder under the RCC, and may involve more serious or culpable conduct. For example, USAO cites the first degree murder statute from New York, which imposes a 15 year mandatory minimum. However, as USAO notes in its comments, New York's *second degree* murder statute more closely corresponds to the RCC's first degree murder statute. New York's first degree murder statute requires that the decedent was an on duty police officer, peace officer, or other designated public safety employee. N.Y. Penal Law § 125.27.

In addition to differences in statutory elements, courts in different jurisdictions may have interpreted elements of seemingly comparable murder more narrowly than the DCCA. For example, USAO cites to Ohio's *aggravated* murder statute, which requires that the defendant causes the death of another "with prior calculation and design."[95] However, this "prior calculation and design" element may require a greater showing than that required for "premeditation" and "deliberation" under District law. *See State v. Jenkins*, 355 N.E.2d 825, 826–27 (Ohio Ct. App. 1976) ("'Prior calculation and design' sets up a new and more demanding standard than the old first degree murder standard of 'deliberate and premeditated malice.' 'Prior calculation and design' require some kind of studied analysis with its object being to cause the death of another. Momentary premeditation is no longer sufficient."

(7) PDS, App. C at 581 objects to inclusion of felony murder as a basis for liability under second degree murder or manslaughter.

- The RCC does not incorporate this recommendation at this time. Although felony murder does not require causing death recklessly or intentionally, the predicate felonies are highly dangerous and create a significant risk of death or serious injury. The penalties authorized under the RCC's second degree murder and manslaughter offenses are not disproportionately severe for negligently causing the death of another while committing or attempting to commit a predicate felony, given that the homicide and predicate offense merge.

(8) PDS App. C at 581 recommends that if the RCC retains felony murder under second degree murder and manslaughter, that the actor be required to commit the "lethal act." Alternatively, PDS recommends that the defense under subsection (g) be incorporated as elements of the offense, instead of as a defense.

- The RCC partially incorporates this recommendation. The updated murder statute includes a defense if the actor did not commit the lethal act, and either believes that no fellow participant intends to cause death or serious bodily injury, or make reasonable efforts to prevent a fellow participant from causing death or serious bodily injury. This defense accounts for the diminished culpability of actors who do not commit the lethal act. This is a change from the prior RCC recommendation for an affirmative defense.

(9) PDS, App. C at 583 recommends that first and second degree criminal abuse of a minor be removed from the list of predicate felonies for felony murder. PDS also recommends that felony murder requires that the "predicate felony must have a purpose that is independent of the decedent's death or serious injury."

- The RCC incorporates this recommendation, and first and second degree criminal abuse of a minor will be removed from the list of predicate felonies for felony murder. 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. This change improves the proportionality of the revised criminal code.
- The RCC does not incorporate the recommendation that the predicate felony must have a purpose that is independent of the decedent's death or serious injury. This limitation is unnecessary and does not change the scope of second degree murder. Under this proposal, if an actor commits a predicate felony with the purpose of causing death or serious bodily injury, the felony murder rule would not apply. However, if the actor acts with this purpose and causes the death of another, that actor would still be guilty of second degree murder under paragraph (b)(1).[96]

[96] Paragraph (b)(1) states that second degree murder includes recklessly, with extreme indifference to human life, causing the death of another. This form of second degree murder is satisfied if a person

(10) The CCRC recommends redrafting subparagraph (b)(2)(F) to reference only first and second degree robbery, instead of first, second, third, and fourth degree robbery. Under the prior version of the robbery statute, fourth degree robbery included recklessly causing significant bodily injury in the course of committing a robbery. The CCRC has recommended reducing the number of penalty gradations in robbery from five to three. Under this revised robbery statute, second degree robbery includes recklessly causing significant bodily injury in the course of committing a robbery. Accordingly, the murder statute is revised to refer to the appropriate grades of the revised robbery statute.

- This change improves the consistency and proportionality of the revised criminal statutes.

intentionally causes the death of another, or causes death of another by acting with intent to cause serious bodily injury.

RCC § 22E-1102. Manslaughter.

(1) *PDS, App. C at 583, recommends the same changes be made to paragraph (1)(b) as it recommended to felony murder under RCC § 22E-1101.*

- The RCC makes the same changes to paragraph (1)(b) as it does with respect to felony murder under RCC § 22E-1101.

(2) *The CCRC recommends that in accordance with changes made to the murder statute, that the affirmative defense under subsection (e) be changed to a defense. The elements of the defense remain unchanged. For further discussion of this change, see responses to RCC § 22E-1101 above.*

RCC § 22E-1201. Robbery.

(1) *USAO, App. C at 507, recommends that the commentary be revised to state that physical force that "overpowers" the complainant is sufficient under subparagraph (e)(4)(D), and that the force need not be "significant."*

- The RCC partially incorporates this recommendation by replacing the words "Using physical force that overpowers the complainant or any person present other than an accomplice" with the words "By applying physical force that moves or immobilizes another person present[.]" This revised language is not intended to substantively change the scope of the robbery offense. Both the prior and revised language is intended to criminalize taking property by using force that does not cause bodily injury (which is separately addressed in the robbery statute), but still moves or immobilizes the complainant, such as shoves or bear hugs. The updated language is intended to more clearly define the degree of force required for robbery. This change improves the clarity of the revised criminal code.

(2) *USAO, App. C at 507, recommends that the commentary clarify that a complainant's injury need not actually be caused by the dangerous weapon or imitation dangerous weapon.*

- The RCC incorporates this recommendation by adding the example suggested by USAO to the commentary footnote referenced by USAO. Specifically, the footnote now includes the sentence: "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." Under this penalty enhancement, there is no requirement that the actor specifically caused bodily injury by using or displaying a weapon or imitation weapon. This change clarifies the RCC commentary.

(3) *The CCRC recommends re-organizing the revised robbery statute into three penalty gradations and adding penalty enhancements such that the total number of classes for the conduct is the same—five. The three penalty grades will be determined by the severity of bodily injury caused during the robbery, as well as whether the property taken in the robbery is a motor vehicle or valued at more than $5,000. The two penalty enhancements are applicable if the robbery is committed by recklessly displaying or using a dangerous weapon or imitation weapon, or if the complainant is a protected person.*

- Under the prior version of the robbery statute, causing bodily injury by using or displaying a weapon was subject to more severe penalties than causing bodily injury to a protected person. Under the revised version of the robbery statute, each grade of robbery is increased in penalty severity by one class if the robbery is committed by using or displaying a weapon, or if the complainant is a protected person. Notably, under the prior version of the robbery statute, robbery of property valued at $5,000 or more, and simple theft of property valued at $5,000 or more were subject to the same maximum penalty of 3 years. Under the revised robbery

statute, committing robbery of property valued at more than $5,000 will be subject to more severe penalties than theft of property valued at more than $5,000. This change improves the organization of the revised statutes.

(4) *The CCRC recommends replacing the word "kidnap" with the word "confines." The prior version of the robbery statute included threatening that a person would "kidnap" the complainant or another person. However, "kidnapping" is a specific offense under the RCC, which requires confinement with intent to inflict some additional harm on the complainant. Kidnapping includes confinement with intent to facilitate the commission of a felony. In virtually any case in which a person threatens to confine a person in order to commit a robbery, which is a felony offense, that confinement would constitute a kidnapping. Substituting the word "confines" for "kidnap" does not substantively alter the scope of the robbery offense, but more clearly communicates that threats of confinement are sufficient for robbery liability, without reference to the specific elements of the RCC kidnapping offense.*

- This change improves the clarity of the revised criminal statutes.

(5) *The CCRC recommends revising the robbery offense to include taking property by causing injury to a person present, regardless of whether the injured person is an accomplice. Although this technically changes the scope of the revised robbery statute, in practice it will have little if any effect because the bodily injury still must be the cause of the taking or exercise of control over the complainant's property. Under the prior version of the statute, only taking property by causing injury to a person* other than *an accomplice constituted robbery. The revised robbery statute now potentially includes robbery by injury to an accomplice. Instances in which a person takes property by causing injury to an accomplice in the robbery are likely very rare and among those instances it is likely rarer still that the injury to the accomplice is the means of accomplishing the robbery. Yet, should such a complainant be caused to give property to the actor by injury to the actor's accomplice (perhaps out of concern for the welfare of the accomplice), such a coercive circumstance still makes such a situation more comparable to robbery rather than other types of theft.*

- This change improves the clarity and proportionality of the revised criminal code.

(6) *The CCRC recommends revising robbery to include taking property by "communicating" that the actor will immediately cause another person to suffer bodily injury, sexual act, sexual contact, confinement, or death. The word "communicating" replaces the word "threatens" from the prior version of the robbery statute to maintain consistency with the revised criminal threats statute. In addition, using the word "communicates" aligns the elements more with criminal threats and ensures that the criminal threats offense is a lesser included offense of robbery.*

- These changes improve the clarity and proportionality of the revised criminal code.

(7) *The CCRC recommends adding an affirmative defense to robbery that the actor reasonably believed that an owner of the property gave effective consent for the actor to take or exercise control over the property. The affirmative defense is*

different than the effective consent defense for assault and applies only in situations where the actor believes they have the effective consent of an owner to take property that is held or possessed by the complainant. If this defense applies, the actor may still be convicted of other property offenses or offenses against persons (e.g., assault), depending on the facts of the specific case. Use of force in reclaiming property of another may be permitted under the RCC § 22E-404 defense of property.

- This change improves the clarity and proportionality of the revised statutes.

(8) *The CCRC recommends replacing the words "physically present" with "present." This change does not substantively change the scope of the offense. The word "physically" is redundant as used in the revised robbery statute.*

- This change improves the clarity of the revised statutes.

RCC § 22E-1202. Assault.

(1) The CCRC recommends removing the enhanced offense gradations that require "displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon." Instead, this display or use of a dangerous weapon or imitation dangerous weapon is codified as a penalty enhancement in subparagraphs (h)(5)(C), subparagraph (h)(6)(B), and subparagraph (h)(7)(B). This revision improves the clarity of the revised statute and does not substantively change the recommended penalties for the offense.

- This change improves the clarity of the revised statute.

(2) The CCRC recommends applying a culpable mental state of "recklessly" to the weapon penalty enhancement that applies to second degree assault (subparagraph (h)(5)(B)). With this change, what is now second degree assault prohibits recklessly, with extreme indifference to human life, causing serious bodily injury, and the penalty enhancement requires committing the offense by recklessly displaying or using a dangerous weapon or imitation dangerous weapon. In the previous version of this statute, what was then first degree assault required the culpable mental state of recklessly, with extreme indifference to human life, both for causing serious bodily injury and for the display or use of a dangerous weapon or imitation dangerous weapon. This change ensures that weapon penalty enhancement consistently requires a "recklessly" culpable mental state.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) The CCRC recommends removing the enhanced offense gradations that require that the complainant is a protected person or that the actor commit the offense with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, or District official. Instead, these situations are codified as penalty enhancements in subparagraphs (h)(5)(A) and (h)(5)(B), and sub-subparagraphs (h)(6)(A)(i), (h)(6)(A)(ii), (h)(7)(A)(i), and (h)(7)(A)(ii). This revision improves the clarity of the revised statute and does not substantively change the recommended penalties for the offense.

- This change improves the clarity of the revised statute.

(4) The CCRC recommends deleting what was previously subsection (g),[97] *the limitation on justification and excuse defenses to assault on a law enforcement*

[97] Subsection (g) previously read:

(g) *Limitation on justification and excuse defenses to assault on a law enforcement officer.* For prosecutions brought under this section, there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of physical force by a law enforcement officer when:

(1) The person is reckless as to the fact that the complainant is a law enforcement officer;

(2) In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful; and

officer, and replacing it with the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." This is a change both as compared to the prior RCC draft of assault and to current District law, which provides a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).[98] *The new RCC reliance on RCC § 22E-403(b)(3) to limit self-defense against a law enforcement officer allows an actor who otherwise meets the requirements for self-defense to use force to oppose a LEO use of force that either is not lawful or when the actor is not reckless as to the lawfulness. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer*[99] OBJ *The CCRC recommends the policy change while noting that a person must still satisfy the requirements of self-defense to avoid liability and that the RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. The commentary to the RCC assault statute has been updated to reflect that this is a substantive change to current District law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) The CCRC recommends deleting the provision in what was previously fifth degree assault for negligently causing bodily injury by discharging a firearm. As the commentary to the RCC assault statute explained previously, this provision was new to District law. Instead, the RCC endangerment with a firearm offense (RCC § 22E-4120) has been revised to include creating a substantial risk of bodily injury to another person and the commentary to RCC § 22E-4120 has been amended to clarify that causing bodily injury satisfies the risk requirement. The RCC endangerment with a firearm offense requires a higher culpable mental state of "knowingly" for discharging a projectile from a firearm and for creating the substantial risk of bodily injury. Under the updated RCC assault statute, negligently discharging a firearm and negligently causing bodily injury is no longer sufficient for liability as it was under the previous version of fifth degree assault. However, an individual that negligently discharges a firearm may have liability for negligent discharge of a firearm (RCC § 22E-4106) or liability for

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(3) The law enforcement officer uses only the amount of physical force that appears reasonably necessary.

[98] Current D.C. Code § 22-405 and § 22-405.01 provide that it is: "neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."

[99] As explained by the DCCA in *McDonald v. United States*, "The legislative history indicates that Congress intended to adopt 'the modern rule' in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72." *McDonald v. United States*, 496 A.2d 274, 276 (D.C. 1985).

knowingly possessing it under several RCC weapons offenses, subject to the limitation on convictions for multiple related weapons offenses in RCC § 22E-4119.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(6) 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.[100]

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(7) The CCRC recommends codifying an effective consent defense for first degree and second degree of the revised assault statute in paragraph (f)(1) and for third degree and fourth degree in paragraph (f)(2). In previous compilations of draft statutes for the RCC, RCC § 22E-409[101] *codified a general effective consent defense for several RCC offenses against persons, including assault. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.*

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[100] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[101] In relevant part, the defense in RCC § 22E-409 stated:

> (a) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
>
> (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
>
> (2) Either:
>
> (A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
>
> (B) The result was a reasonably foreseeable hazard of:
>
> (i) The complainant's occupation;
>
> (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
>
> (iii) Participation in a lawful contest or sport.

The new defenses in paragraphs (f)(1) and (f)(2) are generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defenses continue to exclude an actor that is a "person with legal authority over the complainant" from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The revised defenses still apply if the actor reasonably believes that the actor has the effective consent of the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701.[102] *However, the defenses no longer apply if the actor "in fact" has the complainant's effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.*[103] *The revised consent defenses specify whether the complainant or a "person with legal authority over the complainant" must give the required effective consent based upon the age of the complainant and the age of the actor.*

The previous effective consent defense in RCC § 22E-409 applied, in part, if the "conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ." The new defenses continue to recognize these limitations by permitting a defense for first degree and second degree assault—which require permanent, disabling injuries or "serious bodily injury," as that term is defined in RCC § 22E-701[104]*—only when the injury is "caused by a lawful cosmetic or medical procedure." The defense to third degree and fourth degree assault—which require only "bodily injury" or "significant bodily injury" as those terms are defined in the RCC*[105]*—allows the complainant or a person with legal*

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[102] RCC § 22E-701 defines "person with legal authority over the complainant" as:

(A)When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or

(B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

[103] It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

[104] RCC § 22E-701 defines "serious bodily injury" as "a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D)Protracted loss of consciousness."

[105] RCC § 22E-701 defines "bodily injury" as "physical pain, physical injury, illness, or impairment of physical condition." RCC § 22E-701 defines "significant bodily injury" as "a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. In addition, 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; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation."

authority over the complainant to give effective consent to the injury without any such restriction as to the cause.

For the comparatively low-level "bodily injury" or "significant bodily injury" required in third degree or fourth degree of the revised assault 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[106] and several other jurisdictions.[107]

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(8) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years[108] to 15 years. Specific to the RCC assault statute, USAO states that first degree assault is "comparable to" aggravated assault while armed under current D.C. Code §§ 22-404.01 and 22-4502, which has a maximum possible penalty of 30 years, and aggravated assault "with other enhancements." USAO states that it "does not believe that the maximum penalt[y]" for first degree assault should be lowered from 15 years' incarceration to 12 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[109] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[110] 5) relative ordering of related RCC offenses;[111] and 6) national data on sentencing and time

[106] *See* Model Penal Code § 2.11.
[107] *See, e.g.,* Del. Code Ann. tit. 11, § 452.
[108] In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.
[109] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[110] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[111] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

served.[112] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the extremely high 45 year statutorily authorized penalty for aggravated assault while armed under current D.C. Code §§ 22-404.01 and 22-4502,[113] actual practice in the District has been sharply different. Court data for 2018-2019 shows that the 97.5% quantile of all sentences for aggravated assault, including aggravated assault while armed, was 144 months (12 years).[114] The CCRC recommendation here is generally consistent with current practice.

(9) USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC assault statute, USAO states that second degree assault is "comparable to" aggravated assault under current D.C. Code § 22-404.01, which has a maximum possible penalty of 10 years, and assault with significant bodily injury while armed under current D.C. Code §§ 22-404(a)(2) and 22-4502, which has a maximum possible penalty of 30 years. USAO states that it "does not believe that the maximum penalt[y]" for second degree assault should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[115] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[116] 5) relative ordering of related RCC offenses;[117] and 6) national data on sentencing and time served.[118] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 33 year statutorily authorized penalty for significant bodily injury assault while armed under current D.C. Code §§ 22-404.01 and 22-4502,[119] actual

[112] *See* Danielle Kaeble, *Time Served in State Prison 2016,* U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[113] Note that D.C. Code 22-4502 provides up to an additional 30 years and a mandatory minimum of 5 years for commission of aggravated assault while armed—on the first offense.
[114] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[115] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[116] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[117] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[118] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[119] Note that D.C. Code 22-4502 provides up to an additional 30 years and a mandatory minimum of 5 years for commission of felony assault while armed—on the first offense.

practice in the District has been sharply different. Court data for 2018-2019 shows that the 97.5% quantile of all sentences for felony assault, including significant bodily injury assault while armed, was 66 months (6.5 years).[120] The CCRC recommendation here is generally consistent with current practice.

[120] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1203. Menacing.

(1) *The CCRC recommends striking the separate menacing statute and instead codifying provisions covering menacing conduct in the RCC criminal threats statute. Second degree menacing is now unenhanced first degree criminal threats. First degree menacing is now first degree criminal threats with a penalty enhancement for use or display of a weapon. For further details, please see the entries for RCC § 22E-1204.*

- This change eliminates unnecessary overlap and improves the consistency and logical ordering of the revised statutes.

RCC § 22E-1204. Criminal Threats.

(1) *The CCRC recommends striking the separate menacing statute and instead codifying provisions covering menacing conduct as first degree criminal threats. Second degree menacing in the prior draft is now unenhanced first degree criminal threats. First degree menacing is now first degree criminal threats with a penalty enhancement for use or display of a weapon.*

- This approach is more consistent with the approach in other offenses in Subtitle II that have a weapons enhancement instead of a weapons grade.
- This change eliminates unnecessary overlap and improves the consistency and logical ordering of the revised statutes.

(2) *The CCRC recommends three offense gradations instead of two offense gradations, punishing threats to murder, maim, rape, or kidnap more severely than threats to injure or molest.*

- This change improves the consistency and proportionality of the revised statutes.

(3) *The CCRC recommends striking the $500 threshold for a threat to commit a property offense.*

- This change eliminates a gap in liability.

(4) *The CCRC recommends striking the phrase "anytime in the future or if any condition is met." First degree threats (previously Menacing) requires a threat to immediately cause a criminal harm. Where the word "immediately" does not appear, it is not required. Specifying in this statute that the threat may be conditioned or a future date or event may lead to confusion about how to interpret other RCC statutes (e.g., robbery, sexual assault) that include threatening as an element but do not include the same phrase.*

- This change clarifies the revised statute and does not change its meaning.

RCC § 22E-1205. Offensive Physical Contact.

(1) *The CCRC recommends removing the enhanced offense gradations that require that the complainant is a protected person or that the actor commit the offense with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, or District official. Instead, these situations are codified as penalty enhancements in subparagraphs (d)(3)(A) and (d)(3)(B). This revision improves the clarity of the revised statute and does not change the one class increase for this enhancement that was in the previous RCC draft.*

- This change improves the clarity of the revised statute.

(2) *The CCRC recommends deleting what was previously subsection (d),*[121] *the limitation on justification and excuse defenses to offensive physical contact against a law enforcement officer, and replacing it with the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." This is a change both as compared to the prior RCC draft of offensive physical contact and to current District law, which provides a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).*[122] *The new RCC reliance on RCC § 22E-403(b)(3) to limit self-defense against a law enforcement officer allows an actor who otherwise meets the requirements for self-defense to use force to oppose a LEO use of force that either is not lawful or when the actor is not reckless as to the lawfulness. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer*[123] *The CCRC recommends*

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[121] Subsection (d) previously read:

> (d) *Limitation on justification and excuse defenses to offensive physical contact against a law enforcement officer.* For prosecutions brought under this section there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of physical force by a law enforcement officer when:
>
> > (1) The person is reckless as to the fact that the complainant is a law enforcement officer;
> > (2) In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful; and
> > (3) The law enforcement officer uses only the amount of physical force that appears reasonably necessary.

[122] Current D.C. Code § 22-405 and § 22-405.01 provide that it is: "neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."

[123] As explained by the DCCA in *McDonald v. United States*, "The legislative history indicates that Congress intended to adopt 'the modern rule' in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72." *McDonald v. United States*, 496 A.2d 274, 276 (D.C. 1985).

the policy change while noting that a person must still satisfy the requirements of self-defense to avoid liability and that the RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. The commentary to the RCC offensive physical contact statute has been updated to reflect that this is a substantive change to current District law.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(3) *The CCRC recommends revising paragraph (b)(1) of what is now second degree offensive physical contact to require that the actor causes "the complainant to come into physical contact with any person or any object or substance" as opposed to "causes physical contact with the complainant." The revised language clarifies that causing physical contact between the complainant and any person's body, including the complainant's body, can satisfy the offense, as well as the actor causing the complainant to come into contact with an object or substance, e.g., dumping juice on the complainant's head. The revised wording is also consistent with first degree of the revised statute, which requires that the actor cause the complainant "to come into physical contact with bodily fluid or excrement."*

- This change improves the clarity and consistency of the revised statute.

(4) *The CCRC recommends codifying an exclusion from liability in what is now subsection (c): "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.*[124]

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends codifying an effective consent defense for the offensive physical contact offense in subsection (d). In previous compilations of draft statutes for the RCC, RCC § 22E-409*[125] *codified a general effective consent*

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[124] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[125] In relevant part, the defense in RCC § 22E-409 stated:

> (b) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
>
> (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and

defense for several RCC offenses against persons, including assault. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

The new defense in subsection (d) is generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defense continues to exclude an actor that is a "person with legal authority over the complainant" from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The revised defense still applies if the actor reasonably believes that the actor has the effective consent of the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701.[126] *However, the defense no longer applies if the actor "in fact" has the complainant's effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.*[127] *The updated effective consent defense specifies whether the complainant or a "person with legal authority over the complainant" must give the required effective consent based upon the age of the complainant and the age of the actor.*

The previous effective consent defense in RCC § 22E-409 applied, in part, if the "conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ." Such a limitation is unnecessary in a defense that is specific to the RCC offensive physical contact statute. Given the comparatively less serious physical contact that the offense prohibits, the defense allows the complainant or a person with legal authority over the complainant to give

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(2) Either:

(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or

(B) The result was a reasonably foreseeable hazard of:

(i) The complainant's occupation;

(ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or

(iii) Participation in a lawful contest or sport.

[126] RCC § 22E-701 defines "person with legal authority over the complainant" as:

(A)When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or

(B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

[127] It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

effective consent to the physical contact. In the alternative, the new defense continues to provide a defense when the actor inflicts the physical contact in a lawful sport or occupation when the physical contact is a "reasonably foreseeable hazard" of those activities. However, the new defense also applies when the actor inflicts the physical contact 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 phrase "or other concerted activity" tracks the language in the Model Penal Code[128] and several other jurisdictions.[129]

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

[128] *See* Model Penal Code § 2.11.
[129] *See, e.g.,* Del. Code Ann. tit. 11, § 452.

RCC § 22E-1301. Sexual Assault.

(1) *OAG, App. C at 469, recommends clarifying in the commentary for first degree and third degree sexual assault 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)" and the equivalent provision in third degree sexual assault for threatening to kill, kidnap, or cause bodily injury to any person, or to commit a sexual act against any person. In an earlier RCC draft, first degree and third degree sexual assault specified "by using a weapon" as a distinct basis of liability, but the language has since been deleted.[130] OAG states that it does not object to the deletion of the language from the statutory text.*

- The RCC incorporates this recommendation by revising the commentary to state that:

> The use or threatened use of a weapon is sufficient for first degree or third degree of the revised sexual assault statute if it causes bodily injury to the complainant, accompanies physical force that moves or immobilizes the complainant, or if it constitutes a specified threat, provided the other requirements of the offense are met. If the use or threatened use of a weapon does not satisfy the requirements for liability for first degree or third degree sexual assault, there may be liability for second degree or fourth degree sexual assault for an express or implied coercive threat (subparagraphs (b)(2)(A) and (d)(2)(A)), provided the other requirements of the offense are met. This change improves the clarity of the revised statute.

This change improves the clarity of the revised statute.

(2) *The CCRC recommends replacing "any person" with "the complainant" in subparagraphs (a)(2)(A) and (c)(2)(A). With this revision, subparagraphs (a)(2)(A) and (c)(2)(A) prohibit causing bodily injury to, moving, or immobilizing "the complainant" instead of "any person." Causing bodily injury to, moving, or immobilizing a third party may be sufficient for a threat under first degree or third degree of the revised sexual assault statute, provided the other requirements of the offense are met. This is consistent with the current D.C. Code first degree and third degree sexual abuse statutes, which prohibit the use of "force" against the complainant,[131] currently defined to include "the use of such physical strength*

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[130] App. D1 at 148.

[131] D.C. Code §§ 22-3002(a)(1) ("(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

or violence as is sufficient to overcome, restrain, or injure a person"[132] *and "the use of a threat of harm sufficient to coerce or compel submission by the victim."*[133] *The previous version of the RCC sexual assault offense used "any person" in subparagraphs (a)(2)(A) and (c)(2)(A) to account for the breadth of "the use of a threat of harm" provision in the current D.C. Code definition of "force," but the proportionality of the statute is improved if actual harm is limited to the complainant, and threats of harm extend to third parties. The commentary does not classify this as a change to law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *The CCRC recommends deleting "using physical force" from "By using physical force that causes bodily injury" in subparagraphs (a)(2)(A) and (c)(2)(A). With this revision, subparagraphs (a)(2)(A) and (c)(2)(A) prohibit "By causing bodily injury" to another person. The current D.C. Code first degree and third degree sexual abuse statutes prohibit "By using force" against the complainant*[134] *and define "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to . . . injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim."*[135] *The current D.C. Code definition of "force" includes injury that the actor directly causes with his or her body, as well as indirect means, such as firing a gun or throwing an object at the complainant. Deleting "By using physical force" from the bodily injury provision in first degree and third degree of the RCC sexual assault statute clarifies that "causing bodily injury," by any means, is sufficient for liability, provided that the other requirements of the offense are met. The commentary to this offense has been updated to reflect that this is a clarificatory change in law. The commentary to this offense has been updated to reflect that this is a possible change to law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(4) *The CCRC recommends in subparagraphs (a)(2)(A) and (c)(2)(A) deleting "overcomes" and replacing "restrains" with "moves or immobilizes." With this revision, subparagraphs (a)(2)(A) and (c)(2)(A) prohibit "by using physical force that moves or immobilizes" another person. The term "overcomes" may erroneously imply that the complainant must be actively opposing the use of force. The RCC instead covers conduct such as pushing by the word "moves" in the updated language. The term "restrains" may erroneously imply that non-physical control is included. The RCC covers conduct such as a hug or hold,*

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[132] D.C. Code § 22-3001(5).

[133] D.C. Code § 22-3001(5).

[134] D.C. Code §§ 22-3002(a)(1) ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

[135] D.C. Code § 22-3001(5).

instead, by the word "immobilizes." This language clarifies that first degree and third degree of the revised sexual assault statute prohibit certain use of physical force that falls short of causing "bodily injury," as defined in RCC § 22E-701.[136] *It is consistent and proportionate to include this forceful conduct in first degree and third degree sexual assault.*

- This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

(5) *The CCRC recommends replacing "threatening, explicitly or implicitly" with "communicating, explicitly or implicitly, that the actor will cause" in subparagraphs (a)(2)(B) and (c)(2)(B). With this revision, subparagraphs (a)(2)(B) and (c)(2)(B) prohibit "communicating, explicitly or implicitly, that the actor will cause" another person to suffer a specified harm. The term "threatening" may erroneously be interpreted to require proof of the criminal threats offense. Also, while superficially intuitive, "threatens" is unclear as to the meaning. The updated RCC sexual assault offense, like the RCC criminal threats offense and other provisions, clarifies that a "communication" of the specified sort is sufficient for liability when it is causal—i.e. the complainant engages in the sex act or sex contact because of the communication. The commentary to this offense has been updated to reflect that this is a clarificatory change to law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *The CCRC recommends requiring that the actor threatens to cause another person to suffer "death" in subparagraphs (a)(2)(B) and (c)(2)(B). The previous version of this offense required a threat to "kill."*

- This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends requiring that the actor communicates that they will cause another person to suffer a "confinement" in sub-subparagraphs (a)(2)(B)(i), (a)(2)(B)(ii), (c)(2)(B)(i), and (c)(2)(B)(ii). The previous version of this offense required a threat to "kidnap." "Kidnapping" is a specific offense under the RCC that requires confinement with intent to inflict an additional harm on the complainant. Substituting the word "confines" for "kidnap" does not substantively alter the scope of the threats provision of the revised sexual assault offense, but more clearly communicates that threats of confinement are sufficient for sexual assault liability, without reference to the specific elements of the RCC kidnapping offense. The commentary to this offense has been updated to reflect that this is a clarificatory change to law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(8) *The CCRC recommends replacing "any person" with "the complainant" in sub-subparagraphs (a)(2)(B)(i) and (c)(2)(B)(i) and with "another person" in sub-subparagraphs (a)(2)(B)(ii) and (c)(2)(B)(ii). With this change, first degree and third degree of the revised sexual assault statute exclude the actor threatening to*

[136] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition."

harm himself or herself. The current D.C. Code first degree[137] and third degree[138] sexual abuse statutes prohibit the actor threatening subject "any person" to death, bodily injury, or kidnapping. It is unclear whether "any person" would include the actor threatening to harm himself or herself and there is no DCCA case law on this issue. An actor that threatens to harm himself or herself may have liability for second degree or fourth degree sexual assault for a coercive threat provided the other requirements of the offense are met. The commentary to the revised sexual assault statute has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(9) *The CCRC recommends differentiating the prohibited communications of harm against the complainant and the communications of harm against a third party, and adding a communication about commission of a "sexual contact." The previous version of the revised statute prohibited the same threats for the complainant or a third party—threats to kill, kidnap, cause bodily injury to, or commit a sexual act. Now, sub-subparagraphs (a)(2)(B)(i) and (c)(2)(B)(i) prohibit threats of bodily injury, confinement, or death against the complainant, and sub-subparagraphs (a)(2)(B)(ii) and (c)(2)(B)(ii) prohibit those same threats against a third party, as well as threats of a "sexual act" or "sexual contact" against a third party. Including threats to inflict a sexual act or sexual contact against the complainant in first degree and third degree of the revised sexual assault statute appears circular and may erroneously elevate every sexual assault into first degree or third degree, which is inconsistent with the current D.C. Code sexual abuse statutes and the RCC sexual assault statute, which distinguish the gradations, in part, based on the type of threat. USAO previously recommended adding a threat of a sexual contact to first degree and third degree of the revised statute because a "threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability."[139] A threat of a "sexual contact" against a third person is consistent with the severity of the other specified threats in first degree and third degree of the revised sexual assault statute. The commentary to the revised sexual assault statute has been updated to reflect that this is a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(10) *The CCRC recommends revising the intoxication provisions in first degree and third degree of the revised sexual assault statute to include "willingness" as well as "unwillingness" to engage in the sexual act or sexual contact. With this change, sub-subparagraphs (a)(2)(C)(i) and (c)(2)(C)(i) require "With intent to impair the complainant's ability to express willingness or unwillingness to engage in" the sexual act or sexual contact, and sub-subparagraphs (a)(2)(C)(ii)(III) and (c)(2)(C)(ii)(III) require "Substantially incapable of communicating willingness*

[137] D.C. Code § 22-3002(a)(2).
[138] D.C. Code § 22-3004(2).
[139] App. D1 at 151.

or unwillingness to engage in the" sexual act or sexual contact. The revised language focuses on inability to communicate in the context of sexual activity, not inability to decline sexual activity, physically resist, or otherwise communicate unwillingness. The commentary to this offense has been updated to reflect that this is part of a possible change to law.

- This change improves the clarity and consistency of the revised statute.

(11) *The CCRC recommends revising subparagraphs (b)(2)(A) and (d)(2)(A) to read "By making a coercive threat, explicit or implicit" as opposed to "By a coercive threat, express or implied." The revised language is clearer and consistent with subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (c)(2)(A), (c)(2)(B), and (c)(2)(C), which prohibit, in relevant part, "By causing . . .," "By communicating . . . ," and "By administering . . . ."*

- This change improves the clarity of the revised statute.

(12) *The CCRC recommends deleting "paralyzed" from sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i) of second degree and fourth degree sexual assault. With this change, second degree and fourth degree sexual assault prohibit a sexual act or sexual contact with a complainant that is "asleep, unconscious, or passing in and out of consciousness," as well as with an incapacitated complainant (sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii)), and with a complainant that is "incapable of communicating willingness or unwillingness to engage in" the sexual act or sexual contact (sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii)). The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct"[140] and "incapable of communicating unwillingness to engage in"[141] the sexual act or sexual contact. This language is not statutorily defined, and there is no DCCA case law on point.[142] The previous version of the RCC sexual assault statute added "paralyzed" to second degree and fourth degree sexual assault in an attempt to clarify the scope of these provisions. However, "paralyzed" appears to include within second degree and fourth degree of the RCC sexual assault statute individuals that are able to understand the nature of sexual activity and, through the use technology or other means, are physically able to communicate consent. Retaining "paralyzed" in the RCC sexual assault statute may categorically criminalize persons with certain disabilities engaging in consensual sexual activity. An individual that is paralyzed and is unable to communicate willingness or unwillingness is still protected under sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii) of second degree and fourth degree sexual assault when "incapable of communicating willingness or unwillingness to engage" in the sexual act or sexual contact. The commentary to this offense has been updated to reflect that sub-subparagraph (b)(2)(B)(iii) and sub-*

[140] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[141] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).
[142] In *In re M.S.*, the DCCA stated in dicta that "incapable of appraising the nature of the conduct" for "an adult victim . . . might involve proof of the victim's intoxication or general mental incapacity." In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

subparagraph (d)(2)(B)(iii) include paralyzed individuals who are able to appraise the nature of the sexual activity or of understanding the right to give or withhold consent under sub-subparagraph (b)(2)(B)(ii).

- This change improves the clarity and consistency of the revised statute.

(13) *The CCRC recommends revising sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii) to include "willingness" as well as "unwillingness" to engage in the sexual act or sexual contact. With this change, sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii) read "Incapable of communicating willingness or unwillingness to engage in the" sexual act or sexual contact. The current D.C. Code second degree[143] and fourth degree[144] sexual abuse statutes include complainants that are "[i]ncapable of communicating unwillingness to engage in" the sexual act or sexual contact. This language is not statutorily defined, and there is no DCCA case law on point. The revised language clarifies that the relevant determination is whether the complainant is incapable of communicating in the context of sexual activity, not whether the complainant specifically unable to decline sexual activity, physically resist, or otherwise communicate unwillingness. The commentary to this offense has been updated to reflect that this is a clarificatory change in law.*

- This change improves the clarity and consistency of the revised statute.

(14) *PDS, App. C at 485, recommends deleting paragraph (e)(2) from the effective consent affirmative defense: "The actor's conduct does not inflict significant bodily injury or serious bodily injury or involve the use of a dangerous weapon." PDS states that "[w]hile 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" and that "[c]onsent is an expansive and fact-driven determination that is already amply defined in RCC § 22E-701." In addition, PDS states that "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." PDS states that if the inclusion of paragraph (e)(2) "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" because "[a]n 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."*

- The RCC incorporates this recommendation by deleting what was previously paragraph (e)(2) from the revised statute. In the context of sexual activity, a complainant can consent to conduct, such as temporary asphyxiation, that creates a risk of, or actually causes, significant bodily injury, serious bodily injury, or death. Similarly, a complainant can consent to conduct that involves the use of a dangerous weapon because

[143] D.C. Code § 22-3003(2)(C).
[144] D.C. Code § 22-3005(2)(C).

objects used in a sexual context may otherwise constitute a "dangerous weapon" as defined in RCC § 22E-701. However, an actor may have liability under the RCC sexual assault if the actor's conduct goes beyond the complainant's effective consent, and may have liability under another RCC offense against persons or an RCC weapons offense if the resulting harm (e.g., death, serious bodily injury) is one that cannot be consented to in the RCC. For example, if the complainant gives effective consent to being slapped during sex, but in doing so the actor causes the complainant serious bodily injury, there would be no liability for sexual assault, but there may be liability under the RCC assault statute (RCC § 22E-1202) if the other elements of that offense are met and there is no applicable defense. Similarly, if the complainant gives effective consent to the actor choking the complainant during sex but in doing so the actor causes death, there would be no liability for sexual assault, but there may be liability for an RCC homicide offense. These changes more clearly recognize that sexual offenses cannot be committed where there is effective consent while, for many other offenses, criminal liability exists even where there is effective consent. The commentary to the RCC sexual assault statute has been updated to include this discussion.

- This change improves the clarity and consistency of the revised statute and reduces unnecessary overlap.

(15) *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,*[145] *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.*[146] *However, it is unclear if the DCCA holding is still good law,*[147]

[145] D.C. Code § 22-3007 ("Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006 [first degree through fourth degree sexual abuse and misdemeanor sexual abuse], prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.").

[146] In *Davis v. United States*, the DCCA held that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child [complainant under the age of 16 years] at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense [under D.C. Code § 22-3007]." *Davis v. United States,* 873 A.2d 1101, 1104 n.4, 1106 (D.C. 2005). The DCCA applied the current D.C. Code definition of "child" in D.C. Code § 22-3001, *Davis*, 873 A.2d at 1104 n.4, but did not provide a definition of "adult."

[147] In *Davis v. United States*, the DCCA held that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child [complainant under the age of 16 years] at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense [under D.C. Code § 22-3007]." *Davis v. United States,* 873 A.2d 1101, 1104 n.4, 1106 (D.C. 2005).

It is unclear, however, whether the holding in *Davis* is still good law. After *Davis*, the DCCA judicially narrowed the consent defense in D.C. Code § 22-3007 to consent to the use of force, as opposed to consent to sexual activity more broadly. *See Hatch v. United States,* 35 A.3d 1115 (D.C. 2011). The DCCA has not had occasion since *Hatch* to determine how the narrowed consent defense applies to complainants under the age of 16 years. It is unclear whether the DCCA would categorically hold that a complainant under the age of 16 years cannot consent to the use of force in a sexual encounter with a defendant that is at

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.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(16) *PDS recommends deleting what was previously paragraph (e)(4) from the effective consent affirmative defense—"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." PDS states that "[c]onsent should be a defense to [the RCC sexual assault statute] 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." PDS states that by "precluding a defense of consent [in this situation], 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." PDS states that given the seriousness of the sexual assault offense and penalty, "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" and that "[p]rohibiting the use of a consent defense in these instances would create potentially disparate*

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least four years older, even though under current District law such a complainant cannot consent to the sexual activity. *See, e.g.*, *Davis*, 873 A.2d at 1105 & n.8 (stating "[Current D.C. Code § 22-3011] preserves the longstanding rule that a child is legally incapable of consenting to sexual conduct with an adult" and noting that the current D.C. Code child sexual abuse statutes "[b]y adopting the four-year age differential as an element . . . do[] modify the traditional rule to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child.").

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." PDS states that "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."

- The RCC incorporates this recommendation by deleting this requirement from the sexual assault effective consent affirmative defense. Striking the position of trust requirement allows an effective consent affirmative defense to the use of force when the complainant is 16 or 17 years of age and the actor is at least four years older and in a position of trust with or authority over the complainant. 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 (third or sixth degree), which does not require force, and relies on the ages and relationship between the parties to impose liability.
- This change improves the clarity, consistency, and proportionality of the revised statute.

(17) *OAG, App. C at 469-471, recommends redrafting the effective consent affirmative defense in subsection (e) so that "what qualifies as an affirmative defense" is not included in the "same paragraph level as what excludes an actor from utilizing an affirmative defense." OAG states that the current drafting, with paragraph (e)(1) written in the positive, and paragraphs (e)(2), (e)(3), and (e)(4) written in the negative, may be confusing to the reader. Specifically, OAG recommends drafting subsection (e) to read:*

> *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 age7).*

- The RCC does not incorporate this recommendation because, as is discussed above, the effective consent affirmative defense no longer has these specific age requirements.

(18) *The CCRC recommends deleting that the actor "in fact" has the complainant's effective consent from the effective consent affirmative defense and limiting the affirmative defense to when the actor "reasonably believes" that the actor has the complainant's effective consent. It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability*

under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be." The commentary to the RCC sexual assault statute has been updated to include this discussion.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(19) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to prior* convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims."*[148] *The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*[149]*:*

> *"For [the current sex offense recidivist penalty] 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."*

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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

[148] App. D1 at 170.

[149] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [150]

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.[151] The RCC general recidivist enhancement

[150] USAO states:

> "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."

[151] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior

provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(20) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. Specific to the RCC sexual assault statute, USAO states that second degree sexual assault is "comparable to" second degree sexual abuse under current D.C. Code § 22-3003, which has a maximum possible penalty of 20 years. USAO states that it "does not believe that the maximum penalt[y]" for second degree sexual assault should be lowered from 20 years' incarceration to 18 years' incarceration. USAO does not state*

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conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[152] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[153] 5) relative ordering of related RCC offenses;[154] and 6) national data on sentencing and time served.[155] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 20 year statutorily authorized penalty for second degree sexual abuse, actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of all sentences for all types of second degree sexual abuse distinguished by the court, including enhancements, was 84 months (7 years).[156] The CCRC recommendation here appears to fully encompass current practice.

(21) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual assault statute, USAO states that first degree sexual assault is "comparable to" first degree sexual abuse under current D.C. Code § 22-3002, which has a maximum possible penalty of 30 years, "unless certain conditions are met that could increase the maximum." USAO states that it "does not believe that the maximum penalt[y]" for second degree sexual assault should be lowered from 30 years' incarceration to 24 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[157] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[158] 5) relative ordering

[152] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[153] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[154] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[155] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[156] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[157] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[158] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

of related RCC offenses;[159] and 6) national data on sentencing and time served.[160] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the 30 year statutorily authorized penalty for non-aggravated first degree sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for first degree sexual abuse without an aggravator enhancement, was 300 months (25 years).[161] The CCRC recommendation here is generally consistent with current practice.

(22) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual assault statute, USAO states that enhanced second degree sexual assault is "comparable to" second degree sexual abuse with enhancements under current D.C. Code §§ 22-3003 and 22-3020, which has a maximum possible penalty of 30 years. USAO states that it "does not believe that the maximum penalt[y]" for enhanced second degree sexual assault should be lowered from 30 years' incarceration to 24 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[162] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[163] 5) relative ordering of related RCC offenses;[164] and 6) national data on sentencing and time served.[165] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 30 year statutorily authorized penalty for second degree sexual abuse with enhancements, actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of all sentences for all types of second degree sexual abuse distinguished by the court, including enhancements, was 84

[159] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[160] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[161] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[162] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[163] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[164] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[165] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

months (7 years).[166] The CCRC recommendation here appears to fully encompass current practice.

(23) *USAO, App. C at 544-545, recommends increasing the maximum possible penalty for a Class 3 felony from 36 years to 40 years. Specific to the RCC sexual assault statute, USAO states that enhanced first degree sexual assault is "comparable to" first degree sexual abuse with enhancements under current D.C. Code §§ 22-3002 and 22-3020, "which has a maximum of life imprisonment." USAO states that it "does not believe that the maximum penalt[y]" for enhanced first degree sexual assault should be lowered to 36 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[167] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[168] 5) relative ordering of related RCC offenses;[169] and 6) national data on sentencing and time served.[170] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for aggravated first degree sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree sexual abuse with or without an aggravator enhancement, was 444 months (37 years).[171] The CCRC recommendation here is generally consistent with current practice.

(24) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexual assault statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

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[166] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[167] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[168] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[169] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[170] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[171] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

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

(1) *PDS, App. C at 486-487, recommends amending the reasonable mistake of age affirmative defense to include 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 does not object to or contradict the statement. With this change, subparagraphs (g)(2)(B) and (g)(3)(B) would be rewritten as:*

> *"(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."*

PDS states that 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." PDS states that the "proposed expansion" of the affirmative defense is "modest." PDS notes that the RCC sexual abuse of a minor offense retains strict liability for the age of the complainant even though the American Law Institute's most recent draft of its equivalent offense required recklessness for the complainant's age and there is "general reluctance in American jurisprudence to allow a criminal conviction based on strict liability." To illustrate the proposed revision, PDS poses a series of hypotheticals.[172]

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The RCC sexual abuse of a minor statute is intended to protect complainants who, primarily because of their young age, are not able to consent to sexual activity with older parties. The proposed expansion would make these younger complainants responsible for objecting to or correcting a third party's statement concerning the complainant's age, which is inconsistent with their protected status under the offense. In addition, the proposed recommendation does not require that the complainant actually knew that the statement had

[172] In the first hypothetical, which PDS states is covered by the affirmative defense as currently drafted, the defendant meets the complainant at a bar and asks "You're 21?," to which the complainant states yes. In the second hypothetical, the defendant meets the complainant at a bar and asks "You're 21?" The complainant's friend, who is standing next to the complainant answers, "Yes, we're here celebrating her 21st birthday." The complainant smiles, but says nothing. PDS states that this second hypothetical should be covered by the affirmative defense and would be under its revision. In the third hypothetical, the defendant meets the complainant at a bar and says "You look to 21 to me," and the complainant smiles but says nothing. PDS states that this third scenario would not be covered under its proposed revision.

been made and it is unclear how a complainant can object to or correct a statement in such a situation. Regardless, it is inconsistent with the scope of the offense to require a young complainant to object to or correct statements third parties make about the complainant's age.

(2) *USAO, App. C at 508, repeats its previous objections to the affirmative defense for reasonable mistake of age.*

- The CCRC does not incorporate this recommendation because it may result in disproportionate outcomes. The CCRC addressed these prior objections in App. D1, 175-177 and repeats those comments here.

(3) *The CCRC recommends codifying two subparagraphs for penalty enhancements—subparagraph (h)(7), specific to first degree, second degree, fourth degree, and fifth degree sexual abuse of a minor, and subparagraph (h)(8), specific to third degree and sixth degree sexual abuse of a minor. The previous draft of this offense codified the enhanced penalties for all degrees of the offense under one subparagraph and did not as clearly distinguish between third degree and sixth degree and the other gradations of the offense. This change makes clear that only one offense-specific penalty enhancement applies to any gradation of the offense. It is not a substantive change from the previous draft.*

- This change improves the clarity of the revised statutes.

(4) *USAO, App. C at 510, recommends replacing the "knowingly" culpable mental state with "recklessly" for the fact that the actor is in a position of trust with or authority over the complainant. With this change, paragraphs (c)(2) and (f)(2) of the offense and the penalty enhancement in subparagraph (h)(7)(D) would require that the actor is reckless as to the fact that the actor is in a position of trust with or authority over the complainant. USAO states that the RCC sexual assault statute penalty enhancements require a "recklessly" culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant and that the mental states "should align, and should, at most, require that the defendant be reckless as to the relationship."*

- The RCC does not incorporate this recommendation because the different culpable mental states improve the proportionality of the RCC sexual assault and RCC sexual abuse of a minor statute. In the RCC sexual assault statute, the fact that the actor is in a "position of trust with or authority over" the complainant is a penalty enhancement, and increases the penalty for an actor that has already committed the crime of sexual assault. A comparatively lower culpable mental state of recklessness is proportionate and consistent with several of the other sexual assault penalty enhancements, such as using a dangerous weapon. In contrast, in third degree and sixth degree of the RCC sexual abuse of a minor statute, the fact that the actor is in a "position of trust with or authority" over the complainant criminalizes what is otherwise legal conduct. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal

principle,[173] although recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[174] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, as well as the expansive scope of the definition, a "knowingly" culpable mental state is proportionate. The "knowingly" culpable mental state improves the proportionality of the revised statute.

(5) *USAO, App. C at 508-509, reiterates its recommendation that the sex offense aggravators in current D.C. Code § 22-3020[175] apply to all RCC sex offenses. USAO acknowledges that the RCC partially incorporated this recommendation in the RCC sexual abuse of a minor statute. In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.* [176]

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[173] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[174] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[175] D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.").

[176] USAO states:

> "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

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The RCC sexual abuse of a minor statute codifies as penalty enhancements all the current D.C. Code sex offense aggravators,[177] with two exceptions: 1) the current D.C. Code sex offense recidivist aggravator, discussed below;[178] and 2) the current D.C. Code aggravator for a complainant under 12 years of age.[179] It is unnecessary to codify a penalty enhancement for a complainant under the age of 12 years because first degree and fourth degree of the RCC sexual abuse of a minor offense require as an element that the complainant is under the age of 12 years. First degree and fourth degree are the most serious gradations of the offense for a "sexual act" and a "sexual contact," respectively, and proportionately penalize this conduct.

(6) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to prior* convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; or (2) The offender, in fact, is or has been found guilty of committing a District of Columbia sexual*

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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."

[177] For all gradations of the RCC sexual abuse of a minor statute, these penalty enhancements are: 1) the actor causing the sexual act or sexual contact by displaying or using a dangerous weapon or imitation dangerous weapon; 2) the actor "act[ing]" with one or more accomplices that are "physically present" at the time of the sexual act or sexual contact; and 3) the actor causing serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact. In addition, for first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute, it is a penalty enhancement that the actor knows that he or she is in a "position of trust with or authority" over the complainant. This "position of trust with or authority over" penalty enhancement does not apply to third degree and sixth degree of the offense because those gradations require this as an element of the offense.

[178] D.C. Code § 22-3020(a)(5).

[179] D.C. Code § 22-3020(a)(1).

offense defined in Chapter 13 of this Title [or an equivalent offense], involving 2 or more victims."[180] *The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*[181]*:*

> *"For [the current sex offense recidivist penalty] 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."*

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [182]

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[180] App. D1 at 170.

[181] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

[182] USAO states:

> "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

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.[183]

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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."

[183] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(7) *USAO, App. C at 544-545, recommends increasing the maximum possible penalty for a Class 3 felony from 36 years to 40 years. Specific to the RCC sexual abuse of a minor statute, USAO states that enhanced first degree sexual abuse of a minor is "comparable to" first degree child sexual abuse under current D.C. Code §§ 22-3008 and 22-3020 when the complainant is under 12 years old, with enhancements "which has a maximum of life imprisonment." USAO states that it "does not believe that the maximum penalt[y]" for enhanced first degree sexual abuse of a minor should be lowered to 36 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[184] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[185] 5) relative ordering

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Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

[184] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[185] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

of related RCC offenses;[186] and 6) national data on sentencing and time served.[187] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).[188] The CCRC recommendation here fully encompasses current practice.

(8) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual abuse of a minor statute, USAO states that first degree sexual abuse of a minor is "comparable to" first degree child sexual abuse under current D.C. Code §§ 22-3008 and 22-3020 when the complainant is under 12 years old, "which has a maximum of life imprisonment." USAO states that it "does not believe that the maximum penalt[y]" for first degree sexual abuse of a minor should be lowered to 24 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[189] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[190] 5) relative ordering of related RCC offenses;[191] and 6) national data on sentencing and time served.[192] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months

[186] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[187] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[188] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[189] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[190] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[191] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[192] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

(20.3 years).[193] The CCRC recommendation here fully encompasses current practice.

(9) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual abuse of a minor statute, USAO states that enhanced second degree sexual abuse of a minor is "comparable to" first degree child sexual abuse under current D.C. Code §§ 22-3008 and 22-3020 when the complainant is over 12 years old, with enhancements "which has a maximum of life imprisonment." USAO states that it "does not believe that the maximum penalt[y]" for first degree sexual abuse of a minor should be lowered to 24 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[194] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[195] 5) relative ordering of related RCC offenses;[196] and 6) national data on sentencing and time served.[197] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).[198] The CCRC recommendation here fully encompasses current practice.

(10) *USAO, App. C at 552, recommends increasing the penalty classification of enhanced second degree sexual abuse of a minor from a Class 4 felony (carrying a 24 year maximum imprisonment penalty) to a Class 3 felony, the same classification as enhanced first degree sexual abuse of a minor. USAO states that "the only distinction" between first degree and second degree of the RCC sexual abuse of a minor statute is the age of the complainant—first degree requires that the complainant is under 12 years of age and second degree requires that the complainant is under 16 years of age. USAO states that "it is logical to distinguish" between unenhanced first degree sexual abuse of a minor (a Class 4*

[193] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[194] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[195] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[196] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[197] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[198] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

felony) and unenhanced second degree sexual abuse of a minor (a Class 5 felony). However, USAO states that "an enhancement applies, among other situations, to a situation where the actor is in a position of trust with or authority over the complainant" and that "[i]f this relationship exists . . . the defendant should be equally culpable" regardless of the age of the complainant. USAO gives as an 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" because "[i]n 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 complainant into engaging in sexual intercourse. USAO states that classifying enhanced second degree sexual abuse of a minor as a Class 3 felony would put this offense and enhanced first degree sexual abuse of a minor "at the same level" as enhanced first degree sexual assault (a Class 3 felony). USAO states that "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." USAO states that a "perpetrator often uses various forms of grooming to induce" the minor complainant's submission to the sexual activity and "[n]on-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."

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[199] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[200] 5) relative ordering of related RCC offenses;[201] and 6) national data on sentencing and time served.[202] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).[203] The CCRC recommendation here fully encompasses current practice.

[199] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[200] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[201] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[202] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[203] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

(11) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. Specific to the RCC sexual abuse of a minor statute, USAO states that second degree sexual abuse of a minor is "comparable to" first degree child sexual abuse under current D.C. Code § 22-3008 when the complainant is over 12 years of age, which has a maximum possible penalty of 30 years. USAO states that it "does not believe that the maximum penalt[y]" for second degree abuse of a minor should be lowered from 20 years' incarceration to 18 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[204] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[205] 5) relative ordering of related RCC offenses;[206] and 6) national data on sentencing and time served.[207] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 30 year statutorily authorized penalty for unenhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).[208] Similarly, the 95% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 223 months (18.5 years).[209] The CCRC recommendation here is generally consistent with current practice.

(12) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years[210] to 15 years. Specific to the RCC sexual abuse of a minor statute, USAO states that third degree sexual abuse of a minor is "comparable to" first degree sexual abuse of a minor under current D.C. Code § 22-3009.01, which has a maximum possible penalty of 15 years. USAO states that it "does not believe that the maximum penalt[y]" for first degree assault should be lowered from 15 years' incarceration to 12 years'*

[204] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[205] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[206] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[207] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[208] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[209] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[210] In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.

incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[211] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[212] 5) relative ordering of related RCC offenses;[213] and 6) national data on sentencing and time served.[214] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 15 year statutorily authorized penalty for first degree sexual abuse of a minor, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree sexual abuse of a minor, with or without an aggravator enhancement, was 158 months (13.2 years).[215] The CCRC recommendation here is generally consistent with current practice.

(13) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years[216] to 15 years. Specific to the RCC sexual abuse of a minor statute, USAO states that fourth degree sexual abuse of a minor is "comparable to" second degree sexual abuse of a child under current D.C. Code §§ 22-3009 and 22-3020 when the complainant is under 12 years of age, which has a maximum possible penalty of 15 years. USAO states that it "does not believe that the maximum penalt[y]" for fourth degree sexual abuse of a minor should be lowered from 15 years' incarceration to 12 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data

[211] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[212] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[213] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[214] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[215] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[216] In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.

from recent years on actual sentences imposed for comparable offenses;[217] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[218] 5) relative ordering of related RCC offenses;[219] and 6) national data on sentencing and time served.[220] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the 15 year statutorily authorized penalty for enhanced second degree sexual abuse of a child, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all second degree sexual abuse of a child, with or without an aggravator enhancement, was 120 months (10 years).[221] The CCRC recommendation here is generally consistent with current practice.

(14) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC sexual abuse of a minor statute, USAO states that fifth degree sexual abuse of a minor is "comparable to" second degree child sexual abuse when the complainant is over 12 years old under current D.C. Code § 22-3009, which has a maximum possible penalty of 10 years. USAO states that it "does not believe that the maximum penalt[y]" for fifth degree sexual abuse of a minor should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[222] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[223] 5) relative ordering of related RCC offenses;[224] and 6) national data on sentencing and time served.[225] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

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[217] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[218] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[219] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[220] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[221] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[222] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[223] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[224] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[225] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for unenhanced second degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all unenhanced second degree sexual abuse of a child was 88.8 months (7.3 years).[226] The CCRC recommendation here is generally consistent with current practice.

(15) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexual abuse of a minor statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

[226] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1303. Sexual Abuse by Exploitation.

(1) *The CCRC recommends revising subparagraphs (a)(2)(A) and (b)(2)(A) to require that the actor is a "coach, not including a coach who is a secondary student" instead of simply a "coach." The current D.C. Code sexual abuse of a secondary education student statutes require that the actor is a "coach" in a secondary school and that certain secondary education students be under the age of 20 years.*[227] *In both current law and the previous version of the RCC sexual abuse by exploitation statute, whether an actor is a "coach" is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 18 years, but under the age of 20 years. Requiring that a coach is not also a secondary school student ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. The commentary to this offense has been updated to reflect that this is a possible change in law.*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(2) *The CCRC recommends adding "working as an employee, contract employee, or volunteer" to subparagraphs (a)(2)(A) and (b)(2)(A). The current D.C. Code sexual abuse of a secondary education student statutes list the prohibited actors in a secondary school and do not specify if the actors must be employees, or if contract employees or volunteers are sufficient. There is no DCCA case law on this issue. The RCC statute instead specifies that the actor must be "working as an employee, contract employee, or volunteer," which is consistent with the requirement in (a)(2)(D) and (b)(2)(D) of the RCC sexual abuse by exploitation statute for wards, patients, clients, and prisoners, and subsection (G) of the RCC definition of "position of trust with or authority over" (RCC § 22E-701). The commentary to this offense has been updated to reflect that this is a possible change in law.*

- This revision improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

(3) *OAG, App. D at 471, recommends clarifying in the commentary that the circumstances in D.C. Code § 14-309, pertaining to when specified religious leaders may not be examined in court proceedings, are irrelevant for the purposes of determining which religious leaders are subject to the RCC offense. OAG recommends that the commentary be redrafted to state for both first degree and second degree that "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."*

- The RCC incorporates this recommendation by revising a sentence in the explanatory note and the discussion of District law to read: "A 'religious leader described in D.C. Code § 14-309' is a 'priest, clergyman, rabbi, or

[227] D.C. Code §§ 22-3009.03; 22-3009.04.

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,' regardless of whether the religious leader hears confessions or receives other communications." This does not further change current District law.

(4) *PDS, App. C at 488, recommends revising what were previously subparagraphs (a)(2)(D) and (b)(2)(D) so that the complainant must be a ward, patient, client, or prisoner at the same institution as the actor. Specifically, PDS recommends revising these subparagraphs to require "and recklessly disregards that the complainant is a ward, patient, client, or prisoner at that institution," as opposed to "at such an institution." PDS gives as a hypothetical a defendant that works at the D.C. Jail and 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. PDS states that this would violate first degree of the RCC sexual abuse by exploitation offense. PDS states that 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" and that "the element should be rewritten to more clearly require that relationship between the actor and the complainant." The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.*

- The RCC incorporates this recommendation by requiring in what is now sub-subparagraphs (a)(2)(D)(i)(I), (a)(2)(D)(i)(II), (a)(2)(D)(i)(III), (b)(2)(D)(i)(I), (b)(2)(D)(i)(II), and (b)(2)(D)(i)(III) refer to "that institution"—the same institution as the actor. This change improves the clarity, consistency, and proportionality of the revised statute.

(5) *The CCRC recommends adding "as an employee, contract employee, or volunteer at or for" a specified institution so that sub-subparagraphs (a)(2)(D)(i) and (b)(2)(D)(i) read "works as an employee, contract employee, or volunteer at or for" a specified institution. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include "[a]ny staff member, employee, contract employee, consultant, or volunteer at a" specified institution.[228] There is no DCCA case law interpreting this language. The RCC statute retains "employee," "contract employee," and "volunteer" from the current D.C. Code statutes, and deletes "staff member" as duplicative with an "employee" or "contract employee." It is unclear how a "consultant" differs from an "employee" or "contract employee." However, to the extent that a "consultant" is not an "employee, contract employee, or volunteer at or for" a specified institution, the consultant may not be in a position of authority over a complainant such that otherwise consensual sexual activity is inherently coercive and criminalized. Sexual activity between such a consultant and a complainant at an institution may be prohibited under the RCC sexual assault statute (RCC § 22E-1301) if there is a coercive threat or the complainant is incapacitated. The*

[228] D.C. Code §§ 22-3013; 22-3014.

commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *The CCRC recommends deleting "other" from sub-subparagraphs (a)(2)(D)(i) and (b)(2)(D)(i) of the revised statute so that they refer to an "institution housing persons who are not free to leave at will," as opposed to "other institution housing persons who are not free to leave at will." "Other" may erroneously suggest here that the preceding list of specified institutions, such as a hospital, must be an institution where people are not free to leave. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes refer to "other institution," but do not have the additional requirement that persons not be free to leave.*[229] *D.C. Code §§ 22-3013; 22-3014 ("Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . .").*

- This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends replacing "transports . . . persons at such an institution" in the previous version of the revised statute with the requirement that the complainant is "In transport to or from that institution" (sub-subparagraphs (a)(2)(D)(ii)(III) and (b)(2)(D)(ii)(III)). The previous drafting was unclear and potentially narrowed the offense to transportation "at" the institution, i.e. in an elevator or parking garage. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes clearly include transportation to or from specified institutions: "anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions."*[230] *Transportation "at" an institution would still be covered under the other provisions of the RCC offense if the complainant is a "ward, patient, client, or prisoner at that institution" or "awaiting admission to that institution" and the other requirements of the offense are met.*

- This change improves the clarity and consistency of the revised statute.

(8) *The CCRC recommends adding as sub-subparagraphs (a)(2)(D)(ii)(II) and (b)(2)(D)(II) that the complainant is "Awaiting admission to that institution"—the same institution as where the actor is an employee, contract employee, or volunteer. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit "[a]ny staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution" from engaging in sexual activity with a "ward, patient, client, or prisoner."*[231] *There is no DCCA case law interpreting this provision and it is unclear whether it extends to a complainant that is*

[229] D.C. Code §§ 22-3013 and 22-3014 ("Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . .").
[230] D.C. Code §§ 22-3013; 22-3014.
[231] D.C. Code §§ 22-3013; 22-3014.

awaiting admission to one of the specified institutions. A complainant that is awaiting admission at a specified institution has a similar vulnerability as a ward, patient, client, or prisoner that has been admitted to a specified institution. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(9) *The CCRC recommends adding as subparagraphs (a)(2)(E) and (b)(2)(E) that "The actor knowingly works as a law enforcement officer, and recklessly disregards that the complainant is in official custody or on probation or parole." RCC § 22E-701 defines "official custody" to include detention following arrests and other interactions with law enforcement officers, as well custody for purposes incidental to these types of detention. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit "any official custodian of a ward, patient, client, or prisoner" from engaging in sexual activity with a "ward, patient, client, or prisoner."*[232] *The current D.C. Code does not define "official custodian," but does have an extensive definition of "official custody"*[233] *that is substantively similar to the RCC definition. The term "official custody" was deleted from the D.C. Code sexual abuse of a ward, patient, client or prisoner statutes in 2007.*[234] *The legislative history does not discuss why the definition of*

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[232] D.C. Code §§ 22-3013; 22-3014.

[233] D.C. Code § 22-3001(6) (defining "official custody" as "(A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion; (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or (C) Probation or parole.").

[234] Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482) (2006 Omnibus Act). The original D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes required that the victim be in the "official custody" of certain institutions and under the "supervisory or disciplinary authority" of the defendant. The original D.C. Code first degree sexual abuse of a ward statute was:

> Whoever engages in a sexual act with another person or causes another person to engage in or submit to a sexual act when that other person:
> (1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and
> (2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed $100,000.

The original D.C. Code second degree sexual abuse of a ward, patient, client, or prisoner statute was the same, differing only in penalty and requiring a "sexual contact" instead of a "sexual act." The legislative history for the 2006 Omnibus Act stated that the "supervisory or disciplinary authority" requirement created problems "successfully prosecuting persons who take advantage of inmates, group home residents, and persons with mental retardation." *See* Statement of Robert J. Spagnoletti, Attorney for the District of Columbia, at the May 31, 2005 Public Hearing on B16-247 the Omnibus Public Safety Act of 2005, B16-172 the Criminal Code Reform Commission

"official custody" was left in the D.C. Code. The legislative history does state that the current D.C. Code sexual abuse of a ward statutes were intended to "expand the list of individuals who are prohibited from engaging in sexual relations when the person provides care to a patient or other vulnerable population."[235] *It is unclear whether the current D.C. Code definition of "official custody" is intended to apply to "official custodian" in the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes. To the extent that it does not, deleting the definition of "official custody" narrows, rather than expands, the scope of the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes as they pertain to individuals in the custody of law enforcement officers or on probation or parole. Resolving this ambiguity, the RCC sexual abuse by exploitation statute codifies as a discrete basis of liability a complainant that is in "official custody" of a "law enforcement officer," as those terms are defined in RCC § 22E-701, or a complainant that is on probation or parole. Law enforcement officers have a position of authority over complainants that are in "official custody," such as detention following an arrest, or on probation or parole such that otherwise consensual sexual activity is inherently coercive and criminalized. The RCC sexual abuse by exploitation statute applies a "knowingly" culpable mental state to the fact that the actor is a "law enforcement officer" and a "recklessly" culpable mental state to the fact that the complainant is in "official custody" or on probation or parole, which is consistent with the culpable mental state requirements required for the status of the actor and the complainant in other parts of the statute. The commentary to the definition of "official custody" in RCC § 22E-701 discusses the RCC definition in detail. The commentary to this RCC offense has been updated to reflect that this is a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

(10) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the "recklessly" culpable mental state for the age of a secondary education student in the RCC sexual abuse by exploitation statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of a secondary education student, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has "no limitations on what that recklessness must be based on, and*

Establishment Act of 2005, and B16-130 the Criminal Code Modernization Amendment Act of 2005 at 23. The 2006 Omnibus Public Safety Amendment Act deleted the requirements of "official custody" and "supervisory or disciplinary authority." It expanded the sexual abuse of a ward statutes to their current D.C. Code versions, including adding the language, "any *official custodian* of a ward, patient, client, or prisoner," but did not define the term "official custodian."

[235] Chairman of the Council of the District of Columbia Committee of the Judiciary, Phil Mendelson, "Report on Bill 16-247, the 'Omnibus Public Safety Act of 2006,'" (April 28, 2006) at 11.

no minimum age of a complainant to which it would apply." USAO acknowledges that the RCC sexual abuse of a minor offense is a "more serious offense that carries more serious penalties" than the RCC sexual abuse by exploitation offense, but states that "the same logic should apply to sex offenses involving minors." USAO states that "[e]ven 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." USAO states that "[t]his 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."

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual abuse by exploitation offense criminalizes consensual sexual activity with students under the age of 20 years, and uniquely does so for persons 16 years of age or older (the age of consent in current District law for sexual conduct) solely because of the school-based relationship between the actor and the complainant. A "recklessly" culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the comparatively older age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[236] but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[237] The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[238] which the

[236] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[237] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[238] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code §

RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[239] Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[240] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[241] In addition, the CCRC notes that the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[242]

(11) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020[243] should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant's young age should be an enhancement to other RCC sex offenses because "although [these other sex offenses] may involve less serious sexual acts," they should still be punished more severely with a younger complainant than with an older complainant. USAO states that "[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant" and that this should be an enhancement for all other RCC sex offenses that could involve minors because "it is more serious and egregious to*

22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[239] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[240] D.C. Code § 22-1834.

[241] D.C. Code § 22–1839.

[242] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[243] D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.").

engage in sexual conduct when this relationship exists." USAO states that "if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement" for both minor complainants and adult complainants. USAO gives as an example, "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."

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties for this offense. The RCC sexual abuse by exploitation statute is limited to sexual conduct that occurs without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. If the RCC sexual assault penalty enhancements applied to the RCC sexual abuse by exploitation offense, similar conduct could receive significantly different penalties. For example, if a prison guard uses a dangerous weapon, such as a firearm, to coerce an inmate into having sex with the prison guard, that behavior is more proportionately charged as sexual assault than sexual abuse by exploitation. Or, for example, if a 30-year old prison guard engages in sexual activity with inmate that is under the age of 16 years, the RCC sexual abuse of a minor statute applies and is a more serious offense than sexual abuse by exploitation. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in the RCC sexual abuse by exploitation offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice. If, as hypothesized by USAO, a group of doctors or group of prison guards committed a sex offense "against" a complainant without force and without violating the RCC sexual assault statute, this conduct is more proportionately charged as RCC sexual abuse by exploitation and an accomplice penalty enhancement is unnecessary. Notably, CCRC analysis of court data for the relevant statutes (D.C. Code § 22-3009.03; D.C. Code § 22-3013; D.C. Code § 22-3015) shows that in actual practice, for 2010-2019, no convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 and the penalties were at most about 2 years.[244] Additional enhancements here are unnecessary and would be disproportionate.

(12) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to*

[244] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

prior convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims."*[245] *The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*[246]*:*

> *"For [the current sex offense recidivist penalty] 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."*

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [247]

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[245] App. D1 at 170.

[246] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

[247] USAO states:

> "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

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.[248] The RCC general recidivist enhancement provides a

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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."

[248] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "Thus, at

uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(13) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC sexual abuse by exploitation statute, USAO states that first degree sexual abuse by exploitation is "comparable to" first degree sexual abuse of a secondary education student under current D.C. Code § 22-3009.03, first degree sexual abuse of a ward, patient, client, or prisoner under current D.C. Code § 22-3013, and first degree sexual abuse of a patient or client under current D.C. Code § 22-3015, all of which have a maximum possible penalty of 10 years. USAO states that it "does not believe that the maximum penalt[y]" for first degree sexual abuse by exploitation should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

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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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[249] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[250] 5) relative ordering of related RCC offenses;[251] and 6) national data on sentencing and time served.[252] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for these various offenses (D.C. Code § 22-3009.03; D.C. Code § 22-3013; D.C. Code § 22-3015), actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all of these offenses, including enhancements, was 24 months (2 years).[253] The CCRC recommendation here wholly encompasses current practice.

(14) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexual abuse by exploitation statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

[249] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[250] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[251] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[252] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[253] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

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

(1) *USAO, App. C at 511, recommends revising the Commentary to clarify that a defendant who purposely touches his or her own genitalia, including masturbation, falls within the scope of subparagraph (a)(2)(A). USAO does not recommend specific language. USAO states that the RCC clarified in the Commentary for human trafficking offenses that masturbation can qualify as a sexual act or sexual contact.*

- The RCC incorporates this recommendation by stating in the explanatory note and the commentary to this offense: "To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," or is a sexual or sexualized display of the genitals, pubic area, or anus, that conduct falls under subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii), provided the other requirements of the offense are met."

(2) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the "recklessly" culpable mental state for the age of the complainant in the RCC sexually suggestive conduct with a minor statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of the complainant in the RCC sexually suggestive conduct with a minor statute, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has "no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply." USAO acknowledges that the RCC sexual abuse of a minor offense is a "more serious offense that carries more serious penalties" than the RCC sexually suggestive conduct with a minor offense, but states that "the same logic should apply to sex offenses involving minors." USAO states that "[e]ven 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." USAO states that "[t]his 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."*

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexually suggestive conduct with a minor offense criminalizes a wide range of conduct that does not require the actor to engage in a "sexual act" or "sexual contact" with the complainant and, but for the complainant's age, often would be perfectly legal

conduct.[254] A "recklessly" culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the broad scope and comparatively less serious prohibited conduct. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[255] but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[256] The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[257] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[258] Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[259] already combines a recklessness requirement for the age

[254] Depending on the facts, an offensive physical contact (RCC § 22E-1205) or indecent exposure (RCC § 22E-4206 charge may be brought.

[255] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[256] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[257] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[258] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[259] D.C. Code § 22-1834.

of the complainant with a Rape Shield law.[260] In addition, the CCRC notes that the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[261]

(3) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020[262] should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant's young age should be an enhancement to other RCC sex offenses because "although [these other sex offenses] may involve less serious sexual acts," they should still be punished more severely with a younger complainant than with an older complainant. USAO gives as an example that "it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child." USAO states that "[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant" and that this should be an enhancement for all other RCC sex offenses that could involve minors because "it is more serious and egregious to engage in sexual conduct when this relationship exists." USAO gives as an example "a defendant who is a child's biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship." USAO states that "if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement" for both minor complainants and adult complainants.*

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC sexually suggestive conduct statute is limited to comparatively less serious sexual conduct, such as kissing or removing clothing, that occurs without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-

[260] D.C. Code § 22–1839.

[261] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[262] D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.").

3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. If the RCC sexual assault penalty enhancements applied to the RCC sexually suggestive conduct offense, similar conduct could receive significantly different penalties. For example, if a 20 year old defendant uses a dangerous weapon, such as a firearm, to coerce a complainant under the age of 16 years into kissing the defendant, that behavior may be more proportionately charged as attempted sexual assault or attempted sexual abuse of a minor. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary. Notably, CCRC analysis of court data for the Misdemeanor sexual abuse of a child or minor statute shows that in actual practice, for 2010-2019, few convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 (<25%) and the penalties were at most about 6 months (not exceeding the regular statutory maximum without any enhancements).[263] Additional enhancements here are unnecessary and would be disproportionate.

(4) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to prior* convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims."[264] The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement[265]:*

> *"For [the current sex offense recidivist penalty] 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*

[263] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[264] App. D1 at 170.
[265] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

> *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."*

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [266]

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[266] USAO states:

> "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."

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.[267] The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct.

[267] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.
In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.
Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(5) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexually suggestive conduct with a minor statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

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

(1) *USAO, App. C at 511, recommends reinstating a deleted provision: "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 App D1, page 203, the CCRC stated that it deleted this provision because it overlaps with either the RCC kidnapping offense or the RCC attempted kidnapping offense. USAO states, however, that "[f]or most enticing cases . . . there would be no overlap in liability, and this deletion would, in fact, create a gap in liability" because the RCC kidnapping offense "requires that the defendant actually move the complainant" and in enticing cases a defendant "rarely" moves a complainant. USAO states that "the point of enticing is that the defendant 'enticed' the complainant to move on the complaint's own volition." In addition, USAO states that the RCC kidnapping offense requires that either the defendant lack the complainant's effective consent or that a person with legal authority over the complainant would not have provided effective consent for the complainant to be moved. USAO states that the RCC definition of "effective consent" does not have an exception for a child "so a child could provide effective consent [and was] likely groomed by the defendant to provide that effective consent." USAO states that 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." USAO states that "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."*

- The RCC does not incorporate this recommendation because reinstating the deleted provision would create unnecessary overlap between the RCC enticing offense and the RCC kidnapping and attempted kidnapping offenses. If the defendant entices the complainant and moves the complainant, and the other requirements of the RCC kidnapping offense (RCC § 22E-1401) are met, there is liability for kidnapping. If the defendant does not move the complainant, there may be liability for attempted kidnapping under the general RCC attempt statute (RCC § 22E-301). In addition, if the enticing does not satisfy either the RCC kidnapping or attempted kidnapping offenses, there would still be liability under the RCC enticing offense if the defendant "command[ed], request[ed], or trie[d] to persuade the complainant" to engage in or submit to a sexual act or sexual contact. Deleting the provision does not create a gap in liability, but distinguishes between conduct that is more proportionately charged as kidnapping, attempted kidnapping, or enticing, as those offenses are drafted in the RCC. The RCC kidnapping and RCC attempted kidnapping offenses have higher penalties than the RCC enticing statute and providing separate liability in the RCC enticing statute for moving or attempting to move the complainant risks disproportionate penalties for similar conduct.

- The RCC first degree kidnapping offense provides liability for moving or confining a person with intent to commit a sex offense, regardless of the minor's effective consent, when the actor is 18 years of age or older and reckless as to the fact that the complainant is under 16 years of age and four years younger than the actor and 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. First degree kidnapping liability also exists for moving or confining a person with intent to commit a sex offense without the complainant's effective consent. Notably, under the RCC definition of "consent,"[268] a minor, particularly a minor that has been "groomed," may not be able to give "effective consent" to conduct that constitutes enticing. In addition, even if a minor under age 16 and a person with legal authority over the minor did give effective consent to movement, which precluded liability for kidnapping, the defendant would still have liability under the RCC enticing statute for soliciting, "command[ing], request[ing], or tr[ying] to persuade the complainant," to engage in or submit to a sexual act or sexual contact that constitutes sexual abuse of a minor.[269] Deleting the provision does not create a gap in liability, but distinguishes between conduct that is more proportionately charged as kidnapping, attempted kidnapping, or enticing, as those offenses are drafted in the RCC.
- USAO states correctly that if a person with legal authority over the complainant gives effective consent to the defendant to confine or move the complainant, but not to the sexual conduct, there may be no liability for kidnapping or attempted kidnapping under the RCC. However, depending on the facts of the case, there would still be liability under the RCC enticing statute.[270] In addition, due to the RCC definition of

[268] RCC § 22E-701 defines "effective consent" as "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The definition does not explicitly reference the age of the complainant, but the RCC definition of "consent" does. RCC § 22E-701 defines "consent" in relevant part to exclude consent "given by a person who . . . [b]ecause of youth . . . is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Consequently, the RCC definition of "consent" may exclude a minor that gives consent, especially if that minor has been "groomed."

[269] As an example consider a 40 year-old defendant that asks a 15-year old complainant to come to the defendant's house to engage in a sexual act. If the complainant consents and the consent satisfies the RCC definition of "effective consent," there would be no liability for kidnapping under the RCC. However, there would be liability under the RCC enticing statute for the defendant trying to persuade the complainant to engage in a sexual act. In addition, depending on the facts of the case, the defendant may instead have liability for attempted sexual abuse of a minor.

[270] As an example consider a 40 year-old defendant that asks the parent of a 15-year old complainant if the complainant can come to the defendant's house to mow the lawn. The parent consents, and only later, when the complainant is at the defendant's house, does the defendant decide to ask the complainant to engage in a sexual act. The defendant would not have liability for kidnapping under the RCC. However, there would be liability under the RCC enticing statute for the defendant trying to persuade the complainant

"effective consent," if the defendant obtained consent to move or confine the complainant by deception as to the purpose of the movement or confinement, there would be no "effective consent," and there may still be liability under the RCC kidnapping or RCC attempted kidnapping offenses.[271] Deleting the provision does not create a gap in liability, but distinguishes between conduct that is more proportionately charged as kidnapping, attempted kidnapping, or enticing, as those offenses are drafted in the RCC.

- USAO states that there are "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." It is unnecessary to reinstate the deleted provision to provide liability in this situation. Depending on the facts of the case, a person with legal authority over a minor complainant that gives effective consent to the defendant to engage in a sexual act or sexual contact with the complainant may have liability for arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306), or liability as an accomplice to a sex offense or attempted sex offense under the RCC general accomplice liability provision (RCC § 22E-210). The RCC kidnapping statute also provides liability where the complainant is under 16 and four years younger and, "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).
- USAO states that there are "situations where a person with legal authority over the complainant . . . may even be the person engaging in sexual conduct with the complainant." It is unnecessary to reinstate the deleted provision to provide liability in this situation. Depending on the facts of the case, the RCC sex offenses would provide liability for the actor's conduct.

(2) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the "recklessly" culpable mental state for the age of the complainant in the RCC enticing a minor into sexual conduct statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of the complainant in the RCC*

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to engage in a sexual act. In addition, depending on the facts of the case, the defendant may instead have liability for attempted sexual abuse of a minor.

[271] RCC § 22E-701 defines "effective consent" as "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception" and also defines "deception." A defendant that obtains the consent of a person with legal authority over a minor complainant to move or confine the complainant by lying about or mispresenting the defendant's purpose would likely not have obtained that person's effective consent. For example, if the defendant asks the parent of a minor for consent to take the minor to a museum, but is secretly intending to engage in sexual activity with that minor, there may still be liability for kidnapping or attempted kidnapping under the RCC.

enticing a minor into sexual conduct statute, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has "no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply." USAO acknowledges that the RCC sexual abuse of a minor offense is a "more serious offense that carries more serious penalties" than the RCC enticing a minor into sexual conduct offense, but states that "the same logic should apply to sex offenses involving minors." USAO states that "[e]ven 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." USAO states that "[t]his 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."

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC enticing statute criminalizes commanding, requesting, or trying to persuade a complainant to engage in or submit to a sexual act or sexual contact, and can be committed without the actor seeing the complainant, such as over the internet. The age of the complainant is the sole fact making otherwise legal conduct a crime. A "recklessly" culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the inchoate nature of the offense and the fact that liability turns on the complainant's age. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[272] but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[273] The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[274] which the RCC does not substantively change in any

[272] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[273] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[274] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See*

manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[275] Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[276] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[277] In addition, the CCRC notes that the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[278]

(3) *The CCRC recommends amending the commentary for enticing to note that the RCC offense replaces the indecent sexual proposal to a minor offense in current D.C. Code § 22-1312 ("It is unlawful for a person to make an obscene or indecent sexual proposal to a minor."). The offense has a maximum term of imprisonment of 90 days.[279] The current D.C. Code indecent sexual proposal to a minor offense appears to overlap[280] with the current D.C. Code enticing a minor*

D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[275] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[276] D.C. Code § 22-1834.

[277] D.C. Code § 22–1839.

[278] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[279] D.C. Code § 22-1312.

[280] The DCCA has not interpreted the current D.C. Code indecent sexual proposal to a minor offense. However, the DCCA did interpret an earlier, substantively similar, version of the offense that prohibited making "any lewd, obscene, or indecent sexual proposal." The DCCA stated that in this earlier version, a "sexual proposal . . . connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.... [G]iven the nature of the common law offense of solicitation, it is appropriate to construe the sexual proposal clause . . . as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *District of Columbia v. Garcia*, 335 A.2d 217, 219 (D.C. 1975)).

offense, which prohibits, in relevant part, enticing certain complainants under the age of 18 years to engage in a sexual act or sexual contact.[281] *The current D.C. Code enticing offense has a maximum term of imprisonment of five years, and it is disproportionate to penalize the same conduct under a separate 90 day offense. To the extent that the current D.C. Code indecent sexual proposal to a minor offense does not overlap with the current D.C. Code enticing a minor offense, it may criminalize non-obscene speech to a minor in a content-based manner that raises both vagueness and First Amendment issues. The commentary to the RCC enticing offense has been updated to reflect that this is a substantive change to current District law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends reducing the penalty classification for enticing a minor into sexual conduct from a Class 8 felony, with a maximum penalty of five years, to a Class 9 felony, with a maximum penalty of three years. The current D.C. Code enticing statute has a maximum penalty of five years,*[282] *which is lower than the current D.C. Code penalties for sexual abuse of a child*[283] *and sexual abuse of a minor.*[284] *In the RCC, however, five years is the same as the maximum penalty for sixth degree sexual abuse of a minor (RCC § 22E-1302(f)). It is disproportionate for an inchoate offense like an enticing a minor to have the same penalty as a completed offense. In addition, a higher maximum penalty for enticing a minor is unnecessary to proportionately penalize the prohibited conduct. The RCC enticing statute requires a "knowingly" culpable mental state. If an actor "purposely" solicits a minor for a sexual act or sexual contact and satisfies the requirements of the RCC solicitation statute (RCC § 22E-302), the*

It seems likely that the DCCA would similarly interpret the prohibition in current D.C. Code § 22-1312 on making "an obscene or indecent sexual proposal" to a minor as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime. The earlier version of the offense differed from the current D.C. Code version of the offense only in that it: 1) included "any lewd, obscene, or indecent sexual proposal," as opposed to any "obscene or indecent sexual proposal" in the current D.C. Code offense; and 2) did not require that the proposal be "to a minor" like the current D.C. Code offense Under this interpretation, there is substantial overlap with the current D.C. Code enticing a minor statute, which prohibits soliciting certain minors to engage in a "sexual act" or "sexual contact."

[281] D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[282] D.C. Code § 22-3010.

[283] The current D.C. Code first degree sexual abuse of a child statute has a maximum possible penalty of 30 years unless certain aggravators and conditions are met. D.C. Code § 22-3008. The current D.C. Code second degree sexual abuse of a child statute has a maximum possible penalty of ten years. D.C. Code § 22-3009.

[284] The current D.C. Code first degree sexual abuse of a minor statute has a maximum possible penalty of 15 years. D.C. Code § 22-3009.01. The current D.C. Code second degree sexual abuse of a minor statute has a maximum possible penalty of 7.5 years. D.C. Code § 22-3009.02.

penalties are generally significantly higher than the 3 year maximum penalty for the RCC enticing offense. Court data for 2010-2019 shows that the 97.5% quantile of sentences for the enticing statute, including enhancements, was 35.4 months, with the 97.5% quantile of actual time to serve 28.1 months.[285]

- This change improves the proportionality of the revised statute.

(5) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020*[286] *should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant's young age should be an enhancement to other RCC sex offenses because "although [these other sex offenses] may involve less serious sexual acts," they should still be punished more severely with a younger complainant than with an older complainant. USAO gives as an example that "it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child" and states that "[t]his logic applies similarly to other sex offenses that necessarily involve minors," such as enticing. USAO states that "[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant" and that this should be an enhancement for all other RCC sex offenses that could involve minors because "it is more serious and egregious to engage in sexual conduct when this relationship exists." USAO gives as an example "a defendant who is a child's biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship." USAO states that "if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement" for both minor complainants and adult complainants.*

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC enticing statute is limited to comparatively less serious sexual conduct of commanding, requesting, or trying to persuade a minor complainant to engage in or submit to a sexual act or sexual contact, without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other

[285] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[286] D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.").

RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. The RCC enticing statute uses language identical to the general RCC solicitation statute (RCC § 22E-302) ("commands, requests, or tries to persuade"), but requires a lower culpable mental ("knowingly") than does solicitation ("purposely"). If an actor "purposely" solicits a minor and satisfies the requirements of the general RCC solicitation statute, applying the general RCC solicitation statute to the RCC sexual abuse of a minor statute generally results in higher penalties than the RCC enticing offense[287] and grades based on circumstances like those addressed in D.C. Code § 22-3020—e.g., the under 12 age of the complainant or whether the actor is in a "position of trust with or authority over" the complainant. If the RCC sexual assault penalty enhancements applied to the RCC enticing statute, similar conduct could receive significantly different penalties. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in the RCC enticing offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary. Notably, CCRC analysis of court data for the current enticing statute shows that in actual practice, for 2010-2019, few convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 (<25%) and the penalty or penalties that were enhanced still did not exceed the regular statutory maximum without any enhancements.[288] Additional enhancements here are unnecessary and would be disproportionate.

(6) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to prior* convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement when either: "(1) The offender, in fact, has one or more previous convictions for a District of Columbia sexual offense*

[287] The penalty under the RCC general solicitation statute is one-half the penalty of the underlying offense, in this case the RCC sexual abuse of a minor statute. Soliciting to commit first degree sexual abuse of a minor has a penalty of 12 years (one-half of the maximum penalty of 24 years for first degree sexual abuse of a minor, per Third Draft of Report #41). Soliciting to commit second degree sexual abuse of a minor has a penalty of 9 years (one-half of the maximum penalty of 18 years for second degree sexual abuse of a minor, per Third Draft of Report #41). Soliciting to commit third degree sexual abuse of a minor has a penalty of 6 years (one-half of the maximum penalty of 12 years for third degree sexual abuse of a minor, per Third Draft of Report #41).
Similarly, per the Third Draft of Report #41, the maximum possible penalty for soliciting to commit fourth degree sexual abuse of a minor is 6 years, the maximum possible penalty for soliciting to commit fifth degree sexual abuse of a minor is 4 years, and the maximum possible penalty for soliciting to commit sixth degree sexual abuse of a minor is 2.5 years.

[288] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

defined in Chapter 13 of this Title [or an equivalent offense]; 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 equivalent offense], involving 2 or more victims."[289] *The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*[290]*:*

> *"For [the current sex offense recidivist penalty] 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."*

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [291]

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[289] App. D1 at 170.

[290] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

[291] USAO states:

> "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

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.[292] The RCC general recidivist enhancement

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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."

[292] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count,

provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(7) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised enticing a minor into sexual conduct statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

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it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

(1) *PDS, App. C at 488, states that the offense as previously drafted, which required that a person with a responsibility under civil law for the health, welfare, or supervision of the complainant "gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact," is "so broad that it criminalizes responsible parenting." PDS states that the offense as previously drafted would include 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." PDS recommends revising the offense as follows:*

> *(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;*
>
> *(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*
>
> *(B) The actor:*
>
> *(i) Was reckless as to the fact that [the] 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.*

As compared to the previous RCC version of this offense, the PDS recommendation differs in that it requires that the actor, the third party, and the complainant generally satisfy the same age and age gap requirements as in the RCC sexual abuse of a minor statute (RCC § 22E-1302).[293] *PDS states that the phrasing in its recommended subparagraph (a)(1)(B), "with or for the arousal or gratification of another person," is "to make clear that the conduct of the complainant masturbating for the gratification or arousal*

[293] The PDS recommendation has the same age, age gap, and relationship requirements for liability as the RCC sexual abuse of a minor statute with the exception of requiring that the actor or third party be at least 18 years of age when the complainant is under 16 years of age. The RCC sexual abuse of a minor statute does not have an age requirement for the actor when the complainant is under 16 years of age.

of another person is criminalized by this element."

- 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.
- The RCC does not incorporate the recommendation to require that the actor is at least 18 years of age and at least four years older than the

complainant because it would be inconsistent with the other requirements of the offense. The RCC offense requires that the actor have a responsibility under civil law for a minor complainant. Requiring that the actor be at least 18 years of age and at least four years older than the complainant would exclude some parents, relatives, and caretakers from the offense solely because of their ages.

- The RCC does not incorporate the recommendation to require that the third party is at least 18 years of age when the complainant is under the age of 16 years because it would be inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The RCC sexual abuse of a minor statute does not require that the actor be at least 18 years of age and at least four years older than a complainant under 16 years of age.
- The RCC partially incorporates the recommendation to include "with or for the arousal or gratification of another person." The RCC uses the language "with or for" to make clear that masturbation is included in the scope of the offense, consistent with several of the RCC trafficking statutes.

(2) *The CCRC recommends adding as a discrete basis of liability giving effective consent to a third party to "cause the complainant to engage in or submit to a sexual act or sexual contact with or for a third party." The previous RCC version of this offense was limited to giving effective consent "for the complainant to engage in or submit to a sexual act or sexual contact." The revised language is consistent with the other RCC sex offenses that prohibit engaging in conduct with the complainant as well as causing the complainant to engage in or submit to conduct. The commentary to the RCC arranging has been updated to reflect that this revision is a clarificatory change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

(3) *The CCRC recommends including certain incapacitated complainants in the RCC arranging for sexual conduct offense by codifying what is now subparagraph (a)(2)(C): "The actor is reckless as to: (i) The fact that the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or (ii) The fact that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact."*

This language is identical to requirements for incapacitated complainants in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301). There is no current D.C. Code offense that specifically prohibits arranging for sexual activity with incapacitated complainants. Without such a provision in the RCC, an actor that is civilly responsible for an incapacitated complainant that "knowingly" gives effective consent to a third party to engage in or cause sexual activity with that incapacitated

complainant would not have liability unless there were a harm or a risk of harm that satisfies the RCC criminal abuse of a minor (RCC § 22E-1501), RCC criminal neglect of a minor (RCC § 22E-1502), RCC criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503), or RCC criminal neglect of a vulnerable adult or elderly person statute (RCC § 22E-1504). Providing liability in the RCC arranging for sexual conduct statute when there is a lower culpable mental state of "knowingly" is proportionate given that the actor must have a responsibility under civil law for the complainant's health, welfare, or supervision. An actor that "purposely" engages in this conduct may have liability under an RCC inchoate offense such as solicitation (RCC § 22E-302). The commentary to the RCC arranging has been updated to reflect that this is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

(4) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the "recklessly" culpable mental state for the age of the complainant in the RCC arranging for sexual conduct with a minor statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of the complainant in the RCC arranging for sexual conduct with a minor statute, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has "no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply." USAO acknowledges that the RCC sexual abuse of a minor offense is a "more serious offense that carries more serious penalties" than the RCC arranging for sexual conduct with a minor offense, but states that "the same logic should apply to sex offenses involving minors." USAO states that "[e]ven 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." USAO states that "[t]his 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."*

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC arranging for sexual conduct with a minor offense prohibits giving effect consent for a third party to engage in sexual activity with certain minors or cause minors to do so. A "recklessly" culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the inchoate nature of the offense. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally

accepted legal principle,[294] but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[295] The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[296] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[297] Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[298] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[299] In addition, the CCRC notes that the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[300]

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[294] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[295] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[296] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[297] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "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."

[298] D.C. Code § 22-1834.

[299] D.C. Code § 22–1839.

[300] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

(5) *The CCRC recommends reducing the penalty classification for arranging for sexual conduct with a minor from a Class 8 felony to a Class 9 felony. The current D.C. Code arranging statute has a maximum penalty of five years,*[301] *which is lower than the current D.C. Code penalties for sexual abuse of a child*[302] *and sexual abuse of a minor.*[303] *In the RCC, however, five years is comparable to the maximum penalty for sixth degree sexual abuse of a minor (RCC § 22E-1302(f)). It is disproportionate for an inchoate offense like an arranging for sexual conduct with a minor to have the same penalty as a completed offense. In addition, a higher maximum penalty for arranging for sexual conduct with a minor is unnecessary to proportionately penalize the prohibited conduct. As is discussed elsewhere in this Appendix, the RCC arranging statute requires a "knowingly" culpable mental state. If an actor "purposely" arranges for a sexual act or sexual contact with a minor, the RCC generally has significantly higher penalties than the Class 9 maximum penalty for the RCC arranging offense. Also, while there have been just a handful of convictions (under 20 in total) for this offense 2010-2019, the 97.5% quantile for the sentence imposed was 24 months.*[304] *No enhancements were included as part of the charges for the offense 2010-2019. The revised penalty classification is generally consistent with current sentencing practice for the offense.*

- This change improves the proportionality of the revised statute.

(6) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020*[305] *should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant's young age should be an enhancement to other RCC sex offenses because "although [these other sex offenses] may involve less serious sexual acts," they should still be punished more severely with a younger complainant*

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[301] D.C. Code § 22-3010.02.

[302] The current D.C. Code first degree sexual abuse of a child statute has a maximum possible penalty of 30 years unless certain aggravators and conditions are met. D.C. Code § 22-3008. The current D.C. Code second degree sexual abuse of a child statute has a maximum possible penalty of ten years. D.C. Code § 22-3009.

[303] The current D.C. Code first degree sexual abuse of a minor statute has a maximum possible penalty of 15 years. D.C. Code § 22-3009.01. The current D.C. Code second degree sexual abuse of a minor statute has a maximum possible penalty of 7.5 years. D.C. Code § 22-3009.02.

[304] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[305] D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.").

than with an older complainant. USAO gives as an example that "it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child" and states that "[t]his logic applies similarly to other sex offenses that necessarily involve minors," such as arranging for sexual conduct with a minor. USAO states that "[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant" and that this should be an enhancement for all other RCC sex offenses that could involve minors because "it is more serious and egregious to engage in sexual conduct when this relationship exists." USAO gives as an example "a defendant who is a child's biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship." USAO states that "if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement" for both minor complainants and adult complainants.

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC arranging for sexual conduct statute is limited to comparatively less serious sexual conduct of giving effective consent to sexual activity that would violate the RCC sexual abuse of a minor statute (RCC § 22E-1302), without force, threats, or coercion, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. The RCC arranging for sexual conduct offense is an inchoate offense that requires a lower culpable mental state of "knowingly" as compared to the "purposely" culpable mental state required by RCC inchoate offenses such as attempt (RCC § 22E-301) and solicitation (RCC § 22E-302), or for accomplice liability (RCC § 22E-210). If an actor "purposely" gives effective consent to a third party for sexual activity that would violate either the RCC sexual abuse of a minor statute or the RCC sexual assault statute, and satisfies the requirements of an RCC inchoate offense such as attempt or solicitation, the penalty is one half the maximum penalty of the underlying offense, which generally results in higher penalties than the RCC arranging for sexual conduct offense and grades the conduct based on circumstances like those addressed in D.C. Code § 22-3020—e.g., the under 12 age of the complainant or whether the actor is in a "position of trust with or authority over" the complainant. If an actor "purposely" gives effective consent and satisfies the requirements for accomplice liability in RCC § 22E-210, the actor receives the same penalty as the underlying offense.
- If the RCC sexual assault penalty enhancements applied to the RCC arranging for sexual conduct statute, similar conduct could receive

significantly different penalties. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in the RCC arranging for sexual conduct offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary.

- Notably, CCRC analysis of court data for the current enticing statute shows that while there have been just a handful of convictions (under 20 in total) for this offense 2010-2019, the 97.5% quantile for the sentence imposed was 24 months.[306] No enhancements were included as part of the charges for the offense 2010-2019. Additional enhancements here are unnecessary and would be disproportionate.

(7) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to prior* convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims."[307] The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement[308]:*

> *"For [the current sex offense recidivist penalty] 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*

[306] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[307] App. D1 at 170.
[308] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

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."

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [309]

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law

[309] USAO states:

"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."

clarifying the issue.[310] The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement

[310] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(8) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised arranging for sexual conduct statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(1) *OAG, App. C at 471-472 recommends redrafting subsection (c) to incorporate detail that is in the commentary. Subsection (c) currently states that: "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." OAG notes that the commentary then 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," with Footnote 6 further stating: "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." OAG states that the commentary can be read as inconsistent with the statutory text and "for clarity and to avoid litigation," subsection (c) should be redrafted as: "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 contact."*

- The RCC incorporates this recommendation by revising subsection (c) to state "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."

(2) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability in subsection (c), to make clear that no awareness or culpable mental state is required.*[311]

- This change clarifies and does not substantively change the revised statute.

(3) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020*[312] *should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the*

[311] RCC § 22E-207.

[312] D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.").

complainant's young age should be an enhancement to other RCC sex offenses because "although [these other sex offenses] may involve less serious sexual acts," they should still be punished more severely with a younger complainant than with an older complainant. USAO gives as an example that "it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child" and states that "[t]his logic applies similarly to other sex offenses . . . that could involve minors," such as nonconsensual sexual conduct. USAO states that "[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant" and that this should be an enhancement for all other RCC sex offenses that could involve minors because "it is more serious and egregious to engage in sexual conduct when this relationship exists." USAO gives as an example "a defendant who is a child's biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship." USAO states that "if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement" for both minor complainants and adult complainants.

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC nonconsensual sexual conduct statute is limited to sexual conduct that occurs without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. If the RCC sexual assault penalty enhancements applied to the RCC nonconsensual sexual conduct offense, similar conduct could receive significantly different penalties. For example, if a defendant causes serious bodily injury to the complainant to coerce the complainant to engage in a sexual act, that behavior is more proportionately charged as first degree sexual assault. Also, relevant to the "position of trust" enhancement, if the complainant is under the age of 16 years and the actor is at least four years older, or if the complainant is under the age of 18 years and the actor is at least four years older and in a "position of trust with or authority over there is liability under the RCC sexual abuse of a minor statute, which is a more serious offense than nonconsensual sexual conduct. For example, if a 30-year old defendant engages in non-forceful sexual activity with a 15 year old complainant, the RCC sexual abuse of a minor statute applies and is a more serious offense than nonconsensual sexual conduct. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code §

22-3020 that is not reflected in the RCC nonconsensual sexual conduct offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary.

- Notably, CCRC analysis of court data for the misdemeanor sexual abuse statute shows that in actual practice, for 2010-2019, few convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 (<25%) and the penalties were at most about 6 months (not exceeding the regular statutory maximum without any enhancements).[313] Additional enhancements here are unnecessary and would be disproportionate.

(4) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 "only applies to prior* convictions*, and does not account for multiple victims within the same case (emphasis in original)." In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims."[314] The CCRC previously stated, App. D1 at 170, that this recommendation "significantly expand[s] 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 to be committed 'against' 2 or more victims." USAO states that "[i]t is unclear"" how its recommendation would expand the current D.C. Code sex offense recidivist enhancement[315]:*

> *"For [the current sex offense recidivist penalty] 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*

[313] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[314] App. D1 at 170.
[315] The current D.C. Code sex offense recidivist enhancement states: "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." D.C. Code § 22-3020(a)(5).

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."

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted 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. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator. [316]

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law

[316] USAO states:

"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."

clarifying the issue.[317] The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement

[317] In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: "(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 equivalent offense]." This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant "is or has been found guilty of committing sex offense*s against 2 or more victims*" (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be "against 2 or more victims," which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: "(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 equivalent offense], involving 2 or more victims." In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the "is guilty of" language and that a prior conviction for a sex offense satisfies the "has been found guilty of" language. USAO states that "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." However, this analysis risks rendering the "against 2 or more victims" requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that "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." While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(5) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised nonconsensual sexual conduct statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

RCC§ 22E-1308. Incest.[318]

(1) *OAG, App. C at 472, recommends revising what was previously subparagraphs (a)(2)(E), (a)(2)(F), and (a)(2)(G) to read "while the marriage or domestic partnership creating the relationship exists." These subparagraphs were previously limited to "while the marriage creating the relationship exists." With this revision, the incest statute would prohibit a sexual act with a person who is a step-sibling, a stepchild or step-grandchild, or a stepparent or step-grandparent "while the marriage or domestic partnership creating the relationship exists." OAG states that, in "the rest of [RCC] Chapter 13 marriages and domestic partnerships are treated the same." OAG states that: "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 . . . not be guilty of incest while the domestic partnership creating the relationship exists." The commentary to this offense has been updated to reflect that this is a change in law*

- The RCC incorporates this recommendation by codifying new subparagraphs (a)(2)(A) (and (b)(2)(A) and sub-subparagraph (a)(2)(A)(ii) and (b)(2)(A)(ii): "Parent, grandparent, great-grandparent, child, grandchild, great-grandchild, sibling, parent's sibling, or a sibling's child, whether related by: Marriage or domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends." This revision includes domestic partnerships, but, as is discussed below, now includes these relationships after the marriage or domestic partnership ends. This change improves the clarity, consistency, and proportionality of the revised statutes.

(2) *The CCRC recommends including specified relatives by marriage or domestic partnership "either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends." The previous version of the incest statute was limited to specified relatives while the marriage or domestic partnership creating the relationship existed. This expanded scope is proportionate given that the revised incest offense requires that the actor obtain the consent of the parent's sibling by undue influence. The commentary to this offense has been updated to reflect that this is a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(3) *The CCRC recommends including a "parent's sibling" in subparagraphs (a)(2)(A) and (b)(2)(A) of the revised offense. This change expands the offense to include a "parent's sibling," whether related by blood, adoption, marriage, or domestic partnership. The previous draft of this offense was limited to a "parent's sibling" related by blood. This change makes the scope of a "parent's sibling" in the revised incest offense consistent with the scope of a "parent's*

[318] Incest was previously numbered as RCC § 22E-1312.

sibling" in subsection (A) of the RCC definition of "position of trust with or authority over" and in subsection (A) of the current D.C. Code definition of "significant relationship."[319] *Expanding the scope of a "parent's sibling" is proportionate given that the revised incest offense now requires that the actor obtain the consent of the parent's sibling by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(4) *The CCRC recommends including a "sibling's child" in subparagraphs (a)(2)(A) and (b)(2)(A) of the revised offense. This change expands the offense to include a "sibling's child," whether related by blood, adoption, marriage, or domestic partnership. The previous draft of this offense was limited to a "sibling's child" related by blood. This change makes the scope of a "sibling's child" in the revised incest offense consistent with the scope of a "sibling's child" in subsection (A) of the RCC definition of "position of trust with or authority over." Expanding the scope of a "sibling's child" is proportionate given that the revised incest offense now requires that the actor obtain the consent of the sibling's child by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(5) *The CCRC recommends including a "child of a parent's sibling" (first cousins) in subparagraphs (a)(2)(A) and (b)(2)(A) of the revised offense. The previous RCC draft of this offense and the current D.C. Code incest statute*[320] *do not include first cousins because first cousins are within the fourth degree of consanguinity. However, including cousins, whether by blood, adoption, marriage, or domestic partnership, is consistent with the requirement in the new draft of the incest statute that the consent is obtained by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(6) *The CCRC recommends including a step-great-grandparent and a step-great-grandchild, either while the marriage or domestic partnership creating the relationship exists or after it ends. The previous draft of the RCC incest statute did not include step-great-grandparents and step-great-grandchildren by marriage or domestic partnership, but did include great-grandparents and great-grandchildren related by blood or adoption. Expanding the revised incest offense*

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[319] D.C. Code § 22-3001(10)(A) ("'Significant relationship' includes: (A) A parent, sibling, *aunt, uncle,* or grandparent, whether related by blood, marriage, domestic partnership, or adoption.") (emphasis added).

[320] D.C. Code § 22-1901 ("If any person in the District related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law, shall marry or cohabit with or have sexual intercourse with such other so-related person, knowing him or her to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment for not more than 12 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

to include great-grandparents and step-great-grandchildren by marriage or domestic partnership is proportionate given that the revised incest offense requires that the actor obtain the consent of these individuals by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised offense, and may remove a gap in liability.

(7) *The CCRC recommends requiring that the actor obtain the consent of the specified relative "by undue influence," as defined in RCC § 22E-701,*[321] *and applying a "knowingly" culpable mental state to this element. The previous draft of the RCC statute did not have such an element. These requirements, in conjunction with the requirement that the actor in an incest case be at least 16 years old, ensure that the revised incest statute does not criminalize otherwise consensual sexual activity between adults or minors that are close in age. When the defendant in an incest case is at least four years older than a specified relative that is a minor, there will be liability under the RCC sexual abuse of a minor statute, with higher penalties, regardless of whether there was apparent consent.*[322] *The commentary to this offense has been updated to reflect that this is a change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(8) *The CCRC recommends codifying two degrees of incest. First degree incest requires a "sexual act" and is a Class 9 felony with a maximum term of imprisonment of three years. Second degree incest requires a "sexual contact" and is a Class A misdemeanor with a maximum term of imprisonment of one year. The penalties for first degree incest and second degree incest are the same as first degree and second degree RCC nonconsensual sexual conduct (RCC § 22E-1307), which is also graded based on whether there was a "sexual act" or a "sexual contact." The commentary to this offense has been updated to reflect that this is a change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(9) *USAO recommends classifying incest as a felony and giving it a penalty "consistent with current law." Under current law, incest is a felony with a 12*

[321] RCC § 22E-701 defines "undue influence" as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes that person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."

[322] If the specified relative is under the age of 16 years, a defendant that is at least 16 years of age and at least four years older will have liability for first degree, second degree, fourth degree, or fifth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302). If the specified relative is at least 16 years of age, but under 18 years of age, and the defendant is at least 18 years of age and at least 4 years older, there will be liability under third degree or sixth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302). Third degree and sixth degree of the RCC sexual abuse of a minor statute require that the defendant know that the defendant is in a "position of trust with or authority over" the complainant, and the specified relatives in that definition overlap with the relatives included in the RCC incest statute.

year maximum penalty.[323] *In the previous draft of the RCC incest statute, incest was classified as a Class A misdemeanor with a maximum penalty of one year. USAO states that the RCC's classification is a "steep drop in liability." USAO states that incest "takes place in a variety of situations, which can include sexual activity between consenting adults, but can 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." USAO states that a "higher maximum recognizes the potential severity of this offense."*

- The RCC partially incorporates this recommendation by codifying two gradations of incest. First degree incest requires a "sexual act" and is a Class 9 felony with a maximum term of imprisonment of three years. Second degree incest requires a "sexual contact" and is a Class A misdemeanor with a maximum term of imprisonment of one year. The revised incest statute requires that consent be obtained by undue influence, which ensures that it does not criminalize sexual activity between consenting individuals. However, even if there is consent, the RCC sexual abuse of a minor statute (RCC § 22E-1302) provides higher penalties if the parties satisfy the various age requirements. Further, as regards absolute penalties available for incest conduct, the CCRC notes that notwithstanding the 12 year statutorily authorized penalty for this offense, actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all of these offenses, including enhancements, was 36 months (3 years).[324] The CCRC recommendation here is generally consistent with current practice.
- This change improves the clarity, consistency, and proportionality of the revised statutes.

[323] D.C. Code § 22-1901.
[324] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[Previous RCC § 22E-1309.] Limitations on Liability for RCC Chapter 13 Offenses.

(1) *The CCRC recommends deletion of this text as unnecessary and potentially confusing. The text previously provided that "a person under the age of 12 is not subject to liability for offenses in this subchapter other than first degree sexual assault, pursuant to RCC § 22E-1301(a), or third degree sexual assault, pursuant to RCC § 22E-1301(c)." This provision is no longer necessary given the broader developmental incapacity defense in RCC § 22E-505.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime.

(1) *OAG, App. C at 471, recommends clarifying in the commentary that the circumstances in D.C. Code § 14-309, pertaining to when specified religious leaders may not be examined in court proceedings, are irrelevant for the purposes of determining which religious leaders are subject to the exclusion to report. OAG recommends part of the commentary be redrafted to state: "regardless of whether the religious leader hears confessions or receives other communications."*

- The RCC incorporates this recommendation by revising a sentence in the explanatory note and the discussion of District law to read: "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,' regardless of whether the religious leader hears confessions or receives other communications." This change improves the clarity of the revised statutes.

(2) *OAG, App. C at 472, recommends that the RCC codify the offense of failing to report a sex crime (previously RCC § 22E-1309) and the penalty (previously RCC § 22E-1310), in the same statute. OAG states that "[n]otwithstanding that the current Code . . . has the offense and the penalty separated into two Code provisions [D.C. Code §§ 22-3020.52 and 22-3020.54]" the "current structure of the RCC for other offenses has the penalty in the same provision as the offense."*

- The RCC incorporates this recommendation by combining what was previously two statutes, 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, into one statute, RCC § 22E-1310, Civil Provisions on the Duty to Report a Sex Crime. This change improves the organization and clarity of the revised statutes.

(3) *The CCRC recommends, by use of the phrase "in fact" in paragraph (a)(1), specifying that strict liability applies to the requirements of the duty to report a sex crime. With this change, paragraph (a)(1) reads: "A person who is, in fact, at least 18 years of age, and is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime, shall immediately report such information or belief in a call to 911, a report to the Child and Family Services Agency, or a report to the Metropolitan Police Department." The commentary to this statute has been updated to reflect that this is a clarificatory change in law.*

- This change improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends, by use of the phrase "in fact" in paragraph (b)(1), specifying that strict liability applies to the status of the individuals specified in subparagraphs (b(1)(A), (b)(1)(B), and (b)(1)(C). The commentary to this statute has been updated to reflect that this is a clarificatory change in law.*

- This change improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends codifying as an element of the civil violation that the person "Is, in fact, at least 18 years of age" (paragraph (d)(1)). The previous draft of the civil violation (subsection (a) of former RCC § 22E-1310) did not codify this element. This change improves the consistency of the civil violation with the duty to report in subsection (a) of the revised statute, which only applies if the person is, in fact, at least 18 years of age or older.*

- This change improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends requiring "in fact, reasonably believes" for the defense in subsection (e). With this change, the defense reads: "It is a defense to liability under subsection (d) of this section that the person fails to report a predicate crime under subsection (a) of this section because the person, in fact, reasonably believes that they are a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)." The previous version of this defense (subsection (b) of former RCC § 22E-1310) did not have such a requirement and did not specify any culpable mental states as defined in RCC § 22E-205. "In fact, reasonably believes" is consistent with several defenses in the RCC and requires that the person subjectively and reasonably believes that they are a survivor of intimate partner violence or intrafamily violence. The commentary to this statute has been updated to reflect that this is a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(7) *The CCRC recommends codifying an exclusion to the duty to report for sexual assault counselors in subparagraph (b)(1)(D). Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added this exclusion to the current D.C. Code duty to report a sex crime statute[325] since the last RCC draft of this statute. The RCC draft makes several changes to the exclusion. First, the RCC draft requires that the sexual assault counselor "is aware of a substantial risk" that the situations specified in sub-subparagraphs (b)(1)(D)(i), (b)(1)(D)(ii), and (b)(1)(D)(iii) exist, as opposed to having "actual knowledge."[326] The phrase "is aware of a substantial risk" is consistent with the*

[325] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[326] The exclusion in the current D.C. Code duty to report statute requires that the sexual assault counselor have "actual knowledge" of the specified situations, such as the victim being under the age of 13 years. D.C. Code § 22-3020.52(c), (c)(3). The meaning of "actual knowledge" is unclear and is inconsistent with the "knows, or has reasonable cause to believe" requirement for the duty to report in the current D.C. Code duty to report statute. D.C. Code § 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the

requirement for the duty to report in subsection (a) of the revised statute. The commentary to the RCC statute states that this is a possible change in law. Second, the RCC draft uses the term "sexual assault victim" as opposed to "victim" (sub-subparagraph (b)(1)(D)(i))) and adopts the definition of that term in D.C. Code § 23-1907(11).[327] *The commentary to the RCC statute states that this is a clarificatory change in law. Third, the RCC draft replaces the term "significant relationship" in sub-subparagraph (b)(1)(D)(ii) with the RCC term "position of trust with or authority over," which may differ in scope. The commentary to the RCC statute states that this is a possible change in law.*

- These changes improve the clarity and consistency of the revised statutes.

(8) *The CCRC recommends replacing the term "infraction" with "civil violation" wherever it appears in the revised statute and codifying in paragraph (f)(2) "A violation of subsection (a) of this section shall not constitute a criminal offense or a delinquent act as defined in D.C. Official Code § 16-2301(7)." This is consistent with the marijuana decriminalization in current D.C. Code § 48-1201, which refers to the prohibited conduct as a "civil violation"*[328] *and states that a*

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police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police.").

[327] The sexual assault counselor exclusion in the current D.C. Code duty to report statute states:

> Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:
>
> (A) A *victim* under the age of 13;
>
> (B) A perpetrator or alleged perpetrator with whom the *sexual assault victim* has a significant relationship, as that term is defined in § 22-3001(10); or
>
> (C) A perpetrator or alleged perpetrator who is more than 4 years older than *the sexual assault victim*.

D.C. Code § 22-3020.52(c)(3) (emphasis added).

It is unclear why subparagraph (c)(3)(A) uses the term "victim" instead of "sexual assault victim" as in subparagraphs (c)(3)(B) and (c)(3)(C). Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added this exclusion to D.C. Code § 22-3020.52 and does not define the term "victim". It seems unlikely that the Act intended to adopt the definition of "victim" in D.C. Code § 22-3001 that would otherwise apply (D.C. Code § 22-3001(11) defines "victim" as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter."). Section 5 of the Act added an identical exclusion for sexual assault counselors to D.C. Code § 14-312 for mandatory reporting and also uses the undefined term "victim," as opposed to "sexual assault victim."

Although "victim" is undefined in the identical exclusion in D.C. Code § 14-312, that statute defines "sexual assault victim" as "any individual against whom a sexual assault has been committed or is alleged to have been committed, including: (A) Deceased individuals; and (B) Representatives appointed by the court to exercise the rights and receive services on behalf of sexual assault victims who are under 18 years of age, incompetent, incapacitated, or deceased." D.C. Code § 14-312(a)(6). Sub-subparagraph (b)(1)(D)(i) of the exclusion in the RCC duty to report statute uses the term "sexual assault victim" because this definition is consistent with the use of that term in sub-subparagraphs (b)(1)(D)(i) and (b)(1)(D)(ii).

The definition of "sexual assault victim" in D.C. Code § 14-312(a)(6) is identical to the definition of "sexual assault victim" in D.C. Code § 23-1907(11). The RCC refers to the definition in D.C. Code § 23-1907(11) for consistency with the definition of "sexual assault counselor" in Section 5 of the Act and in the revised duty to report statute (subparagraph (i)(2)(C)).

[328] D.C. Code § 48-1201(a) ("Notwithstanding any other District law, the possession or transfer without remuneration of marijuana weighing one ounce or less shall constitute a civil violation.").

violation of the prohibited conduct "shall not constitute a criminal offense or a delinquent act as defined in § 16-2301(7)."[329] *The commentary to this statute has been updated to reflect that these are clarificatory changes.*

- This change improves the clarity and consistency of the revised statute.

(9) *The CCRC recommends adding Forced Commercial Sex (RCC § 22E-1602) to the predicate offenses in sub-subparagraph (i)(2)(B)(i). This is consistent with the other RCC offenses listed in this sub-subparagraph: Trafficking in Forced Commercial Sex under RCC § 22E-1604; Sex Trafficking of a Minor under RCC § 22E-1605, and Commercial Sex with a Trafficked Person under RCC § 22E-1608. The commentary to the RCC statute has been updated to reflect that this is a change in law.*

- This change improves the clarity and consistency of the revised statute, and removes a possible gap in liability.

(10) *The CCRC recommends deleting D.C. Code § 22-2704 [Abducting or enticing a child from his or her home for purposes of prostitution; harboring such child] from the predicate offenses under subparagraph (i)(2)(B). To the extent that abducting or enticing a minor for purposes of prostitution satisfies the other offenses listed under subparagraph(i)(2)(B), such as Trafficking in Forced Commercial Sex (RCC § 22E-1602), the RCC duty to report statute still applies. However, for conduct that falls outside these offenses, the RCC duty to report statute does not apply. The commentary to the RCC statute has been updated to reflect that this is a change in law.*

- This change improves the clarity and consistency of the revised statute.

(11) *The CCRC recommends adding Trafficking in Commercial Sex (RCC § 22E-4403) to the list of predicate offenses under subparagraph (i)(2)(B). This offense broadly prohibits causing an individual to engage in consensual commercial sex acts and should be included in the list of predicate offenses for a duty to report when the complainant is under the age of 16 years. The commentary to the RCC statute has been updated to reflect that this is a change in law.*

- This change improves the clarity and consistency of the revised statute, and removes a possible gap in liability.

(12) *The CCRC recommends codifying the following definition in subparagraph (i)(2)(A): "'Confidential communication' has the meaning specified in D.C. Code § 14-312(a)(1), and is subject to the protections in D.C. Code § 14-312(b)(3)." Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to the current D.C. Code duty to report a sex crime statute,*[330] *which is codified in*

[329] D.C. Code § 48-1201(b).

[330] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term

subparagraph (b)(1)(D) of the revised statute. Section 6 of the Act did not codify a definition for the term "confidential communication." However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312[331] for mandatory reporting and codified a definition of "confidential communication"[332] applicable to that exclusion. The revised statute incorporates this definition of "confidential communication," as well as the protections for a "confidential communication" that Section 5 of the Act added to current D.C. Code § 14-312.[333] The commentary to the RCC statute has been updated to reflect that this is a clarificatory change in law.

- This change improves the clarity and consistency of the revised statute.

(13) *The CCRC recommends codifying the following definition in subparagraph (i)(2)(C): "'Sexual assault counselor' has the meaning specified in D.C. Code § 23-1907(10)." Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to current D.C. Code § 22-3020.52(c)(3),[334] which is codified in subparagraph (b)(1)(D) of the*

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is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[331] Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

> (5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:
>
> (A) A victim under the age of 13;
>
> (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or
>
> (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

[332] D.C. Code § 14-312(a), (a)(1):

> (a) For the purposes of this section, the term:
>
> (1) "Confidential communication" means:
>
> (A) Information exchanged between a sexual assault victim 13 years of age or older and a sexual assault counselor during the course of the sexual assault counselor providing counseling, support, and assistance to the victim; and
>
> (B) Records kept by a community-based organization in the course of providing victim advocacy services pursuant to § 23-1909 for sexual assault victim 13 years of age or older.

[333] D.C. Code § 14-312(b)(3):

> (3) The confidentiality of a confidential communication shall not be waived by the presence of, or disclosure to a:
>
> (A) Sign language or foreign language interpreter; provided, that a sign language or foreign language interpreter shall be subject to the limitations and exceptions set forth in paragraph (1) of this subsection and the same privileges set forth in subsection (c) of this section;
>
> (B) Third party participating in group counseling with the sexual assault victim; or
>
> (C) Third party with the consent of the victim where reasonably necessary to accomplish the purpose for which the sexual assault counselor is consulted.

[334] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential

revised statute. Section 6 of the Act did not codify a definition for the term "sexual assault counselor." However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312[335] *for mandatory reporting and codified a definition of "sexual assault counselor"*[336] *applicable to that exclusion. The revised statute incorporates this definition of "sexual assault counselor." The commentary to the RCC statute has been updated to reflect that this is a clarificatory change in law.*

- This change improves the clarity and consistency of the revised statute.

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communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[335] Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

> (5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:
>
> (A) A victim under the age of 13;
>
> (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or
>
> (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

[336] D.C. Code § 14-312(a)(5A): "(a) For the purposes of this section, the term: (5) 'Sexual assault counselor' shall have the same meaning as provided in § 23-1907(10).").

RCC § 22E-1401. Kidnapping.

(1) *USAO, App. C at 512, recommends that the word "substantially" be deleted from paragraphs (a)(1) and (b)(1) in RCC § 22E-1401.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Although most kidnappings will involve substantial confinement or movement, retaining the substantiality element in criminal restraint is necessary to prevent minor or trivial confinements or movements from being criminalized.

(2) *USAO, App. C at 513, recommends redrafting commentary to add the sentence: "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 RCC incorporates this change, and the commentary to the kidnapping offense will be updated.

(3) *USAO, App. C at 513-514, recommends changing the requirement from "significant bodily injury" in subparagraphs (a)(3)(F) and (b)(3)(F) to "bodily injury," so that those provisions refer to "Cause any person to believe that the complainant will not be released without suffering bodily injury, or a sex offense defined in Chapter 13 of this Title".*

- The RCC partially incorporates this recommendation. The CCRC recommends dividing kidnapping into two penalty gradations, based on the actor's intent in confining or moving the complainant. Under this revised kidnapping statute, first degree kidnapping includes causing any person to fear that the complainant will not be released without having suffered a serious bodily injury, and second degree kidnapping includes causing any person to fear that the complainant will not be released without having suffered bodily injury. Under this revision, kidnapping with intent to cause a person to fear the complainant will suffer a bodily injury will qualify as kidnapping but not be subject to the same penalty as kidnapping a person with intent to cause a person to fear the complainant will suffer a serious bodily injury, death, or a sex offense. This change improves the clarity and proportionality of the revised statutes.

(4) *USAO, App. C at 514, recommends that kidnapping should be revised to include restraining or moving a person for "any other purpose that the actor believes will benefit the actor."*

- The RCC does not incorporate this recommendation because the change would result in disproportionate penalties. This element would virtually eliminate the distinction between kidnapping and the lesser criminal restraint offense. The kidnapping offense is intended to cover cases in which confinement or movement is especially dangerous or harrowing for the complainant. Under USAO's proposal, any case in which the actor had any motive for confining or restraining a person would constitute kidnapping, even if there was still limited harm or risk to the complainant. Regarding the hypothetical case presented by USAO, CCRC believes such

facts would constitute kidnapping. If an actor confines a person for months on end, but without intent to cause injury or commit a sexual offense, the complainant and the complainant's friends and family, would fear that the complainant will not be released at all, or without having suffered significant bodily injury or a sexual offense. In addition, the CCRC recommends adding a new version of kidnapping, discussed below.

(5) *USAO, App. C at 514-15, recommends that kidnapping and criminal restraint retain an elements-based merger analysis instead of a fact-based merger analysis.*

- The RCC does not incorporate this recommendation because the change would result in disproportionate penalties. Several offenses against persons, notably assault, robbery, and sexual assault, *inherently* involve restraining or moving a person, with intent to cause bodily injury or facilitate commission of a felony offense. Under an elements-based analysis, kidnapping does not merge with these offenses. The additional penalties authorized under the kidnapping statute are not warranted when the movement or confinement of the complainant was incidental to the commission of another offense. An elements-based merger analysis does not sufficiently address the significant overlap between kidnapping and other offenses against persons. Retaining a fact-based merger analysis prevents unnecessary overlap and improves the proportionality of the revised statute.

(6) *The CCRC recommends adding a new version of kidnapping in which the actor restrains the complainant for 72 hours or more. The kidnapping offense is intended to cover restraints that are particularly dangerous or harrowing. In the vast majority of cases, if an actor restrains a person for 72 hours or more, that actor also has intent that a person will fear that the complainant will not be released. However, in order to ensure that such cases constitute kidnapping, the statute will be amended to specifically address restraints of this duration.*

- This change improves the clarity and proportionality of the revised statutes.

(7) *The CCRC recommends re-labeling the exclusion to liability under subsection (c) as a defense. This change does not substantively change the revised offense. Under RCC § 22E-201, under both exclusions and defenses, if there is any evidence at trial then the government bears the burden of disproving all elements of the exclusion or defense beyond a reasonable doubt.*

- This change improves the clarity and organization of the revised statutes.

(8) *The CCRC recommends re-organizing the kidnapping offense into two penalty grades, with separate penalty enhancements that are applicable to each grade. First degree kidnapping now requires intent to commit particularly dangerous and harrowing harms on the complainant*[337]*, while second degree kidnapping*

[337] Under the revised statute, first degree kidnapping will require intent to: hold the complainant for ransom or reward; use the complainant as a shield or hostage; facilitate the commission of any felony or flight thereafter; inflict serious bodily injury upon the complainant; commit a sexual offense defined in Chapter 13 of this Title against the complainant; 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;

requires intent to inflict bodily injury or to cause any person to believe that the complainant will not be released without suffering bodily injury. The previous version of the kidnapping statute treated confinement or movement with intent to inflict mere bodily injury the same as confinement or movement that involve a risk of more serious injury, death, or sexual assaults.

- This change improves the proportionality of the revised statute.

(9) *The CCRC recommends that elements from the prior aggravated kidnapping offense be re-categorized as penalty enhancements, applicable to both grades of the revised kidnapping statute. Under the prior version of the statute, the kidnapping offense was divided into aggravated and non-aggravated forms. Aggravated kidnapping required the same elements as kidnapping, plus at least one additional aggravating factor.*[338] *These aggravating factors will now be penalty enhancements that can apply to both first and second degree kidnapping under the revised statute. One element from the aggravated kidnapping offense will not be included in the revised statute's penalty enhancements. The revised statute's penalty enhancement does not include committing kidnapping with recklessness that the complainant is under 12 years of age. This element is unnecessary, as the penalty enhancements include committing kidnapping with recklessness as to the fact that the complainant is a "protected person." The term "protected person" includes persons under 18 years of age when the actor is at least 18 years of age and 4 years older than the complainant.*

- This change improves the organization and proportionality of the revised statute.

(10) *The CCRC recommends revising the kidnapping statute to include any movement or confinement of incapacitated persons and children under the age of 16, without the effective consent of a "person with legal authority over the complainant who is acting consistent with that authority," but providing an affirmative defense when the actor reasonably believes a person with legal authority would give consent. Under the prior version of the statute, kidnapping included as an element only moving or confining incapacitated persons or children under the age of 16 if the actor was reckless that "a person with legal authority over the complainant would not give effective consent to the confinement or movement[.]" Under that version, if the actor did not communicate with a person with legal authority, the element required that the actor disregarded a substantial risk that such a person would not have effectively consented. Under the revised statute, however, confining or moving an incapacitated persons and children under the age of 16 without communicating with a person with legal authority of the person satisfies this element of the offense. There is no need to prove that the actor disregarded a substantial risk that a person with legal authority would not have*

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permanently deprive a person with legal authority over the complainant of custody of the complainant; or confine or move the complainant for 72 hours or more.

[338] These aggravating factors were: the actor was reckless as to the fact that the complainant was under the age of 12 or a protected person; the actor committed the offense with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, or District official; or the actor committed the offense by using or displaying a dangerous weapon or imitation dangerous weapon.

consented. However, the statute also includes as an affirmative defense that the actor reasonably believed that a person with legal authority would have consented to the movement or confinement. Under this revision, when an actor confines or moves an incapacitated persons and child under the age of 16 without consent of a person with legal authority, the actor bears the burden of proving that the actor reasonably believed a person with legal authority would have consented.

- This change improves the proportionality of the revised statute.

(11) *The CCRC recommends amending the close relatives with intent to assume responsibility for minor defense to require that the complainant is, in fact, under 18 years of age. The prior version of the defense did not specify that the complainant must be under 18 years of age. This change clarifies that the defense only applies for certain kidnappings of minors.*

- This change improves the clarity of the revised criminal statute.

RCC § 22E-1402. Criminal Restraint.

(1) *USAO, App. C at 512, recommends that the word "substantially" be deleted from paragraphs (a)(1) and (b)(1) in RCC § 22E-1402.*

- The RCC does not incorporate this recommendation for the reasons set forth in responses to the analogous recommendation to the kidnapping statute. Removing the term "substantially" from the criminal restraint statute would technically criminalize even trivial restrictions on a person's freedom of movement, such as momentarily confining a person, or causing a person to walk to the opposite side of a sidewalk in order to pass.

(2) *USAO, App. C at 514-15, recommends that kidnapping and criminal restraint retain an elements-based merger analysis instead of a fact-based merger analysis.*

- The RCC does not incorporate this recommendation for the reasons set forth in responses to the analogous recommendation to the kidnapping statute.

(12) *The CCRC recommends re-organizing the criminal restraint statute to include a single grade of the offense, and elements that were specific to the aggravated form of criminal restraint will become penalty enhancements. Under the prior version of the statute, the criminal restraint offense was divided into aggravated and non-aggravated forms. Aggravated criminal restraint required the same elements as criminal restraint, plus at least one additional aggravating factor.*[339] *These aggravating factors will now be penalty enhancements applicable to the single grade of criminal restraint. One element from the aggravated criminal restraint offense will not be included in the revised statute's penalty enhancements. The revised statute's penalty enhancement does not include committing criminal restraint with recklessness that the complainant is under 12 years of age. This element is unnecessary, as the penalty enhancements include committing criminal restraint with recklessness as to the fact that the complainant is a "protected person." The term "protected person" includes persons under 18 years of age when the actor is at least 18 years of age and 4 years older than the complainant.*

- This change improves the organization and proportionality of the revised statute.

(3) *The CCRC recommends revising the criminal restraint statute to include any movement or confinement of incapacitated persons and children under the age of 16, without the effective consent of a "person with legal authority over the complainant who is acting consistent with that authority," but providing an affirmative defense when the actor reasonably believes a person with legal authority would give consent. Under the prior version of the statute, criminal restraint included as an element only moving or confining incapacitated persons*

[339] These aggravating factors were: the actor was reckless as to the fact that the complainant was under the age of 12 or a protected person; the actor committed the offense with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, or District official; or the actor committed the offense by using or displaying a dangerous weapon or imitation dangerous weapon.

or children under the age of 16 if the actor was reckless that "a person with legal authority over the complainant would not give effective consent to the confinement or movement[.]" Under that version, if the actor did not communicate with a person with legal authority, the element required that the actor disregarded a substantial risk that such a person would not have effectively consented. Under the revised statute, however, confining or moving an incapacitated persons and children under the age of 16 without communicating with a person with legal authority of the person satisfies this element of the offense. There is no need to prove that the actor disregarded a substantial risk that a person with legal authority would not have consented. However, the statute also includes as an affirmative defense that the actor reasonably believed that a person with legal authority would have consented to the movement or confinement. Under this revision, when an actor confines or moves an incapacitated persons and child under the age of 16 without consent of a person with legal authority, the actor bears the burden of proving that the actor reasonably believed a person with legal authority would have consented.

- This change improves the proportionality of the revised statute.

(4) *The CCRC recommends re-labeling the exclusions to liability under subsection (c) as defenses. This change does not substantively change the revised offense. Under RCC § 22E-201, under both exclusions and defenses, if there is any evidence at trial then the government bears the burden of disproving all elements of the exclusion or defense beyond a reasonable doubt.*

- This change improves the clarity of the revised criminal statute.

(5) *The CCRC recommends adding a new defense to prosecution under subparagraph (a)(2)(A) that the actor is either is a transportation worker who moves the complainant in the course of the worker's official duties; or 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. Under the revised statute, moving a child under the age of 16 or incapacitated person without consent of a person with legal authority constitutes criminal restraint. This could include a bus driver transporting a 15 year old child without that child's guardian's consent, or a shop owner convincing a 15 year old to come into a store without that child's guardian's consent. This defense bars liability in such cases.*

- This change improves the clarity and proportionality of the revised criminal code.

(6) *The CCRC recommends omitting as a defense to criminal restraint that the actor is a person with legal authority over the complainant. This defense was originally codified to recognize that persons with legal authority over the complainant may legally move or confine the complainant, even without effective consent. The CCRC recommended including this defense before it had drafted RCC § 22E-408, which codifies a general special responsibility for care, discipline, or safety defense, which more broadly governs when persons with legal authority may use force against persons in their care. Instead of including a specific defense for criminal restraint, the general defense under RCC §22E-408 will apply to the criminal restraint statute.*

- This change improves the proportionality and consistency of the revised statute.

RCC § 22E-1403. Blackmail.

(1) *The CCRC recommends replacing the words "by threatening that any person will" with the words "[b]y communicating that if the person does not commit or refrain from the act, any person will[.]" The word "communicating" replaces the word "threatens" from the prior version of the blackmail statute to maintain consistency with the language of the revised criminal threats statute while avoiding the inference that all the elements of the criminal threats statute must be proven for blackmail. Using the word "communicates" ensures that the criminal threats offense is a lesser included offense of blackmail.*

- This change improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends adding a new effective consent affirmative defense. Under this defense, the defendant bears the burden of proving by a preponderance of the evidence that the defendant reasonably believed that the complainant effectively consented to the conduct constituting the offense. This defense recognizes that in some circumstances, a person may consent to another using various coercive threats to compel the person to engage or refrain from particular conduct.*

- This change improves the clarity and proportionality of the revised criminal code.

RCC § 22E-1501. Criminal Abuse of a Minor.

(1) *The CCRC recommends two changes to the list of predicate offenses against persons in paragraph (e)(2): 1) deleting the RCC menacing offense; and 2) replacing the reference to "Sixth Degree Assault" with "Fourth Degree Assault." The updated RCC no longer has a separate menacing offense and in the new draft of the RCC assault statute, fourth degree assault is the equivalent gradation to what was previously sixth degree assault.*

- This change improves the clarity of the revised statute.

(2) *The CCRC recommends moving recklessly causing serious mental injury from second degree of the revised criminal abuse of a minor statute—a Class 8 felony—to third degree—a Class 9 felony. The occurrence of a severe mental injury unaccompanied by physical abuse and with a mental state of only recklessness (as opposed to purposeful infliction, categorized as first degree criminal abuse of a minor) is closer in culpability to the predicate offenses in third degree.*

- This change improves the proportionality of the revised statutes.

(3) *The CCRC recommends codifying an exclusion from liability in what is now subsection (d): "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.*[340]

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends codifying an effective consent affirmative defense in subsection (e). In previous compilations of draft statutes for the RCC, RCC § 22E-409*[341] *codified a general effective consent defense for several RCC offenses*

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[340] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[341] In relevant part, the defense in RCC § 22E-409 stated:

> (c) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
>
> (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
>
> (2) Either:

against persons, including criminal abuse of a minor. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

Like the previous effective consent defense in RCC § 22E-409, the defense continues to exclude an actor that is a "person with legal authority over the complainant"[342] from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The exclusion effectively means that the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a "person with legal authority over the complainant" as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn't foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides without prior consultation with the parent to let a minor climb the tree that results in a significant bodily injury.

The previous effective consent defense in RCC § 22E-409 applied, in part, if the "conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ." The new defense continues to recognize these limitations by applying only to subsection (b)—recklessly causing significant bodily injury—and subsection (c)—recklessly causing serious mental injury or, in fact, engaging in a specified RCC predicate offense against persons, such as fourth degree assault or criminal restraint. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a minor due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or

(B) The result was a reasonably foreseeable hazard of:

(i) The complainant's occupation;

(ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or

(iii) Participation in a lawful contest or sport.

[342] RCC § 22E-701 defines "person with legal authority over the complainant" as:

(A)When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or

(B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

(5) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years[343] to 15 years. Specific to the RCC criminal abuse of a minor statute, USAO states that first degree criminal abuse of a minor is "comparable to" first degree child cruelty under current D.C. Code §§ 22-1101 which has a maximum possible penalty of 15 years. USAO states that it "does not believe that the maximum penalt[y]" for first degree criminal abuse of a minor should be lowered from 15 years' incarceration to 12 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[344] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[345] 5) relative ordering of related RCC offenses;[346] and 6) national data on sentencing and time served.[347] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 15 year statutorily authorized penalty for first degree child cruelty, actual practice in the District has been somewhat different. Court data for 2010-2019 indicates that the 97.5% quantile of sentences for all first degree child cruelty, with or without an aggravator enhancement, appears to be under 120 months (10 years) once an apparent error is accounted for.[348] The CCRC recommendation here is generally consistent with current practice.

[343] In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.
[344] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[345] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[346] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[347] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[348] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions. Notably, this analysis includes an apparent error based on a single sentence that, while marked as unenhanced in the raw data, had a penalty above 15 years that legally could only be possible with an enhancement. The CCRC hopes that its forthcoming analysis (in the next month or so) which uses data corrected by the court after 72 hours will resolve this discrepancy. Without this one case, however, it appears that the 97.5% would be below 120 months.

RCC § 22E-1502. Criminal Neglect of a Minor.

(1) *The CCRC recommends codifying as a discrete basis of liability for third degree of the revised criminal neglect of a minor statute that a person with a responsibility under civil law for the health, welfare, or supervision of the minor complainant recklessly "Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana" (sub-subparagraph (c)(2)(B)(ii)).*

The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, certain persons over the age of 18 years "permit[ting] . . . or allow[ing]" a minor to "[p]ossess or consume alcohol or, without a valid prescription, a controlled substance as that term is defined in § 48-901.02(4)."[349] The current D.C. Code contributing to the delinquency of a minor statute does not require a duty of care between the adult and the minor. As is discussed in the commentary to the RCC contributing to the delinquency of a minor statute, imposing omission liability without a duty of care is generally disfavored. As such, the RCC contributing to the delinquency of a minor statute no longer prohibits "permitting" or "allowing" the complainant to engage in the prohibited conduct because the statute does not require a duty of care.[350]

With this change, the RCC criminal neglect of a minor statute provides liability for caretakers (persons with a duty of care to the minor complainant) who create or fail to mitigate risks of bodily injury arising from the complainant's consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.[351] Rather than use the undefined terms "permitting" or "allowing" (such as in the current D.C. Code contributing to the delinquency of a minor statute), the RCC criminal neglect of a minor statute requires that the actor recklessly "creates, or fails to mitigate or remedy, a substantial risk" of bodily injury from the complainant's consumption of alcohol or drugs. Already under the RCC, if the actor recklessly creates such a risk, and causes "bodily injury" to the complainant, there is liability, with a higher penalty, under third degree of the RCC criminal abuse of a minor statute

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[349] D.C. Code § 22-811(a), (a)(2).

[350] As is discussed in the commentary to the offense, the RCC contributing to the delinquency of a minor statute no longer separately prohibits encouraging, causing, or soliciting a minor to possess or consume alcohol or a controlled substance without a valid prescription. Instead, the RCC statute prohibits being an accomplice to an offense under RCC § 23E-210 or soliciting a minor to commit an offense under RCC § 22E-302. An offense includes a violation of the RCC possession of a controlled substance statute (RCC § 48-904.01) and the RCC contributing statute specifically includes a violation of D.C. Code § 25-1002 (underage possession or consumption of alcohol) as an offense.

[351] Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a parent who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a small child if it is proven that such conduct creates a substantial risk that the complainant would experience a bodily injury from the smoke.

(RCC § 22E-1501) for committing what is now fourth degree assault. Also, if the actor recklessly creates such a risk of a higher level of "bodily injury," such as "significant bodily injury," there already is liability under first degree or second degree of the RCC criminal neglect of a minor statute. This change fills a gap for a caretaker creating or failing to mitigate risks of lower-level harms (bodily injury) without proof of actual injury due to the complainant's consumption of alcohol or drugs. This revision also addresses a written comment OAG made on an earlier draft of the RCC criminal abuse of a minor and criminal neglect of a minor statutes that "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 injury.[352] *The commentary to this offense has been updated to reflect that this is a substantive change in law*

- This change improves the clarity, consistency, and proportionality of the revised statute, removing a possible gap in liability.

(2) *The CCRC recommends codifying an exclusion from liability in what is now paragraph (d)(2): "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.*[353]

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(3) *The CCRC recommends codifying an effective consent affirmative defense in subsection (e). In previous compilations of draft statutes for the RCC, RCC § 22E-409*[354] *codified a general effective consent defense for several RCC offenses*

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[352] OAG written comments on First Draft of Report #20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults (May 11, 2018) at 1-2.

[353] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[354] In relevant part, the defense in RCC § 22E-409 stated:

> (d) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
>
> (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
>
> (2) Either:

against persons, including criminal neglect of a minor. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

Like the previous effective consent defense in RCC § 22E-409, the defense continues to exclude an actor that is a "person with legal authority over the complainant"[355] *from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The exclusion effectively means that the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a "person with legal authority over the complainant" as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn't foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides to let a minor briefly play outside in the snow without gloves if the babysitter can't find them or there aren't any available.*

The previous effective consent defense in RCC § 22E-409 applied, in part, if the "conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ." The new defense continues to recognize these limitations by applying only to subsection (b)—recklessly causing, or failing to mitigate, a risk of significant bodily injury or serious mental injury—and subsection (c)—recklessly failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
(B) The result was a reasonably foreseeable hazard of:
  (i) The complainant's occupation;
  (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
  (iii) Participation in a lawful contest or sport.

[355] RCC § 22E-701 defines "person with legal authority over the complainant" as:
(A)When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or
(B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

(4) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*[356]

- This change clarifies and does not substantively change the revised statute.

[356] RCC § 22E-207.

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

(1) *The CCRC recommends two changes to the list of predicate offenses against persons in paragraph (f)(2): 1) deleting the RCC menacing offense; and 2) replacing the reference to "Sixth Degree Assault" with "Fourth Degree Assault." The updated RCC no longer has a separate menacing offense and in the new draft of the RCC assault statute, fourth degree assault is the equivalent gradation to what was previously sixth degree assault.*

- This change improves the clarity of the revised statute.

(2) *The CCRC recommends moving recklessly causing serious mental injury from second degree of the revised criminal abuse of a vulnerable adult or elderly person statute—a Class 8 felony—to third degree—a Class 9 felony. The occurrence of a severe mental injury unaccompanied by physical abuse and with a mental state of only recklessness (as opposed to purposeful infliction, categorized as first degree criminal abuse of a vulnerable adult or elderly person) is closer in culpability to the predicate offenses in third degree.*

- This change improves the proportionality of the revised statutes.

(3) *The CCRC recommends codifying an exclusion from liability in what is now subsection (d): "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.*[357]

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends codifying an effective consent defense in subsection (e) of the revised criminal abuse of a vulnerable adult or elderly person statute. In previous compilations of draft statutes for the RCC, RCC § 22E-409*[358] *codified a*

[357] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[358] In relevant part, the defense in RCC § 22E-409 stated:

> (e) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
>
> (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
>
> (2) Either:

general effective consent defense for several RCC offenses against persons, including criminal abuse of a vulnerable adult or elderly person. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

The new defenses in paragraphs (e)(1) and (e)(2) are generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defenses continue to exclude an actor that is a "person with legal authority over the complainant" from availing themselves of the defense so that such an actor must use the RCC guardian defense in RCC § 22E-408. The revised defenses still apply if the actor reasonably believes that the actor has the effective consent of the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701.[359] However, the defenses no longer apply if the actor "in fact" has the complainant's effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.[360]

The previous effective consent defense in RCC § 22E-409 applied, in part, if the "conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ." The new defenses continue to recognize these limitations by permitting a defense for subparagraph (a)(2)(B) of first degree—which requires "serious bodily injury," as that term is defined in RCC § 22E-701[361]—when the injury is "caused by a lawful cosmetic or medical procedure." The defense to

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(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
(B) The result was a reasonably foreseeable hazard of:
  (i) The complainant's occupation;
  (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
  (iii) Participation in a lawful contest or sport.

[359] RCC § 22E-701 defines "person with legal authority over the complainant," in relevant part, as " . . . (B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." Subsection (A) of the definition applies if the complainant is under the age of 18 years and neither a "vulnerable adult" or an "elderly person," as those terms are defined in the RCC, can be under the age of 18 years.

[360] It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

[361] RCC § 22E-701 defines "serious bodily injury" as "a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D)Protracted loss of consciousness."

second degree—causing "significant bodily injury"[362] —and the defense to third degree—recklessly causing serious mental injury or, in fact, engaging in a specified RCC predicate offense against persons, such as fourth degree assault or criminal restraint—allows the complainant or a person with legal authority over the complainant to give effective consent to the injury without any such restriction as to the cause. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a vulnerable adult or elderly person due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

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[363] and several other jurisdictions.[364]

In contrast to the previous effective consent defense in RCC § 22E-409, the new effective consent defenses in subsection (e) specifically address where the injury may be caused by an "omission" and allow the complainant, or a "person with legal authority over the complainant" to give effective consent to such an omission. This in part replaces the defense in the previous version of the revised statute for the administration of, or allowing the administration of, prayer in lieu of medical treatment,[365] which was based off an exception in the current D.C.

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[362] RCC § 22E-701 defines "bodily injury" as "physical pain, physical injury, illness, or impairment of physical condition." RCC § 22E-701 defines "significant bodily injury" as "a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. In addition, 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; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation."

[363] *See* Model Penal Code § 2.11.

[364] *See, e.g.,* Del. Code Ann. tit. 11, § 452.

[365] Subsection (d) of the revised criminal abuse of a vulnerable adult or elderly person statute was:

> *Defenses.* It is a defense to liability under this section that, in fact:
>
> (1) The actor has the complainant's effective consent to the conduct charged to constitute the offense, or the actor reasonably believes that the actor has the complainant's effective consent to the conduct charged to constitute the offense; and
>
> (2) The conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise has a responsibility, under civil law, to provide or allow.

Code abuse or neglect of a vulnerable adult or elderly person statutes.[366] *An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.*

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

- *The CCRC recommends codifying as a discrete basis of liability for third degree of the revised criminal neglect of a vulnerable adult or elderly person statute that a person with a responsibility under civil law for the health, welfare, or supervision of vulnerable adult or elderly person recklessly "Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana" (subparagraph (c)(2)(B)). This is consistent with a revision to the RCC criminal abuse of a minor statute (RCC § 22E-1501), discussed elsewhere in this Appendix, but also clarifies the scope of the current D.C. Code neglect of a vulnerable adult or elderly person statute as it pertains to the risk of comparatively less serious physical harms.*

  The current D.C. Code neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to "provide care and services necessary to maintain the physical and mental health of a vulnerable adult or elderly person."[367] *The offense is partially graded on a failure to discharge the required duty.*[368] *The statute appears to provide liability for a failure to discharge the required duty even if the resulting risk to the physical or mental health of the complainant is comparatively trivial. There is no DCCA case law on this issue. Resolving this ambiguity, the revised criminal neglect of a vulnerable adult or elderly person statute limits liability for creating a risk of comparatively low-level physical harm to a risk of "bodily injury" due to the complainant consuming alcohol or consuming or inhaling, without a valid prescription, a controlled*

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[366] Current D.C. Code § 22-935 states:

> A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.

[367] D.C. Code § 22-934.

[368] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

substance or marijuana. With this change, the RCC criminal neglect of a minor statute provides liability for caretakers (persons with a duty of care to the vulnerable adult or elderly person) who create or fail to mitigate risks of bodily injury arising from the complainant's consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.[369] Already under the RCC, if the actor recklessly creates such a risk, and causes "bodily injury" to the complainant, there is liability, with a higher penalty, under third degree of the RCC criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1501) for committing what is now fourth degree assault. Also, if the actor recklessly creates such a risk of a higher level of "bodily injury," such as "significant bodily injury," there already is liability under first degree or second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute. This change fills a gap for a caretaker creating or failing to mitigate risks of lower-level harms (bodily injury) without proof of actual injury due to the complainant's consumption of alcohol or drugs. The commentary to this offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute, removing a possible gap in liability.

- *The CCRC recommends codifying an exclusion from liability in what is now subsection (d): "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.[370]*
  - This change improves the clarity, consistency, and proportionality of the revised statutes.
- *The CCRC recommends codifying an effective consent defense in subsection (e) of the revised criminal neglect of a vulnerable adult or elderly person statute. In previous compilations of draft statutes for the RCC, RCC § 22E-409[371] codified a*

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[369] Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a caregiver who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a vulnerable adult or elderly person if it is proven that such conduct creates a substantial risk that the complainant would experience a bodily injury from the smoke.

[370] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[371] In relevant part, the defense in RCC § 22E-409 stated:

general effective consent defense for several RCC offenses against persons, including criminal neglect of a vulnerable adult or elderly person. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

The new defenses in paragraphs (e)(1) and (e)(2) are generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defenses continue to exclude an actor that is a "person with legal authority over the complainant" from availing themselves of the defense so that such an actor must use the RCC guardian defense in RCC § 22E-408. The revised defenses still apply if the actor reasonably believes that the actor has the effective consent of the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701.[372] However, the defenses no longer apply if the actor "in fact" has the complainant's effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.[373]

The previous effective consent defense in RCC § 22E-409 applied, in part, if the "conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily

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(f) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
  (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
  (2) Either:
    (A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
    (B) The result was a reasonably foreseeable hazard of:
      (i) The complainant's occupation;
      (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
      (iii) Participation in a lawful contest or sport.

[372] RCC § 22E-701 defines "person with legal authority over the complainant," in relevant part, as " . . . (B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." Subsection (A) of the definition applies if the complainant is under the age of 18 years and neither a "vulnerable adult" or an "elderly person," as those terms are defined in the RCC, can be under the age of 18 years.

[373] It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

member or organ." The new defenses continue to recognize these limitations by permitting a defense for first degree—which requires a risk of "serious bodily injury," as that term is defined in RCC § 22E-701,[374] or death—when the risk is "caused by a lawful cosmetic or medical procedure." The defense to second degree—a risk of "significant bodily injury" or a risk of "serious mental injury"—and the defense to third degree— failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption—allows the complainant or a person with legal authority over the complainant to give effective consent to the injury without any such restriction as to the cause.

For the comparatively low-level risks required in second degree and third degree of the revised criminal neglect of vulnerable adult or elderly person statute, the new defenses continue to provide a defense when the actor's creation, or failure to mitigate or remedy, the risk is a "reasonably foreseeable hazard" of a lawful sport or occupation. However, the new defenses also apply when the actor creates, or fails to mitigate or remedy, the risk 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[375] and several other jurisdictions.[376]

In contrast to the previous effective consent defense in RCC § 22E-409, the new effective consent defenses in subsection (e) specifically address where the risk, or failure to mitigate or remedy the risk, is caused by an "omission" if the complainant, or a "person with legal authority over the complainant" gives effective consent to the omission. This replaces in relevant part the defense in the previous version of the revised statute for the administration of, or allowing the administration of, prayer in lieu of medical treatment,[377] which was based off an exception in the current D.C. Code abuse or neglect of a vulnerable adult or elderly person statutes.[378] An omission includes the actor administering prayer or

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[374] RCC § 22E-701 defines "serious bodily injury" as "a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D)Protracted loss of consciousness."

[375] *See* Model Penal Code § 2.11.

[376] *See, e.g.,* Del. Code Ann. tit. 11, § 452.

[377] The previous subsection (d) of the revised criminal abuse of a vulnerable adult or elderly person statute was:

> *Defenses.* It is a defense to liability under this section that, in fact:
>
> (1) The actor has the complainant's effective consent to the conduct charged to constitute the offense, or the actor reasonably believes that the actor has the complainant's effective consent to the conduct charged to constitute the offense; and
>
> (2) The conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise has a responsibility, under civil law, to provide or allow.

[378] Current D.C. Code § 22-935 states:

allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.

RCC § 22E-1601. Forced Labor.

(1) *The CCRC recommends re-labeling the offense "forced labor" instead of "forced labor and services" and omitting the term "labor" in the revised statute. This change is clarificatory and is not intended to change the scope of the offense. The term "services" as defined in RCC § 22E-701 includes "labor." This change does not substantively change the scope of the offense and is merely clarificatory.*

- The change improves the clarity of the revised criminal code.

RCC § 22E-1602. Forced Commercial Sex.

(1) *PDS, App. C at 489, recommends that the phrase "knowingly causes the complainant to engage in a commercial sex act other than with the actor" be re-drafted as "Knowingly causes the complainant to engage in a commercial sex act with or for the gratification or arousal another person[.]"*

- The RCC partially adopts this recommendation by adoption of language similar to that recommended by PDS. In the Second Draft of Report #27, the CCRC recommended that the relevant portion of the forced commercial sex statute be revised to read, "causes the complainant to engage in or submit to a commercial sex act with or for another person[.]" This change improves the clarity of the revised criminal code.

RCC § 22E-1603. Trafficking in Labor.

(1) *The CCRC recommends re-labeling the offense "trafficking in labor" instead of "trafficking in labor and services" and omitting the term "labor" in the revised statute. This change is clarificatory and is not intended to change the scope of the offense. The term "services" as defined in RCC § 22E-701 includes "labor." This change does not substantively change the scope of the offense, and is merely clarificatory.*

- The change improves the clarity of the revised criminal code.

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

(1) *The CCRC recommends re-drafting subparagraph (a)(1)(C) to require that complainant is incapable of communicating willingness or unwillingness to engage in a commercial sexual act. Re-drafting this subparagraph to include that the complainant is incapable of communicating willingness as well as unwillingness is consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. The commentary to the offense has been updated to reflect that this is a substantive change in law.*

- This change improves the clarity and consistency of the revised criminal code.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

(1) *The CCRC recommends re-drafting sub-subparagraph (b)(2)(B)(iii) to require that complainant is incapable of communicating willingness or unwillingness to engage in a commercial sex act. Re-drafting this sub-subparagraph to include that the complainant is incapable of communicating willingness as well as unwillingness is consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. The commentary to the offense has been updated to reflect that this is a substantive change in law.*

- This change improves the clarity and consistency of the revised criminal code.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 473, says that the statute's exception for expressing an opinion on a "political or public matter" neither in the statutory language nor in the commentary defines the phrase "public matter." OAG provides an example in which one neighbor repeatedly follows another neighbor, yelling at her about failing to clean up after a dog, negligently causing significant emotional distress. [The CCRC infers that OAG requests a clarification of this term, although the comment itself does not recommend or ask for any action.]*

- The RCC does incorporates this recommendation by noting in the commentary explanatory note that "public matter" has the meaning indicated in Supreme Court case law. The Supreme Court has addressed the distinction between matters of public concern (also called "public questions" and "public affairs") and matters of purely private interest since 1940.[379] Public matters have been said to include "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[380] It is difficult to analyze whether the OAG's hypothetical involves protected speech, because the example does not include any specific language. For examples of public matters, see, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011); *Rankin v. McPherson*, 483 U.S. 378 (1987); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For examples of private concerns, see, e.g., *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

(2) *USAO, App. C at 515 – 516, recommends that the commentary state that any fear or distress taking place in D.C. is sufficient to establish jurisdiction in D.C. USAO raises a question as to whether a person who travels to D.C. within a day or several hours of experiencing emotional distress would be a proper complainant under the revised statute. USAO states that its previous proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant's actions is clearer.*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct or the result *happens* within its territorial limits,[381] not if the result merely *continues* there. The result element of the negligent version of this offense[382] is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. A stalking victim does not create jurisdiction in the District by traveling here while still being under distress that was inflicted in

[379] *Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940).
[380] *Id*. at 102.
[381] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[382] The intentional version of this offense does not require proof that "the victim suffers any harm."

another state. (Nor would a theft victim create jurisdiction by traveling here while still being deprived of property stolen in another state.)

(1) *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.*

- This change improves the logical order and consistency of the revised statutes.

(3) *The CCRC recommends including in the exclusion from liability provision speech on a matter of public concern directed at a law enforcement officer. Such speech is generally recognized as protected speech under the First Amendment and more narrowly tailoring the statute to exclude such protected speech may improve the constitutionality of the revised statute. CCRC also revises paragraph (b)(2) to improve its grammar.*

- This change clarifies and improves the proportionality (and perhaps the constitutionality) of the revised statute.

(4) *The CCRC recommends specifying that a person is not subject to both a penalty enhancement under subparagraph (d)(2)(B) for having a prior conviction and a repeat offender penalty enhancement in RCC § 22E-606 for having a prior conviction.*

- This change reduces unnecessary overlap and improves the proportionality of the revised statutes.

RCC § 22E-1802. Electronic Stalking.

(2) *USAO, App. C at 515 – 516, recommends that the commentary state that any fear or distress taking place in D.C. is sufficient to establish jurisdiction in D.C. USAO raises a question as to whether a person who travels to D.C. within a day or several hours of experiencing emotional distress would be a proper complainant under the revised statute. USAO states that its previous proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant's actions is clearer.*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct or the result *happens* within its territorial limits,[383] not if the result merely *continues* there. The result element of the negligent version of this offense[384] is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. A stalking victim does not create jurisdiction in the District by traveling here while still being under distress that was inflicted in another state. (Nor would a theft victim create jurisdiction by traveling here while still being deprived of property stolen in another state.)

(3) *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.*

- This change improves the logical order and consistency of the revised statutes.

(4) *CCRC recommends specifying that a person is not subject to both a penalty enhancement under subparagraph (d)(2)(B) for having a prior conviction and a repeat offender penalty enhancement in RCC § 22E-606 for having a prior conviction.*

- This change reduces unnecessary overlap and improves the proportionality of the revised statutes.

[383] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[384] The intentional version of this offense does not require proof that "the victim suffers any harm."

RCC § 22E-1803. Voyeurism.

(1) *OAG, App. C at 473, recommends that the commentary affirmatively state that a person has committed this offense even when they use items such as binoculars, a telescope, or any nonrecording electronic device to enhance their ability to see the victim.*

- The RCC incorporates this recommendation by revising the commentary to state, "The word 'directly' includes observations made with the aid of a device such as binoculars, a telescope, or any nonrecording electronic device to enhance their ability to see. It does not include viewing an image that another person recorded." This change clarifies the revised commentary.

(2) *The CCRC recommends specifying in a footnote to the commentary that the word "breast" excludes the chest of a transmasculine man.*

- This change clarifies the revised statute.

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

(1) *USAO, App. C at 515 – 516, recommends that the commentary state that any fear or distress taking place in D.C. is sufficient to establish jurisdiction in D.C. USAO raises a question as to whether a person who travels to D.C. within a day or several hours of experiencing emotional distress would be a proper complainant under the revised statute. USAO states that its previous proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant's actions is clearer.*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct or the result happens within its territorial limits.[385] Unlike the negligent versions of stalking and electronic stalking,[386] emotional distress is not an element of this offense. The revised statute does not require any proof that "the victim suffers any harm." The result element of this offense is satisfied as soon as distribution of an image occurs.

(2) *USAO, App. C at 516, recommends that the commentary clarify that the word "alarm," has its common meaning, to "disturb," "excite," or "strike with fear," and to provide an example of "revenge porn" that would fall under the statute.*

- The RCC incorporates this recommendation by revising the commentary to include two additional footnotes. The first states, "Per its ordinary meaning, 'alarm' includes efforts to 'disturb,' 'excite,' or 'strike with fear.' Merriam-Webster.com, "alarm", 2020, available at https://www.merriam-webster.com/dictionary/alarm." The second states, "For example, a person may commit an offense by posting a homemade sex tape out of revenge after a bad breakup, with intent to harass or humiliate their ex-partner. This change clarifies the revised commentary.

(3) *USAO, App. C at 553, recommends reclassifying this offense as a Class B misdemeanor, to ensure that there is a non-jury demandable, misdemeanor version of this offense.*[387] *USAO states that, at trial, 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. USAO states that 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), which expressly created a non-jury demandable, misdemeanor version of this offense.*

- The RCC partially incorporates this recommendation by reclassifying this offense as a Class B misdemeanor, however that penalty class is not recommended to be non-jury demandable. The RCC seeks to provide proportionate penalties even if that means an offense will be jury

[385] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[386] RCC §§ 22E-1801 and 22E-1802.
[387] USAO recommends that Class B misdemeanors be jury demandable only when they are punishable by more than 180 days' imprisonment.

demandability. Public opinion surveys by the CCRC have not addressed distribution of an image to only a few people, however the surveys indicate that a low felony statutory maximum is justified for the enhanced version of the offense.[388] This change improves the proportionality of the revised statute.

(4) *The CCRC recommends specifying in a footnote to the commentary that the word "breast" excludes the chest of a transmasculine man.*

- This change clarifies the revised statute.

[388] *See* Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses (Response to question #3.28, ranking).

RCC § 22E-1805. Distribution of an Obscene Image.

(1) *The CCRC recommends revision the exclusions from liability and affirmative defenses to ensure a person is not prosecuted when they reasonably believe they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is. Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.*

- This change improves the consistency and proportionality of the revised statutes.

(2) *The CCRC recommends specifying in a footnote to the commentary that the word "breast" excludes the chest of a transmasculine man.*

- This change clarifies the revised statute.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

(1) *The CCRC recommends revision the exclusions from liability and affirmative defenses to ensure a person is not prosecuted when they reasonably believe they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is. Consider, for example, a parent who discovers an obscene image of their child engaged in a sexual act with another child and promises not to share it. If the parent sends the image to the other child and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1804 - 1806.*

- This change improves the consistency and proportionality of the revised statutes.

(2) *The CCRC recommends specifying in a footnote to the commentary that the word "breast" excludes the chest of a transmasculine man.*

- This change clarifies the revised statute.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

(1) *The CCRC recommends in paragraph (d)(1), by use of the phrase "in fact," specifying that strict liability applies to the fact that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the* Miller *standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*[389]

- This change improves the clarity and consistency of the revised statute.

(2) *The CCRC recommends in paragraphs (c)(1) and (c)(2), by use of the phrase "in fact," specifying that strict liability applies to the fact that the actor is a licensee or interactive computer service. This is consistent with the objective nature of these exclusions from liability.*

- This change improves the clarity and consistency of the revised statute.

(3) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from sub-subparagraph (d)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from subparagraph (d)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends requiring that the actor "reasonably believes" that the recipient, intended recipient, or user of an electronic platform is the complainant in subparagraph (d)(3)(E) of the marriage, domestic partnership, or relationship affirmative defense. The previous draft of subparagraph (d)(3)(E) required that*

[389] *Miller v. California*, 413 U.S. 14, 24 (1973).

"in fact" the recipient, intended recipient, or user of an electronic platform is the complainant. Requiring that the actor "reasonably believes" that the recipient, intended recipient, or user of the electronic platform is the actor or the complainant accounts for the inherently unreliable nature of many forms of distribution, display, and electronic platforms,[390] and is consistent with this requirement in RCC § 22E-1809, arranging a live sexual performance of a minor.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(6) *The CCRC recommends deleting "in fact" from paragraph (d)(4) of the innocent distribution affirmative defense. This "in fact" was an error and conflicts with the "With intent" requirement in subparagraph (d)(4)(A). "In fact" remains specified in subparagraph (d)(4)(B) of the affirmative defense and, per the rule of construction in RCC § 22E-207, applies to the elements in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii).*

- This change improves the clarity of the revised statute.

[390] For example, a defendant that satisfies all other requirements of the marriage, domestic partnership, or romantic relationship affirmative defense e-mails the permitted image to his girlfriend and reasonably believes that the girlfriend will be the only person that sees it. However, the girlfriend opens her e-mail with her friend present, and her friend sees the image. The affirmative defense will still apply.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(1) *The CCRC recommends in paragraph (d)(1), by use of the phrase "in fact," specifying that strict liability applies to the fact that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the* Miller *standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*[391]

- This change improves the clarity and consistency of the revised statute.

(2) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from sub-subparagraph (d)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(3) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from subparagraph (d)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends in paragraph (d)(5), by use of the phrase "in fact," specifying that strict liability applies to all elements of the affirmative defense in subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C). "In fact" is consistent with this affirmative defense in the creating or trafficking an obscene image of a minor offense (RCC § 22E-1807) and was omitted in error from the previous draft.*

- This change improves the clarity and consistency of the revised statute.

[391] *Miller v. California*, 413 U.S. 14, 24 (1973).

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

(1) *The CCRC recommends in paragraph (c)(1), by use of the phrase "in fact," specifying that strict liability applies to the fact that the live performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the* Miller *standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*[392]

- This change improves the clarity and consistency of the revised statute.

(2) *The CCRC recommends adding the requirement that the live performance is "considered as a whole" to the affirmative defense for serious literary, artistic, political, or scientific value in paragraph (c)(1). This is consistent with the affirmative defense in the other RCC obscenity offenses, such as creating or trafficking an obscene image of a minor (RCC § 22E-1807), and was omitted in error from the previous draft.*

- This change improves the clarity and consistency of the revised statute.

(3) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from sub-subparagraph (c)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from subparagraph (c)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends deleting that the actor "in fact" is the only audience for the live performance in subparagraph (c)(3)(E) of the marriage, domestic*

[392] *Miller v. California*, 413 U.S. 14, 24 (1973).

partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor is the only audience for the live performance. It is an unusual scenario where an actor is the only audience but mistakenly believes he or she is not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(6) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC arranging a live sexual performance of a minor statute, USAO states that first degree arranging a live sexual performance of a minor is "comparable to" the sexual performance using minors offense under current D.C. Code § 22-3101* et seq.*, which has a maximum possible penalty of 10 years. USAO states that it "does not believe that the maximum penalt[y]" for first degree arranging a live sexual performance of a minor should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[393] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[394] 5) relative ordering of related RCC offenses;[395] and 6) national data on sentencing and time served.[396] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for the sexual performance using minors offense, actual practice in the District has been somewhat different. Court data for 2010-2019 indicates that the 97.5% quantile of sentences for all sexual performance using minors offenses, with or without an enhancement, appears to be

[393] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[394] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[395] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[396] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

under 18 months (1.5 years).[397] The CCRC recommendation here fully encompasses current practice.

[397] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(1) *The CCRC recommends in paragraph (c)(1), by use of the phrase "in fact," specifying that strict liability applies to the fact that the live performance or live broadcast has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the* Miller *standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*[398]

- This change improves the clarity and consistency of the revised statute.

(2) *The CCRC recommends codifying that "The actor is under 18 years of age" as subparagraph (c)(2)(A) of the effective consent affirmative defense. The RCC obscenity offenses codify this element as a separate subparagraph of the effective consent affirmative defense for clarity and it was omitted in error from the previous version.*

- This change improves the clarity and consistency of the revised statute.

(3) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from sub-subparagraph (c)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(4) *The CCRC recommends deleting that the actor "in fact" has the required effective consent from subparagraph (c)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends deleting that the actor "in fact" is the only audience for the live performance in subparagraph (c)(3)(E) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this*

[398] *Miller v. California*, 413 U.S. 14, 24 (1973).

subparagraph of the affirmative defense to when the actor "reasonably believes" that the actor is the only audience for the live performance. It is an unusual scenario where an actor is the only audience but mistakenly believes he or she is not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

(1) *The CCRC recommends deletion of this text as unnecessary and potentially confusing. The text previously provided that "a person under the age of 12 is not subject to prosecution for offenses in this chapter." This provision is no longer necessary given the broader developmental incapacity defense in RCC § 22E-505.*

(16) This change improves the clarity and consistency of the revised statutes.

RCC § 22E-2101. Theft.

(1) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*[399]

- This change clarifies and does not substantively change the revised statute.

(2) *In the theft from a person gradation, the CCRC recommends replacing "(i) Holds or carries the property on his or her person; or (ii) Has the ability and desire to exercise control over the property" with "possesses the property." RCC § 22E-701 defines "possesses" as to "hold or carry one one's person" or to "have the ability and desire to exercise control over" and this change codifies the defined term as opposed to its definition. With this change, the gradation (now subparagraph (d)(4)(B)) will require that the property is taken from a complainant who "possesses the property within the complainant's immediate physical control" as opposed to 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 immediate control." This is consistent with the language in the RCC robbery statute (RCC § 22E-1201).*

- This change improves the clarity and consistency of the revised statute.

(3) *The CCRC recommends lowering theft from a person from third degree theft to fourth degree theft. Third degree theft is a Class 9 felony, with a maximum term of imprisonment of three years, which is the same classification and penalty as the lowest grade of robbery (third degree robbery in RCC § 22E-1201). It is disproportionate to penalize a non-violent taking of property from a person in the theft statute the same as a violent taking of property in the robbery statute. With this change, a non-violent taking of property from a person will be fourth degree theft, a Class A misdemeanor with a maximum term of imprisonment of one year. It is penalized the same as theft of property with a value of $500 or more.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

[399] RCC § 22E-207.

RCC § 22E-2102. Unauthorized Use of Property.

(1) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*[400]

- This change clarifies and does not substantively change the revised statute.

(2) *The CCRC recommends adding a defense in what is now subsection (c) of the revised statute: "It is a defense to liability under this section that, in fact: 1) The actor reasonably believes that the property is lost or was stolen by a third party; and 2) Engages in the conduct constituting the offense with intent to return the property to a lawful owner." Without such a defense, a person that takes, obtains, transfers, or exercises control over the property of another without the owner's effective consent, but with the intent to return the property to its lawful owner, would be guilty of the offense. A substantively identical defense is being recommended for the RCC unauthorized use of a motor vehicle statute (RCC § 22E-2103), discussed later in this Appendix.*

Unauthorized use of property (UUP) and unauthorized use of a motor vehicle (UUV) are the only two RCC property offenses where a defendant would have liability despite a good-faith intent to return the property to a lawful owner. In all other RCC property offenses, such a good-faith intent to return property would preclude liability because it would negate the required intent to deprive an owner or other similar intent. However, as the RCC has drafted the revised UUP statute, a defendant's belief that property is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that it is "property of another" and that he or she lacks the "effective consent" of the owner. The commentary to this offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

[400] RCC § 22E-207.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(1) *The CCRC recommends adding a defense in what is now subsection (b) of the revised statute: "It is a defense to liability under this section that, in fact: 1) The actor reasonably believes that the motor vehicle is lost or was stolen by a third party; and 2) Engages in the conduct constituting the offense with intent to return the motor vehicle to a lawful owner." Without such a defense, a person that operates a motor vehicle without the owner's effective consent, but with the intent to return the motor vehicle to its lawful owner, would be guilty of the offense. A substantively identical offense is being recommended for the RCC unauthorized use of a property statute (RCC § 22E-2102), discussed earlier in this Appendix.*

Unauthorized use of a motor vehicle (UUV) and unauthorized use of property (UUP) are the only two RCC property offenses where a defendant would have liability despite a good-faith intent to return the property to a lawful owner. In all other RCC property offenses, such a good-faith intent to return property would preclude liability because it would negate the required intent to deprive an owner or other similar intent. However, as the RCC has drafted the revised UUV statute, a defendant's belief that property is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that he or she lacks the "effective consent" of the owner. The commentary to this offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

RCC § 22E-2104. Shoplifting.

(1) *The CCRC recommends adding the defined term "in fact" to the qualified immunity provision in subsection (d), to make clear that no awareness or culpable mental state is required.*[401]

- This change clarifies and does not substantively change the revised statute.

[401] RCC § 22E-207.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(1) *The CCRC recommends applying the definition of "live performance" in RCC § 22E-701, "a play, dance, or other visual presentation or exhibition for an audience, including an audience of one person," to this statute. The definition is consistent with the scope of this offense, which prohibits, in relevant part, making, obtaining, or possessing a sound recording or audiovisual recording of a live performance without the effective consent of an owner and with intent to derive commercial gain or advantage.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

(2) *The CCRC recommends adding the defined term "in fact" to the qualified immunity provision in subsection (c), to make clear that no awareness or culpable mental state is required.*[402]

- This change clarifies and does not substantively change the revised statute.

(3) *The CCRC recommends replacing "all sound recordings [and] audiovisual recordings" with "any recording" in the forfeiture provision in subsection (d). The RCC definition of "sound recording"* [403] *excludes recordings of sounds that accompany motion pictures and would not apply to any recordings made in violation of this offense. Given that the offense prohibits operating a recording device and does not require that a recording be produced, it is clearer to refer to "any recording" that might exist.*

- This change improves the clarity and consistency of the revised statute.

[402] RCC § 22E-207.

[403] RCC § 22E-701 defines "sound recording" as "a material object in which sounds, *other than those accompanying a motion picture* or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (emphasis added).

RCC § 22E-2205. Identity Theft

(1) OAG, App. C at 474, recommends that the District should have jurisdiction over identity thefts that occur entirely outside if the District if the complainant is a resident of the District. OAG argues that in these cases, although the offense occurred in another jurisdiction, the resident has suffered harm, and therefore, there was a detrimental effect within the District.

- The RCC does not adopt this recommendation because this extension of jurisdiction may not be legal. Although it is true that in OAG's hypothetical that the District resident's harm has a detrimental effect on the District, this is true almost any time a District resident is the victim of a crime that occurs in another jurisdiction. For example, if a District resident is robbed while visiting another jurisdiction, there is also a detrimental effect to the District. However, it would be inappropriate to extend jurisdiction to such cases. In general, it may not be legal to extend extraterritorial jurisdiction to conduct that occurs entirely outside the District.[404]

[404] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

RCC § 22E-2206. Identity Theft Civil Provisions

(1) OAG, App. C at 474-475, recommends that subsection (a) should be amended in include cases in which pursuant to a competency hearing, a court finds that "There is no substantial probability that [the defendant] will attain competence or make substantial progress toward that goal in the foreseeable future."

- The RCC does not incorporate this recommendation because it would make the revised statute less clear. Subsection (a) applies in cases in which there has been a determination by a court or fact finder that a person actually committed identity theft against the complainant.[405] In these cases, the court may order that records that contain incorrect information due to the identity be corrected. When a person is found incompetent to stand trial, there is not necessarily a finding that the person committed identity theft. In cases in which the actor is found incompetent to stand trial, under subsection (b), the complainant may petition the court for a determination that public records contain false information, and the court may issue orders necessary to correct the public records.

(2) The CCRC recommends deleting the words "by reason of insanity" and adding the words "under the mental disability affirmative defense in RCC § 22E-504." The RCC has codified a mental disability affirmative defense, which replaces what was commonly known as the insanity defense. Reference to the mental disability affirmative defense does not change current District law, except to the extent that the codified defense differs from the insanity defense recognized under current law.

- This change improves the clarity and consistency of the revised criminal code.

[405] The RCC's mental disease or defect defense requires a finding that the actor actually committed the offense.

RCC § 22E-2207. Unlawful Labeling of a Recording.

(1) OAG, App. C at 475, recommends redrafting paragraph (c)(2) to read, "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."

- The RCC adopts this recommendation. This change does not substantively alter the scope of the offense. This change improves the clarity of the revised statute.

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

(1) OAG, App. C at 475, recommends redrafting subparagraphs (e)(1)(A) and (e)(1)(C) to refer to "the owner" instead of "an owner."

- The RCC does not adopt this recommendation because it would make the revised statute less clear. Subparagraphs (e)(1)(A) and (e)(1)(C) use the term "an owner," because those elements may be satisfied if *any* owner's consent is obtained by undue influence, or if the actor had intent to deprive *any* owner of the property. However, subparagraph (e)(1)(B) uses the term "the owner," to specify that the owner whose consent was obtained by undue influence must be a vulnerable adult or elderly person. For example, if property is jointly owned by two people and the actor uses undue influence to obtain consent to take property from one owner, and the *other* owner is a vulnerable adult or elderly person, the actor would not be guilty of financial exploitation of a vulnerable adult or elderly person.

(2) OAG, App. C at 475 recommends adding the term "as to the fact" to subparagraph (1)(C). [The CCRC assumes that OAG meant that the term "as to the fact" should be added to paragraph (e)(2).]

- The RCC adopts this recommendation. Paragraph (e)(2) will be amended to read in part, "with recklessness as to the fact that the complainant is a vulnerable adult or elderly person." This change clarifies the revised statutes.

(3) OAG, App. C at 476, recommends that paragraph (e)(2) be re-drafted to replace the word "complainant" with the word "owner."

- The RCC does not adopt this recommendation because it would make the revised statute less clear. Paragraph (e)(2) specifically refers to commission of various offenses defined elsewhere in the RCC, and it is clearer to refer to the complainant of one of those offenses.

(4) The CCRC recommends redefining the term "undue influence" to omit reference to a vulnerable adult or elderly person. However, this change to the definition of "undue influence" does not affect the FEVA offense. The FEVA statute still requires that the actor was reckless as to the complainant being a vulnerable adult or elderly person. Amending the definition allows the term "undue influence" to be used in other offenses that do not require that any person involved in the offense be a vulnerable adult or elderly person.

- This change improves the consistency and clarity of the revised statutes.

(5) The CCRC recommends replacing the words "with recklessness" with "reckless" in paragraph (e)(2). This change clarifies that the complainant must actually be a vulnerable adult or elderly person.

- This change improves the consistency and proportionality of the revised statute.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions.

(1) OAG, App. C at 476, recommends deleting paragraph (a)(4). OAG states that paragraph (a)(4) sets forth a restitution priority rule that is separately defined in RCC § 22E-2208 (g).

- The RCC adopts this recommendation. This change improves the clarity of the revised statute.

RCC § 22E-2501. Arson.

(1) *OAG, App. C at 476, recommends revising the affirmative defense in subsection (d) so that "in fact" is repeated. With OAG's recommendation, the affirmative defense would read, "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." As drafted currently, the affirmative defense only uses "in fact" once, "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." OAG states that as currently drafted, it is unclear whether "in fact" applies to the compliance with the rules and regulations.*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the revised statutes. RCC § 22E-207 has been revised to specify that the phrase "in fact" applies to any result element or circumstance element that follows unless a culpable mental state is specified. It is no longer necessary to repeat "in fact" for each element to which strict liability applies. However, the explanatory note for the revised arson statute has been revised to state that:

> "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (d), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

(2) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. Specific to the RCC arson statute, USAO states that first degree arson is "comparable to" arson under current D.C. Code § 22-301, which has a maximum possible penalty of 10 years, with the added requirement of causing death or serious bodily injury. USAO states that it "does not believe that the maximum penalt[y]" for first degree arson should be lowered from 20 years' incarceration to 18 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C.

Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[406] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[407] 5) relative ordering of related RCC offenses;[408] and 6) national data on sentencing and time served.[409] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for arson in the D.C. Code currently, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for arson of all types, including those with enhancements, was 68.1 months.[410] The CCRC recommendation here appears to fully encompass current practice regarding arson.

(4) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC arson statute, USAO states that second degree arson is "comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years' incarceration, where a person is present." USAO states that it "does not believe that the maximum penalt[y]" for second degree arson should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[411] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[412] 5) relative ordering of related RCC offenses;[413] and 6) national data on sentencing and time served.[414] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for arson in the D.C. Code currently, actual practice in the District

[406] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[407] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[408] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[409] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[410] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[411] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[412] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[413] CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[414] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for arson of all types, including those with enhancements, was 68.1 months.[415] The CCRC recommendation here appears to fully encompass current practice regarding arson.

RCC § 22E-2503. Criminal Damage to Property.

(1) *OAG, App. C at 476, recommends revising paragraph (e)(4) to require "The amount of damage is, in fact, any amount." Paragraph (e)(4) is currently drafted as "In fact, there is damage to the property." OAG states that this drafting is duplicative to paragraph (e)(1), which requires that the defendant recklessly "damages or destroys property." OAG notes that the Commentary to the offense states that paragraph (e)(4) "requires that the amount of damage to the property for fifth degree CDP is 'any amount.'"*

- The RCC incorporates this recommendation by revision paragraph (e)(4) to read "In fact, there is any amount of damage."

[415] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-2601. Trespass.

(1) *The CCRC recommends revising the commentary to note the DCCA's recent opinion in* Wicks v. United States*,*[416] *which was issued after the most recent draft language was released. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*

- This change clarifies the revised commentary.

(2) *The CCRC recommends revising the commentary to note the DCCA's recent opinion in* Broome v. United States*,*[417] *which was issued after the most recent draft language was released. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*

- This change clarifies the revised commentary.

(3) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*[418]

- This change clarifies and does not substantively change the revised statute.

(4) *The CCRC recommends repealing D.C. Code § 22-3301, Forcible Entry and Detainer, which is archaic, unused, and duplicative of conduct in the revised Trespass and Burglary statutes.*[419]

- This change reduces unnecessary overlap between the revised statutes.

[416] 226 A.3d 743 (D.C. 2020).
[417] 240 A.3d 35 (D.C. 2020).
[418] RCC § 22E-207.
[419] RCC §§ 22E-2601 and 22E-2701.

RCC § 22E-2701. Burglary.

(1) *USAO, App. C at 516, recommends striking the requirement that a person who is not a participant in the burglary directly perceive the actor or enter with the actor. Alternatively, USAO recommends requiring 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.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. By requiring that a complainant perceives the burglar, the revised statute reserves first degree liability for the most frightening invasions of privacy. Without this element, a person who stealthily breaks into the laundry room or mailroom of a residential building and leaves unnoticed[420] would face the same maximum punishment as a person who enters someone's bedroom and awakens someone from their sleep. The revised statute punishes both fact patterns as burglary but grades the latter more severely. The revised statute includes the same differentiation between second and third degree burglary in sub-subparagraph (b)(1)(B)(ii).
- USAO's proposed alternative language would make the statute unclear, by raising questions about the degree of probability that a person would be seen and inviting the factfinder to speculate about what would have been possible if events did not transpire as they did. The RCC does not broaden the burglary statute itself to include inchoate or endangerment fact patterns. However, where a person comes dangerously close to being seen in a dwelling, they may commit an attempted first degree burglary under the revised attempt statute, consistent with the standard for other criminal offenses.[421] Similarly, where a person comes dangerously close to being seen in a building, they may commit an attempted second degree burglary.

(2) *USAO, App. C at 548, opposes eliminating the statutory minimum for this offense.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.

(3) *USAO, App. C at 551, continues to recommend that, at a minimum, 1st Degree Burglary and Enhanced 1st Degree Burglary both be increased in class. USAO states the RCC equivalent of 1st Degree Burglary While Armed is subject only to a maximum of 8 years' incarceration and unarmed 1st Degree Burglary is subject only to a maximum of 5 years' incarceration. USAO states that the offense is very serious because a home invasion can shatter a victim's feeling of safety and security. USAO does not state specifically how much higher the revised penalty should be for this offense.*

[420] Consistent with recent District case law, the RCC defines the term "dwelling" to include communal areas secured from the general public. *Ruffin v. United States*, 219 A.3d 997 (D.C. App. 2019).
[421] *See* RCC § 22E-301.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.
- Nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when the burglary was the most serious crime (so presumably not concurrent to another penalty).[422] These statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon.
- Polling of District voters also strongly suggests that while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and worse felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).[423] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC.

[422] U.S. Department of Justice Bureau of Justice Statistics, Time Served in State Prison, 2016, November 2018 at 3.

[423] Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

RCC § 22E-3201. Impersonation of an Official.

(1) *USAO, App. C at 602, recommends renaming the offense to "Impersonation of an Official." USAO notes that the statute includes various federal officials and limiting the title to "District" may be confusing.*

- The RCC incorporates this recommendation using the language suggested by OAG. This change clarifies the revised statute.

(2) *USAO, App. C at 602, recommends redrafting paragraph (a)(1)(B) and paragraph (b)(1)(B). USAO notes that the statute may unnecessarily exclude benefits for others. USAO recommends new language of "Cause a benefit or harm, to any person."*

- The RCC incorporates this recommendation using substantially identical language per the similar recommendation by OAG (see immediately below). This change clarifies the revised statute.

(3) *OAG, App. C at 599, recommends redrafting paragraph (a)(1)(B) to state, "That any person receive a personal benefit of any kind, or to cause harm to another"" instead of "[the actor] receive a personal benefit of any kind, or to cause harm to another." OAG says that the current formulation is too limited as there may be times when the actor is impersonating an official to benefit someone else.*

- The RCC incorporates this recommendation using the language suggested by OAG, although with a slight change in word order to: "To cause harm to another or that any person receive a personal benefit of any kind". This change clarifies the revised statute.

(4) *OAG, App. C at 603-604,[424] recommends elimination of paragraph (a)(1)(B) and paragraph (b)(1)(B) as unnecessary. OAG says that the current formulation is so broad as to be satisfied in virtually any case where there is impersonation.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. While the requirement may be a low burden, it is not met in all cases and, indeed, some cases of impersonation may be so trivial in the benefit (e.g., temporary amusement) that they would subject to a de minimis defense under RCC § 22E-215.

[424] The CCRC notes that these comments were submitted on November 9, 2020, after the deadline for written comments on RCC § 22E-3201. However, the comments were also submitted under the memo title of another offense, so the submission may have been in error or supplemental. Regardless, the CCRC addresses the comment.

RCC § 22E-3202. Misrepresentation as a District of Columbia Entity.

(1) *PDS, App. C at 618,.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.*

- The RCC incorporates this recommendation by amending paragraph (a)(2)(A) to read: "Deceive any other person as to the actor's lawful authority as a District of Columbia entity;". Other types of misrepresentation to gain a benefit may give rise to a fraud charge under RCC § 22E-2201. This change improves the clarity and proportionality of the revised statute.

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

(2) *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.

(3) *OAG, App. C at 477, recommends redrafting the exclusion from liability to state, "A person does not commit an offense under subsection [(a)] of this section if that person has not left the correctional facility, juvenile detention facility, or halfway house." OAG states that it believes the drafters meant to cite to subsection (a) instead of subsection (b) and believes the drafters meant to clarify that a person has not committed the offense if they had never left the facility. OAG states that it is concerned that it could be read to apply to someone who left a facility and then came back sometime later.*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap in liability. the intended purpose of this provision is not to clarify that a person does not commit an offense under subsection (a) if they have not left the facility or halfway house. Rather, the purpose is to ensure that the escape from a law enforcement officer provision in subsection (b) applies only to street encounters and not to a person who walks away from a corrections officer inside a facility. As the commentary for this exclusion explains in a footnote, "[A] person who is *confined* within a correctional facility does not commit an escape from the lawful *custody* of a law enforcement officer by wriggling out of an officer's grasp and returning to their designated cell."

(4) *The CCRC recommends eliminating the mandatory consecutive sentencing provision. Consistent with CCRC's reasoning for eliminating all mandatory minima, "'Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.'" Judicial discretion may still be exercised to impose consecutive sentencing.*

- This change improves the consistency and proportionality of the revised statutes.

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

(1) *USAO, App. C at 516 – 517, reiterates its recommendation that this offense cover defendants in non-D.C. criminal cases who are supervised by agencies in D.C. USAO states, "[T]o 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." USAO also states that the current statute was recently modified in 2017 and did not include this limitation.*

- The RCC does not incorporate this recommendation because it may result in unnecessary overlap between criminal offenses. USAO is correct in noting that many deterrents short of criminal liability also apply to people who are on release in D.C. cases. Examples include revocation of pretrial release or probation and, where applicable, criminal prosecution for criminal damage to property.[425] This significant overlap may provide a reasonable basis for eliminating the offense altogether.[426] However, the RCC instead retains and marginally narrows the offense to exclude non-D.C. cases. This narrowing seems most appropriate because the District has no control over the underlying statutes and procedures that allow for the placement of a detection device in a case that originated out of state.
- USAO does not provide evidence or statistics on how use of District resources to prosecute and confine persons wearing a detection device based on another jurisdiction's orders, but commits no other District crime, would ensure public safety in the District. GPS monitoring is not limited to dangerous or high-risk offenders. It is often used to ensure a person's return to court in the demanding jurisdiction. Although the District's pretrial release statute[427] requires, in many cases, the least restrictive conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community, there is no such judicial finding required before GPS monitoring is ordered as a condition of probation or required as a sanction for a technical violation.

(2) *USAO, App. C at 517, recommends clarifying in subparagraph (a)(1)(D) that the offense applies to those incarcerated at or committed to a D.C. Department of Corrections facility.*

[425] RCC § 22E-2503. Consider, for example, a person who cuts an ankle bracelet, automatically destroying the tracking mechanism inside the device.

[426] Criminal statutes that apply only to people who are already system-involved can perpetuate a cycle of reincarceration and the collateral consequences that stem therefrom, leading to disparate outcomes for segments of the community that are more heavily surveilled, policed, prosecuted, and incarcerated. *See* Josh Kaplan, *D.C. Defendants Wear Ankle Monitors That Can Record Their Every Word and Motion*, WASHINGTON CITY PAPER (October 8, 2019).

[427] D.C. Code § 23-1321(c)(1)(B).

- The RCC does not incorporate this recommendation because the statutory language already includes the proposed language. Subparagraph (a)(1)(D) already says "or incarcerated."[428]

(3) *The CCRC recommends striking the definition of "protection order" as potentially confusing. Where applicable, individual statutes will refer to a temporary protection order under D.C. Code § 16-1004, a final protection order under D.C. Code § 16-1005, or a valid foreign protection order as defined in D.C. Code § 16-1041.*

- This change clarifies, but does not substantively change, the revised code.

[428] *See also* App. D (April 15, 2019) adopting an OAG's recommendation, App. C at 214, to rephrase "Incarcerated or committed to the Department of Youth Rehabilitation Services" to read "committed to the Department of Youth Rehabilitation Services or incarcerated," to avoid confusion as to whether a person can be incarcerated to the Department of Youth Rehabilitation Services.

RCC § 22E-3403. Correctional Facility Contraband.

(1) *OAG, App. C at 477, recommends clarifying in commentary that the word "bringing" includes lobbing an object over a facility wall.*

- The RCC incorporates this recommendation by adding a footnote to the commentary stating, "The word 'bringing' has its ordinary meaning, 'to convey, lead, carry, or cause to come along with one toward the place from which the action is being regarded' Merriam-Webster.com, 'bring', 2020, available at https://www.merriam-webster.com/dictionary/bring. For example, where a person lobs a tennis ball filled with contraband over the wall of a facility, the person can be said to have brought the contraband there, without having entered the building." Moreover, a person who lobs contraband over a wall likely commits an offense (or attempts to commit an offense) under paragraph (a)(2) or (b)(2) as an accomplice under RCC § 22E-210.

(2) *OAG, App. C at 477 – 478, recommends that subsection (d) be amended to allow the director of New Beginnings to detain a person for up to three hours. OAG states that New Beginnings is located in Laurel, Maryland and the Metropolitan Police Department ("MPD") must travel along highways that often have bumper-to-bumper traffic. OAG does not provide evidence of any specific incidents arising from the current two-hour detention rule in current law.*

- The RCC does not incorporate this recommendation because it would change current District law in a manner that does not appear necessary. According to General Order 305-01(M)(2) (January 28, 2020), MPD's 5th District does not respond to New Beginnings for contraband incidents, only for "deaths, criminal assaults requiring medical treatment, and escapes." Nevertheless, under the revised statute, the director of New Beginnings would two hours to detain a nonresident[429] who brings in contraband, which is ample time for MPD to travel from the 5th District[430] or for authorities in Maryland to respond. Where authorities do not respond in a timely manner, the director has administrative remedies available, including ejecting or barring the visitor from the premises.

[429] The director may detain a resident for the duration of their placement.

[430] According to the Office of the District of Columbia Auditor, the 5th District's average response time to a call for service is under 14 minutes. *See* letter from Kathleen Patterson to D.C. Councilmembers (February 3, 2017) (available at http://lims.dccouncil.us/Download/37333/AU22-0004-Introduction.pdf). It is unlikely that traffic would prolong a 20-minute, 18-mile drive by more than an hour and 45 minutes.

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

(1) *PDS, App. C at 489 – 490, objects to the elimination of the provision that excluded liability for an attempt to commit this offense. PDS states, "Allowing attempt liability generally for this offense creates a double inchoate crime…[it] 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 attempt liability would then allow punishment of the risk of the risk of the completed offense." PDS offers a hypothetical in which a person instructs a friend 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. PDS objects to imposing liability where the possession and the assault never came to fruition. PDS also recommends rewriting the offense to include as a possible means of committing the crime that the actor possessed an object with the intent (instead of knowledge) that it is a dangerous weapon.*[431]

- The RCC does not incorporate this recommendation because it would create a gap in liability. The CCRC believes PDS' proposed hypothetical does not amount to an attempted offense because the person did not come dangerously close to possessing (having the ability to exercise control over[432]) the brass knuckles. As USAO noted in its prior comment (App. C at 399), attempt liability would apply where the 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." Consider, for example, a person who buys what they believe to be a bomb,[433] with intent to use that bomb to blow up a building.[434] If it turns out that the bomb is actually broken or fake, the person has not committed a completed offense but has committed an attempted offense because they "[w]ould have come dangerously close to completing that offense if the situation was as the person perceived it to be."[435] The CCRC retains attempt liability to cover such situations.
- PDS's proposed alternative language makes the statute less clear and may authorize disproportionate penalties. RCC § 22E-701 defines "dangerous weapon" to include "Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Read literally, the proposed language would impose liability where a person incorrectly – even irrationally – believes that an object can be dangerous.[436] The revised offense requires that the object actually be dangerous.

[431] "(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."
[432] "Possess" is defined in RCC § 22E-701.
[433] "Restricted explosive" is defined in RCC § 22E-701.
[434] *See* RCC §§ 22E-2501 (Arson); 22E-2503 (Criminal Damage to Property).
[435] *See* RCC § 22E-301(a)(3)(B).
[436] Consider, for example, a person who intends to beat someone to death with a very soft foam bat, even though the toy is not at all likely to cause death or serious bodily injury.

(2) *The CCRC recommends amending the phrase "offense against persons under Subtitle II" to state "offense under Subtitle II." The phrase "against persons" was included in error.*

- This change clarifies and does not substantively change the revised statute.

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

(1) *PDS, App. C at 490 – 491, objects to the elimination of the provision that excluded liability for an attempt to commit this offense. PDS states, "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." PDS offers a hypothetical in which a person is in the middle of a fight and yells to the surrounding crowd, "someone give me a knife!" but never receives one. 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 (instead of knowledge) that it is a dangerous weapon.*[437]

- The RCC does not incorporate this recommendation because it would create a gap in liability. The proposed hypothetical does not amount to an attempted offense because the person did not come dangerously close to possessing (having the ability to exercise control over[438]) the knife. As USAO noted in its prior comment (App. C at 400), attempt liability would apply where the 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." Consider, for example, a person who detonates what they believe to be a bomb,[439] intending to blow up a building.[440] If it turns out that the bomb is actually broken or fake, the person has not committed a completed offense but has committed an attempted offense because they "[w]ould have come dangerously close to completing that offense if the situation was as the person perceived it to be."[441]
- PDS's proposed language makes the statute less clear and may authorize disproportionate penalties. RCC § 22E-701 defines "dangerous weapon" to include "Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Read literally, the proposed language would impose liability where a person incorrectly – even

[437] "(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."
[438] "Possess" is defined in RCC § 22E-701.
[439] "Restricted explosive" is defined in RCC § 22E-701.
[440] *See* RCC §§ 22E-2501 (Arson); 22E-2503 (Criminal Damage to Property).
[441] *See* RCC § 22E-301(a)(3)(B).

irrationally – believes that an object can be dangerous.[442] The revised offense requires that the object actually be dangerous.

(2) *USAO, App. C at 517, reiterates its recommendation that a firearm and imitation firearm be graded the same. USAO states, "Because the weapon must be used 'in furtherance' of the offense, the weapon will surely make an impression on the complainant." USAO states that it may still be impossible for a victim to tell if a firearm is real or imitation, particularly if the defendant flees.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties.
- First, where a dangerous weapon or imitation dangerous weapon is used against or displayed to a person (as in the USAO hypothetical), the RCC provides additional punishment for that conduct in its offenses against persons in Subtitle II, regardless of whether it was a real or imitation weapon. For example, the RCC raises the penalty otherwise applicable to an assault causing significant bodily injury from fourth degree to third degree[443] and includes a penalty enhancement for criminal threats with a weapon.[444] The separate crime of merely possessing—but not using or displaying—a dangerous weapon in RCC § 22E-4104 is thus 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. And, it is precisely in those instances where a weapon is apprehended (though never displayed or used in the crime) that the distinction between an imitation and a real dangerous weapon is a fact available to the prosecution.
- Second, where a weapon is possessed but not used or displayed (and so makes no impression on the complainant), the difference in actual dangerousness between a real and fake dangerous weapon should be reflected in the RCC penalty. The presence of an actual firearm creates a danger that someone will be fatally injured, intentionally or inadvertently. Polling of District voters also suggests that carrying a fake, concealed firearm in a public place is substantially lower level conduct as compared to a real firearm.[445]

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[442] Consider, for example, a person who intends to beat someone to death with a very soft foam bat, even though the toy is not at all likely to cause death or serious bodily injury.

[443] Such a person could certainly be charged with both committing an assault using a dangerous or imitation dangerous weapon and possessing a dangerous weapon during a crime, but at sentencing a conviction would not be entered for more than 1 of these overlapping offenses per RCC § 22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses.

[444] RCC § 22E-1204.

[445] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses. Compare the following. Question 4.11 provided the scenario: "Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime." Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: "Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not

(3) *USAO, App. C at 517, reiterates its recommendation that the requirement that a weapon be used "in furtherance of" an offense be removed. USAO states, given 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.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Striking the "in furtherance" requirement appears to include constructive possession of a weapon far away from the offense. For example, a person who commits a simple assault in one part of the city could be convicted of first degree possession of a weapon during a crime by virtue of having a lawfully registered handgun in their home miles away, even if their possession of the handgun has no connection to the crime and poses not additional threat to the complainant. In contrast, RCC § 22E-4104 requires a link between the possession of the weapon and the crime in some manner. Other RCC crimes provide liability for conduct where an actor brings a dangerous weapon to a location where a crime is committed (e.g., RCC § 22E-4102, Carrying a Dangerous Weapon) or displays or uses a dangerous weapon (see RCC offenses against persons under Subtitle II with gradations that authorize higher penalties for use or display of a weapon).

(4) *USAO, App. C at 517-518, recommends aligning the predicate offenses for first and second degree, so that, at minimum, both degrees include burglary, arson, and reckless burning as predicate offenses. USAO states that "it creates a large gap in liability not to have burglary listed as an underlying offense in first degree."*

- The RCC partially incorporates this recommendation by eliminating references to arson, reckless burning, and burglary from the offense, such that the predicate offenses in first and second degree align and consist of all Subtitle II Offenses Against Persons. Since burglary was initially drafted in the RCC, the offense has been updated to provide an enhancement when "the actor knowingly holds or carries on the actor's person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location." See RCC § 22E-2701(d)(4). Also, a review of court statistics shows that from 2009 through 2019, there was not a single arson charge (or conviction) brought with a while-armed enhancement.[446] Consequently, inclusion of burglary and arson in this statute is unnecessary. This change improves the consistency and proportionality of the revised statutes.

(5) *USAO, App. C at 548, opposes eliminating the mandatory minimum for this offense. USAO notes an increase in gun violence.*[447] *USAO states, "This offense*

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involved in any crime." Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code.

[446] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[447] https://cdn.americanprogress.org/content/uploads/2019/11/18070707/WashingtonDCGunViolence-Factsheet.pdf

involves not just possession of firearms, but possession of firearms when the firearms are being used to commit offenses against others." USAO also states that under federal law, many firearms offenses are subject to a mandatory minimum.[448]

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- The CCRC also notes that USAO does not assert that the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter either the possession of firearms or the use of firearms during the commission of offenses against others.[449]
- The RCC's penalty recommendations for RCC § 22E-4104 reflect a sharp decrease from the current D.C. Code § 22-4504(b) statutory penalties and related federal statutes cited by USAO, however those offenses are limited to possessing a firearm during a crime of violence. In contrast, RCC § 22E-4104 applies much more broadly and includes minor assaults and other offenses against persons.
- The RCC recognizes that the degree of additional punishment due to the mere possession of a dangerous weapon during a crime should be less than the display or use of the weapon during the crime.[450] (Indeed, to the extent that penalty differences are a factor in deterring commission of criminal acts, there is a strong social interest in incentivizing those committing crimes to not pull out a gun or knife.) The mere possession crime in RCC § 22E-4104 (and its penalty classification) is not intended to account for the actual use or brandishing of a dangerous weapon, let alone to account for the whole harm done during the crime. At least in the case of serious felonies, the physical injury or sexual intrusion experienced by the complainant almost always far outweighs the means (a dangerous weapon) by which the crime was committed.

[448] 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).

[449] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

[450] Display or use of a weapon during a crime is punished inside the offense definitions themselves. *See, e.g.,* RCC §§ 22E-1201, 22E-1203, 22E-2701.

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

(2) *USAO, App. C at 518, recommends that sub-subparagraph (b)(2)(C)(ii) be modified to include a stay away/no contact order. USAO states both D.C. Code § 22-4503(a)(5)(B) and the revised statute contain a gap in liability by failing to include a stay away/no contact order, which is stricter order than a "no HATS"*[451] *order.*

- The RCC partially incorporates this recommendation by amending subparagraph (b)(2)(C) to include any final civil protection order issued under D.C. Code § 16-1005, whether the order includes a stay away/no contact provision, a "no HATS" provision, or not.[452] This change eliminates a gap in liability.

(3) *USAO, App. C at 548, opposes eliminating the mandatory minimum for this offense. USAO notes an increase in gun violence.*[453]

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- The CCRC also notes that USAO does not assert that the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter the possession of firearms.[454]

(2) *The CCRC recommends clarifying that the term "prior conviction" (now defined in RCC § 22E-701) includes a conviction that is pending appeal but does not include a conviction that has been vacated or reversed. The DCCA's recent opinion in* Blocker v. United States,[455] *which was issued after the most recent draft language was released, noted an ambiguity here but did not resolve it.*

- This change clarifies the revised commentary.

(4) *The CCRC recommends allowing a 24-hour grace period.*[456] *This ensures that a lawful gun owner does not automatically commit an offense the moment a new conviction is entered. It also provides a short period of time for a person to safely relinquish their firearms after being convicted or served with a protective order.*

- This change improves the proportionality of the revised statute.

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[451] "No Harassing, Assaulting, Threatening, or Stalking."

[452] Current D.C. Code § 22-4503(a)(5) appears to apply to civil protection orders only. A stay away/no contact order or "no HATS" order issued as a condition of release under D.C. Code § 23-1321, does not require the actor "relinquish possession of any firearms."

[453] https://cdn.americanprogress.org/content/uploads/2019/11/18070707/WashingtonDCGunViolence-Factsheet.pdf

[454] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

[455] 240 A.3d 35 (D.C. 2020).

[456] *See, e.g.,* Va. Code Ann. § 18.2-308.1:4.

RCC § 22E-4106. Negligent Discharge of Firearm.

(1) *The CCRC recommends amending the phrase "discharges a firearm" to state "discharges a projectile from a firearm," consistent with the revised endangerment with a firearm statute in RCC § 22E-4120.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

(1) *OAG, App. C at 478, recommends that paragraph (b)(5) be redrafted to strike the reference to "a book." OAG states, 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.*

- The RCC incorporates this recommendation by adopting OAG's proposed language in paragraph (b)(5) and in paragraph (b)(6). This change clarifies the revised statute.

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

(1) *OAG, App. C at 478, recommends 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." (Emphasis added.) OAG states that, because its Juvenile Section has jurisdiction to prosecute youth for all offenses for which USAO prosecutes adults and its Criminal Section prosecutes unregistered firearm, no potential evidence should be destroyed unless OAG is also consulted.*

- The RCC partially incorporates this recommendation by requiring that either USAO *or* OAG certify that the article is not needed as evidence. Consistent with current District practice,[457] the authorization of the office in charge of the prosecution will be required before seized property is destroyed. This change eliminates a gap in the revised statute.

(2) *OAG, App. C at 478 – 479, recommends restructuring subsection (d) so that each subparagraph flows naturally from the lead in language.*

- The RCC incorporates this recommendation by adopting OAG's proposed language. This change clarifies the revised statute.

(3) *OAG, App. C at 479, recommends redrafting the last sentence in subsection (e) to state, "A District government agency receiving a dangerous article under this section shall establish property responsibility and records." OAG states, the Council lacks authority to regulate federal agencies.*

- The RCC incorporates this recommendation by adopting OAG's proposed language. This change clarifies the revised statute.

(4) *OAG, App. C at 479, n. 16, recommends replacing the phrase "law-enforcing agency" with "law enforcement agency."*

- The RCC incorporates this recommendation by adopting OAG's proposed language. This change improves the consistency of the revised statutes.

[457] For example, currently, when a case is referred to USAO for papering, the Metropolitan Police Department requires only an AUSA signature on the Property Record form (PD-81(c)) before evidence is forfeited or returned to its owner.

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

(1) *PDS, App. C at 491, recommends that the commentary clarify that the limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained, such as an attempt theory.*

- The RCC incorporates this recommendation by amending the commentary to include the proposed example in a footnote stating, "The limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained. For example, the limitation prevents the court from entering judgments of conviction for possession of a dangerous weapon during a crime and for attempted first degree robbery." This change clarifies the revised commentary.

(2) *The CCRC recommends revising a footnote in the revised commentary to correctly cite controlling District case law on the unit of prosecution for firearm offenses.*

- This change clarifies the revised commentary.

RCC § 22E-4120. Endangerment with a Firearm.

(1) *USAO, App. C at 592, recommends increasing the maximum authorized penalty for this offense. USAO states that the conduct is serious. USAO does not specify a penalty recommendation.*

- 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.[458]

(2) *PDS, App. C at 588, 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. PDS states, "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."*

- The RCC incorporates this recommendation by adding to the revised statute a new subsection (c) that states: "*Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for another offense that has as an objective element in the offense definition or applicable penalty enhancement the use or display, or attempted use or display, of a firearm, imitation firearm, or dangerous weapon shall merge, under RCC § 22E-214, when both convictions arise from the same course of conduct and the same complainant."
- The updated subsection (c) merges a conviction for endangerment with a firearm with a conviction for a crime that already accounts the use or display of a firearm in the offense definition or penalty enhancement. The updated subsection (c) does not apply, however, to crimes involving only the possession or attempted possession of a firearm, imitation firearm, or dangerous weapon. The fact that subsection (c) requires merger in specified circumstances is not intended to preclude the court from merging endangerment with a firearm with another conviction in other circumstances under RCC § 22E-214. This change improves the clarity and proportionality of the revised statutes.

[458] RCC § 22E-1202.

RCC § 22E-4201. Disorderly Conduct.

(1) *The CCRC recommends striking the word "involving," to make clear that a categorical approach is intended.*[459]

- This change clarifies and improves the consistency of the revised statutes.

(2) *The CCRC recommends repealing D.C. Code § 22-1809, which provides that a person who fails to pay a fine for a disorderly conduct offense shall be committed to a workhouse for up to six months.*

- This change improves the consistency and proportionality of the revised statutes and eliminates an archaic provision in the D.C. Code.

[459] In *Taylor* v. *United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word "involved" in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan* v. *Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word "involves" did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word "involves." Under *Taylor*'s reasoning, the inclusion of the word "involves" in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 22E-4202. Public Nuisance.

(1) *OAG, App. C at 479 – 480, recommends that the commentary make clear 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 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."*

- The RCC incorporates this recommendation by amending the commentary to include a similar statement and example. It states, "The notice to stop may be given by any person and is not limited to notice from a law enforcement officer." An accompanying footnote states, "For example, a private citizen may give notice by calling a noisy neighbor and asking them to, 'Keep it down.'" This change clarifies the revised commentary.

RCC § 22E-4205. Breach of Home Privacy.

(1) *OAG, App. C at 480, recommends adding a new subsection (b) stating, "It is not necessary that the dwelling be occupied at the time the person makes the observation." OAG states that this proposed change would make the provision understandable to a lay person.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC's approach to drafting and might, thereby, make the statute confusing. The RCC does not specify in statutory language elements that *may or may not* exist, although such a style was used in the original 1901 D.C. Code in some offenses. For example, unlike current D.C. Code § 22-801, RCC § 22E-2701 does not state that a person commits burglary "in the nighttime or in the daytime" or if they "break and enter, or enter without breaking." Similarly, the revised breach of home privacy does not specify that the dwelling may be "occupied or unoccupied." Doing so may raise questions as to whether elements should be inferred in other statutes that do not explicitly state that the element does not exist.

RCC § 22E-4206. Indecent Exposure.

(1) *OAG, App. C at 480, recommends striking the language in the prosecutorial subsection that states, "except as otherwise provided in D.C. Code § 23-101."*

- The RCC incorporates this recommendation by striking the language as proposed. This clause was included in error.

(2) *The CCRC recommends specifying that OAG will prosecute second degree indecent exposure, leaving first degree to USAO. D.C. Code § 23-101(b), which states in relevant part: "Prosecutions for violations of section 6 of the Act of July 29, 1892 (D.C. Official Code, sec. 22-1307), relating to disorderly conduct,* and for violations of section 9 of that Act (D.C. Official Code, sec. 22-1312), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel [Attorney General for the District of Columbia] *or his assistants." (Emphasis added.) However, section 9 of the Act of July 29, 1892 does not include conduct by a person in a private location to a person who is in a private location.*[460]

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends adding the defined term "in fact" to the exclusions from liability, to make clear that no awareness or culpable mental state is required.*[461]

- This change clarifies and does not substantively change the revised statute.

[460] *See United States v. Strothers*, 228 F.2d 34, 35 (D.C. Cir. 1955) ("On July 29, 1892, Congress passed 'An act for the preservation of the public peace and the protection of property within the District of Columbia', 27 Stat. 322. The first seventeen sections of this Act enumerated and made unlawful a number of certain actions, mostly minor in nature, some more serious, each section containing a separate provision for a penalty ranging from a maximum fine of five dollars in some instances to a maximum fine of two hundred and fifty dollars in some others. Section 18 of this Act provided that all prosecutions for the offenses were to be conducted in the name of and for the benefit of the District of Columbia. From the date of the passage of this Act until August 15, 1935, the Corporation Counsel for the District of Columbia, and his predecessors, prosecuted cases arising thereunder…").

[461] RCC § 22E-207.

RCC § 22E-4301. Rioting.

(3) *The CCRC recommends striking the word "involving," to make clear that a categorical approach is intended.*[462]

- This change clarifies and improves the consistency of the revised statutes.

(4) *The CCRC recommends specifying in statutory text that the other people engaged in riotous conduct must be in the area reasonably perceptible to the actor.*

- This change clarifies the revised statute and does not change its meaning.

[462] In *Taylor* v. *United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word "involved" in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan* v. *Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word "involves" did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word "involves." Under *Taylor*'s reasoning, the inclusion of the word "involves" in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 22E-4302. Failure to Disperse.

(1) *The CCRC recommends striking the word "involving," to make clear that a categorical approach is intended.* [463]

- This change clarifies and improves the consistency of the revised statutes.

(2) *The CCRC recommends specifying in statutory text that the other people engaged in riotous conduct must be in the area reasonably perceptible to the actor.*

- This change clarifies the revised statute and does not change its meaning.

[463] In *Taylor* v. *United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word "involved" in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan* v. *Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word "involves" did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word "involves." Under *Taylor*'s reasoning, the inclusion of the word "involves" in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 22E-4401. Prostitution.

(1) *OAG, App. C at 561, recommends adding "and" after paragraph (a)(3) and adding a new paragraph (a)(4) "Provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value." With this revision, the RCC offense would read:*

(a) 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 any person receiving anything of value;

(2) Agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for any person receiving 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 any person receiving anything of value; and

(4) Provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value.

OAG states that "because 'any person receiving" [in the RCC prostitution statute] implies that someone gave, and 'for giving' to any person [in the RCC patronizing statute] implies that someone received" the RCC prostitution and RCC patronizing prostitution statutes "are essentially the same."

- The RCC partially incorporates this recommendation by replacing "in exchange for any person receiving anything of value" in paragraphs (a)(1), (a)(2), and (a)(3) with "in exchange for the actor or a third party receiving anything of value." When the actor engages in, agrees to, or solicits for sexual activity in exchange for the actor receiving anything of value, this revision excludes the patron.[464] It is not possible to as clearly distinguish between the prostitute and the patron when the recipient or promised recipient of anything of value is a "third party,"[465] but the commentary to

[464] The plain language reading of paragraph (a)(1) with the new language, in relevant part, is the actor, pursuant to a prior agreement, engages in or submits to sexual activity "in exchange for the actor receiving anything of value." A patron does not engage in or submit to sexual activity in exchange for the patron receiving anything of value.

The plain language reading of paragraph (a)(2) with the new language, in relevant part, is the actor agrees to engage in or submit to sexual activity "in exchange for the actor receiving anything of value." A patron does not agree to engage in or submit to sexual activity in exchange for the patron receiving anything of value.

The plain language reading of paragraph (a)(3) with the new language, in relevant part, is the actor solicits any person to engage in or submit to sexual activity "in exchange for the actor receiving anything of value." A patron does not solicit sexual activity in exchange for the patron receiving anything of value.

[465] The resulting plain language readings are arguably susceptible to OAG's interpretation that "receiving anything of value" implies "giving anything of value" and would thus apply to a patron, as well as a prostitute.

The plain language reading of paragraph (a)(1) with the new language, in relevant part, is the actor, pursuant to a prior agreement, engages in or submits to sexual activity "in exchange for a third party

the offense states that the phrase "in exchange for" is intended to exclude a patron from the RCC prostitution offense and that the RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. In addition, based on an OAG comment discussed below, the RCC prostitution and RCC patronizing offenses now have the same penalty (excluding enhanced patronizing prostitution), which eliminates incentives for charging one offense over the other. The RCC did not incorporate OAG's specific recommended language because it did not address the agreement (paragraph (a)(2)) and solicitation (paragraph (a)(3)) prongs of the offense.

(2) *The CCRC recommends two changes to the deferred disposition provision in subsection (c) of the revised statute: 1) deleting from a sentence in paragraph (c)(1) the language "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"; and 2) deleting what was previously paragraph (c)(3), which provided for expungement of the nonpublic record created in paragraph (c)(1). With this revision, the sentence in paragraph (c)(1) reads "Discharge and dismissal under this subsection shall be without court adjudication of guilt" and a judge may defer and dismiss proceedings for a prostitution case, even if the defendant has previously had a case dismissed. There is no longer a provision for expungement of the nonpublic record in the revised prostitution statute because paragraph (c)(1) no longer creates such a record.*

The current D.C. Code deferred disposition provision for prostitution does not have a limit on the number of times the provision can be applied.[466] *The*

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receiving anything of value." Under OAG's interpretation, a patron could engage in or submit to sexual activity in exchange for a third party receiving anything of value because the patron will give it.

The plain language reading of paragraph (a)(2) with the new language, in relevant part, is the actor agrees to engage in or submit to sexual activity "in exchange for the a third party receiving anything of value." Under OAG's interpretation, a patron could agree to engage in or submit to sexual activity in exchange for a third party receiving anything of value because the patron will give it.

The plain language reading of paragraph (a)(3) with the new language, in relevant part, is the actor solicits any person to engage in or submit to sexual activity "in exchange for a third party receiving anything of value." Under OAG's interpretation, a patron could solicit for sexual activity in exchange for a third party receiving anything of value because the patron will give it.

[466] D.C. Code § 22-2703 ("The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include an order to stay away from the area within which the offense or offenses occurred, submission to medical and mental examination, diagnosis and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.").

previous draft of the RCC prostitution statute imposed such a limit by largely adopting the deferred disposition provision in the RCC possession of a controlled substance statute (RCC § 48-904.01a). However, the RCC possession of a controlled substance statute has since deleted the language pertaining to a nonpublic record retained by the courts, and a judge can defer and dismiss proceedings, even if the defendant has previously had a case dismissed. This change makes the RCC prostitution deferred disposition provision consistent with the deferred disposition in the RCC possession of a controlled substance statute and provides trial judges with broader discretion to dismiss proceedings when appropriate. The commentary to the revised prostitution statute states that a judge may defer and dismiss proceedings for a prostitution case, even if the defendant has previously had a case dismissed.

- This change improves the proportionality of the revised statutes.

(3) *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.

(4) *USAO, App. C at 589-590 states that it "agrees with OAG's comments [App. C, 558-561] that prosecutors and law enforcement need to have access to" the nonpublic records referred to in subsection (c). However, "in lieu of expungement" (previously provided for in paragraph (c)(3) of the RCC*

prostitution statute), USAO recommends that the "CCRC create a sealing provision" because sealing "would accomplish many of the goals of this provision, including lack of public access to these records." USAO states that "[e]xpungement would have adverse impacts that are not immediately apparent," including "an impact on USAO's ability to locate and disclose relevant Brady *material." USAO states that "[c]losed files, including those that do not result in a conviction, sometimes contain* Brady *information, and USAO obtains that information from closed files" and "[i]f 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." USAO gives as examples a case that "was originally investigated as a felony offense" and a witness testified in the grand jury and committed perjury, a case that went to trial as a misdemeanor and a witness committed perjury at trial, and, regardless of whether a misdemeanor case went to trial, a witness made inconsistent statements to police or prosecutors. USAO also states that "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."*

- The RCC does not incorporate this change for the reasons discussed above in response to an identical recommendation from OAG. With respect to the Home Rule Act, there is no D.C. Court of Appeals case law as to whether mandating USAO expungement of records violates the Home Rule Act. D.C. Code § 16-803 specifically authorizes "the prosecutor's office" to retain any and all records relating to the . . . arrest and conviction in a nonpublic file[.]" The previous expungement provision in the RCC prostitution statute was modeled off the deferred disposition provision in current D.C. Code § 48-904.01, which contains an identical provision for expungement of a nonpublic record. If omitting reference to D.C. Code § 16-803 violates the Home Rule Act, then current D.C. Code § 48-904.01 already appears to violate the Home Rule Act. The current D.C. Code possession of a controlled substance statute does not reference D.C. Code § 16-803, or otherwise specifically authorize USAO to maintain non-public records.[467] The CCRC is not aware of any litigation about a Home Rule Act issue with this provision, but welcomes Advisory Group updates about any such litigation.

(5) *PDS, App. D at 583-584, recommends replacing "Metropolitan Police Department" with "the District" in subparagraph (b)(2) so that it reads, in relevant part, "The District shall refer any person under 18 years of age that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of" sex trafficking of a minor under RCC § 22E-1605. PDS states that it "hopes that the Council for the District of Columbia and the Mayor answer the call to narrow the*

[467] Current D. C. Code § 48-904.01 states that "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[.]" D.C. Code § 48-904.01(e)(1) (emphasis added). This subsection does not specifically authorize the USAO to retain a non-public record.

duties of MPD and to assign the work of delivering health and human services to District agencies that are better suited to delivering those services." PDS states that "[r]equiring 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 (emphasis in original)."*

- The RCC partially incorporates this recommendation by adding to the subparagraph (b)(2) duty to make a referral "and any other District agency designated by the Mayor" after the current reference to "Metropolitan Police Department." The updated language reads, in relevant part, "The Metropolitan Police Department and any other District agency designated by the Mayor shall refer any person under 18 years of age that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of" sex trafficking of a minor under RCC § 22E-1605. The updated language will ensure the referral provision remains relevant and applicable should there be future changes in service delivery while (unlike the PDS proposed language) ensuring that MPD remains bound to provide referrals. This change improves the clarity of the revised statutes. The commentary to the revised prostitution offense has been updated to reflect that this is a clarificatory change in law.

(6) *PDS, App. C at 584, states that it supports the provision in subsection (c) that allows for the dismissal of proceedings and reiterates its previous recommendation, App. C at 491 that the CCRC create a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class.*

- The RCC does not incorporate in the general provisions at this time an expanded deferred disposition provision that applies to whole classes of RCC offenses. The CCRC will revisit such a possibility as penalty recommendations for misdemeanor classes are reviewed again.

(7) *The CCRC recommends adding the defined term "in fact" to the immunity provision in paragraph (b)(1) to make clear that no awareness or culpable mental state is required.*[468]

- This change clarifies and does not substantively change the revised statute.

[468] RCC § 22E-207.

RCC § 22E-4402. Patronizing prostitution.

(1) *OAG, App. C at 561-562, recommends adding "and" after subparagraph (a)(3) and adding a new subparagraph (a)(4) "Was provided the sexual act or sexual conduct that was performed by another person who committed the offense of prostitution in RCC § 22E-4401." With this revision, the RCC offense would read:*

> *(a) 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 for giving any person anything of value;*
>
> *(2) Agrees, expressly or implicitly, to give anything of value to any person 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 for giving any person anything of value; and*
>
> *(4) 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.*

OAG states that "because 'any person receiving" [in the RCC prostitution statute] implies that someone gave, and 'for giving' to any person [in the RCC patronizing statute] implies that someone received" the RCC prostitution and RCC patronizing prostitution statutes "are essentially the same." OAG further recommends that "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."

- The RCC partially incorporates this recommendation by replacing "in exchange for giving any person anything of value" with "in exchange for the actor giving another person anything of value" in paragraphs (a)(1) and (a)(3) of the RCC patronizing offense. This revision further clarifies that the actor must engage in or solicit for sexual activity, as well as give or promise to give anything of value to another person, which excludes a prostitute from the scope of the offense.
- The RCC replaces "to give anything of value to any person" in paragraph (a)(2) with "to give anything of value to another person" to maintain consistency with the wording in paragraphs (a)(1) and (a)(3). No further revision is necessary to paragraph (a)(2) because, read in conjunction with subsection (a), it prohibits the actor from agreeing to give anything of value in exchange for sexual activity and cannot apply to a prostitute.
- The RCC does not incorporate OAG's specific recommended language because it did not address the agreement (paragraph (a)(2)) and solicitation (paragraph (a)(3)) prongs of the offense.
- The commentary to the RCC Patronizing Prostitution has been revised to state that the offense does not require that a person be arrested or

convicted for the RCC prostitution offense. These changes clarify the revised statutes.

(2) *The CCRC recommends two changes to the deferred disposition provision in subsection (b) of the revised statute: 1) deleting from a sentence in paragraph (b)(1) the language "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"; and 2) deleting what was previously paragraph (b)(3), which provided for expungement of the nonpublic record created in paragraph (b)(1). With this revision, the sentence in paragraph (b)(1) reads "Discharge and dismissal under this subsection shall be without court adjudication of guilt" and a judge may defer and dismiss proceedings for a patronizing prostitution case, even if the defendant has previously had a case dismissed. There is no longer a provision for expungement of the nonpublic record in the revised patronizing prostitution statute because paragraph (b)(1) no longer creates such a record.*

The current D.C. Code deferred disposition provision for prostitution does not have a limit on the number of times the provision can be applied.[469] *The previous draft of the RCC patronizing prostitution statute imposed such a limit by largely adopting the deferred disposition provision in the RCC possession of a controlled substance statute (RCC § 48-904.01a). However, the RCC possession of a controlled substance statute has since deleted the language pertaining to a nonpublic record retained by the courts, and a judge can defer and dismiss proceedings, even if the defendant has previously had a case dismissed. This change makes the RCC patronizing prostitution deferred disposition provision consistent with the deferred disposition in the RCC possession of a controlled substance statute and provides trial judges with broader discretion to dismiss proceedings when appropriate. The commentary to the revised prostitution statute states that a judge may defer and dismiss proceedings for a patronizing prostitution case, even if the defendant has previously had a case dismissed.*

- This change improves the proportionality of the revised statutes.

(3) *OAG, App. C at 558-560, recommends revising a sentence in paragraph (b)(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*

[469] D.C. Code § 22-2703 ("The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include an order to stay away from the area within which the offense or offenses occurred, submission to medical and mental examination, diagnosis and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.").

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 (b)(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 (b)(1) and (b)(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.

(4) *USAO, App. C at 589-590 states that it "agrees with OAG's comments [App. C, 558-561] that prosecutors and law enforcement need to have access to" the nonpublic records referred to in subsection (b). However, "in lieu of expungement" (previously provided for in paragraph (b)(3) of the RCC patronizing prostitution statute), USAO recommends that the "CCRC create a sealing provision" because sealing "would accomplish many of the goals of this provision, including lack of public access to these records." USAO states that "[e]xpungement would have adverse impacts that are not immediately apparent," including "an impact on USAO's ability to locate and disclose relevant* Brady *material." USAO states that "[c]losed files, including those that do not result in a conviction, sometimes contain* Brady *information, and USAO obtains that information from closed files" and "[i]f 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." USAO gives as examples a case that "was originally investigated as a felony offense" and a witness testified in the grand jury and committed perjury, a case that went to trial as a misdemeanor and a witness committed perjury at trial, and, regardless of whether a misdemeanor case went to trial, a witness made inconsistent statements to police or prosecutors. USAO also states that "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."

- The RCC does not incorporate this change for the reasons discussed above in response to an identical recommendation from OAG. With respect to the Home Rule Act, there is no D.C. Court of Appeals case law as to whether mandating USAO expungement of records violates the Home Rule Act. D.C. Code § 16-803 specifically authorizes "the prosecutor's office" to retain any and all records relating to the . . . arrest and conviction in a nonpublic file[.]" The previous expungement provision in the RCC patronizing prostitution statute was modeled off the deferred disposition provision in current D.C. Code § 48-904.01, which contains an identical provision for expungement of a nonpublic record. If omitting reference to D.C. Code § 16-803 violates the Home Rule Act, then current D.C. Code § 48-904.01 already appears to violate the Home Rule Act. The current D.C. Code possession of a controlled substance statute does not reference D.C. Code § 16-803, or otherwise specifically authorize USAO to maintain non-public records.[470] The CCRC is not aware of any litigation about a Home Rule Act issue with this provision, but welcomes Advisory Group updates about any such litigation.

(5) *OAG, App. C at 562-563, recommends changing the penalty classification for this offense to a Class D misdemeanor, which is the same penalty classification as the RCC prostitution offense (RCC § 22E-4401) with a maximum possible penalty of 30 days. The RCC patronizing prostitution offense previously was a Class C misdemeanor, with a maximum possible penalty of 90 days. OAG states that in the current D.C. Code prostitution statute,[471] prostitution and patronizing prostitution have the same penalty—a maximum possible penalty of 90 days for a first offense, a maximum possible penalty of 180 days for a second offense, and a maximum possible penalty of 2 years for a third or subsequent offense. OAG says it "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, OAG recommends that, as under current law, the offenses have the same penalty.*

- The RCC incorporates this recommendation by decreasing the penalty classification for the RCC patronizing offense to a Class D misdemeanor. The penalty classification for the RCC enhanced patronizing offense remains a Class A misdemeanor.

(6) *The CCRC recommends codifying a penalty enhancement in subparagraph (c)(2)(A) that, in fact, the person patronized is under 12 years of age. With this revision, subparagraph (c)(2)(A) provides a penalty enhancement when the actor "Is reckless as to the fact that the person patronized is under 18 years of age, or,*

[470] Current D. C. Code § 48-904.01 states that "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[.]" D.C. Code § 48-904.01(e)(1) (emphasis added). This subsection does not specifically authorize the USAO to retain a non-public record.

[471] D.C. Code § 22-2701

in fact, the person patronized is under 12 years of age." Applying strict liability for a person under the age of 12 is consistent with the RCC sex offenses. The penalty enhancement also is consistent with a penalty enhancement in the RCC trafficking in forced commercial sex statute (RCC § 22E-1604), as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. However, the commentary to the RCC patronizing prostitution statute emphasizes that this penalty enhancement is intended to be used in the rare instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.[472] *The commentary to the offense has been updated to reflect that this is a substantive change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(7) *The CCRC recommends codifying a penalty enhancement in subparagraph (c)(2)(B) and sub-subparagraphs (c)(2)(B)(i) and (c)(2)(B)(ii) that the actor is reckless as to the fact that the person patronized is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a sexual act or sexual contact. These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. However, the commentary to the RCC patronizing prostitution statute states that this penalty enhancement is generally intended to be used when a more serious RCC sex offense, such as sexual assault (RCC § 22E-1301), or RCC Chapter 16 human trafficking offense does not apply. The commentary to the offense has been updated to reflect that this is a substantive change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(8) *PDS, App. C at 584, states that it supports the provision in subsection (b) that allows for the dismissal of proceedings and reiterates its previous recommendation, App. C at 491 that the CCRC create a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class.*

- The RCC does not incorporate in the general provisions at this time an expanded deferred disposition provision that applies to whole classes of RCC offenses. The CCRC will revisit such a possibility as penalty recommendations for misdemeanor classes are reviewed again.

[472] Because the patronizing prostitution statute includes more inchoate conduct (e.g., efforts to persuade) with a "knowingly" culpable mental state, there may be rare instances where patronizing prostitution is chargeable but attempted sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for attempt liability.

RCC § 22E-4403. Trafficking in Commercial Sex.

(1) *OAG, App. C at 562, recommends revising subparagraph (a)(3) so that it reads, in relevant part, "Obtains anything of value from the proceeds or earnings from a commercial sex act that a person has engaged in or submitted to." The language in subparagraph (a)(3) currently reads "Obtains anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act." OAG states that, as currently drafted, "it would technically reach the proceeds derived from a person who has engaged in a commercial sex act even though those proceeds" were earned "at a part time job that was unrelated to prostitution."*

- The RCC incorporates this recommendation by revising the relevant language in subparagraph (a)(3) to read "Obtains anything of value from the proceeds or earnings of a commercial sex act that a person has engaged in or submitted to." The commentary to this offense has been updated to reflect that this is a clarificatory change in law. This change improves the clarity of the revised statutes.

(2) *OAG, App. C at 562, recommends creating two penalty enhancements for trafficked persons under the age of 18 years. As currently drafted, subparagraph (b)(2) has a single penalty enhancement with an increase of one penalty class if the actor is reckless as to the fact that the person trafficked is under 18 years of age. Specifically, OAG recommends:*

"(2) Enhanced penalties. In addition to the general penalty enhancements under this title, the penalty classification for 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 as 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."

OAG "agrees that there should be an enhancement for recklessly trafficking persons who are under the age of 18, [but] we do not believe that the enhancement goes far enough." OAG states that, as currently drafted, "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."

- The RCC partially incorporates this recommendation by revising subparagraph (c)(2)(A) to include "or, in fact, the person trafficked is under 12 years of age." With this change, subparagraph (c)(2)(A) provides an enhanced penalty if "The actor is reckless as to the fact that the person trafficked is under 18 years of age, or in fact, the person trafficked is under 12 years of age." Applying strict liability for a person under the age of 12 is consistent with the RCC sex offenses. The penalty enhancement also is consistent with a penalty enhancement in the RCC trafficking in forced commercial sex statute (RCC § 22E-4403). However, the commentary to the RCC trafficking in commercial sex statute emphasizes that this penalty enhancement is intended to be used in the rare

instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.[473]

- The RCC does not incorporate OAG's proposed language because this statute is limited to consensual commercial sex acts. If a commercial sex act is not consensual, or if the person trafficked is under the age of 18 years, there is more proportionate liability under the RCC sex offenses in Chapter 13 or the RCC human trafficking statutes, which account for the nonconsensual nature of the conduct or the young age of the complainant. However, should RCC § 22E-4403, trafficking in commercial sex, be applied, it is consistent and proportionate to have a penalty enhancement for when, in fact, the complainant is under 12 years of age. The commentary to the RCC Trafficking in Commercial Sex statute has been updated to reflect this discussion and that this revision is a change in law. This change improves the consistency and proportionality of the revised statutes.

(3) *The CCRC recommends adding a penalty enhancement if the actor is reckless as to the fact that the trafficked person is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a commercial sex act. The revised language is:*

"The actor is reckless as to the fact that the person trafficked is:

(i) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or

(ii) Incapable of communicating willingness or unwillingness to engage in the commercial sex act.

These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as the requirements for an incapacitated complainant in the RCC sex trafficking of a minor or adult incapable of consenting statute (RCC § 22E-1605). The commentary to the statute states that this penalty enhancement is generally intended to be used when a more serious RCC sex offense, such as sexual assault (RCC § 22E-1301), or RCC Chapter 16 human trafficking offense does not apply. The commentary to the RCC Trafficking in Commercial Sex statute has been updated to reflect this discussion and that this revision is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

[473] Because the trafficking in commercial sex statute includes conduct with a "knowingly" culpable mental state, there may be rare instances where the commercial sex statute is chargeable but accomplice liability for sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for accomplice liability.

RCC § 22E-4601. Contributing to the Delinquency of a Minor.

(1) *The CCRC recommends a single penalty gradation for the revised contributing to the delinquency of a minor (CDM) statute and classifying it as a Class B crime, with a maximum term of imprisonment of 180 days. The previous draft of the revised CDM statute had two degrees and three penalty gradations based, in part, on whether the underlying offense was a felony or a misdemeanor. The single flat penalty for all offenses in the revised statute effectively raises the penalty for what would otherwise be chargeable as lesser misdemeanors (Classes C-E) to a Class B offense when an actor who is an adult is an accomplice to or solicits a minor in an offense. However, where a person is an accomplice to or solicits a serious felony the actor should be charged with and subject to correspondingly higher penalties as provided under RCC § 22E-210 and RCC § 22E-302. The commentary to the revised CDM statute reflects that this is a change in law.*

- This change improves the proportionality of the revised statute.

(2) *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 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.

(3) *OAG, App. C at 608, recommends expanding the explanation in the RCC commentary concerning OAG's lack of prosecutorial authority in the revised CDM statute. OAG states that it "does not disagree with the proposal, [but] given the evolving nature of the analysis concerning the distribution of prosecutorial authority in the District, [OAG] believes that a fuller explanation is warranted."*

- The RCC generally incorporates the recommended language into the commentary in the eighth point regarding prosecutorial authority. The added historical detail does not change the analysis that OAG appears to lack prosecutorial authority over the contributing to the delinquency of a minor statute. This change improves the clarity of the commentary.

(4) *PDS, App. C at 619-621, recommends deleting second degree of the revised CDM statute. PDS states that it agrees with Professor Butler's comments at the*

October 7, 2020 Advisory Group meeting that "this conduct is better addressed outside of the criminal legal system." PDS states that "[w]hile the offense does not appear to be directed at parents or at mothers specifically, PDS believes that this who prosecutors will target." PDS discusses research and statistics and states that second degree of the revised CDM statute will "perpetuate the racism and classism of the District's criminal legal system." In addition, PDS states that second degree of the revised CDM statute is "not a necessary tool for holding parents accountable" given several juvenile court provisions in Title 16 of the current D.C. Code.

- The RCC incorporates this recommendation by deleting second degree CDM. The commentary to the revised CDM statute reflects that this is a change in law. Notably, other statutes not addressed in the RCC may still criminalize facilitating truancy (see D.C. Code § 38-203(d)) and facilitating contempt by aiding violation of a court order (see D.C. Code §§ 11–944; § 22–1805). This change reduces unnecessary overlap and improves the proportionality of the revised statutes.

(5) *PDS, App. C at 621-622, recommends replacing "knowingly" with "purposely" in what is now paragraph (a)(3) and adding an element requiring that the minor had to engage in the conduct or attempt to do so. PDS states that if, as the commentary notes, the revised CDM statute largely tracks the RCC accomplice and RCC solicitation provisions "it is largely duplicative and has no place in a reform code written with a mandate to reduce overlap as a primary goal." PDS states that "[i]f there is a place for such an offense in the RCC . . . 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" and that the offense should not allow "liability for speech knowingly made but without any intent for the speech to have an effect."*

PDS states that it is not clear what it means to "knowingly command'" in former subparagraphs (a)(3)(C) and (b)(3)(C). PDS notes that the commentary to the offense stated "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." PDS states that 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?"[474] PDS states that "[i]f knowingly means

[474] PDS gives as a hypothetical:

> 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

more in this context, the commentary must say so."

- The RCC partially incorporates this recommendation by requiring that the actor is either an accomplice to the complainant under the RCC general provision for accomplice liability (RCC § 22E-210) or commits criminal solicitation of the complainant under the RCC general solicitation provision (RCC § 22E-302). This effectively changes the required culpable mental state for assisting, encouraging, or soliciting the complainant from "knowingly" to "purposely." The commentary to the revised CDM statute reflects that this is a possible change in law. This change improves the clarity, consistency, and proportionality of the revised statutes.
- The RCC does not incorporate the recommendation to add an element that requires that the minor had to engage in the conduct or attempt to do so. The revised CDM statute specifically incorporates the RCC general provisions for accomplice liability and solicitation. The requirements of the general accomplice liability statute (RCC § 22E-210) ensure that the revised CDM statute does not criminalize merely suggesting specific conduct, which, if carried out, would constitute a crime.[475] The RCC solicitation provision, however, does not require actual assistance, although it does require that the actor solicit "the planning or commission of specific conduct, which, if carried out, will constitute that offense or an attempt to commit" the underlying offense. The RCC solicitation statute does criminalize suggestions of conduct, but the actor must have the purpose of bringing about conduct planned to culminate in an offense.

(6) *PDS, App. C at 622, recommends revising the definition of "chronic truancy" and 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."*

- The RCC does not incorporate this recommendation because, as is discussed above, the updated CDM statute no longer has a second degree and does not cover chronic truancy.

(6) *PDS, App. C at 622, recommends narrowing the merger restriction in what was previously subsection (f) ("A conviction for contributing to the delinquency of a*

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stranger, yet technically, the 20-year-old is "practically certain" that he has requested specific conduct.

[475] The accomplice liability provision (RCC § 22E-210) requires that the accomplice actually assist the minor in a non-trivial way. As the commentary to RCC § 22E-210 states (footnotes omitted):

> To satisfy the conduct requirement of accomplice liability under paragraphs (a)(1) and (a)(2), it is not necessary that the principal actor have been subjectively aware of the effect of the accomplice's assistance or encouragement. However, the accomplice's conduct must have actually assisted or encouraged the principal in some non-trivial way. This means that an unsuccessful accomplice—i.e. one who attempts to aid or encourage the principal but fails to promote or facilitate the target offense in any way—is not subject to liability under §22E-210.

minor does not merge with any other offense arising from the same course of conduct.") PDS states that "[p]rohibiting merger with any offense that arises from the same course of conduct is too broad." PDS states that as previously drafted, the merger provision "would disallow merger of [the revised CDM statute] with the almost identical offense of solicitation [or] 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." PDS states "[t]hat is not to say that [the RCC merger provision] 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." PDS does not recommend specific language.

- The RCC partially incorporates this recommendation by deleting all limitations on merger. The commentary to the revised CDM statute reflects that this is a possible change in law, given that the scope of the revised offense now is such that it will merge with other convictions for accomplice or solicitation liability based on the same conduct. Specifically, the commentary notes that the RCC accomplice and RCC solicitation offenses are lesser included offenses of the revised contributing to the delinquency of a minor statute, and those offenses would merger into the contributing to the delinquency of a minor conviction under the RCC general merger provision (RCC § 22E-214). This change improves the clarity, consistency, and proportionality of the revised statutes.

(7) *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.

(8) *USAO, App. C at 632-633, recommends clarifying that the revised CDM statute applies to an adult that provides alcohol to a minor in violation of D.C. Code § 25-1002. USAO states that D.C. Code § 25-1002 "makes it only a civil offense" for a minor to possess alcohol and "under the plain language of the RCC statute, it is arguable whether this would constitute a "District offense."" USAO states that it is also unclear whether D.C. Code § 25-1002 would constitute a "misdemeanor offense" for the purposes of the revised CDM penalty gradations.*

USAO states that, at the October 7, 2020 Advisory Group meeting, the CCRC stated the revised CDM statute would apply to D.C. Code § 25-1002. USAO does not recommend specific language.

- 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.

(9) *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.

(10) *USAO, App. C at 633, recommends adding "or, if carried, out would constitute" in the penalty gradation that was previously in paragraph (f)(1). With this change, the penalty gradation would read "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." USAO states that this language "tracks the language in [former subparagraph] (a)(3)(C)." USAO states that "[b]ecause liability [for first degree of the revised CDM statute] 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."*

- The RCC does not incorporate this recommendation because, as discussed above, the revised CDM statute directly incorporates the RCC general provisions for accomplice liability (RCC § 22E-210) and criminal solicitation (RCC § 22E-302), which address whether and to what extent the complainant must engage in conduct.

(11) *The CCRC recommends revising subsection (C) of the statute to read: "An actor may be convicted of an offense under this section even though the complainant has not been arrested, prosecuted, convicted, or adjudicated delinquent for an offense." This language encompasses what was previously specified in paragraph (c)(1) ("Has not been prosecuted, subject to delinquency proceedings, convicted, adjudicated delinquent or found in contempt of court.") and paragraph (c)(3) ("Has been acquitted, found to be not delinquent, or found to not be in contempt of court."). What was previously paragraph (c)(2) ("Has been convicted or found delinquent of a different offense or degree of an offense") has been deleted as surplusage. The revised language is consistent with an identical provision in the RCC accomplice liability statute (RCC § 22E-210).*

- This change improves the clarity and the consistency of the revised statutes.

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

(1) *The CCRC recommends renumbering the revised offense § 7-2502.01A, to clarify that the exclusions, defense, penalties, and definitions do not apply to remaining provisions in D.C. Code § 7-2502.01 that are not being revised at this time.*

- This change clarifies and does not substantively change the revised statute.

RCC § 7-2502.15. Possession of a Stun Gun.

(1) *OAG, App. C at 480 – 481, recommends that the penalty clause state, "The penalty for violation of this offense is governed by D.C. Official Code § 16-2320." OAG states, "[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."*

- The RCC does not incorporate this recommendation because it would reduce the clarity and consistency of the revised statutes. In some instances, a person under 18 years old may be charged and prosecuted under this section as an adult. For example, under D.C. Code § 16-2307(e-2)(2), a charge under this section may be joined with a more serious charge that is transferred to adult court. Further, under D.C. Code § 16-2307(h), a child who has previously been convicted as an adult, must be charged as an adult in any subsequent proceeding. Consistent with most District criminal statutes, the RCC does not specify that children must be treated as children, because Title 16 already specifies when that is and is not the case.

RCC § 7-2507.02A. Unlawful Storage of a Firearm.

(1) *The CCRC recommends renumbering the revised offense § 7-2507.02A, to clarify that the penalties and definitions do not apply to subsection (a) of D.C. Code § 7-2507.02, which is not being revised at this time.*

- This change clarifies and does not substantively change the revised statute.

(2) *The CCRC recommends specifying in the statutory language that the minor or unauthorized person must be a person other than the actor.*

- This change clarifies and does not substantively change the revised statute.

(3) *The CCRC recommends striking the word "involving" from the penalty enhancement, to make clear that a categorical approach is intended.*[476]

- This change clarifies and improves the consistency of the revised statutes.

[476] In *Taylor* v. *United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word "involved" in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan* v. *Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word "involves" did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word "involves." Under *Taylor*'s reasoning, the inclusion of the word "involves" in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner.

(1) *The CCRC recommends renumbering the revised offense § 7-2509.06A, to clarify that it does not replace D.C. Code § 7-2509.06, which is not being revised at this time.*

- This change clarifies and does not substantively change the revised statute.

RCC § 16-705(b). Jury trial; trial by court.

(1) *OAG, App. C at 521-522, recommends a different format for the revised statute that uses separate subparagraphs and departs from current D.C. Code § 16-705(b). OAG says that a revised organization would be more intuitive and understandable to a lay person and practitioners.*

- The RCC partially incorporates this recommendation by restructuring the revised statute, including redrafting current subsection D.C. Code § 16-705(a) and renumbering current subsection D.C. Code § 16-705(c). The updated statute departs from the suggested OAG drafting by no longer maintaining as the primary basis for dividing subsections (a) and (b) whether an offense is jury demandable under the Constitution. Under the revised statute, jury rights extend beyond the constitutional minimum in many respects and constitutional requirements are just one of several considerations. This change improves the clarity and organization of the revised commentary.

(2) *OAG, App. C at 522, recommends that instead of setting the minimum penalty to qualify for a jury trial in terms of a specific maximum imprisonment of maximum fine, the statute refer to RCC penalty classes that are jury demandable. OAG says that this change would avoid giving organizational defendants—who are subject to higher penalties under the RCC—greater access to jury trials.*

- The RCC does not incorporate OAG's recommended language because it would render the statute inapplicable to any unrevised statutes or future statutes that do not follow the RCC penalty classifications. As D.C. Code § 16-705 applies to all criminal statutes in the D.C. Code, currently and as recommended by the CCRC, its operation with respect to all statutes must be clear. The RCC includes revisions to hundreds of charges, but there remain hundreds of additional provisions throughout the D.C. Code that carry imprisonment penalties of variable numbers that are not assigned to a penalty class. However, as noted in a provision described further below, the CCRC recommends that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This would remove almost all remaining differences between the jury rights of an organizational defendant and others.

(3) *OAG, App. C at 523, says in reference to the provision regarding a right to a jury trial when the person subjected to the criminal offense is a law enforcement officer that where there is a question as to the status of the complainant as a law enforcement officer is in question the revised provision "should clearly state how that determination should be made. OAG said that it believed other Advisory Group members should weigh in and that OAG was not making a recommendation at that time. This item was raised an Advisory Group meeting subsequently, with no clear resolution. OAG has not updated its response in the intervening months.*

- The RCC does not incorporate a change based on this comment because it appears unnecessary. This issue already may arise in cases where a

factual question exists as to whether the court has jurisdiction or under the District's unlawful entry[477] statute which provides a right to a jury if the location entered is a public building but does not provide such a right if the location is a private building. The court may hold a pretrial hearing and rule on the matter.

(4) *OAG, App. C at 524 says that it "do[es] 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." OAG notes that because attempt penalties in the RCC are half the maximum penalty, a person who is subject to only a 90 day penalty for attempting a 180 day offense would get a jury trial but another person committing another offense with imprisonment of 90 days would not get a jury trial. OAG says that "defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial."*

- The RCC partially incorporates this recommendation by recommending, in a provision described further below, that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change would bring the District in line with the majority of the country and satisfy the principle articulated by OAG that "defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial." In the interim, however, for the reasons stated in the commentary the RCC retains a greater expansion of jury rights for offenses classified below a Class B offense in a variety of circumstances, including for attempts of Class B offenses. This change improves the proportionality and consistency of the revised statutes.

(5) *OAG, App. C at 524 recommends that, if retained in the RCC, the subparagraph referring to law enforcement officers refer to an officer, as defined, "who is either working a tour of duty or in uniform." OAG says that the current "provision does not distinguish between when an officer is on duty or off duty or whether the officer is in uniform or not."*

- The RCC partially incorporates this recommendation by referring in the statute to the updated definition of a "law enforcement officer" that more clearly states covered individuals and when they are within the definition. Under the updated definition, an MPD officer is a "law enforcement officer" all the time, whether on or off-duty, consistent with MPD policy and other law. However, special police officers and campus police are only "law enforcement officers" while on duty. As previously stated in the commentary regarding jury demandability, there are distinct reasons why a person should have a right to a jury of peers when the complaining witness is a law enforcement officer. Also, as noted in a provision described further below, the CCRC recommends that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change clarifies the revised statutes.

[477] D.C. Code § 22–3302.

(6) *OAG, App. C at 524-525 recommends changing the threshold for jury demandability when there are multiple charges to a cumulative term of imprisonment of more than 90 days. OAG says that, "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."*

- The RCC partially incorporates this recommendation by adjusting the length of cumulative imprisonment to be "more than $1,000 or a cumulative term of imprisonment of more than 90 days." However, as noted in a provision described further below, the CCRC recommends that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change improves the proportionality of the revised statutes.

(7) *PDS, App. C at 529 recommends that "all offenses that permit a punishment that includes incarceration should be jury demandable." PDS cites the reasoning of Chief Judge Washington in the case of* Bado v. United States, *186 A.3d 1243 (D.C. 2018).*

- The RCC partially incorporates this recommendation by recommending that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change would bring the District in line with the majority of the country and satisfy the principle articulated by OAG that "defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial." However, the delay in implementation would provide government institutions and private practitioners to prepare for possible changes in charging and trial caseload. This change improves the clarity, consistency, and proportionality of the revised statutes.

(8) *PDS, App. C at 529 recommends expanding the RCC jury trial right regarding sex offender registration "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." PDS says that, "[c]urrently, this would expand this provision to include gun offenses that require a convicted defendant to register as a gun offender.*[478]

- The RCC partially incorporates this recommendation by recommending, in a provision described above, that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. In the interim, however, the CCRC declines to extend jury demandability to all crimes that may subject a person to a registration requirement. As described in the commentary, ex offender registration is a uniquely stigmatizing form of registration that distinguishes this crime from others. This change improves the proportionality of the revised statutes.

[478] D.C. Code § 7–2508.02.

(9) *PDS, App. C at 530-531 recommends expanding the RCC jury trial right for persons who (if they were a non-citizen) would be subject to deportation to include charges that could result in denial of naturalization under federal immigration law. PDS says that the consequences of denial of naturalization are "devastating." PDS proposes specifically adding the phrase "or denial of naturalization under federal immigration law" to the end of the current RCC provision related to deportation.*

- The RCC incorporates the language recommended by PDS. Denial of naturalization is a collateral consequence that, while civil in nature, holds life-altering consequences for the accused and their family. This change improves the proportionality of the revised statutes.

(10) *PDS, App. C at 531 recommends (similar to an OAG comment) changing the threshold for jury demandability when there are multiple charges to a cumulative term of imprisonment of more than 90 days or more than $1,000.*

- The RCC incorporates this recommendation by adjusting the length of cumulative imprisonment to be "more than $1,000 or a cumulative term of imprisonment of more than 90 days" offense, changing both the amount of imprisonment and fine thresholds. This change improves the proportionality of the revised statutes.

(11) *USAO, App. C at 536 recommends that, with respect to prior subsections (b)(1)(A), (b)(1)(B), and (b)(1)(F), consistent with current District 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. USAO says that while the RCC commentary notes the historical context for earlier decisions about limiting jury rights, "[m]any concerns that relate to judicial efficiency, however, remain in place."*

- The RCC does not incorporate this recommendation because it would decrease the proportionality of the revised statutes. USAO concerns about additional costs assume that prosecutors will not adjust to the expansion of jury demandability by bringing different (or fewer) charges for the Classes B-E misdemeanors that would be jury demandable under the RCC recommendation, or that court processing abilities are fixed and static. As noted in the commentary, District misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions, and there is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting some of these bench trials to jury trials. It is unclear what additional administrative costs will arise under the expanded jury rights of the RCC, but these appear to be outweighed by the benefits to the administration of justice in the District by expansion of community voices in juries.

(12) *USAO App. C at 538 recommends that prior subsection (b)(1)(E) be more limited to align with what it describes as the D.C. Court of Appeals' majority holding in* Bado v. United States, *186 A.3d 1243 (D.C. 2018). USAO says that the court ruling "focused on the harms incurred by someone who is actually facing the possibility of deportation or is deported" and the holding and rationale*

"would only apply to those actually facing the possibility of deportation—not to all defendants, regardless of their citizenship status." USAO also says that, "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."

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The USAO recommendation does not address the fundamental problem that, per its recommended language, non-citizens would be in the position of having to reveal their immigration status in open court in order to claim a constitutional right, potentially triggering investigation and the very consequences that the *Bado* opinion recognizes as serious enough under a constitutional standard to warrant jury rights. As a sub-constitutional matter, to avoid placing persons who may be subject to deportation proceedings in such a position, the CCRC recommends a more expansive access to a jury trial as the majority of other states provide. The courts are often called upon to construe federal immigration law and application of the RCC standard is within the court's abilities notwithstanding potential complexities.

(13) *USAO, App. C at 540-541, recommends removal of prior subsection (b)(1)(D), regarding jury demandability for crimes requiring sex offender registration. USAO cites case law stating that sex offender registration is "an administrative requirement and not penal in nature" such that the constitution does not require a jury trial where the maximum penalty exceeds 180 days. USAO also cites its testimony in 2005 to the D.C. Council for the points that the office sometimes "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" and that jury trials take longer and may delay resolution of a sex offense case such that, if children or minors are involved, their ability to testify may be impaired.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The CCRC recognizes that testifying before a jury may be more difficult for some witnesses than testifying before a judge, and that resolution may take longer should a jury trial occur. However, given the low 5% misdemeanor bench trial rates and the fact that a strong majority of states provide jury trials in all cases involving any amount of imprisonment, the RCC approach would be well within accepted norms. Sex offense cases may, in fact, raise credibility questions and questions about community norms that make having a diverse jury weighing the evidence particularly valuable to a just resolution.

(14) *The CCRC recommends deletion of current D.C. Code language requiring judicial and prosecutorial consent either to a defendant's waiver of a jury trial, (except that, if the waiver occurs within 10 days of a scheduled trial the court must consent to a waiver of a jury trial), or to invoke a right to a jury trial that is not required by the Constitution. Under current D.C. Code § 16-705(a), the plain language of the statute requires that a jury trial be held for offenses to which a defendant has a right to a jury under the Constitution, unless the*

defendant requests trial by the court "and the court and the prosecuting officer consent thereto."[479] *This language appears to allow the court or a prosecutor, by withholding their consent to a defendant's request for a trial by court, to require a defendant to have a jury trial where the Constitution provides a jury trial right. Also, under current D.C. Code § 16-705(b)(2), the plain language of the statute requires that a trial by the court be held for offenses to which a defendant does not have a right to a jury under the Constitution, unless the defendant requests trial by jury "and the court and the prosecuting officer consent thereto."*[480] *This language appears to allow the court or a prosecutor, by withholding their consent to a defendant's request for a jury trial, to require a defendant to have a trial by the court trial where the Constitution does not provide a jury trial right. It is unclear how requiring prosecutorial and court consent to demand a jury under D.C. Code § 16-705(b)(2) may limit jury demandability for offenses in the D.C. Code with a penalty of 6 months which are presumptively "petty," non-jury demandable offenses under the Constitution.*[481] *There is confusion in at some legislative history as to the Council's intent in categorizing some offenses as 180 day versus 6 month offenses to demarcate jury-demandability,*[482] *and there no case law on point.*

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[479] D.C. Code § 16-705(a) ("In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, 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 without a jury, the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.").

[480] D.C. Code § 16-705 ("(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 which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days (or for more than six months in the case of the offense of contempt of court); or (B) 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; 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.").

[481] According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

As a District offense with a 6 month penalty is presumptively a "petty" offense under *Blanton,* such an offense would appear to fall under D.C. Code § 16-705(b) and by default be subject to a trial by the court unless the defendant requests a trial by jury and the prosecutor consents. It is unclear if more recent legislative decisions setting a 6 month penalty for certain offenses were made with knowledge that prosecutorial discretion could still be exercised to deny jury demands for offenses with a 6 month penalty.

[482] The Council's earliest post-*Blanton* legislation changing dozens of penalties to 180 day maximum imprisonment misstated the *Blanton* holding, with the apparent assumption that a 6 month penalty would be

In contrast, the RCC codifies a right to a jury as a personal right and does not allow a court or prosecutor either to require a jury trial when the defendant timely wishes to waive their right to a jury trial, or to require a trial by court when the defendant wishes to exercise their right to a jury trial for an offense that is not required to be jury demandable under the Constitution. Jurisdictions have taken a range of views on this matter, some treating a defendant's waiver of a jury as a personal right as in the RCC, some treating a defendant's waiver of a jury as subject only to court consent, and others treating a defendant's waiver of a jury as subject to both court and prosecutorial consent.[483] The revised statute resolves significant ambiguity under the current D.C. Code as to the status of offenses subject to a 6 month penalty by clarifying that all offenses specifically described in the revised statute are jury demandable and shall be by jury unless the defendant waives the right. The revised statute also addresses possible administrative concerns by requiring court consent to waiver of a jury trial within 10 days of a scheduled trial.

- These changes improve the clarity and proportionality of the revised statutes.

(15) *The CCRC recommends reorganizing and revising current D.C. Code § 16-705(a) and § 16-705(b-1) to provide a clearer and more consistent articulation of jury demandability, and renumbering current D.C. Code § 16-705(c). The CCRC takes no position at this time on the substance of current D.C. Code § 16-705(c) but notes that some jurisdictions have smaller juries for minor misdemeanor cases.*

- This change improves the organization and clarity of the revised statutes.

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jury demandable under *Blanton* even though the Court holding was that offenses 6 months or less were presumptively petty. *See* Committee on the Judiciary, *Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994,"* (Jan. 26, 1994) at 3 ("Under *Blanton v. City of Las Vegas*, the Supreme Court indicated that it would presume that offenses punishable by less than 6 months imprisonment are "petty offenses" and not subject to 6th amendment guarantees for trial by Jury.").

[483] *See Waiver of Jury Trials, 0030 SURVEYS 24 (Westlaw); People v. Dist. Court of Colorado's Seventeenth Judicial Dist*., 843 P.2d 6, 11 (Colo. 1992) (*en banc*). Notably, Maryland specifically provides that, "The State does not have the right to elect a trial by jury." Md. Rule 4-246.

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RCC § 16-1005A. Criminal Contempt for Violation of a Civil Protection Order.

(16) *OAG, App. C at 565, recommends specifying in commentary that, "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."*

- The RCC incorporates this recommendation by adding OAG's proposed language to the commentary. This change clarifies the revised commentary.

(17) *OAG, App. C at 565 – 566, recommends striking the phrase "extension of the protection order" in subparagraph (a)(1)(C). OAG explains that a protection order cannot be extended without notice to the respondent and the issuance of a new, appealable order.*

- The RCC incorporates this recommendation by striking the language as proposed by OAG. This change may reduce a gap in liability.

(18) *OAG, App. C at 566, recommends revising the commentary concerning D.C. Code § 16-1005(g-1) (regarding violations of protection orders by children) to state, "This change clarifies the revised statutes* and does not change District law.*" (Emphasis added.)*

- The RCC incorporates this recommendation by adding OAG's proposed language to the commentary. This change clarifies the revised commentary.

(19) *OAG, App. C at 566 – 567, recommends specifying in the statutory text that civil protection orders include consent orders, as noted in footnote 2 in the commentary. Alternatively, if this recommendation is not incorporated, OAG recommends that the commentary specifically address this issue and affirmatively state that no change in District law is intended.*

- The RCC partially incorporates this recommendation by amending the commentary to address this issue and affirmatively state that no change in District law is intended. This change clarifies the revised statute.

RCC § 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond.

(1) *OAG, App. C at 564 – 565, recommends specifying that the defense for persons excused from appearing by a prosecutor be limited in several ways. OAG says, "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. [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."]. 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." OAG does not provide draft language for these changes.*

- The RCC does not incorporate this recommendation because it is unnecessary and may reduce the clarity of the revised statute. The revised statute applies only to failure to a appear at a first court appearance. Status hearings, trials, and sentencings are addressed in RCC § 22E-1327, Failure to Appear in Violation of a Court Order. That statute does not include a defense for persons excused by a prosecutor or releasing official.

(2) *USAO, App. C at 592 – 593, recommends increasing the maximum authorized penalty for this offense. USAO states, "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." USAO states, "[T]he maximum penalty needs to be sufficiently high to incentivize the defendant's appearance." USAO states, "[I]t 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." USAO does not specify a penalty recommendation.*

- The RCC does not incorporate this recommendation because it may authorize penalties that are disproportionate. For example, USAO's proposal would punish failing to appear in court after being released by a law enforcement officer as severely or more severely than escaping from a law enforcement officer.[484] An escape warrants a higher punishment because it may create a physical danger when an officer gives chase.

[484] Second degree escape from an institution or officer under RCC § 22E-3401 is a Class A misdemeanor.

- The CCRC notes that notwithstanding the 5-year statutorily authorized penalty for failure to appear, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all charges under D.C. Code § 23–585 was 6 months.[485] The CCRC recommendation here is generally consistent with current practice.
- The CCRC also notes that USAO does not assert that the current penalty in the D.C. Code adequately deter failing to appear.[486]

(3) *PDS, App. C at 586, recommends revising the second element of the offense to require the person "(2) Knowingly 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." PDS explains that, based on current District case law,[487] where a defendant desires but fails to appear, the question for the factfinder should not be whether the failure was voluntary (as defined in RCC § 22E-203) but whether the person's efforts to appear were reasonable.*

- The RCC partially incorporates this recommendation by adopting language similar to PDS' proposed language. The second and third elements of the offense state, "(2) Knowingly fails to make reasonable efforts to appear or remain for the hearing; and (3) In fact, fails to appear or remain for the hearing." This change clarifies the revised statute.

[485] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[486] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

[487] *Foster v. United States*, 699 A.2d 1113 (D.C. 1997).

RCC § 23-1327. Failure to Appear in Violation of a Court Order.

(1) *USAO, App. C at 548, opposes eliminating the statutory minimum for this offense.*
- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.

(2) *USAO, App. C at 592 – 593, recommends increasing the maximum authorized penalty for this offense. USAO states, "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." USAO states, "[T]he maximum penalty needs to be sufficiently high to incentivize the defendant's appearance." USAO states, "[I]t 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." USAO does not specify a penalty recommendation.*
- The RCC does not incorporate this recommendation because it may authorize penalties that are disproportionate. Specifically, USAO's proposal would punish failing to appear in court more severely than escaping from a law enforcement officer.[488] An escape warrants an equal or higher punishment because it may create a physical danger when an officer gives chase.
- The CCRC notes that notwithstanding the 5-year statutorily authorized penalty for failure to appear under D.C. Code § 23–1327, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all charges under D.C. Code § 23–1327(a)(1) felony charges was 20 months, and the 75% quantile was 12 months.[489] The CCRC recommendation here is generally consistent with most convictions in current practice.
- The CCRC also notes that USAO does not assert that the current penalty in the D.C. Code adequately deter failing to appear.[490]

(3) *PDS, App. C at 584 – 586, recommends revising the second element of the offense to require the person "(2) Knowingly 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." PDS explains that, based on current District case law,[491] where*

[488] Second degree escape from an institution or officer under RCC § 22E-3401 is a Class A misdemeanor.
[489] CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.
[490] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").
[491] *Foster v. United States*, 699 A.2d 1113 (D.C. 1997).

a defendant desires but fails to appear, the question for the factfinder should not be whether the failure was voluntary (as defined in RCC § 22E-203) but whether the person's efforts to appear were reasonable.

- The RCC partially incorporates this recommendation by adopting language similar to PDS' proposed language. The second and third elements of the offense state, "(2) Knowingly fails to make reasonable efforts to appear or remain for the hearing; and (3) In fact, fails to appear or remain for the hearing." This change clarifies the revised statute.

(4) *PDS, App. C at 586, recommends eliminating the mandatory consecutive sentencing provision. PDS states, consistent with CCRC's reasoning for eliminating all mandatory minima, "'Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.'"*

- The RCC incorporates this recommendation by striking the mandatory consecutive sentencing provision. Judicial discretion may still be exercised to impose consecutive sentencing. This change improves the consistency and proportionality of the revised statutes.

(5) *CCRC recommends revising the commentary to note the DCCA's recent opinion in* Laniyan v. United States*,*[492] *which was issued shortly before the first draft of this section issued. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*

- This change clarifies the revised commentary.

[492] *Laniyan v. United States*, 226 A.3d 1146 (D.C. 2020).

RCC § 23-1329A. Criminal Contempt for Violation of a Release Condition.

(1) *USAO, App. C at 590, recommends revising a footnote in the commentary that says, "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 [in the same case]." USAO says this statement inaccurate and that "[a] judge may issue an order other than one listed in D.C. Code § 23-1321." USAO cites no authority for this assertion.*

- The RCC does not incorporate this recommendation at this time because the CCRC is not aware of any authority under current District law for the government to request or a criminal court to order conditions for a person who is not released. There is statutory authority to preventatively detain a person[493] and there is statutory authority to release a person on conditions,[494] however, there is no statutory authority to do both. Although it may occur routinely in practice, imposition of such an order appears to be illegal.[495]

(2) *PDS, App. C at 586 – 587, recommends striking the requirement that contempt proceedings be "expedited." PDS states, "[T]his offense is not inherently more urgent than any other criminal offense and should not dictate how judicial resources are expended."*

- The RCC incorporates this recommendation by striking the requirement that a contempt proceeding be expedited. This change clarifies the revised statute.

(3) *PDS, App. C at 587, recommends redrafting the hearing provision to state, "A proceeding determining a violation of this section shall be heard by the court without a jury." PDS states that a bench trial has the same effect but is not the same as a jury trial.*

- The RCC does not incorporate this recommendation because it would be inconsistent with language in D.C. Code § 16-705(a), which is not being revised at this time, and RCC § 16-705(b). The RCC tracks this language to avoid confusion about the consistency between these provisions.

[493] *See, e.g.,* D.C. Code §§ 23-1322(a); 23-1325(a).
[494] D.C. Code § 23-1321(c)(1).
[495] The power that judges in the Superior Court of the District of Columbia have to issue orders derives from statutes that were passed by the D.C. Council and later became law. *See In re T.K.*, 708 A.2d 1012 (D.C. 1998); *see also Salvattera v. Ramirez*, 105 A.3d 1003 (D.C. 2014).

RCC § 24-241.05A. Violation of Work Release.

(1) *PDS, App. C at 586, recommends eliminating the mandatory consecutive sentencing provision. PDS states, consistent with CCRC's reasoning for eliminating all mandatory minima, "'Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.'"*

- The RCC incorporates this recommendation by striking the mandatory consecutive sentencing provision. Judicial discretion may still be exercised to impose consecutive sentencing. This change improves the consistency and proportionality of the revised statutes.

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

(1) *OAG, App. C at 568, states: "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." OAG has not provided an update on this since submitting its comment on June 19, 2020.*

(2) *PDS, App. C at 587-588, recommends changing the revised statute's provision regarding teleconferencing. PDS says that some BOP facilities do not have the capacity for video conferencing or may raise objections to video conferencing because it may occur on non-secure lines. PDS says: "Remote participation should include participation by phone" and "non-physical appearance should only occur with the defendant's consent." PDS provides specific language recommendations*

- The RCC does not incorporate the PDS recommendation at this time pending further investigation whether the Omnibus Public Safety and Justice Amendment Act of 2020 (Bill 23-0127) under Council review considered this recommendation. The CCRC welcomes further information from Advisory Group members as to this matter.

(3) *PDS, App. C at 588, says that: "W*ith 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*.'"*

- The RCC does not incorporate the PDS recommendation because the cited language appears to be part of the original committee bill, B23-0127, introduced as the Second Look Amendment Act of 2019 on February 6, 2019. However, as of writing, neither current D.C. Code § 24-403.03 nor the pending Omnibus Public Safety and Justice Amendment Act of 2020 (Bill 23-0127) contain the described language regarding CTF.

(4) *USAO, App. C at 590-591, recommends against the RCC provision, stating: "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." USAO also says it is "concerned about whether USAO and Superior Court will have sufficient resources available to thoroughly address and litigate these important motions" and 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." Finally, USAO also says it*

"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." USAO also said that, "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." USAO has not provided an update on this since submitting its comment on June 19, 2020.

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. As described in the RCC commentary, the District is an outlier in not having parole eligibility and requiring at least 85% of a sentence be served (under BOP policy). This sentencing policy bars review whether an offender's success in rehabilitation or other changed circumstances merits a reduction in sentence. The RCC recommendation to expand second look procedures would provide a mechanism for such review after a minimum of 15 years incarceration. The resource concerns of USAO are significant but must be balanced against the resource costs of lengthy incarceration terms and the more weighty justice concerns at stake in the proposal.

(5) *The CCRC sole recommendation remains that the age restriction in D.C. Code § 24-403.03 as to time of the offense be removed. While legislation changing the age at the time of the offense to before the 25th birthday and otherwise changing the drafting of the statute is pending, the CCRC makes no change to the language in the draft RCC statutory text or commentary pending finalization of that legislation, the Omnibus Public Safety and Justice Amendment Act of 2020 (Bill 23-0127).*

RCC § 48-904.01a. Possession of a Controlled Substance.

(1) *OAG, App. C at 481, states that subsection (g) does not "permit a prosecutor from retaining a copy of the record as a check on the court." OAG recommends that subsection (g) be redrafted to include the words "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)."*

- 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.
- However, the RCC will delete omit the words "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." These words are unnecessary, as subsection (g) has been amended to allow for dismissals regardless of whether a person has previously had a possession of a controlled substance case dismissed. This change clarifies the revised statutes.

(2) USAO, App. C at 589-590, states that it agrees with OAG's recommendation that USAO should be authorized to retain a non-public record of cases dismissed under section (g) of RCC § 48-904.01a. USAO notes that requiring USAO to expunge records may violate the Home Rule Act.

- The RCC does not incorporate this change for the reasons discussed above in response to an identical recommendation from OAG. With respect to the Home Rule Act, there is no D.C. Court of Appeals case law as to whether mandating USAO expungement of records violates the Home Rule Act. D.C. Code § 16-803 specifically authorizes "the prosecutor's office" to retain any and all records relating to the . . . arrest and conviction in a nonpublic file[.]" However, if omitting reference to D.C. Code § 16-803 violates the Home Rule Act, then the current statute already appears to violate the Home Rule Act. The current possession of a controlled substance statute does not reference D.C. Code not reference § 16-803, or otherwise specifically authorize USAO to maintain non-public records.[496] The CCRC is not aware of any litigation about a Home Rule Act issue with this provision, but welcomes Advisory Group updates about any such litigation.

(3) OAG, App. C at 482, recommends that paragraph (g)(2) be re-drafted to replace the word "him" with "him or her."

[496] The current statute states that "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[.]" D.C. Code § 48-904.01 (e) (emphasis added). This subsection does not specifically authorize the USAO to retain a non-public record.

- The RCC partially adopts this recommendation by changing the word "him" with the gender neutral word "the person." This change improves the clarity of the revised statute.

(4) OAG, App. C at 482, recommends that paragraph (g)(2) be re-drafted to replace the phrase "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" with the phrase "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 notes that this change clarifies that this rule cannot apply with respect to statements to federal law enforcement officials, including the USAO.

- The RCC does not adopt this recommendation at this time because it would change current District law in a way that would undermine the effect of prior District record sealing legislation. 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. Exempting the USAO would undermine the purpose of this clause, and would require persons to disclose their prior arrests, indictments, or trials even when those cases resulted in dismissal.

(5) PDS, App. C at 491, recommends that the RCC include a general provision that allows for judicial dismissal of proceedings for all offenses up to a certain class, similar to the dismissal proceeding under subsection (g) of RCC § 48-904.01a.

- The RCC does not incorporate this recommendation at this time. However, the CCRC may re-visit the issue at a later time and consider whether other offenses should be subject to judicial dismissals if certain conditions are met.

(6) The CCRC recommends amending subsection (g) to specify that discharge or dismissal under subsection (g) "shall not be deemed a conviction for purposes . . . under RCC § 22E-606[.]" This change is intended to clarify that dismissals under subsection (g) do not authorize repeat offender penalty enhancements under RCC § 22E-606.

- This change improves the clarity and proportionality of the revised criminal code.

(7) The CCRC recommends deleting paragraph (g)(3), which specifies that a person who is discharged under this subsection is "entitled to a copy of the nonpublic record retained under paragraph (1) of this subsection[.]" Since non-public records will no longer be kept, this paragraph is unnecessary.

- This change improves the clarity and consistency of the revised criminal code.

(7) The CCRC notes that a technical amendment may be required to the definition of "controlled substance" as defined under D.C. Code § 48-901.02. The term "controlled substance" is subject to several limitations relating to marijuana as

set forth in D.C. Code § 48-904.01.[497] *The term "controlled substance" as used in the RCC is intended to have the same meaning as under the current D.C. Code, including the limitations set forth in § 48-904.01. The CCRC recommends that the definition of "controlled substance" in § 48-901.02 be amended to include the limitations relating to marijuana that are currently included in § 48-904.01.*

- This change improves the clarity of the revised criminal code and the D.C. Code.

[497] D.C. Code *§ 48-904.01 states that the terms* "controlled substance" and "controlled substances," shall not include:
"(i) Marijuana that is or was in the personal possession of a person 21 years of age or older at any specific time if the total amount of marijuana that is or was in the possession of that person at that time weighs or weighed 2 ounces or less;
(ii) Cannabis plants that are or were grown, possessed, harvested, or processed by a person 21 years of age or older within the interior of a house or rental unit that constitutes or at the time constituted, such person's principal residence, if such person at that time was growing no more than 6 cannabis plants with 3 or fewer being mature flowering plants and if all persons residing within that single house or single rental unit at that time did not possess, grow, harvest, or process, in the aggregate, more than 12 cannabis plants, with 6 or fewer being mature, flowering plants; or
(iii) The marijuana produced by the plants which were grown, possessed, harvested, or processed by a person who was, pursuant to sub-subparagraph (ii) of this subparagraph, permitted to grow, possess, harvest, and process such plants, if such marijuana is or was in the personal possession of that person who is growing or grew such plants, within the house or rental unit in which the plants are or were grown."

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

(1) *USAO, App. C at 518-19, recommends that the CCRC consult with the Department of Forensic Sciences (DFS) regarding subsection (g), to determine whether DFS is able to determine the concentration of a controlled substance included within an edible product.*

- The CCRC contacted DFS to inquire as to the feasibility of performing purity analysis with respect to edible products. DFS provided a written response, in which it stated that while its staff is capable of performing qualitative analysis to determine the presence of controlled substance in edibles, it does not currently have quantitative testing methods in place to measure the amount of controlled substances included in edibles.[498] DFS stated that while it was interested in expanding its testing capabilities, it would not be able to perform this analysis until it had established new testing methods which may not be possible under its currently available budget. Finally, DFS stated its belief that some nearby laboratories may have protocols that would allow them to conduct quantitative analysis [on contract], but DFS does not have specific information on their capacities or accreditation for such testing.

(2) *The CCRC recommends deleting paragraph (i)(3), which specified the burden of production and proof for the defenses defined under subsection (i). This paragraph is unnecessary as subsection (k) specifies that the genera provisions in Chapters 1 through 6 shall apply to this offense, including RCC § 22E-201 which specifies burdens for all defenses.*

- This change improves the clarity and consistency of the revised criminal code and the D.C. Code.

[498] In its response, DFS specifically noted that it does not have testing methods in place to test for the quantity of "THC, THC-A, CBD, and CBD-A, which are the typically regulated compounds for edible products." DFS's response did not state whether it has testing methods to test for quantity of other controlled substances contained in edibles.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

(1) *PDS, App. C at 491, recommends that the trafficking in counterfeit substance offense also include a provision similar to subsection (g) under the trafficking of a controlled substance, which states that the weight of mixtures and compounds does not include edible products or non-consumable containers.*

- The RCC adopts this recommendation. This language is identical to an analogous subsection in RCC § 48-904.01b. This change improves the consistency and proportionality of the revised statute.

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

(1) *OAG, App. C at 483 notes that subsection (b) is missing the word "not."*

- The RCC adopts this recommendation and adds the word "not" to subsection (b). This change improves the clarity of the revised statute.

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

(1) *The CCRC recommends re-labeling the exclusion to liability under subsection (b) as a defense. This change does not substantively change the revised offense. Under RCC § 22E-201, under both exclusions and defenses, if there is any evidence at trial then the government bears the burden of disproving all elements of the exclusion or defense beyond a reasonable doubt.*

- This change improves the clarity of the revised statutes.

RCC § 22E-602. Authorized Dispositions.

PDS, App. C at 584, reiterates its previous recommendation, App. C at 491 that the CCRC create a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class, similar to the deferred disposition subsection in RCC § 22E-4401(c), 4402 (b), and 48-904.01a (g).

- The RCC now incorporates this recommendation. RCC § 22E-602 is amended to include a new subsection (c) that allows a judge to defer proceedings when a defendant is convicted of any Class C, D, or E offense. Under this subsection, if a defendant is convicted of a Class C, D, or E offense, the judge may defer further proceedings without entering a judgment of guilty, and place the defendant on probation subject to reasonable conditions. If the defendant does not violate the terms of probation, the judge shall dismiss the proceedings against the defendant without entering a judgment of guilty.
- 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 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.
- In addition, the CCRC recommends that the deferred disposition provisions be deleted from RCC §§ 22E-4401, 22E-4402, and 48-904.01a. When a defendant is found guilty under either of those statutes, a judge may still defer disposition under RCC § 22E-602.
- This change improves the proportionality and consistency of the revised criminal code.

RCC § 22E-603. Authorized Terms of Imprisonment.

(1) *PDS, App. C at 531 recommends lowering the statutory maximum for Classes 1, 2, and 3 to 30 years, 28 years, and 26 years, respectively. PDS says that the draft RCC penalty recommendations for these classes "will perpetuate the mass incarceration has caused the United States to have the highest incarceration rate in the world" and "will further an incredible racial disparity in incarceration." PDS, citing to the epilogue in the Pulitzer prize book "Locking Up Our Own,"[1] says that, "[w]hile 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." PDS argues and cites research that most incarcerated people are parents, that individuals "age out" of crime, that the "the overwhelming majority of criminal justice system relies too heavily on incarceration and strongly prefer investments in prevention and treatment to more spending on prisons and jail,"[2] and that there is no evidence of a meaningful additional deterrent effect between a 60 year and 30 year sentence.*

- The RCC partially incorporates this recommendation by revising maximum imprisonment penalties for classes 1, 2, and 3 to 45 years, 40 years, and 30 years respectively. The RCC § 22E-603 commentary further explains the rationale for this change. This change improves the proportionality of the revised statutes.

(2) *USAO, App. C at 552, recommends increasing the penalties for Creating or Trafficking an Obscene Image of a Minor, and for Possession of an Obscene Image of a Minor to "align more closely with federal law." USAO cites federal statutes providing a mandatory minimum of 15 years and a maximum of 30 years for producing child pornography, and possession of child pornography offenses with maxima of 10 or 20 years depending on the age of the child. USAO does not provide a rationale (deterrence, severity of the offense, etc.) for its recommendation or provide other explanation.*

- The RCC does not incorporate this recommendation because doing so would result in disproportionate penalties. Federal penalties for child pornography have received sharp criticism from sentencing experts and many federal judges,[3] and the CCRC does not seek to change District law to follow federal precedent on this matter.
- The CCRC notes that court data for 2010-2019 shows that the 97.5% quantile of sentences for all charges under D.C. Code § 22– 3102(b) (Sexual Performance Using Minors (Attend, Transmit, or Possess)) was

[1] James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (2018).
[2] 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.
[3] *See, e.g.,* Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?,* 22 Stan. L. & Pol'y Rev. 545 (2011).

17.7 months.[4] The CCRC recommendation here is consistent with current District practice.

(3) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC robbery statute, USAO states that third degree robbery is "comparable to" armed robbery under current D.C. Code §§ 22-2801, -4502, which has a maximum possible penalty of 30 years incarceration where bodily injury results from a dangerous weapon or to a protected person; and armed carjacking under current D.C. Code § 22-22-2803, which has a maximum possible penalty of 30 years unless other conditions are met that would increase the maximum. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. Since the USAO comment was made, robbery with significant bodily injury or involving seizure of a motor vehicle has been re-graded to be second degree robbery, and classified as a Class 8 offense unless the complainant is a protected person (then it is a Class 7 offense), or a dangerous weapon is used or displayed (then it is a Class 6 offense).
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[5] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[6] 5) relative ordering of related RCC offenses;[7] and 6) national data on sentencing and time served.[8] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 45 year statutorily authorized penalties for armed robbery armed under current D.C. Code §§ 22-2801 and 22-4502,[9] and 30+ year statutorily authorized penalties for armed carjacking under D.C. Code § 22-2803, actual practice in the District has been sharply different. Court data for 2015-2019 shows that the 97.5% quantile of all sentences for all forms of robbery, including robberies committed while armed and inflicting *serious* bodily injury

[4] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[5] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[6] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[7] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[8] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[9] Note that D.C. Code 22-4502 provides up to an *additional* 30 years and a mandatory minimum of 5 years for commission of robbery while armed—on the first offense.

(which is classified higher under the RCC as first degree or enhanced first degree robbery) was 96 months (8 years).[10] The 97.5% quantile of unenhanced (not while-armed or a protected person) robbery sentences during this period was 72 months (6 years) and included robberies involving a serious bodily injury (again, the equivalent in the RCC of first degree robbery).[11] As for carjacking, it appears virtually all sentences (at least 97.5%) are at the District's current mandatory minimum of 15 years. The CCRC recommendation here is comparable to robbery penalties and significantly lower than current carjacking penalties in current court practice.

(4) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. In relevant part, USAO states that the RCC involuntary manslaughter is "comparable to" manslaughter under current D.C. Code § 22-2105, which has a maximum possible penalty of 30 years incarceration. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Involuntary manslaughter is the less serious of the two forms.
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[12] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[13] 5) relative ordering of related RCC offenses;[14] and 6) national data on sentencing and time served.[15] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for involuntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply

[10] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[11] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[12] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[13] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[14] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[15] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for involuntary manslaughter was 86.6 months (7.2 years). The CCRC recommendation here is generally consistent with involuntary manslaughter penalties in current court practice.

(5) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years[16] to 15 years. In relevant part, USAO states that the RCC enhanced involuntary manslaughter is "comparable to" manslaughter under current D.C. Code § 22-2105, which has a maximum possible penalty of 30 years incarceration. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 15 years' incarceration to 12 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Involuntary manslaughter is the less serious of the two forms, and under the RCC an enhancement applies primarily when the complainant is a protected person.
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[17] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[18] 5) relative ordering of related RCC offenses;[19] and 6) national data on sentencing and time served.[20] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for involuntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for involuntary manslaughter was 86.6 months (7.2 years). The CCRC recommendation here encompasses involuntary manslaughter penalties in current court practice.

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[16] The USAO comment actually refers to the RCC recommendation as being "10 year," however that appears to be a typo. At the time the comment was made (and currently), the RCC recommends Class 6 felonies be subject to a 12 year maximum imprisonment penalty.

[17] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

[18] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

[19] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

[20] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

(6) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. In relevant part, USAO states that the RCC kidnapping is "comparable to" kidnapping under current D.C. Code § 22-2001, which has a maximum possible penalty of 30 years incarceration. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 20 years' incarceration to 18 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. Notably, since the USAO provided its comment the CCRC has recommended a different organization for the offense such that the prior comment referring to "kidnapping" appears to apply to conduct that is now split between both first and second degree kidnapping under RCC § 22E-1401(a) and (b). The RCC now recommends classifying first degree kidnapping as a class 5 offense (18 years max) and a class 7 offense (8 years max).
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[21] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[22] 5) relative ordering of related RCC offenses;[23] and 6) national data on sentencing and time served.[24] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for kidnapping under current D.C. Code § 22-2001, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for all kidnapping offenses (including while-armed and protected person complainants which are subject to higher penalties in the RCC) was 204 months (17 years). The CCRC recommendation here is generally consistent with penalties in current court practice.

(7) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. In relevant part, USAO states that the RCC voluntary manslaughter is "comparable to" manslaughter under current D.C. Code § 22-2001, which has a maximum possible penalty of 30 years incarceration. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 20 years' incarceration to 18 years'*

[21] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[22] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[23] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[24] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Voluntary manslaughter is the more serious of the two forms, and under the RCC an enhancement applies primarily when the complainant is a protected person.
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[25] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[26] 5) relative ordering of related RCC offenses;[27] and 6) national data on sentencing and time served.[28] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for voluntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for voluntary manslaughter was 180 months (15 years). The CCRC recommendation here encompasses voluntary manslaughter penalties in current court practice.

(8) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. In relevant part, USAO states that the RCC second degree murder is "comparable to": 1) second degree murder under current D.C. Code § 22-2103 -2104, which has a maximum possible penalty of 40 years incarceration unless aggravators are present; and 2) first degree murder with respect to felony murder under D.C. Code § 22-2101 -2014 which has a maximum possible penalty of 60 years incarceration unless aggravators are present. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 30 years' incarceration to 24 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

[25] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[26] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[27] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[28] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. The RCC does not include felony murder within first degree murder unless the actor also (in addition to committing the murder in the course of a specified felony) has the culpable mental state otherwise required for first degree murder. However, it is unclear from existing court data whether and to what extent what is now sentenced as felony murder would only be prosecutable as second degree murder in the RCC.
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[29] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[30] 5) relative ordering of related RCC offenses;[31] and 6) national data on sentencing and time served.[32] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 40 year statutorily authorized penalties for second degree under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for all second degree murder, including enhanced penalties, was 324 months (27 years). [33] The 97.5 quantile for unenhanced second degree murder was 308.2 months (25.7 years).[34] The CCRC recommendation here is somewhat lower than penalties in current court practice for second degree murder.

(9) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. In relevant part, USAO states that the RCC enhanced voluntary manslaughter is "comparable to" manslaughter under current D.C. Code § 22-2105, which has a maximum possible penalty of 30 years incarceration unless aggravators are present. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 30 years' incarceration to 24 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in

[29] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[30] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[31] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[32] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[33] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[34] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Voluntary manslaughter is the more serious of the two forms, and under the RCC an enhancement applies primarily when the complainant is a protected person.

- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[35] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[36] 5) relative ordering of related RCC offenses;[37] and 6) national data on sentencing and time served.[38] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for voluntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for voluntary manslaughter (including sentences with enhancements) was 180 months (15 years). The CCRC recommendation here encompasses voluntary manslaughter penalties in current court practice.

(10) *USAO, App. C at 544-545, recommends increasing the maximum possible penalty for a Class 3 felony from 36 years to 40 years. In relevant part, USAO states that the RCC enhanced second degree murder is "comparable to": 1) second degree murder under current D.C. Code § 22-2103 -2104 with aggravators under D.C. Code § 24-403.01(b-2), which has a maximum possible penalty of life incarceration; and 2) first degree murder with respect to felony murder under D.C. Code § 22-2101 -2014 with enhancements, which has a maximum possible penalty of life imprisonment. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 40 years' incarceration to 36 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. The RCC does not include felony murder within first degree murder unless the actor also (in addition to committing the murder in the course of a specified felony) has the culpable mental state otherwise required for first degree murder.

[35] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[36] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[37] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[38] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

However, it is unclear from existing court data whether and to what extent what is now sentenced as felony murder would only be prosecutable as second degree murder in the RCC. Notably, the CCRC now recommends that class 3 felonies be subject to a maximum of 30 years imprisonment.

- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;[39] 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;[40] 5) relative ordering of related RCC offenses;[41] and 6) national data on sentencing and time served.[42] Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high life imprisonment authorized penalty for aggravated second degree murder under current D.C. Code § 22-2103, -2104 and D.C. Code § 24-403.01(b-2), actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for all second degree murder, including enhanced penalties, was 324 months (27 years).[43] The 97.5 quantile for unenhanced second degree murder was 308.2 months (25.7 years).[44] The CCRC recommendation here is generally consistent with current court practice for second degree murder.

(11) *USAO, App. C at 545, recommends the CCRC codify "codify the CCRC's intent to have an increased reliance on consecutive sentences, rather than concurrent sentences." USAO says that: "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." USAO does not provide any specific language for its recommendation.*

- The CCRC does not incorporate this recommendation because doing so would make the revised statutes less clear and may result in disproportionate penalties. As the CCRC Director clarified at the June 2020 Advisory Group meeting, the CCRC does not intend that there be

[39] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[40] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.
[41] CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.
[42] *See* Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).
[43] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.
[44] CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

increased reliance on consecutive sentencing as described by USAO. Rather, the CCRC has pointed out that consecutive sentencing remains an option under the RCC just as in current law, and that in many cases increased use of consecutive sentencing by District sentencing judges may result in overall imprisonment terms that offset the reduced incarceration terms under the RCC. The CCRC takes no position as to whether a sentencing judge should, in a particular case or in the aggregate, make greater use of consecutive sentencing authority. Moreover, codifying language as suggested by USAO would be extremely difficult to do with clarity as to which cases are or are not suitable for consecutive sentencing and is a matter more appropriate for sentencing guidelines and individual judicial discretion.

(12) *The CCRC recommends changing the maximum imprisonment penalties for felony classes 1 and 2 from 60 and 45 years (respectively) to 45 and 40 years, changing class 3 from 36 to 30 years, changing felony classes 8 and 9 from 5 and 3 years (respectively) to 4 and 2 years, as well as changing the misdemeanor Classes C and D from 90 days and 30 days (respectively) to 60 days and 10 days. The RCC § 22E-603 commentary further explains the rationale for these changes.*

- This change improves the proportionality of the revised statutes.

CCRC Responses and Recommended Revisions Relevant to Multiple RCC Statutes

(1) *The CCRC recommends specifying "in fact" in several exclusions from liability, defenses, and general provisions in Chapters 2 and 3 to clarify that in those provisions no culpable mental state, as defined in RCC § 22E-205, applies beyond what is specified in the statute (e.g. accomplice liability requires acting with the culpability required for that offense, but there is no additional requirement). This revision was made in the previous compilation and should be done consistently for exclusions and defenses that do not require a culpable mental state.*

- This change improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends replacing references to the "Superior Court for the District of Columbia" with "court" in the following RCC statutes: 1) Civil Provisions on the Duty to Report a Sex Crime (RCC § 22E-1309); 2) Admission of Evidence in Sexual Assault and Related Cases (RCC § 22E-1310); 3) Unlawful Creation or Possession of a Recording (RCC § 22E-2105); and 4) Unlawful Operation of a Recording Device in a Movie Theater (RCC § 22E-2106). For RCC §§ 22E-1309 and 22E-1310, the current D.C. Code equivalent statutes[1203] use "court" generally and it was an error to specify Superior Court in the RCC statutes. For RCC §§ 22E-2105 and 22-2106, the forfeiture provisions are new and using "court" as opposed to Superior Court is consistent with the similar forfeiture provisions in the RCC[1204] and D.C. Code[1205] Deceptive Labeling statutes. This is a non-substantive drafting clarification.*

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends adding to commentary entries for defenses or exclusions from liability that refer to "reasonably believes" a statement that: "Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist."*

- This change improves the clarity and consistency of the revised statutes.

[1203] D.C. Code §§ 22-3020.51 – 3020.54; 22-3021 – 22-3024.
[1204] RCC § 22E-2207.
[1205] D.C. Code § 22-3214.01.

RCC § 22E-102. Rules of Interpretation.

(1) *OAG, App. C at 640-42, recommends adding a new subsection that specifies that when statutes use terms defined in § 22E-701, but are not referenced in that statute's definitions subsection, that "inclusion or exclusion in a cross-reference shall not affect the provision's interpretation." OAG says that, "[t]erms and phrases should be interpreted to be consistent with the plain meaning of the statute."(citing* Pannell-Pringle v. D.C. Dep't of Emp't Servs*., 806 A.2d 209, 213-14 (D.C. 2002)). OAG proposes specific clarificatory language that would read: "Effect of definitional cross-references. 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."*

- The RCC partially adopts this recommendation by including a new subsection (c) that states: "*Effect of definition cross references*. Cross references to definitions located elsewhere in this title, or omissions of such cross references, may aid the interpretation of otherwise ambiguous statutory language." This RCC language parallels the language in the prior subsection (b) concerning the effect of captions and titles in the RCC. Commentary further clarifies the meaning and effect of cross references to Title 22E definitions, or omissions of such cross references. This change improves the clarity of the revised statutes.

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

(1) *The CCRC recommends replacing the words "all elements" with "at least one element" in paragraphs (b)(1) and (b)(2). Under the prior language, when there was evidence of an exclusion or defense, the government was required to prove the absence of all elements of the exclusion or defense. This rule improperly limits liability.*[1206]

- This change improves the proportionality of the revised statutes.

(2) *The CCRC recommends changing the defined term "culpability requirement" in subsection (e) to "culpability required" and making conforming changes to the definition of "offense element" in subsection (c). These non-substantive changes make it clear that when there is reference to "culpability required" in later sections of Chapter 2 and 3, the term in subsection (e) is meant. Previously this was only clear in commentary.*

- This change improves the clarity and consistency of the revised statutes.

[1206] For example, under RCC § 22E-403 self-defense requires that the actor reasonably believes that the actor is in imminent danger of physical harm, and that the actor's conduct was will protect against the harm and is necessary in degree. If the government concedes that the actor reasonably believed that harm was imminent, but proves that the actor's conduct was not necessary in degree, the defense should not apply. Under the prior language, in this hypothetical the government would not have met its burden and the defense would apply.

RCC § 22E-204. Causation Requirement.

(1) *The CCRC recommends replacing the phrase "the actor is justly held responsible for the result" with the phrase "there is a close connection between the actor's conduct and the result[.]" This phrase more closely aligns with language from D.C. Court of Appeals case law pertaining to proximate causation when there is an intervening volitional act by another person. The relevant factors for determining whether an actor may be "justly held responsible for the result" are also relevant in determining whether there is a "close connection" between the actor's conduct and the result.*

- This change improves the clarity of the revised criminal code.

RCC § 22E-205. Culpable Mental State Requirement.

(1) *The CCRC recommends deleting the phrase "or a comparable mental state specified in this title" from paragraph (b)(1). As the commentary explained, this phrase had been introduced not to make additional terminology in the RCC recommendations a defined "culpable mental state," but to allow the Council in the future to add to the definition of "culpable mental state" if it wished. However, this placeholder for a possible future change is confusing as to whether other terminology now in the RCC is a "culpable mental state." The deletion of this phrase does not limit the power of the Council, of course, to add or subtract culpable mental state terminology in the future.*

- This change improves the clarity of the revised statutes.

RCC § 22E-206. Definitions and Hierarchy of Culpable Mental States.

(1) The CCRC recommends combining the culpable mental state definition of "intentionally" with the definition of "knowingly" in subsection (b) and adjusting subsection numbering for the remainder of the statute accordingly. As previously stated in the commentary, the terms knowingly and intentionally are equivalent in terms of the subjective mental state that must be proven and differ only in how they relate to the objects of the terms and whether those circumstance or result elements have to be proven. Knowingly is used in statutes, consistent with ordinary language, when the following circumstance or result element must be proven to have actually existed or occurred; intent is used in statutes when the following circumstance or result element is inchoate and need not be proven to have actually existed or occurred. In the RCC the only variant of the culpable mental state "intentionally" that is used is "with intent," and RCC § 22E-205(b) clearly provides that "[t]he object of the phrases 'with intent'" (and "with the purpose") are not stand-alone objective elements that must be proven but are rather part of the culpable mental state itself. While the RCC is careful to use "intentionally" only in the form "with intent" and only where the following object is inchoate, the prior draft's separate subsection for "intentionally" may lend itself to subsequent legislative drafters misusing the term when an inchoate element did not follow. To ameliorate this possibility, to avoid possible confusion as to there being a difference in the subjective mental state requirements as to "knowingly" or "with intent," and to further make the RCC culpable mental state definitions align with the MPC and other jurisdictions' four-level distinctions in culpable mental states, the CCRC recommends merging the definition of "intentionally" that previously was in subsection (c) into the definition of "knowingly" in subsection (b). No substantive change as compared to the prior draft is intended by this reorganization.

- This change improves the clarity and organization of the revised statutes.

(2) *The CCRC recommends in the definitions of "recklessly" and "negligently" referring to consideration of "the nature and motivation for the person's conduct and the circumstances the person is aware of" instead of the nature and purpose of the person's conduct and the circumstances known to the person…". Replacing "purpose of" with "motivation for" and "known to" with "is aware of" avoid confusion about the meaning since "purpose" and "known" are separately defined culpable mental state terms. The RCC intends the new terminology to be functionally equivalent to the prior language for assessing the nature and degree of risk at issue.*

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends in the definitions of "recklessly" and "negligently" referring to the disregard or failure to perceive the risk being "a gross deviation from the standard of [conduct] [care] that a reasonable individual would follow in the person's situation" instead of being "clearly blameworthy." As compared*

to the prior RCC language, the updated language provides a clearer standard for application and more closely tracks the standard Model Penal Code[1207] *language used, with minor variants, in dozens of jurisdictions. The relevant factors for determining whether an actor may be "clearly blameworthy" are functionally the same as under the gross deviation standard and the same examples and commentary apply. The RCC commentary on this point merely substitutes the "gross deviation…" for the clearly blameworthy language.*

- This change improves the clarity and consistency of the revised statutes.

[1207] Model Penal Code § 2.02 ("(c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. (d) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

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

(1) *The CCRC recommends changing the subsection (b) provision to eliminate unnecessary references to "the existence of the" and "applicable." No substantive change is intended compared to the prior drafting.*

- This change improves the clarity of the revised statutes.

(2) *The CCRC recommends changing the subsection (c) provision regarding mistake or ignorance of law to read "A person remains liable for an offense when they are mistaken or ignorant …" instead of "A person may be held liable for an offense when they are mistaken or ignorant…." The prior "may" was unclear and "remains" better communicates the point that ignorance of the law is not a defense when elements of an offense are otherwise proven (except as provided in (c)(1) and (c)(2)). No substantive change is intended compared to the prior drafting.*

- This change improves the clarity of the revised statutes.

RCC § 22E-209. Principles of Liability Governing Intoxication.

(1) *The CCRC recommends changing the subsection (b) provision to refer to "a result or circumstance element" in each paragraph. No substantive change is intended compared to the prior drafting.*

- This change improves the clarity of the revised statutes.

(2) *The CCRC recommends changing the subsection (b) provision to refer to the gross deviation standard now recommended in RCC § 22E-206 (instead of "clearly blameworthy"). No substantive change is intended compared to the prior drafting.*

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends amending the definition of "self-induced intoxication" in subsection (c) to clarify culpable mental states and make various other non-substantive changes. The revised definition reads: "'Self-induced intoxication' means intoxication that, in fact, is caused by a substance that an actor knowingly introduces into their body, negligent as to the tendency of the substance to cause intoxication and, in fact, the substance was not introduced pursuant to medical advice by a licensed health professional or under circumstances that would afford a general defense under Chapters 4 or 5 of this Subtitle." Regarding mental states, this updated language replaces "should be aware of" in the prior draft with negligent, and specifies strict liability ("in fact") as to whether the substance was introduced pursuant to medical advice or in circumstances that afford a general defense. RCC definitions almost never use culpable mental states in definitions because of possible confusion over how a culpable mental state that applies to the defined term interacts with the culpable mental states in the definition, as well as concerns about how to construe mental states. However, the only uses of the term in the RCC are in three special liability provisions in murder, manslaughter, and aggravated assault where there are no other culpable mental state requirements. Moreover, for the RCC definition to closely follow the Model Penal Code definition, culpable mental state provisions are necessary.*[1208]

- This change clarifies the revised statutes.

[1208] Model Penal Code § 2.08 ("'self-induced intoxication' means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.").

RCC § 22E-210. Accomplice Liability.

(1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraphs (a)(1) and (a)(2) the requirement that the actor "acts with the culpability required for that offense." This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*

- This change clarifies the revised statutes.

(2) *The CCRC recommends revising subsection (d) of the statute to state that an accomplice shall be charged and subject to punishment as a principal.*

- This change clarifies the revised statutes.

(3) *The CCRC recommends revising subsection (e) of the statute to state: "An actor is liable as an accomplice under this section even though the principal has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense." This updated language largely tracks the text used in the RCC Contributing to the delinquency of a minor statute and is more concise. The prefatory language that previously was at the beginning of subsection (d) is duplicative of the requirements already articulated in subsection (a). No substantive change is intended. Commentary has been updated to reflect this change, including a statement similar to that in the commentary to contributing to the delinquency of a minor that: "In addition to the language in subsection (d), RCC § 22E-216 establishes that an actor can be liable as an accomplice even if the principal actor is under the age of 12 years and is not subject to criminal liability under the RCC."*

- This change clarifies the revised statutes.

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

(1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraph (a)(2) the requirement that the actor "acts with the culpability required for that offense." This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*

- This change clarifies the revised statutes.

(2) *The CCRC recommends updating the reference to excuse and justification defenses in subsection (b) of the prior draft to refer to general defenses under Chapters 4 or 5 of Subtitle I. The commentary has also been updated to replace the prior language referring to an immaturity defense to note that, apart from the defenses in Chapters 4 and 5, immaturity may also be a basis of being an innocent or irresponsible person. The commentary also cites to RCC § 22E-216, the new minimum age for offense liability provision.*

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends revising subsection (c) of the statute to state that an actor who is liable under the section shall be charged and subject to punishment as if the actor had directly engaged in the conduct constituting the offense.*

- This change clarifies the revised statutes.

(4) *The CCRC recommends revising subsection (d) of the statute to state: "An actor is liable as an accomplice under this section even though the principal has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense." This updated language largely tracks the text used in the RCC Contributing to the delinquency of a minor statute and RCC § 22E-210, Accomplice Liability, and is more concise.*

- This change clarifies the revised statutes.

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.

(1) *The CCRC recommends adding "in fact" before the terms of this exclusion to clarify that there is no additional culpable mental state requirement.*

- This change improves the clarity and consistency of the revised statutes.

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

(1) *The CCRC recommends eliminating as unnecessary and potentially confusing prior RCC subsection (b) which states that the section "is inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct." If there were to be a conflict between clear legislative intent regarding non-merger that is contrary to the general provisions in RCC § 22E-214, the more specific legislative intent would prevail under general canons of construction. But, even more to the point, the cornerstone of all merger analysis is legislative intent. Even the* Blockburger *rule merely creates a presumption of legislative intent, and the results it yields can always be overcome by 'a clearly contrary legislative intent' manifested by the D.C. Council.* Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002).*

- This change clarifies the revised statutes.

(2) *The CCRC recommends revising RCC § 22E-214 procedures to be consistent with the OAG recommendation at App. C at 661 (regarding the parallel merger procedures in RCC § 22E-4119). OAG makes 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." The CCRC agrees that these changes to the merger procedure are warranted, as well as clarification that, as per current RCC § 22E-214, a trial judge should have the option of engaging in merger analysis at initial sentencing (contrary to current Superior Court practice). Accordingly, the RCC has revised the merger procedure to clarify that the sentencing court may either vacate all but one of the offenses that merge prior to initial sentencing, or go ahead and enter judgment and sentence the actor for the offenses that merge. But, if the latter course is chosen the sentences must run concurrently and the convictions for all but one (assuming all are not overturned on appeal) must be vacated after the time for appeal has expired or there is a judgment on appeal.*

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends amending the subsection (c) rule of priority to refer to "The offense with the higher authorized maximum period of incarceration; or if the offenses have the same authorized maximum period of incarceration, any offense that the sentencing court deems appropriate." The prior statutory language did not specify "imprisonment" versus other (fine) penalties.*

- This change clarifies the revised statutes.

RCC § 22E-215. Judicial Dismissal for Minimal or Unforeseen Harms [formerly De Minimis Defense].

(1) *PDS App C. at 677 notes that the commentary to the de minimis defense references as an example in a footnote an offense that the Council recently repealed. PDS recommends referencing a different code provision that criminalizes a minimal harm.*

- The RCC incorporates this revision by deleting the outdated reference. This change improves the clarity of the revised statutes.

(2) *The CCRC recommends an array of changes to the draft language to clarify the scope of the statute, improve its consistency with other jurisdictions' statutes (providing persuasive authority on interpretation), and improving the proportionality of the revised statutes.*

- First, the CCRC recommends changing the title of the provision to "Judicial Dismissal for Minimal or Unforeseen Harms." Latin phrases, however well-established in legal doctrine, do not belong in a modernized D.C. Code.
- Second, the CCRC recommends changing the language of the provision to provide a more specific, and limited set of situations when the provision applies, tracking Model Penal Code § 2.12 (de minimis) and jurisdictions with nearly identical statutes.[1209] As compared to the prior RCC language which would have codified a non-exhaustive list of factors for consideration when conduct was insufficiently blameworthy, the updated language provides a clearer standard for application. The situations include conduct under a customary license or tolerance despite lack of consent, conduct that doesn't actually cause or threaten the harm sought to be prevented by the law defining the offense, conduct that does cause the targeted harm but to a trivial extent, and conduct that was not reasonably envisioned by the legislature.
- Third, the CCRC recommends removing the limitation of RCC § 22E-215 to misdemeanor and felony Class 6, 7, 8, and 9 charges. With respect to one prong of section—regarding the triviality of the harm—it is highly unlikely any major felony would ever meet the requirements of section 215. But other prongs of RCC § 22E-215 may apply to major felonies—e.g., an extremely improbable conspiracy to commit murder may satisfy the requirements of the first prong of section 215(a)(2). This expansion is consistent with the statutes in other jurisdictions and the MPC.
- Fourth, the CCRC recommends RCC § 22E-215 be amended to make dismissal a matter of judicial discretion, not a defense, with any findings of facts established by a preponderance of the evidence. The MPC and

[1209] *See, e.g.,* Haw. Rev. Stat. § 702-236; N.J. Stat. Ann. 2C:2-11 (2005); Me. Rev. Stat. Ann. 17-A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998).

other jurisdictions' de minimis statutes similarly make this a matter of judicial power, while other state jurisdictions provide broad judicial discretion to dismiss prosecutions in the interests of justice.[1210] While mixed questions of fact and law arise under RCC § 22E-215, the statute also covers many matters that are purely matters of law.

[1210] *See, e.g.,* Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 332 (2017) (collecting statutes from 15 states and Puerto Rico, which employ this approach).

RCC § 22E-301. Criminal attempt.

(1) *OAG, App. C at 642, recommends that paragraph (d)(1) be edited to replace the words "imprisonment or fine" with the words "imprisonment and fine." This change will clarify that defendants convicted of attempted offenses may penalized by both a term of imprisonment and a fine.*

- The RCC adopts this recommendation. This change improves the clarity of the revised statutes.

(2) *The CCRC recommends revising subsection (a) of the statute reorder the requirement that the actor "acts with the culpability required for that offense." This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*

- This change clarifies the revised statutes.

RCC § 22E-302. Criminal Solicitation.

(1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraph (a)(2) the requirement that the actor "acts with the culpability required for that offense." This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*

- This change clarifies the revised statutes.

(2) *The CCRC recommends reorganizing into its own subsection (b) the portion of the definition of solicitation that refers to the applicable offenses—now both offenses against persons and property offenses. Organizing this requirement as a separate subsection (b) does not change the meaning of the statute, but allows other RCC statutes (e.g., contributing to the delinquency of a minor) to more clearly cross-reference to criminal solicitation without regard to the scope of applicable offenses in § 22E-302.*

- This change improves the organization of the revised statutes.

(3) *The CCRC recommends in subsection (b) expanding the scope of offenses subject to criminal solicitation liability to include felony property offenses as defined in Subtitle III of Title 22E. While the RCC already provides accomplice, conspiracy, and attempt liability for conduct that does not result in a property crime, this change would add liability for solicitation of high value property crimes, most forms of burglary, and arson. Current District law provides liability only for crimes of violence as defined in D.C. Code § 23–1331, which includes arson and burglary but no other property offenses. While there is considerable variation across U.S. jurisdictions, this expansion is more consistent with the majority of jurisdictions.*[1211]

- This change improves the proportionality of the revised statutes.

(4) *The CCRC recommends in subsection (d) the deletion of the second sub-paragraph of the revised statute providing for possible exceptions to the regular penalty under the first sub-paragraph. As no exceptions are recommended, the entry is extraneous.*

- This change improves the clarity of the revised statutes.

[1211] *See* § 11.1(a)Common law and statutes, 2 Subst. Crim. L. § 11.1(a) (3d ed.).

RCC § 22E-303. Criminal Conspiracy.

(1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraph (a)(2) the requirement that the parties to the agreement "act with the culpability required for that offense." This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*

- This change clarifies the revised statutes.

(2) *The CCRC recommends in subsection (d) the deletion of the second sub-paragraph of the revised statute providing for possible exceptions to the regular penalty under the first sub-paragraph. As no exceptions are recommended, the entry is extraneous.*

- This change improves the clarity of the revised statutes

§ 22E-401. Lesser Harm

(1) *PDS App. C at 677 recommends eliminating the codified exception to the defense when "the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability." PDS says that the policy reasons supporting why such a provision is unnecessary for the duress defense also apply for this defense. PDS says that a defendant should be able to present evidence of all available defenses and notes the government may present alternate theories of liability.*

- The RCC does not incorporate this recommendation because it may create a gap in liability. The exception to this defense where the conduct is expressly addressed by another available offense appropriately recognizes that this defense has broader, more general requirements than other defenses (such as self-defense) and is not intended to supplant the more specific requirements of those defenses.

§ 22E-402. Execution of Public Duty.

(1) *PDS App. C at 677 recommends eliminating the codified exception to the defense when "the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability." PDS says that the policy reasons supporting why such a provision is unnecessary for the duress defense also apply for this defense. PDS says that a defendant should be able to present evidence of all available defenses and notes the government may present alternate theories of liability.*

- The RCC does not incorporate this recommendation because it may create a gap in liability. The exception to this defense where the conduct is expressly addressed by another available offense appropriately recognizes that this defense has broader, more general requirements than other defenses (such as self-defense) and is not intended to supplant the more specific requirements of those defenses.

§ 22E-403. Defense of Self or Another Person.

(1) *OAG, App. C at 667, requests that commentary further clarify what it means to reasonably believe something while acting in the heat of passion.*

- The RCC does not adopt this recommendation. The defense requires that the actor reasonably believes that the conduct will protect against harm and that it was necessary in degree. Reasonableness is a flexible standard that takes into account not just the circumstances that were known the actor, but certain characteristics and traits of the actor. The defense recognizes that a belief that would be unreasonable to a calm observer may have been reasonable to a person making snap decisions in a state of utter terror. OAG's statement that "[t]he defining characteristic of acting in the heat of passion is that one is not acting reasonably[]" is not entirely accurate. A person in the heat of passion may act unreasonably as compared to a calm individual, but determining whether a person's belief was reasonable necessarily involves taking in account the actor's emotional state.
- The commentary already describes when a person in the heat of passion's belief is reasonable, however, as this determination is highly fact specific it is best left to fact finders to assess in each specific case.

RCC § 22E-408. Special Responsibility for Care, Discipline, or Safety Defense.

(1) *OAG App. C at 642 recommends adding an example to the commentary on the parental defense in RCC § 22E-408(a) of how a babysitter would have liability for punishing a child if they lacked effective consent to engage in punishment. OAG provides a specific example.*

- The RCC adopts the recommendation by adding an example in a footnote to the commentary similar to that recommended by OAG. The example says: "For example, consider a parent who leaves their young child in a babysitter's care with no instructions as to punishment for misbehavior. While the parent is gone the babysitter punishes the child for a misdeed by spanking, causing a bodily injury. Absent evidence that the babysitter reasonably believed that they had the effective consent of the parent to engage in such punishment, the babysitter could not avail themselves of this defense." This change improves the clarity of the revised statutes.

RCC § 22E-501. Duress.

(1) *The CCRC recommends replacing the term "custody" with the term "official custody." As is discussed in this Appendix for RCC § 22E-701, what was previously the definition of "custody" is now the definition of "official custody." The definition itself is unchanged.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-503. Entrapment.

(1) The CCRC recommends referring to a "third person" in paragraph (a)(2) to clarify the different persons involved in derivative entrapment.

- This change clarifies the revised statutes.

(2) *The CCRC recommends clarifying in the prefatory language in subsection (a) that a person cooperating with the law enforcement officer specifically refers to the previously mentioned "law enforcement officer acting under color or pretense of official right."*

- This change clarifies the revised statutes.

RCC § 22E-504. Mental Disability Defense.

(1) USAO App. C at 684 recommends changing the name of the mental disability defense to the prior RCC title of "Mental disease or defect defense." USAO says that "mental disability" is very similar to "intellectual disability" used in other contexts such as D.C. Code § 7-1301.03(15A). USAO also says that the phrase "mental disease or defect" is used in D.C. Code § 24-531.01(5) (definition of "incompetent" for purposes of competency evaluations and proceedings).

- The RCC partially incorporates the USAO recommendation by suggesting a conforming amendment be made to replace the phrase "mental disease or defect" in D.C. Code § 24-531.01(5) with "mental disability." This would align the usage of the two terms. The term "mental defect" is rejected as being particularly outdated and stigmatizing. This change improves the clarity and consistency of the revised statutes.

RCC § 22E-505. Developmental Incapacity Defense.

(1) *OAG App. C at 643-644 says that children under 12 years of age "should not be prosecuted in the juvenile justice system." However, OAG recommends that instead of an affirmative defense the revised statute should state that "a child who is under 12 years of age does not commit a delinquent act." OAG says that its recommendation is consistent with the language previously in the developmental incapacity defense. Further, OAG says that because Title 16 Chapter 23 of the D.C. Code addresses juvenile delinquency proceedings, the revised statute affecting such proceedings should be located in Title 16.*

- The RCC partially adopts the OAG recommendation by recharacterizing the developmental incapacity defense as an exception to liability for any offense when the actor, in fact, is under 12 years of age. However, the RCC refers more directly to an "offense" rather than to a "delinquent act" a term which is defined in terms of an offense.[1212] The revised statute is located in Title 22E which establishes fundamental requirements for liability for all offenses, as stated in App. D2 at 31. However, in App. K the CCRC recommends possible conforming amendments be made to Title 16 Chapter 23. This change improves the clarity and organization of the revised statutes.

(2) *OAG App. C at 643-644 recommends language be added to the revised statute that shields any District public official from civil liability for arrest or seizure of a child under 12 years of age. OAG says that, "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." OAG also says that it inadvertently "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." OAG provides specific language[1213] for the civil liability shield.*

- The RCC does not adopt the OAG recommendation at this time. It is not clear why a special liability shield for an improper seizure, arrest, or prosecution is necessary for this provision as compared to other bars on criminal or juvenile proceedings in the RCC or elsewhere in the D.C. Code. It also is not clear whether or how the proposed language may shield a bad faith action by an official.

[1212] D.C. Code § 16–2301(7) ("The term "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. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.").

[1213] "Nothing in this section shall be construed as creating a cause of action against the District of Columbia or any public official for seizing, arresting, or prosecuting a child who is under 12 years of age."

(3) *OAG App. C at 643-644 reiterates its "strong objection" App. C at 571-573 to the other provisions of the developmental incapacity defense applicable to actors age 12 and 13.*

- The RCC adopts the OAG recommendation by eliminating a developmental incapacity defense for those age 12 or 13 years of age. As described in the updated commentary, the elimination of the defense for persons of these ages appears to change current District law by eliminating, in part, the common law defense of *doli incapax.* This change improves the clarity of the revised statutes and may fill a gap in existing law.

(4) *OAG App. C at 675 says it does not believe that the RCC commentary entry to the developmental incapacity defense and paragraph (c)(1) of the RCC Contributing to the Delinquency of a Minor (CDM) offense (stating that a person may be convicted even if the minor complainant "has not been prosecuted [or], subject to delinquency proceedings") adequately clarify that an adult may be prosecuted for CDM based on conduct by a person under 12 years of age. OAG notes that while the revised provision for accomplice liability states that the actor can be convicted even if the other person cannot be convicted, it does not provide that a person can be convicted even if the other person could not be convicted. See also the earlier USAO comment, App. C at 632.*

- The RCC incorporates these recommendations by codifying language alongside the exception to liability for actors under 12 that states: "When otherwise liable for an offense based on the conduct of another, an actor remains liable for the offense notwithstanding the fact that the conduct is committed by a person under 12 years of age." This provision is intended to clarify that the fact that the actor is themselves not liable, because they are under 12 years of age, does not affect the liability of others based on the conduct of the 12 year old. Liability as an accomplice, for conspiracy, or for the CDM offense based on the conduct of another is the same regardless of the fact that the other person is under 12. This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends labeling the revised statute (without the defense for those 12 and 13 years of age) as "RCC § 22E-216, Minimum Age for Offense Liability" and locating the provisions in chapter two alongside other basic requirements of offense liability rather than among excuse defenses in chapter 5.*

- This change improves the organization of the revised statutes.

RCC § 22E-602. Authorized Dispositions

(1) *OAG App. C 694-700*[1214] *objects to the current subsection (c) language and instead "recommends that the judge's authority to grant a PBJ [probation before judgment], for the designated offenses - over the government's objection- 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." OAG says its language is modeled on certain provisions in the Maryland Code and the limitation "ensures that defendants who receive this benefit deserve it." OAG states: "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." OAG says that the broad scope of the statute "improperly impedes on prosecutorial discretion in seeking justice" or, as clarified in a subsequent statement to the CCRC, "impedes upon the exclusive discretion of prosecutors in charting the course of a criminal case."*[1215] *OAG also recommends an amendment to record sealing provisions in subparagraph (c)(2) so that instead of simply "law," the sentence refers only to "'District law' in light of the fact that the District lacks the authority to control the operation of federal law."*

- The RCC partially adopts the OAG recommendation by revising subsection (c)(2) to provide for record sealing under D.C. Code § 16–803(l) and (m) (rather than expungement) upon successful completion of probation, discharge, and dismissal of proceedings. The maintenance of a non-public file concerning prior utilization of deferred disposition proceedings under RCC § 22E-602(c) may facilitate better decision making by the court and prosecutors regarding use of deferral and diversion mechanisms.[1216] This change improves the proportionality of the revised statutes.

[1214] On February 2, 2021 OAG stated that it had found an error in the submission in a paragraph at App. C at 699 and wished to revise the language of the Comments as follows: "While OAG disagrees with the proposal to allow judges to grant unlimited PBJ's 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).[1] This limitation ensures that defendants who receive this benefit deserve it. By limiting the judge's ability to grant 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. OAG is concerned that the broad scope of CCRC's recommendation impedes upon the exclusive discretion of prosecutors in charting the course of a criminal case. OAG submits that this remedy only be available in exceptional circumstances. 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." The text of Appendix C reflects the written comments that were timely received from Advisory Group members.

[1215] *Id*.

[1216] However, the CCRC notes two assumptions underlying OAG's repeated concern that an injustice may happen if a judge might grant a deferral under RCC § 22E-602(c) with an expungement provision—1) the defendant must have successfully completed terms of their probation previously, and 2) any court choosing

- However, the remaining justification offered by OAG for limiting the 22E-602(c) deferral process to one instance for all Class C, D, and E offenses in any 10 year period appears to be an assertion that judicial deferral impedes prosecutorial discretion. Other than noting that the practice is uncommon in other jurisdictions, OAG cites no rationale for the proposition that the Council cannot or should not provide the court with the ability to defer sentencing without prosecutorial agreement. The CCRC notes several points in support of the Council vesting courts with broad authority in this area.
    - First, the purpose of this RCC provision, as stated by the American Law Institute (ALI) regarding its similar (though more expansive) recommendation to provide authority for judicial deferral, is to "promote the rehabilitation and reintegration of the accused individual and the restitution of direct and indirect victims of the crime. Deferred adjudication should be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction."[1217] Particularly for low-level misdemeanors, there is reason to be concerned that the collateral consequences of conviction (e.g. employment) are severe in relation to the harm caused, and conviction and incarceration may even have a criminogenic effect on future conduct.[1218]
    - Second, the RCC provision is premised on the belief, inherent in judicial sentencing authority, that, at times, the court may have a different and more accurate perspective than the government as to what disposition will better suit the goals of rehabilitation, reintegration, restitution, public safety and justice. There may be reasonable disagreements between the government and courts as to whether, for example, deferral under RCC § 22E-602(c) should be limited to "defendants whose criminal offenses represent aberrant behavior," as stated by OAG, or whether use of deferral under RCC § 22E-602(c) may be an appropriate alternative to a criminal conviction and incarceration for some repeat offenders. While it is commendable that OAG pursues diversion and deferral under its

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to offer deferral would know that the defendant may have had prior arrests and successfully completed the terms of their probation.

[1217] Model Penal Code: Sentencing § 6.02B PFD (2017)

[1218] An extensive 2009 review found that the criminogenic effect of imprisonment either nullified or outweighed its incapacitation or deterrence effect. Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME JUSTICE 115–200 (2009); *National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), https://doi.org/10.17226/18613. A 2017 natural experiment study found that "being sentenced to prison rather than probation increases the probability of a future prison admission within 3 y after release by 18–19 percentage points." David J. Harding et al., *Short- and long-term effects of imprisonment on future felony convictions and prison admissions*, 114 PROC. NATL. ACAD. SCI. 11103–11108 (2017).

own authority, this should not be a barrier to judges' independent exercise of judgment and authority.

- As one legal treatise has noted: "With a few exceptions, the legislature determines which actor may authorize or offer deferred adjudication. Legislatures may delegate the ultimate suitability determination to prosecutors, judges, or some combination of the two, with or without guidance," (internal citations omitted).[1219]
- With respect to the Maryland model cited by OAG for its recommended limitation of PBJ to one in a ten year period, the CCRC notes that the Maryland statute's use of a ten year limitation is the exception to a rule that otherwise does not limit the timeframe or repeat judicial use of deferral proceedings and sweeps much more broadly than the RCC recommendation. The Maryland once in a ten year period rule extends only to certain transportation offenses (e.g. vehicular homicide and driving under the influence of an intoxicant). The Maryland statute also categorically excludes certain sex crimes against minors, moving violations under certain conditions, and repeat controlled substance crimes under certain conditions are categorically excluded from the judicial deferral provision. However, apart from these limited exceptions, the general rule in Maryland does not appear to limit the timeframe or repeat judicial use of deferral proceedings for any offense (misdemeanor or felony). If anything, the Maryland precedent lends support to an expansion of the scope of the RCC § 22E-602(c) provision. The CCRC also notes that legislation is currently under consideration in Maryland to expand its judicial deferral provision to allow the court to impose PBJ prior to a finding of guilt, when the "court finds facts justifying a finding of guilt."[1220]
- For further discussion of judicial deferral mechanisms in other jurisdictions, see Margaret Love and David Schlussel, *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction* (September 2020) at 62-70 (available online at https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf).[1221] This recent survey appears to be the most

[1219] § 7:22.Deferred adjudication and other diversionary dispositions, Colgate Love, Roberts and Klingele, Collateral Consequences § 7:22

[1220] 2021 Maryland Senate Bill No. 527, Maryland 442nd Session of the General Assembly, 2021, 2021 Maryland Senate Bill No. 527, Maryland 442nd Session of the General Assembly, 2021.

[1221] "19 states now make deferred adjudication broadly available, in many cases for any offense eligible for a probationary sentence and without regard to prior record, leaving it up to the court (and in some states also the prosecutor) to determine the appropriateness of the disposition on a case-by-case basis. Alabama and Georgia are included in this category because of their extensive system of intervention courts that are administered on a county-by-county basis. All but one of these 19 states (Idaho) authorize sealing upon successful completion, though Texas requires a 2-to-5-year waiting period in some cases before the court

on-point and up-to-date compilation available. It is a very fast changing area, with 18 states enacting laws regarding diversionary and deferred dispositions in 2019 alone.[1222]

- Seven examples[1223] of jurisdictions that provide for judicial deferral without government approval include: Cal. Penal Code § 1001.95; Ga. Code Ann. § 42-8-60; La. Code Crim. Proc. Ann. art. 894; Me. Rev. Stat. tit. 17-A, § 1902; Md. Code Ann., Crim. Proc. § 6-220; and Tex. Code Crim. Proc. Ann. art. 42A.102; Vt. Stat. Ann. tit. 13, § 7041.

- The RCC does not at this time adopt the OAG recommendation to refer to "District law" instead of simply "law" in subsection (c)(2) because the statute no longer refers to "law" in (c)(2) (or the new (c)(3)) and instead simply cross-references the current sealing procedures under D.C. Code § 16–803(l) and (m).

(2) *PDS App. C at 708 recommends expanding the deferral mechanism in subsection (c) to include all misdemeanors and low felonies. PDS notes that an analogous provision already exists for first time drug offenders who otherwise face 180 days of incarceration. PDS notes that the deferral provision is "necessary to bring a measure of racial equity to the District's criminal legal system." PDS says that, "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." PDS cites to research indicating that 12 states broadly recognize the judicial capacity to dismiss cases in the interest of justice, and particularly notes the example of New York Criminal Procedure § 170.40, which allows for dismissal of all misdemeanors by the court, on its own authority, "in the interests of justice."*

- The RCC partially adopts this recommendation by expanding the scope of subsection (c) deferral proceedings to reach Class A and Class B misdemeanors (in addition to the previously included Classes C, D, and E misdemeanors). While many jurisdictions provide a broader judicial power to dismiss charges, the RCC does not adopt such a provision at this time. While a number of jurisdictions provide broader "probation before judgement" (PBJ) authority to courts, including over many or all felony offenses,[1224] the RCC does not adopt such a provision at this time. While

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will issue an Order of Nondisclosure. In many of the 19 states, a court-managed diversion program has existed for years, though programs have recently been expanded or reorganized to target certain populations, like veterans and individuals with mental health needs. The next category of 15 states is distinguishable from the first by varying restrictions on eligibility based on offense charged or prior record and, for many, limits on record relief." (internal citations omitted).

[1222] *Id.* at 68 (citing Collateral Consequences Resource Center, *Pathways to Reintegration: Criminal Record Reforms in 2019* at 21, https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf.).

[1223] The CCRC has not examined most jurisdictions and, with respect to the examples identified, no case law research was performed to see if there are significant limitations on the plain language conferral of a right solely to the court to decide on deferral.

[1224] *See, e.g.* Md. Code Ann., Crim. Proc. § 6-220. For a description of other jurisdictions' similar provisions, see reference to the report by Margaret Love and David Schlussel in the above response to OAG's recommendation to narrow the availability of subsection (c).

the RCC seeks to appropriately expand alternatives to conviction and incarceration for low-level crimes, the proposed expansion of deferred dispositions to all misdemeanors will be a significant change to current District practice. After review of the effects of the change, inclusion of additional (felony) offenses may be warranted. This change improves the proportionality of the revised statutes.

(3) *USAO App. C at 711-712 recommends there be a clarification that subsection (c) deferral is only available when a Class C, D, or E offense is the most serious offense of which a defendant has been found guilty. USAO notes that under the current draft, "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." However, USAO says that, "This result would not be justified by the rationale and likely was not intended by the drafters."*

- The RCC does not adopt this recommendation because it may result in disproportionate penalties in some cases. The RCC provision does not disqualify a person from receiving a judicial deferral under RCC § 22E-602(c) because the person has a prior criminal record or in the instant case is also found guilty of a more severe (felony) offense. As indicated by USAO, a person found guilty of both a felony and a Class C misdemeanor in the same case could benefit in some instances from deferral as to the misdemeanor even though they are found guilty of the felony. In practice, it would seem to be an uncommon case where there is a benefit to the court proceeding to initiate deferral on the misdemeanor even when there is a felony conviction—namely, where the felony sentence is time served or extremely low and the additional conviction for the misdemeanor may result in significant non-incarceration consequences beyond the felony conviction that is unwarranted. However, such a case may arise and, if it does, the revised statute would authorize judicial deferral. But, normally where there is a conviction on a non-qualifying (felony) offense in the same case, there would be incarceration time, supervised release, or at least a suspended sentence with conditions of release for as long or longer than the one year period of probation authorized under RCC § 22E-602(c). To ensure there is no confusion that RCC § 22E-602(c) does not affect proceedings on a nonqualifying (felony) charge in a case, the statutory language is updated in paragraph (c)(1) to authority to "defer further proceedings *on that offense*" (emphasis added). This change clarifies the revised statute.

(4) *USAO App. C 712 recommends increasing the penalties for Class C and D misdemeanors to be 90 days and 30 days, respectively. USAO notes that the lower penalties currently recommended in the RCC, 60 days and 10 days, respectively, would have the effect of lowering the statutory maximum penalty for many offenses in these classifications.*

- The RCC does not incorporate this change because it may result in disproportionate penalties. The Class C and D misdemeanors are

virtually[1225] the lowest-level crimes in the D.C. Code and principally include charges such as shoplifting, D.C. Code § 22-3213 (brought in lieu of more severe theft charges), disorderly conduct (not meeting the threshold for an attempted assault or attempted property damage), D.C. Code § 22-1321, drug paraphernalia possession, D.C. Code § 48-1103(a), possession of an open container of alcohol, D.C. Code § 25-1001, and unlawful entry of a motor vehicle, D.C. Code § 22-1341. For RCC recommendations for these classes not only would lower the statutory maximum penalties authorized under law, but would significantly lower penalties as compared to current practice.[1226] The CCRC notes, however, that the incremental increase in punishment of 3 or 4 weeks proposed by USAO is unlikely to have a significant deterrent effect,[1227] but may significantly employment, family, and other aspects of reentry.

(5) *The CCRC recommends reinserting into RCC § 48-904.01a, possession of a controlled substance, the prior deferred disposition language that provides for expungement, consistent with current District law and notwithstanding the sealing provision in RCC § 22E-602(c).*

- This change improves the clarity of the revised statutes.

(6) *The CCRC recommends retitling subsection (c) as "Judicial deferral and dismissal of proceedings" and clarifying in commentary that the articulation of the procedure in subsection (c) is not intended to affect any other form of diversion or deferral otherwise used by the government or authorized by law.*

- This change improves the clarity of the revised statutes.

(7) *The CCRC recommends the commentary to subsection (c) include a sentence clarifying that the statutory description of a judicial deferral mechanism in subsection (c) is not intended to affect other deferral mechanisms that may be in use by the government or the court. As the comment by OAG indicates, App. C at 696, the government has several procedural means to divert and defer cases that are not intended to be affected by the present judicial mechanism in subsection (c). The CCRC will further research reform recommendations related to deferral mechanisms in the future.*

- This change improves the clarity of the revised statutes.

[1225] Currently the RCC ranks only one offense, fourth degree parental kidnapping, as a fine-only, Class E offense. See Appendices E, G.
[1226] See Appendix G - Correspondence of RCC to D.C. Code penalties.
[1227] National Institute of Justice, *Five Things About Deterrence* 2 (2016).

RCC § 22E-603. Authorized Terms of Imprisonment.

(1) *PDS App. C 705-706 recommends an absolute maximum sentence for an offense at no more than 20 years of incarceration. PDS cites other research arguing for a 20 year maximum and says that penalties should not be based on "the possibility that the punishment can be longer than the life of the person being punished." PDS says that long prison sentences "are imposed almost exclusively on Black residents," that this "traumatizes families and perpetuates poverty by depriving families of the support and wages of incarcerated family members." PDS says there is "no evidence that sentences beyond 20 years further community safety" citing research regarding the age-crime curve. PDS says there also is no evidence that the difference in sentencing from 20 years to 45 years deters criminal conduct. PDS says that while incarcerating older individuals "offers diminishing returns from a public safety standpoint, it comes with significant financial costs" and cites a figure on the average cost of incarceration being $45,000 per year per individual.*

- The RCC does not adopt the PDS recommendation because it may result in disproportionate penalties. While there are many sound policy arguments for sharp reductions in the use of incarceration compared to current levels, even for the most severe crimes such as murder, the CCRC recommendations set the most severe imprisonment penalties at or near a life-long sentence in order to accommodate the very worst forms of crime. The CCRC also has structured the penalties, grading, and offense elements in the RCC cognizant that many types of criminal behavior will create liability under multiple statutes and the total penalty liability must be proportionate to the behavior as a whole—in many cases the aggregation of penalties for crimes arising from one occasion will also approach (or possibly surpass) a de facto life sentence. Imprisonment penalties at this level are expected to rare. For murder, as for all other offenses, it is expected that the District's sentencing guidelines will provide guidance to help ensure that lower penalties are utilized in less severe circumstances. The RCC recommendation to eliminate mandatory minimum sentences provides judges the discretion to provide punishment tailored to the facts of the particular case, in contrast to the current mandatory minimum sentence of 30 years for all first degree murder convictions. Further reductions in the maximum imprisonment penalties are not recommended at this time.

RCC § 22E-604. Authorized Fines.

(1) *PDS App. C at 677-78 notes that the RCC authorizes increased fines and says that subsection (c) of the revised statute is insufficient to ensure that these fines do not burden the District's poorest residents. RCC § 22E-604(c) states: "Notwithstanding any other provision of law, a court may not impose a fine that would impair the actor's ability to make restitution or deprive the actor of sufficient means for reasonable living expenses and family obligations." PDS says that subsection (c) is subject to interpretation, there is no specified evidentiary process, and no reconsideration provision for circumstances where a fine becomes a greater burden as a result of job or housing loss or illness. PDS says that "[i]f 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." Further, PDS recommends creating a separate table for corporate defendants; no specific language is provided.*

- The RCC partially incorporates this recommendation by adding to RCC § 22E-604(c) the clause: ", and a person who is eligible for appointed counsel under D.C. Code § 11-2601 shall not be subject to a fine under subsection (a) of this section." This additional language clarifies that a person who is indigent under standards for appointment of counsel—whether or not the person proceeds *pro se* or with appointed counsel—is not subject to the fines in subsection (a). However, the revised statute does not preclude other economic sanctions or costs described outside subsection (a). While PDS does not address the matter, categorically barring all fines for District defendants with appointed counsel may preclude assessments for the victims of violent crime fund.[1228] The increased maximum authorized fines in the RCC fines are not intended to burden poor District residents. In fact, the RCC for the first time provides language, modeled on language in the ALI's Model Penal Code: Sentencing, that fines shall not deprive the actor of means for reasonable living expenses and family obligations—a significant protection that does not exist in current District law.[1229] While the updated RCC language regarding persons eligible for appointed counsel adds clarity, the earlier language in subsection (c) was intended to preclude fines in such

[1228] *See* D.C. Code § 4-516 "Assessments under this chapter shall be collected as fines. Failure to pay assessments as ordered by the Court will subject a defendant so ordered to sanctions provided pursuant to § 16-706."); *Lopez-Ramirez v. United States*, 171 A.3d 169, 177 (D.C. 2017) (Judge Beckwith, in dissent, arguing that the "commonsense understanding" of the word fine includes assessments under the VVCCA and they should be treated as fines in the determination of jury demandability in the District).

[1229] *See generally* American Law Institute *Model Penal Code: Sentencing,* (2017) 6.06(6) ("No economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.").

instances. The CCRC is well aware that in many jurisdictions burdensome fines are highly problematic, fostering a cycle of poverty and being potentially criminogenic. However, the CCRC is not aware of evidence of unfair imposition of fines being imposed on poor individuals in the District under current law,[1230] and there is no reason to believe that judges would do so under the new RCC provisions, particularly given the additional protections in RCC § 22E-604(c). The RCC commentary states that the purpose of the raised fines is to provide an alternative punishment for all persons, individuals as well as legal entities like businesses and corporations. Given that the overwhelming majority of criminal defendants are appointed counsel because they are financially unable to obtain adequate representation (D.C. Code Ann. § 11-2601), use of any fines, let alone fines that approach the maximum authorized, are likely to be rare. However, in the case that the more severe fine provisions deter or better punish a wealthy individual (or organization), their authorization is justified.[1231] Notably, the RCC also already provides higher fines for organizational defendants in RCC § 22E-604(b). This change improves the clarity and proportionality of the revised statutes.

(2) *The CCRC recommends changing the word "may" to "shall" in RCC § 22E-604(c). The provision now states: "Notwithstanding any other provision of law, a court shall not impose a fine that would impair the actor's ability…". This better communicates that the provision is a requirement, not optional guidance.*

- This change clarifies the revised statutes.

[1230] The CCRC has reviewed fine data from Superior Court and notes that fines (besides VVCCA assessments) are very rarely imposed.

[1231] American Law Institute *Model Penal Code: Sentencing* (2017) commentary to 6.04 (renumbered 6.06 in final text) ("[T]he Code would preserve, and in some instances expand, the use of economic sanctions for defendants of sufficient means, who might be strongly affected by those penalties without being driven below the threshold of reasonable law-abiding subsistence. While not a majority of offenders, there is a significant subset for whom economic penalties can further such goals as proportionate punishment, victim restitution, general deterrence, specific deterrence, and disgorgement of criminally gotten gains. As the original Code also assumed, some classes of offenses require the availability of muscular financial penalties—albeit often for use in conjunction with other sanctions (in original § 7.02(2)(a), where "the defendant has derived a pecuniary gain from the crime"). Effective criminal-justice response to many kinds of organized crime, corporate offending, environmental crime, and fraudulent financial schemes requires an array of economic penalties that can mete out punishments proportionate to the enormous monetary harms suffered by victims, disgorge illegal profits, lower the ex ante incentives of crimes involving large returns and small risks of detection, and disable the operations of criminal enterprises by depriving them of necessary resources. Indeed, historically, for crimes at the high end of the spectrum of white-collar crime, one serious problem in American law has often been the failure of state codes to authorize economic sanctions of sufficient severity to serve the purposes of deterrence and punishment. When they are enforced with seriousness and do not drive offenders into poverty, economic sanctions have advantages not shared by other forms of criminal punishments.").

(3) *The CCRC recommends adding footnotes in the Commentary to note that the model of RCC § 22E-604(c) is the Model Penal Code: Sentencing 6.06(6). This provides a useful reference as to the intended scope and considerations behind the RCC subsection (c).*

- This change clarifies the revised statutes.

RCC § 22E-606. Repeat Offender Penalty Enhancement.

(1) *PDS App. C at 678 and 709 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: "Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses."*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *PDS App. C at 679 and 709 recommends elimination of the repeat offender penalty enhancement and the pretrial release penalty enhancement. PDS cites research noting that enhancements for prior convictions target older individuals who may have longer criminal records and are closer to aging out of crime. PDS also says that, if the enhancements are retained, the CCRC clarify that the enhancements are determined based on the classification of the unenhanced, base offense.*

- The RCC partially incorporates this recommendation by clarifying in these two statutes,[1232] their commentary,[1233] and supporting documents[1234] that the magnitude of each of these enhancements is determined by the classification of the base offense (not an enhanced version of the offense).

[1232] The RCC has added the following language to RCC § 22E-606 and RCC § 22E-607: "provided that the determination of the offense class under subsection [] of this section shall be based on the offense penalty before application of any additional penalty enhancements."

[1233] A footnote now provides this example: "For example, consider a person who commits offense fourth degree assault under RCC § 22E-1202(d) and that offense is subject to enhancement under RCC § 22E-1202(h)(7) for being against a protected person and under RCC § 22E-608 for being a hate crime. If a [] enhancement is also applied, the calculation would be based on the class of the unenhanced fourth degree assault—not, on the offense classification after application of enhancements in RCC § 22E-1202(h)(7) and/or RCC § 22E-608."

[1234] The CCRC has updated Appendices E and G, presenting recommended penalties, to reflect this change.

- The RCC also partially incorporates this recommendation by eliminating prior paragraphs (a)(2) and (b)(3) of RCC § 22E-606 as predicates for the enhancement and imposing a ten year window for prior felony and misdemeanor convictions that are offenses against persons or enhanced burglary. Paragraphs (a)(2) and (b)(3) previously stated that the commission of two or more prior felony convictions (of any type) in the prior 10 years may trigger the repeat offender enhancement for a felony offense against person under Subtitle II or an enhanced burglary offense. The elimination of these paragraphs focuses the repeat offender enhancement on persons who not only are immediately facing a crime against persons or enhanced burglary (while armed), but have a past history of committing such a crime or crimes. For example, two or more prior convictions in the last ten years for felony crimes of distributing any quantity of a controlled substance[1235] or unauthorized use of a motor vehicle[1236] no longer trigger the felony repeat offender provision under RCC § 22E-606. The RCC also imposes a ten year limit on prior convictions being used to trigger the felony repeat offender provision under RCC § 22E-606. Research suggests both a low incidence of recidivism after a 7 year gap,[1237] and a significant drop-off in public support for increasing sentences based on prior convictions as the priors are more than 10 years or so old.[1238]
- Yet, for the reasons provided in response to prior comments, the RCC does not eliminate these enhancements altogether. The CCRC agrees that raising the statutory maximum applicable to a charge under RCC § 22E-606 and also raising sentencing guidelines for a given charge based solely on the criminal history of the defendant may constitute an unfair "double" counting of prior offenses in sentencing. However, whether the D.C. Voluntary Sentencing Guidelines continue to be based solely on the charge and criminal history of the offender is not a matter within the ambit of the CCRC. Clearly the D.C. Voluntary Sentencing Guidelines will

[1235] D.C. Code § 48-904.01(a)(1).
[1236] D.C. Code § 22-3215.
[1237] *See* Richard S. Frase, *Criminal History Sentencing Enhancements Imprison Too Many Aging, Low-Risk Offenders* (September 20, 2017), online at https://sentencing.umn.edu/content/criminal-history-sentencing-enhancements-imprison-too-many-aging-low-risk-offenders (last visited 2/1/2021) *citing* Piquero, Alex R., David Farrington, and Alfred Blumstein, *Key Issues in Criminal Career Research*, Cambridge University Press (2007).
[1238] *See* Julian Roberts, *Public Attitudes Regarding Look-Back Limits: Findings from New Robina Institute Research* (September 20, 2017), online at https://sentencing.umn.edu/content/public-attitudes-regarding-look-back-limits-findings-new-robina-institute-research (last visited 2/1/2021) (Reviewing results of a public opinion survey and stating: "The most significant finding is that in the eyes of the public, older prior convictions carry less weight than more recent priors: the public was less punitive when the prior crime was older. In addition, there was substantial public support for look-back limits on counting prior convictions. Two-thirds of respondents were in favour of a policy that restricted judges from considering old offenses, and of those, three quarters believed the time limit should be set at ten years or less.").

need to be updated should the RCC be adopted in the District, and it may be that the Sentencing Commission will follow the best practices in the American Law Institute (ALI) Model Penal Code: Sentencing in their updates.[1239] The ALI allows that criminal history scores may be an appropriate consideration in sentencing guidelines, but only in limited circumstances, and with due "consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups."[1240] Whether there ultimately is a conflict between RCC § 22E-606 is not foreseeable and, at this time, does not preclude the CCRC recommendation to the Council for consideration.

- This change clarifies and improves the proportionality of the revised statutes.

(3) *PDS App. C at 710 recommends amending Appendix E (showing penalties for RCC offenses) "so that the main charts only show the class rankings of the offense gradations and not any enhanced rankings." PDS says that the "problem with ranking unenhanced offenses and enhanced offenses in the same chart is that*

[1239] Model Penal Code: Sentencing § 6B PFD (2017) (Sentencing Guidelines).

[1240] Model Penal Code: Sentencing § 6B.07 PFD (2017)

("(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of presumptive sentences, as grounds for departures from presumptive sentences, or in other provisions of the guidelines. The commission shall explain and justify any use of criminal history in the guidelines with reference to the purposes in § 1.02(2).

(a) If criminal history is used for purposes of assessing offenders' blameworthiness for their current offenses, the commission shall consider that offenders have already been punished for their prior convictions.

(b) If criminal history is used for purposes of assessing an offender's risk of reoffending, the commission shall consider that the use of criminal history by itself may over-predict those risks.

(c) The commission shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.

(2) The commission may include consideration of prior juvenile adjudications as criminal history in the guidelines, but only when the procedural safeguards attending the adjudications were comparable to those of a criminal trial. If prior juvenile adjudications are used as criminal history for purposes of assessing an offender's blameworthiness for the current offense, the offender's age at the time of the adjudicated conduct shall be a mitigating factor, to be assigned greater weight for younger ages.

(3) The commission shall fix clear limitations periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance sentence. The limitations periods may vary depending upon the current and prior offenses, but shall not exceed [10] years. The commission should create presumptive rules that give decreasing weight to prior convictions and juvenile adjudications with the passage of time.

(4) The commission shall monitor the effects of guidelines provisions concerning criminal history, any legislation incorporating offenders' criminal history as a factor relevant to sentencing, and the consideration of criminal history by sentencing courts. The commission shall study the experiences of other jurisdictions that have incorporated criminal history into sentencing guidelines. The commission shall give particular attention to the question of whether the use of criminal history as a sentencing factor contributes to punishment disparities among racial and ethnic minorities, or other disadvantaged groups.").

it is confusing and could allow a practitioner to apply an enhancement based on the classification of an enhanced offense."

- The RCC partially incorporates this recommendation by moving the Chapter 6 general penalty enhancements from the Appendix E main sheets (listing penalties for RCC offenses) into a separate sheet with a clear text note that, "Penalties for the RCC § 22E-606 and RCC § 22E-607 enhancements apply to the relevant unenhanced gradation of the offense." However, to present an easily navigable and comprehensive picture of available penalties, Appendix E continues to list enhanced gradations of offenses when the enhancement is offense-specific (i.e., not based on Chapter 6 general enhancements). This change improves the clarity of the revised statutes.

(4) *USAO App. C at 685 opposes limiting the felony repeat offender penalty enhancement to felony offenses under Subtitle II. USAO recommends that the enhancement apply to other offenses, "particularly to the offenses of Burglary and Arson." USAO says that burglaries or arsons "are, in many ways, as serious as some felony offenses under Subtitle II."*

- The RCC partially incorporates this recommendation by adding to the offenses subject to the repeat offender enhancement enhanced first and enhanced second degree burglary under RCC § 22E-2701(a)-(b), (d)(4). These crimes, also included in the RCC definition of "crime of violence," are sufficiently serious and violent in nature to warrant categorization with other offenses against persons. In contrast, other forms of burglary and arson, which does not require any interaction or endangerment of others, are not violent toward other persons in a comparable way. This change improves the consistency and proportionality of the revised statutes.

(5) *CCRC recommends amending the statutory language to clarify that qualifying prior convictions must be committed within ten years of the current offense being enhanced and, when two or more prior convictions are required under (a)(2)(B), (b)(1), and (b)(3), the prior convictions cannot be from the same occasion or on the same occasion as the current offense being enhanced. Although the commentary was already clear on these points, the statutory language was ambiguous. The updated language also is consistent with the updated language regarding prior convictions in RCC § 22E-4105, possession of a firearm by an unauthorized person.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

(1) *PDS App. C at 678 and 709 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: "Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses."*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *PDS App. C at 679 and 709 recommends elimination of the repeat offender penalty enhancement and the pretrial release penalty enhancement. PDS cites research noting that enhancements for prior convictions target older individuals who may have longer criminal records and are closer to aging out of crime. PDS also says that, if the enhancements are retained, the CCRC clarify that the enhancements are determined based on the classification of the unenhanced, base offense.*

- The RCC partially incorporates this recommendation by clarifying in these two statutes,[1241] their commentary,[1242] and supporting documents[1243] that the magnitude of each of these enhancements is determined by the classification of the base offense (not an enhanced version of the offense). However, for the reasons provided in response to prior comments, the RCC does not eliminate these enhancements. The CCRC recognizes that maintaining sentencing guidelines for a given charge based solely on the criminal history of the defendant may constitute an unfair "double" or "triple" counting of prior offenses in sentencing. This may be a

[1241] The RCC has added the following language to RCC § 22E-606 and RCC § 22E-607: "provided that the determination of the offense class under subsection [] of this section shall be based on the offense penalty before application of any additional penalty enhancements."

[1242] A footnote now provides this example: "For example, consider a person who commits offense fourth degree assault under RCC § 22E-1202(d) and that offense is subject to enhancement under RCC § 22E-1202(h)(7) for being against a protected person and under RCC § 22E-608 for being a hate crime. If a [] enhancement is also applied, the calculation would be based on the class of the unenhanced fourth degree assault—not, on the offense classification after application of enhancements in RCC § 22E-1202(h)(7) and/or RCC § 22E-608."

[1243] The CCRC has updated Appendices E and G, presenting recommended penalties, to reflect this change.

consideration for the Council, however, whether and how the D.C. Voluntary Sentencing Guidelines continue to be based on criminal history is not a statutory matter currently within the ambit of the CCRC. This change clarifies and improves the proportionality of the revised statutes.

RCC § 22E-608. Hate Crime Penalty Enhancement.

(1) *PDS App. C at 678 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: "Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses."*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *OAG App. C at 644-645 suggests amendment of the latest draft to ensure the statutory language is clearly applicable to not only a person or group harmed because of prejudice against a specified attribute of that person or group, but also to any person or group harmed because of prejudice against a specified attribute (e.g. a lawyer or group of supporters for those who have the perceived attribute). OAG notes that the RCC commentary already describes the statute as having this scope, but the latest draft language appears to limit the statute to harms against a person or group that are perceived to themselves have the specified attribute. OAG suggests specific revised language to address this issue and also suggests the statute refer to the "actual or perceived race, color…"*

- The RCC partially incorporates this recommendation by replacing "the" with "a" and reorganizing the statute to clarify that the enhancement is applicable to harms inflicted because of prejudice against a specified attribute, regardless of whether the complainant person or group themselves are perceived to have the attribute. The RCC does not adopt the specific language recommended by OAG because the meaning of "business, personal, or supportive relationship to a person or group [having a specified attribute]" is unclear and may be too narrow.[1244] The RCC also does not adopt the language "actual or perceived" because, while most victims may actually have the perceived characteristic, it is the

[1244] For example, it is unclear that such a relationship exists for passersby in front of a church, mosque, or synagogue who are harmed by a criminal act that was committed because of the actor's prejudice against the members of the church, mosque, or synagogue.

actor's perception that is critical. This change improves the clarity of the revised statute.

(3) *The CCRC recommends adding to the penalty section language stating that the enhancement is subject to a one class increase "except, for Class 1 offense, the authorized term of imprisonment and fine for an offense increases by 6 years and $50,000." As there is no higher class than Class 1, this provides a penalty increase equal to that of the RCC repeat offender and offenses committed during release enhancements.*

- This change improves the proportionality of the revised statutes.

(4) *The CCRC recommends moving the statute's cross-reference to the definition of "gender identity or expression" in D.C. Code § 2-1401.02 to subsection (d) and making other clarificatory changes to the language in the penalty and multiple penalty enhancements subsections.*

- This change improves the clarity of the revised statutes.

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

(1) *PDS App. C at 678 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: "Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses."*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *The CCRC recommends that offense-specific provisions be added to the penalty provisions of RCC § 22E-1403, blackmail, and RCC § 22E-1303, sexual abuse by exploitation that prohibit prosecution for violations of those sections and an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct. Those statutes' relevant provisions already require as an element that the actor be in a government role.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-701. Generally Applicable Definitions.

"Amount of damage"

(1) *The CCRC recommends in the definition of "amount of damage" replacing "before" with "at the time." With this change, the definition refers to property's fair market value "at the time it was destroyed" or "at the time it was partially damaged." "Before" suggested an indeterminate amount of time before the damage or destruction and was unintentionally ambiguous.*

- This change improves the clarity and consistency of the revised statutes.

"Comparable offense"

(1) *OAG, App. C at 668, regarding the term "comparable offense," recommends clarifying whether the words "current District offense" refers to an offense "when the RCC was enacted, when the offense took place, when the person was charged, or when the trial took place."*

- The RCC adopts this recommendation and the commentary will be updated to clarify that the words "current District offense" refers to the time that the comparable offense was committed.
- This change improves the clarity of the revised statutes.

"Consent"

(1) *USAO App. C at 685 recommends in the definition of "consent" two changes related to culpable mental states. First, USAO recommends adding "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." Second, recommends "replacing the words 'is believed by the actor to be' with the words 'the actor knew or should have known is[]'" because "[t]he objective reasonableness of the actor's belief is important."*

- The RCC partially incorporates this recommendation by striking the current phrase "believed by the actor to be" and relying exclusively on the mental states specified in the particular offense or defense language (the term is used frequently in both situations) where the term consent is used. As a general matter the RCC does not include defined culpable mental states in any definitions because, under RCC § 22E-207 rules of interpretation applicable to culpable mental state requirement, a defined culpable mental state applies to all the following terms until another such culpable mental state is specified. Inserting "knowing" or "in fact" into a definition would have the effect of changing culpable mental states for the following elements in a non-transparent way. As the phrase "believe by the actor to be" may be confusing in this way, it is eliminated in the updated definition. In addition, the updated commentary on the definition of "consent" specifically notes that: "There is no culpable mental state

specified in the definition of consent,[1245] rather the use of the term in particular RCC offenses determines what culpable mental state applies." As used throughout the RCC, a reasonable belief, recklessness or knowledge is required as to the term "consent" (and "effective consent") in nearly all instances. This change improves the clarity and proportionality of the revised statutes.

(2) *OAG App. C at 668-69 recommends deleting from the definition of "consent" subparagraph (C) the phrase "by a subsequent word or act." OAG say that the language is superfluous.*

- The RCC does not adopt the recommendation because it would make the statute less clear. There may be confusion as to whether consent or lack of consent is a wholly internal, subjective phenomena akin to "willingness." Neither the current D.C. Code definition nor the RCC intends such a meaning and inclusion of the words "by a subsequent word or act" helps clarify that point.

(3) *The CCRC recommends that the definition of "consent" be amended to refer to "mental disability" instead of "mental illness or disorder," and "legally unable to authorize the conduct" instead of "legally incompetent to authorize the conduct." Neither change is intended to substantively change the definition. Reference to "mental disability" instead of "mental disease or defect" is consistent with the language in RCC § 22E-504, Mental disability defense, which broadly refers to both short-term and long-term mental conditions affecting cognition and behavioral controls. Reference to "legally unable" clarifies that the provision refers broadly to a person unable to provide consent for any reason (e.g. a court ruling) and not only mental fitness.*

- This change improves the clarity and consistency of the revised statutes.

"Crime of violence"

(1) *The CCRC has defined the term "crime of violence" which in the RCC is used solely in the revised RCC § 22E-4105 Possession of a Firearm by an Unauthorized Person statute. The revised definition is similar in scope to the definition of "crime of violence" in current D.C. Code § 23–1331(4). See commentary to "crime of violence" in RCC § 22E-701.*

- This change improves the clarity of the revised statutes.

[1245] The RCC differs somewhat from the Model Penal Code in this respect, the former potentially allowing for a lower culpable mental state (e.g. recklessness) than the latter's specification that the lack of reasonable judgment be "manifest" or "known." *See* Model Penal Code § 2.11 ("Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if… (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or *known* by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense[.]"). The RCC approach of not specifying a culpable mental state in the definition of "consent also avoids also avoids changing the culpable mental state applicable to following offense elements after the term. *See* Rules of Interpretation Applicable to Culpable Mental State Requirement in RCC § 22E-207.

"Deceive" and "Deception"

(1) *The CCRC recommends in the RCC definition of "deceive" and "deception" deleting "known" from sub-subparagraph (A)(iv). With this change, the sub-subparagraph reads, in relevant part: "For offenses against property in Subtitle III of this title, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property . . . ." It is unnecessary to include a culpable mental state in the definition. The relevant RCC property offenses codify any necessary culpable mental states.*

- This change improves the clarity and consistency of the revised statutes.

"Dwelling"

(1) *PDS App. C 679 recommends that the definition of "dwelling" be amended to include the phrase "at the time of the offense" as per the prior draft. PDS notes that the RCC's latest revision striking that phrase was intended to be non-substantive, but PDS says that the phrase is: "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.'"*

- The RCC (re-)incorporates the phrase "at the time of the offense", as recommended by PDS. The definition now reads: "'Dwelling' means a structure that at the time of the offense is either designed or actually used for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public." The inclusion of this language may help avoid a misconstruction in this instance. This change improves the clarity of the revised statute.

"Ghost gun"

(1) *The CCRC recommends adding as a defined term "ghost gun," with a cross-reference to "the meaning specified in D.C. Code § 7-2501.01." Addition of this term is necessary due to the inclusion of the term in* RCC § 22E-4101, *possession of a prohibited weapon or accessory. The term recently was defined and added to D.C. Code § 22–4514 (Definitions [for firearm offenses]) because the term was also added to D.C. Code § 22–4514 (Possession of certain dangerous weapons prohibited; exceptions) by the recently enacted Omnibus Public Safety and Justice Amendment Act of 2020 (projected law date May 18, 2021). Accordingly, the CCRC recommends inclusion of the term in RCC § 22E-701 and the revised possession of a prohibited weapon or accessory statute, RCC § 22E-4101.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

"Movie theater"

(1) *The CCRC recommends codifying the RCC definition of "movie theater" in RCC § 22E-701 and making the definition applicable to all statutes in the RCC. In the previous RCC draft compilation, the definition of "movie theater" was limited to RCC § 22E-2106, Unlawful Operation of a Recording Device in a Movie Theater (previously Unlawful Operation of a Recording Device in a Motion Picture Theater). The definition has not changed since the previous RCC draft compilation. In the current RCC draft compilation, the only additional RCC statutes that use the term "movie theater" are the obscenity offenses in RCC §§ 22E-1805 – 1810. The commentaries to those offenses discuss the RCC definition of "movie theater."*

- This change improves the clarity and consistency of the revised statutes.

"Official custody"

(1) *The CCRC recommends replacing the previous definition of "official custody"*[1246] *with the definition of "custody"—"full submission after an arrest or substantial physical restraint after an arrest." With this change, the revised definition of "official custody" is now "full submission after an arrest or substantial physical restraint after an arrest." This change distinguishes custody after an arrest from custody in other contexts in the RCC, such as parental custody. The previous definition of "official custody" is deleted for the reasons discussed in this Appendix for the RCC sexual abuse by exploitation offense (RCC § 22E-1303).*

- This change improves the clarity and consistency of the revised statutes.

"Open to the general public"

(1) *The CCRC recommends revising the definition of "open to the general public" to exclude from the definition locations requiring proof of "identity" and include locations that generally require a "security screening" rather than a "security screening for dangerous items." The identity requirement in the previous draft*

[1246] RCC § 22E-701 previous defined "official custody" as:

(A) Detention for a legitimate police purpose, or detention following or pending:
  (i) Arrest or surrender in lieu of arrest for an offense;
  (ii) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;
  (iii) Commitment as a material witness; or
  (iv) Civil commitment proceedings, extradition, deportation, or exclusion;

(B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation.

would categorically include as a category private members-only clubs and similar locations. Because a security screening reasonably might be for things other than dangerous items (e.g., outside food or bottles at an entertainment venue) that provision is expanded and it may include proof of identity. The commentary has an additional sentence added stating: "The term includes location where there is a security screening, such as a District government building, or a location where proof of age is required, such as a restaurant serving alcohol."

- This change improves the clarity and consistency of the revised statutes.

"Payment card"

(1) *The CCRC recommends editing the definition of "payment card" to remove the phrase "description of the instrument." The definition includes the number inscribed on a card, and the phrase "description of the instrument" is redundant.*

- This change improves the clarity of the revised statutes.

"Personal identifying information"

(1) *The CCRC, regarding the term "personal identifying information," recommends replacing the words "shall include the following" with the word "means." Technically this changes the scope of the definition by indicating that the list of items is exhaustive. However, subsection (N) of the definition is catch-all provision that includes "any information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property." With this catch-all provision this change makes little, if any, substantive change to the definition.*

- This change improves the clarity of the revised statutes.

"Position of trust with or authority over"

(1) *PDS, App. C at 679-80, objects to including in the definition of "position of trust with or authority over" in subsection (A) a "child of a parent's sibling," or first cousin ("A . . . child of a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship, whether related by: (i)Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends."). PDS states that including first cousins by adoption, marriage, or domestic partnership "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 another . . . carry a heightened risk of coercion." PDS states that 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" and that criminalizing an otherwise consensual relationship "serves to protect no one." PDS states that if "the RCC employs this expansive definition, it should also import into the definition . . . . a requirement like that in RCC § 22E-1308, incest, that one party obtains the*

consent of the other by undue influence." It is unclear whether PDS recommends striking a "child of a parent's sibling" entirely from the definition or narrowing the provision to biological relationships.

- The RCC incorporates this recommendation by deleting "a child of a parent's sibling" from subsection (A). The RCC incest statute would provide liability for a sexual act or sexual contact where a first cousin that is at least 16 years of age obtains the apparent consent of the complainant by undue influence, and, depending on the ages of the parties, there may be liability for first degree, second degree, fourth degree, or fifth degree sexual abuse of a minor. This change improves the clarity, consistency, and proportionality of the revised statutes.

(2) *PDS recommends in the definition of "position of trust with or authority over" deleting any individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. PDS states that "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." PDS states that if "the RCC employs this expansive definition, it should also import into the definition . . . . a requirement like that in RCC § 22E-1308, incest, that one party obtains the consent of the other by undue influence."*

- The RCC incorporates this recommendation by deleting from subsection (B) an individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. Subsection (B) is now limited to a half-sibling related by blood. This change improves the clarity, consistency, and proportionality of the revised statutes.

(3) *OAG, App. C at 669, in the definition of "position of trust with or authority over" objects to replacing "contractor" with "contract employee" in subsection (F). In the previous RCC draft compilation,[1247] the CCRC recommended replacing "contractor" with "contract employee," stating that "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" and noting that the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include a "contract employee." OAG states that this change is "not correct" and "blurs the distinction between a contractor and an employee." OAG further states that "the suggestion that the word 'contractor' could refer to the one doing the contracting rather than the person whose services are contracted is incorrect" because "[a] contractor is 'a person or company that undertakes a contract to provide materials or labor to perform a service or do a job." OAG does not discuss the use of "contract employee" in subsection (G) of the definition, or in the RCC sexual abuse by exploitation statute (RCC § 22E-1303).*

- The RCC replaces "contract employee" with "contractor" in subsections (F) and (G) of the definition, as well as in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). This change improves the clarity and consistency of the revised statutes.

[1247] App. D2 at 59.

"Prior conviction"

(1) *USAO App C at 686 recommends the definition of "prior conviction" be revised to strike the phrase "a conviction that is subject to completion of a diversion program or" in (B). USAO says that: "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." USAO also says: "This misdemeanor conviction would and should still qualify as a "prior conviction" ... [and], in many cases, successful completion of a diversion program would not result in a conviction at all."*

- The RCC adopts the USAO recommendation, striking the language as specified. The current RCC language is unclear as to the scope of the reference to diversion, but appears to be overbroad by including convictions that are allowed to stand post-diversion proceedings. This change improves the clarity of the revised statutes.

(2) *USAO App C at 686 recommends the definition of "prior conviction" be revised to delete the word "clemency." USAO says that "clemency" includes a commutation, which is a reduction in sentence that does not negate the conviction.*

- The RCC adopts the USAO recommendation, striking the language as specified. The fact of the prior conviction, left intact by commutation, logically should remain a prior conviction under the definition. This change improves the clarity and may improve the proportionality of the revised statutes.

"Public safety employee"

(1) *The CCRC recommends replacing what was previously subsection (C) of the revised definition of "public safety employee" ("Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in paragraph (A) and paragraph (B)") with a new subsection (B) ("Any other on-duty firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician operating in the District of Columbia"). With this change, the revised definition excludes investigators, vehicle inspection officers, and code inspectors from other jurisdictions unless they are employed by the District (subsection (C)). The revised definition still includes firefighters and EMTs from other jurisdictions as long as they "are operating in the District," which is consistent with the scope with the RCC definition of "law enforcement officer" as it pertains to members of other jurisdictions' police forces.*[1248]

[1248] Subsection (A) of the revised definition of "law enforcement officer" RCC § 22E-701 is "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*.") (emphasis added).

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(2) *The CCRC recommends in the revised definition of "public safety employee" requiring that the specified individuals in subsections (A), (B), and (C) be "on-duty." This is consistent with the requirement in subsections (B)-(G) of the RCC definition of "law enforcement officer" that specified individuals who are not police officers be "on-duty."*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

"Revoked or canceled"

(1) *The CCRC has defined the term "revoked or canceled," which is used in the revised payment card fraud offense. The definition specifies when a payment card is deemed to have been revoked or canceled, such that its use constitutes payment card fraud. Prior versions of the RCC included this definition within the payment card fraud statute, and the definition has been moved unchanged to RCC § 22E-2202.*

- This change improves the clarity and consistency of the revise statute.

"Value"

(1) *The CCRC recommends assigning a "value" of $10.00 to a payment card alone and a "value" of $10.00 to an unendorsed check alone in subsection (C) of the revised definition of "value." With this change, subsection (C) reads: "Notwithstanding subsections (A) and (B) of this section, the value of a payment card alone is $10.00 and the value of an unendorsed check alone is $10.00." Subsection (C) was recommended in previous compilations of the draft statutes, but the specific value amount was bracketed for future determination. As is discussed in the commentary to the definition of "value," assigning a nominal value to a payment card or unendorsed check avoids disparate valuation of these items based upon available credit or money in a bank account. These nominal values do not apply to the use or attempted use of the payment card or check to obtain or attempt to obtain property.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1101. Murder.

(1) *USAO, App. C at 686-689, recommends including first and second degree criminal abuse of a minor and first and second degree criminal neglect of a minor as predicate offenses for felony murder.*

- The CCRC partially incorporates this recommendation. The second degree murder statute has been amended to include first degree criminal abuse of a minor, when the actor knowingly causes serious bodily injury, but does not include criminal neglect of a minor.
- Including second degree criminal abuse of a minor, or first degree criminal abuse of a minor without requiring that the actor knowingly causes serious bodily injury would improperly broaden the murder statute and impose disproportionately severe penalties. Criminal abuse of a minor covers *recklessly* causing bodily injuries to minors. Because of this culpable mental state difference, including first and second degree criminal abuse of a minor as predicate offenses to felony murder would equate recklessly causing the death of a minor with *intentionally* causing the death of a minor. For example, a parent who drives too fast in icy conditions with his child in the backseat resulting in a car crash that causes significant or serious injury to the child may be convicted of first or second degree criminal abuse of a minor. If the child tragically dies from the injuries, the parent is blameworthy, but he is not as culpable as if he had intentionally killed his child. The felony murder rule in general equates accidental homicide with intentional homicide, but all other predicate offenses under the RCC's murder statute require that the defendant *knowingly* engages in wrongful and dangerous conduct. As USAO has previously noted, "[a]ll felony murders involve [1249]OBJ. While this is often true when other predicate offenses that require knowing conduct, it is not the case with criminal abuse of a minor which only requires reckless conduct.
- USAO notes that particularly egregious child abuse cases, for example involving "prolonged period of torture" that result in the death of a child, warrant murder liability. In egregious cases in which a person intentionally or recklessly with extreme indifference to human life causes the death of a child, the RCC provides murder liability subject to penalty enhancements.
- USAO notes that there may be cases in which a person engages in repeated incidents of abuse that cause non-fatal but significant injuries that leave the child more vulnerable to subsequent abuse. For example, USAO notes that 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." USAO says that in some cases the government may not be able to prove that the defendant intentionally, or recklessly with extreme indifference to human life,

[1249] App. C at 497.

caused the death of the child. While the loss of a young life in these circumstances is tragic, a murder charge against the actor, most likely a parent, who did not intend to cause and was not extremely reckless as to the death of their child is disproportionate. In these cases, the defendant may still be liable for enhanced involuntary manslaughter *and* separate criminal abuse of a minor charges based on the prior separate incidents and the sentencing judge may order the sentences be served consecutively. These penalties provided by the RCC are proportionately severe in cases in which a person did not act intentionally, or recklessly with extreme indifference to human life.

- USAO also recommends that first and second degree criminal *neglect* of a minor should be included as a predicate offense to felony murder. Including these offenses are predicates for felony murder would impose disproportionately severe penalties relative to the defendant's culpability. In the particularly egregious cases cited by USAO, it is likely that alternate theories of murder liability would apply. For example, if parent knows that a child has suffered extremely severe injuries that require medical attention, but refuse to seek medical care, resulting in the child's death, depraved heart murder liability may apply. When a person with a duty of care over a child, such as a parent, fails to act, that *omission* may be sufficient grounds for liability.
- Similarly, USAO cites to a case, *United States v. Morris*, and states that a small child was burned in scalding water, had cigarette burns on her body, and suffered severe blunt force traumas to her head and abdomen, and was strangled and smothered to death. USAO states that in this case, the jury acquitted the defendant of murder and found him guilty of the lesser included offense of involuntary manslaughter. CCRC staff does not have access to the actual evidence presented in this case or the view of the facts as they appeared to defense counsel, but if the facts as described by USAO were actually proven, the CCRC believes such conduct would sustain a depraved heart murder conviction under the RCC, subject to a penalty enhancement. Having available for review only the published D.C. Court of Appeals opinion in *Morris*, the CCRC cannot further assess the facts of the particular case or the USAO summary.
- Although the most egregious cases, such as the ones described in USAO's comments are subject to murder liability under the RCC, USAO's proposal would extend murder liability to serious but much less egregious cases. First and second degree criminal neglect of a minor require the actor recklessly creates a substantial risk that a child would suffer injury or death. If the defendant then *negligently* causes the death of the child, under USAO's proposal murder liability would apply. Consider the following hypothetical: a child falls ill and the child's parent is aware that without medical care there is a substantial risk that complications may arise that require hospitalization. Failure to obtain medical care would constitute second degree criminal neglect. However, the parent genuinely, but mistakenly and unreasonably, believes that there is no risk to the

child's life. If the parent does not obtain medical care, and the child then dies of complications from the illness, under USAO's proposal the parent's conduct would constitute murder. While the parent's behavior in this hypothetical is highly irresponsible and warrants criminal sanction, it would be disproportionate to treat such behavior as equivalent to intentionally killing the child.

- USAO notes that in some cases, it may be difficult to prove that a defendant acted with the requisite intent for murder. While undoubtedly true, that is not a justification for lowering the culpability requirements. Murder is rightly deemed the most serious offense in American criminal law precisely because it requires a high degree of culpability. Reckless or negligent tragedy does not warrant the highest condemnation under criminal law. The RCC provides proportionate penalties in these cases that reflect the defendant's lesser degree of culpability.

(2) *USAO, App. C at 712-713 says it "continues to oppose lowering the penalty for Murder, particularly for First Degree Murder." USAO says, "Premeditated first degree murder is the most serious criminal offense that can be committed [and] [t]he penalty for this offense should be commensurate with the seriousness of this offense…." USAO cites a research article which states that, "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."*[1250] *USAO says, "[g]iven these findings [by DeLisi], 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."*

- The RCC does not incorporate the USAO recommendation to increase murder penalties to 60 years for unenhanced first degree murder[1251] and life without release for enhanced first degree murder[1252] because it may result in disproportionate penalties.
- USAO's comment does not address the rationale or supporting facts for the RCC setting statutory penalties for enhanced and unenhanced first degree murder at 45 and 40 years, respectively--to provide what are effectively "life with possibility of release."[1253] Authorities vary on what imprisonment term constitutes a *de facto* life without parole (LWOP) sentence, but recent case law indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders.[1254] The federal Bureau of Prisons (BOP) calculates persons incarcerated for a "life" sentence,

[1250] Matt DeLisi, et al., *Who will kill again? The forensic value of 1st degree murder convictions,* Forensic Science International: Synergy 1 (2019) at 12.
[1251] D.C. Code § 22–2104.
[1252] D.C. Code § 22–2104.01.
[1253] Commentary to RCC § 22E-603.
[1254] *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.")

including District inmates in BOP custody, as serving a 470 month (39 years and two months) sentence based on their life expectancy.[1255] In the District, the life expectancy of black men is just under 69 years.[1256] The RCC Class 1 and 2 maximum penalties of 45 and 40 years mean that without early release a 25 year old adult could still be incarcerated until they are 70 or 65, in the range of their current life expectancy. An 18 year old without early release could be incarcerated until they are 63 or 58, about five to ten years short of their current life expectancy.

- Establishing the most severe RCC Class 1 and Class 2 penalties as life with the possibility of release is strongly supported by the recent sentencing recommendations of the American Law Institute (ALI).[1257] The *ALI Model Penal Code: Sentencing* recommends that, except in jurisdictions where it is the only alternative to the death penalty, imposition of the most severe penalty in criminal law should be life imprisonment with a "meaningful possibility of release before the prisoner's natural death."[1258] The rationale for the ALI rejection of life imprisonment without release is grounded not only in a realistic assessment of life expectancy but in skepticism as to the abilities of a sentencing judge: "Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time—even very long periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner's acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far-distant future, are not supportable."[1259]

[1255] *See* United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").

[1256] *See* D.C. Department of Health, *District Of Columbia Community Health Needs Assessment, Volume 1* (March 15, 2013) at 16; Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020).

[1257] The ALI is a longstanding, leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. Its diverse national membership includes judges, scholars, and practitioners of law. Over the course of eight years, the organization drafted and approved an update to the sentencing provisions in the ALI *Model Penal Code*. The *Model Penal Code: Sentencing* was approved April 10, 2017 and the final text is available online at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[1258] *Model Penal Code: Sentencing* (Am. Law Inst., 2017), Comment k(2)at 159. ("With one narrow exception, the revised Code continues the policy judgment of the original Code that the most severe sanction in the criminal law should be a life prison term with a meaningful possibility of release before the prisoner's natural death. In a departure from the Institute's previous position, the Code now also concedes the policy advisability of life prison sentences with no prospect of release—the equivalent of "life without parole" in some systems—but only when this sanction is the sole alternative to a death sentence."). As the District is not a death penalty jurisdiction, the ALI recommendation is to reject a life without possibility of release sentence.

[1259] *Model Penal Code: Sentencing* (Am. Law Inst., 2017), Comment k(2) at 162.

- Data from other jurisdictions indicates that for those in prison for murder and non-negligent manslaughter (combined), 39.6% served less than 10 years before their first release, 50% served 13.4 years or less before their first release, and 69.6% served less than 20 years before their first release.[1260]
- In terms of general deterrence of crime, research indicates that lengthy prison sentences—and even the death penalty—do little or nothing to deter criminal behavior.[1261] Given the extraordinary length and severity of a 40-45 year sentence an individual released after such a period generally would not be expected to pose a public safety threat.
- In terms of recent District practice, over the 2010-2019 period, all District sentences for all charges other than aggravated first degree murder were for fewer than 40 years as far as the analysis indicates (presenting sentences at the 97.5 quantile).[1262] However, a significant number of aggravated (enhanced) first degree murder sentences were for 40 years or more, and it is reasonable to estimate that up to a quarter of the term-of-years adult sentences for aggravated murder from 2010-2019 were higher than the RCC Class 1 and 2 maximum penalties would allow.[1263] While the CCRC has not completed an analysis of all aggravated first degree murder convictions receiving sentences for 40 years or more, it appears that many (if not most or all) those sentences were for individuals who faced additional criminal charges and/or convictions for which additional imprisonment time would be authorized under the RCC. Consequently, in practice, it is not clear whether and to what extent individuals convicted of aggravated murder under the current D.C. Code and sentenced to 40 in the RCC would face less incarceration time
- The CCRC recognizes that there may be reasonable disagreement about the appropriate sentences for first degree murder and enhanced first degree murder based on differing opinions about the seriousness of the offenses. Some, contrary to the RCC recommendation and the recommendation of

[1260] U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016,* NCJ 252205 (November 2018) at 2, 3.

[1261] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016) at 1, 2 (citing relevant research and summarizing that, "There is no proof that the death penalty deters criminals," and "Increasing the severity of punishment does little to deter crime.").

[1262] CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D (Last in Time analysis). Note that 97.5 % (a high as the analysis goes) of sentences for *unenhanced* first degree murder were under 40 years.

[1263] The same analysis of adult dispositions over the timespan 2010-2019 shows that for other than "felony murder" forms of first degree murder, including both aggravated and unenhanced charges, the 75th quantile of sentences was 40 years, the 90th quantile was 45 years, and 95th quantile was nearly 50 years. The analysis also showed that for "felony murder" first degree murder, including both aggravated and unenhanced charges, the 75th quantile of sentences was 42.5 years, the 90th quantile was 60 years, and 95th quantile was nearly 62 years. Combined, convictions for all forms of first degree murder (felony murder and non-felony murder, enhanced and unenhanced) totaled 168 during the 2010-2019 period. CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D (Last in Time analysis).

the ALI and other authorities, that lifelong imprisonment without release is necessary to reflect the seriousness of an enhanced murder offense. The USAO position on the "seriousness of the offense," App. C at 712 has support.

- However, the CCRC does not believe that life without release sentences or sentences higher than the 40 and 45 year maximums are necessary for public safety or deterrence. The CCRC disagrees with the USAO assertion that current D.C. Code statutory maximum penalties of 60 years and life without release are "essential to protect the community." The public safety[1264] and deterrence[1265] rationales for life without release and effective life without release sentences are not supported in expert literature.
- USAO says that, "[a]lthough 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.'" App. C at 712. However, this and the following USAO quotations of a recent criminology article by Professor Matt DeLisi et al.[1266] does not establish a public safety need for maximums higher than in the RCC or life without release. CCRC has reviewed the article and notes the following.
    - The DeLisi et al. article cites many prior studies that found no significant correlation between prior and future lethal offending and, to the extent Professor DeLisi's conclusions find support in other research papers, there are two concerns. First, due to the relative infrequency of murder, most of the studies cited in support had a sample size of about 100 people of whom very few are homicidal recidivists. In fact, even in studies with larger samples, homicidal recidivists were found to be incredibly uncommon. A

[1264] Offenders may recidivate at any age, including after completion of a 40 or 45 year sentence. However, if the risk of recidivism by such older individual justifies 60 year and life without release sentences, a similar standard would need to be applied to those convicted of lesser crimes who, based solely on their age at release, are much more likely to recidivate. *See* U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017) at 30 ("Among offenders released younger than age 21, 67.6 percent were rearrested compared to 13.4 percent of those released age 65 or older. The pattern is consistent across age groups, as age increases recidivism by any measure declined. Older offenders who do recidivate do so later in the follow-up period, do so less frequently, and had less serious recidivism offenses on average.").

[1265] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence,* NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

[1266] Matt DeLisi, et al., *Who will kill again? The forensic value of 1st degree murder convictions*, Forensic Science International: Synergy 1 (2019) at 12.

study that was cited in the DeLisi et al. article as a counterargument had a sample size of 1088 convicted murderers and only 3 committed another murder upon release. Second, many of the papers investigate whether the offender had committed, rather than been convicted of, a murder prior to the one they were presently charged with. Based on the length of time between murders described in one of the studies, for example, the offenders had clearly not been convicted of the initial murder. In fact, the RCC's penalty for first degree murder is far longer than the longest gap (11 years) the study had between murders.

- In terms of the research of DeLisi et. al., there are at least four important points. First, the study sample is not representative of the demographics of those charged with murder in D.C.. Only 30 percent of the sample was African American whereas about 90 percent of felony convictions in D.C. are of African Americans. Additionally, historically serial killers are non-African American – meaning that there is likely a higher proportion of serial killers in this sample than among those convicted of murder in DC. Second, the strongest effect on likelihood of future lethal behavior in DeLisi's research was not prior murders but age. Not only was age more strongly correlated with likelihood of future killing (by an order of magnitude) but each additional year of age decreased the odds of committing murder by 4 percent. *Third, the authors found no significant correlation between prior first-degree murder and the likelihood of future murder. The authors say that there are significantly increased odds, but these odds still do not reach statistical significance.* The significant correlation the authors found is between among those currently incarcerated on multiple homicide charges and prior first-degree murder. However, this refers to only about 80 people of their over 680 offender sample and the authors make no comment as to whether this significant correlation was driven by the handful of offenders who are currently incarcerated for five or more murder charges. Fourth, while DeLisi et al. recognize that many convicted murders suffer from mental illnesses, such as schizophrenia and addiction, it appears that no psychiatric data was collected or analyzed as part of the study. Without this data, it is impossible to know whether mental illness has a mediating affect on the relationship between prior and future lethal behavior.

(3) *PDS, App. C at 680-681, objects to applying felony murder liability in cases in which the defendant did not commit the lethal act.*

- The CCRC adopts this recommendation and recommends changing felony murder under the revised second degree murder statute to require that the actor commits the "lethal act"—this updated recommendation reflects an earlier draft that was commented on by the Advisory Group. Under this update, a person may only be convicted as a principal of felony murder if

the person actually committed the lethal act during the course of committing or attempting to commit an enumerated felony. If a person who committed or attempted to commit an enumerated felony who did not cause the lethal act may only be held liable for the death of another under a different theory of liability. The CCRC also recommends deleting paragraph (f)(3), which had provided a defense in cases in which the actor did not commit the lethal act. This defense is unnecessary due to the requirement that the actor commit the lethal act. Upon further examination of the procedural issues involved, the prior (f)(3) defense recommendation does not seem practical and the "lethal act" requirement more directly addresses possible proportionality concerns with the felony murder portion of the statute. This change improves the clarity and proportionality of the revised criminal code.

(4) *The CCRC recommends amending the murder statute to specify that knowingly causing the death of another constitutes second degree murder. This is a clarificatory change and is consistent with current District law. Knowingly causing the death of another is recognized as a form of second degree murder under current District law, and would have satisfied the requirements of depraved heart murder under the prior version of the murder statute. This change merely clarifies that knowingly causing the death of another constitutes second degree murder.*

- This change improves the clarity of the revised statute.

(5) *The CCRC recommends adding subsection (g) to the murder statute, which bars accomplice liability for felony murder—this updated recommendation reflects an earlier draft that was commented on by the Advisory Group. Under the principles of accomplice liability established in RCC § 22E-210, a person is guilty as an accomplice if the person purposely assists another in conduct constituting the offense, and has the culpable mental state required for the offense. Because felony murder requires that the actor negligently causes death, a person who purposely assists in the predicate felony with negligence that death could result could be liable as an accomplice to felony murder. A person could be convicted of murder even if that person did not actually kill another person, did not intend that anyone be killed, and was not even aware of a risk that anyone would be killed. Equating this relatively lower degree of culpability to a person who intentionally kills another is disproportionately severe.*

- This change improves the proportionality of the revised criminal code.

(6) *The CCRC recommends amending the list of predicate offenses for felony murder to include second degree sexual abuse of a minor and first degree assault. These statutes require knowingly or purposely perpetrating a major felony crime and their inclusion is consistent with other offenses that already are predicates for felony murder.*

- This change improves the proportionality of the revised criminal code.

(7) *The CCRC recommends amending the murder statute with a new subsection (h) to clarify merger of murder and other felonies that arise from a single act or course of conduct. If a person is convicted of felony murder under paragraph (b)(3), the convictions for second degree felony murder and the predicate felony merge and*

the court follows the procedures for merger in RCC § 22E-214(b) and (c). Subsection (h) does not otherwise control merger and the commentary makes clear that, subject to the general merger provision in RCC § 22E-214, there may be multiple convictions for second degree murder under paragraphs (b)(1) or (b)(2) and a predicate offense—and sentences may run consecutive or concurrent as decided by the sentencing judge.

- This change improves the clarity and proportionality of the revised criminal code.

(8) *The CCRC recommends amending subsection (c) of the revised statute to specify the culpable mental state "in fact" as to "the actor was unaware of the risk, but would have been aware had the actor person been sober." While this subsection is an unusual rule of liability, practically it will be treated as a defense so clarifying what culpable mental states, if any, apply to the subsection is necessary. The updated language clarifies that there is no additional culpable mental state requirement as to being unaware of the risk when the actor would have been so aware if the actor had been sober. Note also that the definition of "self-induced intoxication" in RCC § 22E-209 itself specifies certain culpable mental states that must be proven.*

- This change clarifies the revised statutes.

(9) *The CCRC recommends replacing the term "custody" in subparagraph (d)(3)(C) with the term "official custody." As is discussed in this Appendix for RCC § 22E-701, what was previously the definition of "custody" is now the definition of "official custody." The definition itself is unchanged.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-1102. Manslaughter.

(1) *PDS, App. C at 681, makes the same objection to "felony manslaughter" under paragraph (a)(2) as it does to felony murder under the revised second degree murder statute.*

- The CCRC adopts this recommendation, as discussed above in commentary for RCC § 22E-1101.
- This change improves the proportionality of the revised statutes.

(2) *The CCRC recommends amending the manslaughter statute to specify that knowingly causing the death of another constitutes voluntary manslaughter. This is a clarificatory change and is consistent with current District law. Knowingly causing the death of another is recognized as a form of manslaughter under current District law, and would have satisfied the requirements of depraved heart manslaughter under the prior version of the manslaughter statute. This change merely clarifies that knowingly causing the death of another constitutes voluntary manslaughter.*

a. This change improves the clarity of the revised statute.

(3) *The CCRC recommends amending new paragraph (a)(3), which criminalizes negligently causing the death of another while committing an enumerated felony in accordance with changes to felony murder under the second degree murder statute. For further discussion of these changes, see commentary for RCC § 22E-1101.*

a. These changes improve the proportionality and consistency of the revised statutes.

(4) *The CCRC recommends adding subsection (e) to the murder statute, which bars accomplice liability for felony murder.*

a. This change improves the proportionality of the revised criminal code.

(5) *The CCRC recommends amending the list of predicate felonies under (a)(3) in conformity with changes made the paragraph (b)(3) of the revised murder stat*

a. This change improves the proportionality and consistency of the revised statutes.

(6) *The CCRC recommends amending subsection (c) of the revised statute to specify the culpable mental state "in fact" as to "the actor was unaware of the risk, but would have been aware had the actor person been sober." While this subsection is an unusual rule of liability, practically it will be treated as a defense so clarifying what culpable mental states, if any, apply to the subsection is necessary. The updated language clarifies that there is no additional culpable mental state requirement as to being unaware of the risk when the actor would have been so aware if the actor had been sober. Note also that the definition of "self-induced intoxication" in RCC § 22E-209 itself specifies certain culpable mental states that must be proven.*

a. This change clarifies the revised statutes.

(7) *The CCRC recommends amending the manslaughter statute with a new subsection (f) to clarify merger of voluntary manslaughter and other felonies that arise from a single act or course of conduct. If a person is convicted of voluntary*

manslaughter under paragraph (a)(3), the convictions for voluntary manslaughter and the predicate felony merge and the court follows the procedures for merger in RCC § 22E-214(b) and (c). Subsection (f) does not otherwise control merger and the commentary makes clear that, subject to the general merger provision in RCC § 22E-214, there may be multiple convictions for voluntary manslaughter under paragraphs (a)(1) or (a)(2) and a predicate offense—and sentences may run consecutive or concurrent as decided by the sentencing judge.

a. This change improves the clarity and proportionality of the revised criminal code.

RCC § 22E-1201. Robbery

(1) *OAG, App. C at 645-646, recommends that the robbery statute be amended to include a fourth degree, which would include any taking when the property "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." OAG says that "[t]he Commentary can make clear that the force has to be more than trivial." OAG recommends the new fourth degree robbery be a Class B misdemeanor (180 days maximum). In support of the expansion of the RCC robbery statute, OAG says it "supports limiting third degree robbery to where actual, as opposed to theoretical force is used[, h]owever, 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." OAG says that, "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, a victim who has had property taken directly from them certainly believes that they have been robbed and, they have been under current law." OAG does not provide specific statutory language for its recommended fourth degree.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Robbery under the RCC is intended to criminalize takings from persons that involve the intentional use of force or threats, as distinct from mere pickpocketing or theft from the area around a person. Robbery includes takings by communicating, explicitly or implicitly, that the actor will cause bodily injury.
- OAG raises hypothetical cases in which an actor, without causing pain to the complainant (which would constitute bodily injury), rips property off a person's clothing or a bag from a person's arm. In such cases a menacing glare or other gestures may constitute an implicit communication that resistance to the taking will be met with force, enabling the taking and rendering it a robbery under the RCC. While takings from the person may be quite frightening when discovered and merit a criminal sanction, absent the use of force or explicit or implicit threats to effect the taking, labeling such conduct as "robbery" may inaccurately suggest a higher degree of violence than what is involved in these takings. Robbery under the RCC

includes taking property from the complainant's hands a clear, limited exception to this approach, since taking property from someone's immediate grasp may be especially likely to provoke some measure of resistance.

- The CCRC notes that OAG's recommendation is reasonable in that taking property attached to a person's clothing may be nearly as startling or frightening as taking property from a person's hands, and the penalties OAG has proposed are similar to those in the RCC.[1267] However, the CCRC continues to recommend that the robbery offense only criminalize takings that involve intentional uses of force or threats, with the sole exception of taking property from a person's hands or arms. The CCRC declines to apply the "robbery" label to pickpocketing that does not involve intentional use of force or threats. The current D.C. Code and proposed RCC definition of "crime of violence" both refer broadly to "robbery," but under the RCC pickpocketing that doesn't include a threat or bodily injury would be theft from a person and outside the definition of a "crime of violence."
- Many jurisdictions similarly have a crime of "theft from a person" that differentiate non-violent takings from a person, as compared to robbery.[1268]

(2) *OAG App. C at 700-701 recommends adding language to the penalty enhancement in 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;" (added language underlined). OAG says that the current text of the statute either does not require that the display of the dangerous weapon directly or indirectly causes the bodily injury, contrary to the commentary, or the statutory text relies on the word "by" for that meaning.*

- The RCC adopts the additional language recommended by OAG, with a slight modification to delete the word "that." This change clarifies the revised statute.

[1267] The current RCC theft from the person as described in OAG's hypotheticals is subject to a maximum term of imprisonment of 1 year under the RCC, but has no offense specific enhancements and is not subject to the general repeat offender enhancement. The OAG proposal would expand the scope of third degree robbery—subject to a Class 9, 2 year penalty, with additional offense-specific and repeat offender enhancements—to include takings of anything, "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 [directly from the person]." The OAG proposal also would create a new fourth degree robbery—subject to a Class B, 180 day maximum, but with an array of additional offense-specific and repeat offender enhancements—to include any takings "directly from a victim" even "when the victim does not realize that the property was taken."

[1268] *See, e.g.,* N.J. Stat. Ann. § 2C:20-2; Tex. Penal Code Ann. § 31.03; and Mich. Comp. Laws Ann. § 750.357.

(3) *PDS App. C at 709 PDS recommends that the explanatory note for robbery include clarification that the enhancements authorized by RCC §22E-606 and §22E-607 enhance the unenhanced robbery gradation.*

- The RCC adopts the PDS recommendation, clarifying in commentary for robbery and other offenses against persons which reference the applicability of Chapter 6 enhancements that, "If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC §22E-606 and §22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense." This change clarifies the revised commentary.

(4) *USAO App. C at 711-712 recommends that the penalty enhancement in subsection (c)(5)(A)(II) increase the penalty classification by two classes, rather than one class. USAO says that, "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." USAO also says that, "At a minimum, a maximum penalty of 8 years imprisonment (rather than 4 years) is appropriate for all armed robberies." USAO says this penalty is "consistent with recent Superior Court practice, citing statistics from Appendix G.*[1269]

- In addition to its prior responses regarding robbery penalties, the RCC does not adopt the USAO recommendation because it would be inconsistent with other RCC penalty distinctions between brandishing a dangerous weapon and causing injury with the weapon, and may result in disproportionate penalties.
- The CCRC notes that this is one of the few RCC penalty recommendations that would appear to impact more than the top 5-10% of current sentences issued for similar cases in Superior Court practice.[1270] The CCRC

[1269] Specifically, USAO states the following: "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."

[1270] For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

estimates that 20-50% of armed robbery sentences currently issued in Superior Court would fall above the new RCC maximum due to this issue raised by USAO about the penalty enhancement in subsection (c)(5)(A)(II). A more precise estimate of the impact of the RCC recommendation is not possible because of how current court statistics (and the current District robbery statute under D.C. Code § 22–2801) are organized. The current statistics and robbery statute do not differentiate between robberies where a person brandishes versus inflicts bodily injury with a dangerous weapon (the difference between a Class 8/4 year and Class 7/8year penalty) or between any of these instances and cases where the person robbed experiences a significant bodily injury and a dangerous weapon is brandished versus used to inflict the injury (the difference between a Class 7/8year and Class 6/12 year penalty). It simply isn't known how many cases have these types of facts.

- In assessing court practice there is also a major confounding influence of mandatory minimum penalties for robbery convictions being enhanced with the while-armed enhancement in D.C. Code § 22–4502, preventing judges who otherwise find that a lower penalty would be appropriate from imposing a penalty less than 5 years when a firearm is possessed (used or brandished or hidden entirely) during a robbery. About two-thirds of the enhanced robbery sentences (nearly all of which are for while-armed enhancements) are at or below the 5 year mandatory minimum in D.C. Code § 22–4502 for robbery while possessing a firearm (used or brandished or hidden entirely). The current mandatory minimum statutory requirements also informed the structure of the current voluntary sentencing guidelines' recommendations for sentencing. Per the RCC, there would be no mandatory minimum penalties, and the effect on judicial practice and possible changes to the voluntary sentencing guidelines is unclear.
- Criminal history, which affects judicial application of sentencing guidelines and the availability of repeat offender enhancements, is another factor. Unenhanced third degree robbery is a Class 9 offense, subject to a 180 day repeat offender statutory enhancement under RCC § 22E-606 for a person with a prior history of robbery or any other felony crimes against persons.
- Notably, if the USAO recommendation were adopted, the CCRC estimates the RCC penalties would then accommodate 95-100% of current sentences given in Superior Court practice for armed robbery. Again, there are difficulties in a precise estimate given the operation of current District law, the effect of mandatory minimums, and sentencing guidelines. However, the 8 year (96 month) maximum penalty recommended by USAO for any robbery involving use or display of a dangerous weapon would accommodate 90-95% of all robbery sentences that were enhanced

due to a dangerous weapon—i.e., from 2010-2019, 90-95% of all adult robbery convictions that were enhanced (nearly all of which were because of a while-armed enhancement) had a sentence of 96 months or less. Moreover, the RCC robbery penalties provide more severe maximums where the complainant experiences significant bodily injury or serious bodily injury (up to 18 years), so the 5-10% of armed robbery court sentences that were above 8 years (96 months) are to some undeterminable extent covered by these more severe RCC penalties. It may well be that, with adoption of the USAO recommendation here, there would be no necessary impact on current District sentencing of while armed robbery penalties.[1271]

- The CCRC also notes that the decision about penalties for this particular aspect of robbery is particularly consequential as robbery is the most common felony offense prosecuted in the District, and more than a quarter of robbery convictions are enhanced (almost all with a while-armed enhancement).
- In sum, the CCRC notes that most current Superior Court armed robbery penalties currently cluster in a fairly narrow band, between 4 years and 8 years in length. As noted above, the CCRC estimates that the current RCC recommendation to raise robbery penalties one class under subsection (c)(5)(A)(II) has the potential to preclude somewhere in the range of 20% or more of current armed robbery sentences, requiring lower sentences as compared to current practice. The CCRC estimates that the USAO recommendation to raise the penalty under subsection (c)(5)(A)(II) by two classes would mean that 0-5% of current armed robbery sentences would have to be reduced under the new maximum penalty. Overshadowing all of current court practice, however, are the current mandatory minimums in D.C. Code § 22–4502, and it is unclear to what extent current judicial practice would be to give lower sentences but for that statutory bar on their assessment of what is proportionate.
- Current practice is only part of the relevant considerations, as critical as it is to assessing how impactful changes to robbery in the RCC may be. The CCRC recommendation regarding subsection (c)(5)(A)(II) is based primarily on a distinction that court data does not track and the USAO recommendation thinks is inapt—the distinction between brandishing a dangerous weapon and using a dangerous weapon to inflict bodily injury during a robbery. The RCC robbery statute, consistent with many other RCC offenses against persons, provides escalating penalties for differences between hidden possession, display, and use of a dangerous

[1271] This is not to say that lowering statutory maximums would have no impact on judicial sentencing even if the new maximums would accommodate all current court sentences. Lower statutory maximums could have indirect effects on sentencing through the effects on plea bargaining and charge bargaining.

weapon. All these circumstances merit more severe penalties as compared to crimes without any involvement of a dangerous weapon because there is a risk of greater harm. From the perspective of both the actor and complainant, however, these distinctions as to hidden danger, threatening but no physical harm, and physical harm matter significantly. All RCC robbery penalties, including the lowest levels, are classified as felonies, and the RCC provides heightened penalties in all instances when a dangerous weapon is part of the robbery.[1272]

(5) *USAO App. C at 714 states that it "continues to oppose decreasing the penalty for carjacking." USAO says that "carjacking is a significant intrusion into a person's personal space, and a carjacking is a violation of that sense of personal space," and the offense "also results in the loss of what is often a more significant asset than is lost in another form of robbery." USAO cites several features of the CCRC analysis of court data and notes that: "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." USAO concludes that, "[t]he 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." USAO's current comments do not specify what maximum punishment it would recommend.[1273]*

- The RCC does not adopt the USAO recommendation because it would be inconsistent with other RCC penalties, and may result in disproportionate penalties. The CCRC takes a quite different view of how to interpret current court statistics than that presented by USAO, principally because of the confounding effect of mandatory minimum requirements in current law and the broad scope of conduct covered by the current carjacking statute. The RCC would make a major change to the available statutory penalties for armed and unarmed carjacking-type behavior, but whether and to what extent the CCRC classifications for carjacking/robbery would change current practice is unclear because of the confounding effect of current mandatory minimums.
- In addition to its prior responses regarding robbery penalties (carjacking is treated as a form of robbery in the RCC), the CCRC notes that this is one of the few RCC penalty recommendations that would appear to impact more than the top 5-10% of current sentences issued for similar cases in

[1272] Note that while the RCC robbery statute does not itself have an enhancement for having a hidden dangerous weapon during the robbery, other RCC offenses provide additional liability to the robbery in those possession-type instances. See, e.g., Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; Carrying a Dangerous Weapon under RCC § 22E-4102.

[1273] Previously, however, USAO has opposed elimination of mandatory minimum penalties for carjacking. App. C at 548. USAO also has previously recommended carjacking be a class 5 offense and armed carjacking a class 4 offense. App. C at 426.

Superior Court practice.[1274] Many unenhanced and enhanced (armed) carjacking sentences currently issued in Superior Court likely would fall above the new RCC maximum. A more precise estimate of the impact of the RCC recommendation is not possible, however, because of how current court statistics (and the current District robbery statute under D.C. Code § 22–2801 and carjacking under D.C. Code § 22–2803) are organized. The current court statistics and robbery and carjacking statutes do not differentiate between robberies/carjackings that involve bodily injuries of any sort or involve kidnapping-type conduct (where the victim is in the vehicle). Court statistics and current law. The current court statistics and armed robbery and carjacking statutes (enhanced under D.C. Code § 22–4502 and D.C. Code § 22–2803(b)) also do not differentiate between robberies/carjackings that involve mere possession (hidden) of a dangerous weapon, brandishing a dangerous weapon, and use of a dangerous weapon. It simply isn't known how many cases have these different types of facts.

- The RCC provides, for carjacking-type cases the following penalties under the robbery statute (with additional felony penalties under the RCC if there is also a kidnapping or possession but not displaying or using a dangerous weapon, as well as repeat offender and other enhancements)[1275]:
    - Second degree robbery (for unarmed carjacking-type activity), maximum 4 years where the taking of the vehicle is by a threat or causing a bodily injury (any pain) or moving a person (e.g., a push).
    - Second degree robbery (for some unarmed carjacking-type activity) enhanced when one or more of the complainants is elderly, a minor, or another type of "protected person," maximum 8 years.
    - Second degree robbery (for some armed carjacking-type activity) enhanced by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon, maximum 8 years.
    - Second degree robbery (for some armed carjacking-type activity) enhanced by inflicting significant bodily injury with a dangerous weapon, maximum 12 years.

[1274] For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

[1275] See RCC § 22E-1401, Kidnapping. Note that while the RCC robbery statute does not itself have an enhancement for having a hidden dangerous weapon during the robbery, other RCC offenses provide additional liability to the robbery in those possession-type instances. See, e.g., Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; Carrying a Dangerous Weapon under RCC § 22E-4102. See also RCC Chapter 6 general penalty enhancements applicable to robbery/carjacking.

  - First degree robbery (for some unarmed or armed carjacking-type activity) where the complainant experiences serious bodily injury, maximum 12 years.
  - First degree robbery (for some armed carjacking-type activity) when the complainant experience serious bodily injury by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon, maximum 18 years.
- The RCC range of 4-18 years (not counting additional liability for weapon possession and/or kidnapping that may be applicable) is differentiated by factors that are almost entirely ignored under current robbery/carjacking law, which differentiates only on whether the actor had a dangerous weapon available to them at the time of the offense. Consequently, it is hard to make any intelligent estimate of how current court sentences for adult carjacking and armed carjacking, which over a 10 year period have ranged up to a maximum of 16.5 years (97.5% percentile), would map on to the RCC penalty levels. For example, the while-armed distinction in current carjacking law does not give insight as to the degree of injury (if any) experienced during an unarmed carjacking. For many forms of unarmed carjacking, the RCC provides penalties of 8 years or more (and 75-90% of current sentences for unarmed carjacking are 8 years or less).
- Notably, there are relatively few adult convictions for carjacking, armed or unarmed, with about 2 armed and 8 unarmed convictions annually, on average, in the period 2010-2019.
- However, perhaps the most confounding factor to reliance on court sentencing statistics as a basis for what carjacking-type offenses should be is the effect of the mandatory minimum requirements currently in place, 7 years (84 months) for unarmed carjacking and 15 years (180 months) for armed carjacking. For unarmed carjacking, 50-75% of all sentences were at the mandatory minimum; for armed carjacking, 95-97.5% of sentences were at the mandatory minimum. Those statistics strongly suggest that in most cases judges would find a lower penalty proportionate, but for the mandatory minimum requirement in law. The effect of the mandatory minimum also may play an important role in charge and plea bargaining for carjacking-type behavior.
- Current practice is only part of the relevant considerations, as critical as it is to assessing how impactful changes to carjacking/robbery in the RCC may be. The RCC provides felony level penalties for all forms of carjacking, whether or not there is any bodily injury, with escalating penalties depending on the level of physical harm and/or use or display of a firearm, and the victim characteristics. This approach treats carjacking as essentially similar to all other forms of robbery, though involving property of higher value. In the most severe forms of carjacking-type behavior where a person is actually moved by the actor (e.g. confined in

the vehicle), an actor is separately and in addition subject to major felony liability under the RCC kidnapping statute.

RCC § 22E-1202. Assault.

(1) *The CCRC recommends for third degree and fourth degree assault separating the penalty enhancement for the display or use of an imitation dangerous weapon from the penalty enhancement for the display or use of a dangerous weapon. With this change, recklessly displaying or using what, in fact, is an imitation dangerous weapon receives a penalty increase of one class in both third and fourth degrees, and recklessly displaying or using what, in fact, is a dangerous weapon receives a penalty increase of either two classes (third degree) or three classes (fourth degree). This is consistent with the penalty enhancements for the revised robbery statute (RCC § 22E-1201). It is also consistent with the gradation scheme in the revised assault statute, where the display or use of a dangerous weapon in the lower gradations of the offense receives multiple penalty bumps—either two classes (third degree) or three classes (fourth degree) —to account for the discrepancy between a low-level actual harm and a potentially very serious harm that might have occurred through use of the dangerous weapon. When the item at issue is an imitation dangerous weapon, however, there is a lower likelihood of serious harm and a consistent one class penalty increases is proportionate. The penalty enhancements for second degree assault do not change because they already capped at a consistent one class increase, and there are no penalty enhancements for first degree assault, the most serious gradation of the offense.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(2) *OAG App. C at 669 recommends, in a comment on RCC § 22E-1202, Assault, changing all references in exclusions to liability in all offenses from "conduct specifically permitted by a District statute or regulation" to "conduct specifically permitted by a District statute." OAG says that it "does not oppose codifying an exclusion from liability when District law specifically permits the actor's actions" but also says "[a]n agency cannot, by rule, carve out an exemption to a criminal statute." OAG cites no legal authority.*

- The RCC does not adopt the OAG recommendation at this time because it may make the revised statutes less clear and proportionate. The OAG comment does not address the specific regulatory example provided in the commentary: "For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[1276]" CCRC notes that the OAG comment may be based on general legal doctrine regarding separation of powers and the ability of executive (regulatory) authorities to curtail legislatively-enacted statutes. However, while legal challenges may arise from regulatory efforts to carve unforeseen exceptions to a legislatively-enacted statute, this does not impinge on the right of the legislature to establish rules of criminal liability based on compliance or failure to comply with executive-branch regulations—which is essentially what is being done by the RCC. Though phrased in terms of a defense (an exclusion to liability) rather than an element of an offense, the legislature can affirmatively choose to exclude from criminal liability conduct that is legally authorized by a regulation. The CCRC would welcome the opportunity to review legal authority in support of the OAG position on this matter.

[1276] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

RCC § 22E-1204. Criminal Threats.

(1) *OAG App C at 646-47 recommends that the Commentary add a hypothetical to 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 communicated to person B. OAG notes that the relevant Criminal Jury Instruction 4.130, threats say, "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)."*

- The RCC incorporates this recommendation by adding to the commentary the statement, with a footnote, that: "However, the government is not required to prove that the target of the threat is the one to whom the communication is made.[1277] This change improves the clarity of the revised statute.

[1277] For example, assuming other elements of the offense are satisfied, it would be enough for the actor to tell a friend that the actor will kill person Z even if the friend never communicates that to person Z and the actor didn't intend the threat to reach person Z. See *Beard v. U.S.,* 535 A.2d 1373, 1378 (D.C. 1988); *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-1205. Offensive Physical Contact.

(1) *USAO, App C at 689-90, recommends revising the commentary for the revised offensive physical contact offense to "clarify that there could still be liability for non-violent sexual touching as Offensive Physical Contact, even if there could no longer be liability for non-violent sexual touching as Assault." In particular, USAO refers to this text in the Commentary to Subtitle II: "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 offense, or sex offenses under RCC Chapter 13." USAO states that "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."*

- The RCC incorporates this recommendation by revising the text to read (footnotes omitted):

> The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting "bodily injury." Offensive physical contact that satisfies the RCC offensive physical contact offense may be sexual in nature. However, depending on the facts of the case, other offenses in the RCC may provide more serious liability for offensive touching that is sexual in nature such as other RCC Chapter 12 offenses, RCC weapons offenses, or RCC sex offenses in Chapter 13. The RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law.

This change improves the clarity and consistency of the revised statutes.

(2) *USAO, App. C at 690, recommends including in the revised offensive physical contact statute that, for 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." For complainants under the age of 16 years, USAO states that this language incorporates the DCCA's holding in* Augustin v. United States*, 240 A.3d 816, 828 (D.C. 2020), 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." For complainants under the age of 18 years, USAO states that its proposed language is contrary to the DCCA's holding in* Augustin*,[1278] but, that as a "matter of policy," the language should be included.*

[1278] USAO states that in *Augustin*, the DCCA 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

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC offensive physical contact offense. Offensive physical contact is not a sex offense, although conduct that is sexual in nature and meets the statutory requirements may satisfy the RCC offensive physical contact offense (RCC § 22E-1205). However, in the case of minors with an adult, such sexual misconduct can be, and generally should be, more proportionately charged under the RCC sexual abuse of a minor (RCC § 22E-1302) and RCC sexually suggestive conduct with a minor (RCC § 22E-1304) offenses, to which consent is not a defense. Also, note that the RCC definition of "consent" does not specify any specific ages, which allows for evaluation of the specific facts of the case (e.g. the conduct involved, the ages of other participants, and the relationship between the participants). But, depending on the circumstances, a person under 16 years of age may be unable to give effective consent as the term is defined.
- Notably, the kiss at issue in *Augustin* would likely satisfy the RCC sexually suggestive conduct with a minor offense, which prohibits any kissing with the required intent[1279] as opposed to "placing one's tongue in the mouth of the child or minor," and if so charged, there would be no consent defense.[1280]

(3) *USAO App C at 711-712 recommends increasing the penalties for offensive physical contact and enhanced versions of the offense all by one penalty class. USAO says that the harm caused by first degree offensive physical contact (causing the complainant to come into contact with bodily fluid or excrement) is similar to fourth degree assault (infliction of bodily injury). USAO also says that second degree offensive physical contact (causing the complainant to come into*

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whether the complainant and the defendant are in a significant relationship, as defined in D.C. Code § 22-3001(10)."

[1279] As in current law, the RCC sexually suggestive conduct with a minor statute requires an intent to sexually arouse or gratify that the non-violent sexual touching form of assault does not. *See, e.g.*, *Augustin v. United States*, 240 A.3d at 826 ("stating that "the simple assault offense requires only 'the intent to do the proscribed act.'") (quoting *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001)).

[1280] As the DCCA noted in *Augustin*:

> The simple assault can be committed by sexual touching conduct that does not fall within the [D.C. Code sexual abuse statutes]. The present case illustrates this: appellant could never have been convicted of [misdemeanor sexual abuse of a child or minor] or any other [D.C. Code sexual abuse statutes] offense for kissing A.G. in the manner it was proved he did, because such kissing (even if non-consensual, for sexual gratification, and committed by someone in a "significant relationship" with A.G.) was not "sexually suggestive conduct," a "sexual act," or a "sexual contact," within the meaning of the [D.C. Code sexual abuse statutes].

Augustin, 240 A.3d at 827.

physical contact with that person with the intent that the contact be offensive) is similar to attempted fourth degree assault (attempted infliction of bodily injury). USAO also says that, says "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."

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties.
- When exposure to bodily fluids causes illness or pain, that is a bodily injury with liability the same as fourth degree assault. Otherwise, causing someone to come into contact with bodily fluid, while highly offensive, does not pose a physical danger. Likewise, physical contact that is designed to be and is offensive is not as serious as purposeful attempts to cause someone bodily injury. The additional months of authorized jail time under the USAO recommendation appear unnecessary and potentially disproportionate. Most adult simple assaults receive three months or lower sentences already, typically with even less time to actual serve (not suspended).[1281] While warranting arrest and possible jailtime, these types of offensive physical contact are among the most minor of offenses and should be penalized in classes C and D.
- Regarding non-consensual sexual touching as conduct that may be charged as offensive physical contact, see the above CCRC responses to similar recommendations by USAO. The CCRC repeats again that nonconsensual sexual touching constitutes one of several types of sex crimes for which the RCC, like the current D.C. Code, provides more severe punishment[1282]—typically felony-level.

[1281] See analysis by CCRC of Superior Court data in CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D (Last in Time analysis).

[1282] *See* RCC § 22E-1301, Sexual Assault; RCC § 22E-1302, Sexual Abuse of a Minor; RCC § 22E-1304, Sexually Suggestive Conduct with a Minor; and RCC § 22E-1307, Nonconsensual Sexual Conduct.

RCC § 22E-1301. Sexual Assault.

(1) *OAG App. C at 647-648 recommends both re-inserting language providing liability for second degree sexual assault when the complainant is paralyzed, and "in addition" providing liability under first degree sexual assault for when the complainant is paralyzed. OAG says that the second degree language addressed a scenario where: "A woman has a spinal cord injury that prevents her from being able to move any part of her body...[while] in a long term nursing facility [] her ex-boyfriend comes into her room and has sexual intercourse with her against her will." OAG says that first degree liability is also appropriate because, "When a victim is paralyzed [], the victim is aware that the rape is taking place and is traumatized to a greater degree [than in instances where a victim it drugged and asleep or unable to appraise the nature of the sexual act]. OAG also recommends comparable changes be made to sexual assaults involving sexual contacts in third and fourth degrees.*

- The RCC partially incorporates this recommendation by adding to second and fourth degree sexual assault new sub-subparagraphs (b)(2)(B)(iv) and (d)(2)(B)(iv) providing liability when the complainant is "substantially paralyzed." This change ensures liability exists when the complainant is substantially paralyzed, but is capable of communicating willingness or unwillingness and appraising the nature of the sexual conduct (if a complainant is incapable of such communicating willingness or unwillingness, the actor faces liability under (b)(2)(B)(iii) and (d)(2)(B)(iii)). Grading in this manner the penalties for committing a sexual act or contact with a complainant that is substantially paralyzed is consistent with current District law which provides liability in second and fourth degree when the complainant is "incapable of declining participation in that sexual act."[1283] The RCC declines to also[1284] include committing a sexual act or contact with a paralyzed complainant as first degree and third degree sexual assault because doing so would be inconsistent with the core gradation distinctions in current District law and the RCC which provide higher penalties for committing the offense by the use of physical force, by threats of bodily harm, or by administering a substance without consent that impairs the complainant. Second and fourth degree sexual assault continue to carry very high penalties under the RCC and the penalties would be subject to the vulnerable adult

[1283] *See* D.C. Code § 22–3003, Second degree sexual abuse ("A person shall be imprisoned for not more than 20 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or (2) Where the person knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual act; or (C) Incapable of communicating unwillingness to engage in that sexual act.").

[1284] OAG does not offer any rationale for how to differentiate between paralysis liability under first degree and second degree.

enhancement[1285] where the complainant is paralyzed. Where further force or violence is used against the paralyzed complainant, there may also be liability under enhanced first and enhanced third degree sexual abuse. This change improves the clarity and proportionality of the revised statutes and removes a possible gap in liability.

(2) *PDS, App. C at 681, recommends changing the effective consent affirmative defense in subsection (e) to a defense. PDS states that this change would be consistent with D.C. Law 18-88, which changed the D.C. Code consent affirmative defense for the general sexual abuse statutes to a defense due to the difficulty of instructing the jury when consent can be an aspect of the failure to prove force.*

- The RCC incorporates this recommendation by making the effective consent affirmative defense in subsection (e) a defense. This change improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C 670-671, objects to the deletion of what was previously paragraph (e)(3) of the revised sexual assault statute, "The actor is not at least 4 years older than a complainant who is under 16 years of age." OAG states that the "CCRC should not remove this defense [requirement] because it believes that the DCCA might overrule this holding."*

- The RCC does not incorporate this recommendation because it risks disproportionate penalties for similar conduct. If the effective consent defense is successful, there is no liability for sexual assault, but there would still be liability for RCC sexual abuse of a minor (RCC § 22E-1302), which does not require force, and relies on the ages and relationship between the parties to impose liability.[1286] In addition, due to the RCC definitions of "effective consent" and "consent," it is unlikely that very young complainants would be able to give consent to conduct that otherwise satisfies the RCC sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statutes, and removes unnecessary overlap between the RCC sexual assault statute (RCC § 22E-1301) and RCC sexual abuse of a minor statute (RCC § 22E-1302).

(4) *USAO, App. C at 715 says it "continues to oppose decreasing the penalty for First Degree Sexual Assault and Enhanced First Degree Sexual Assault." USAO says: "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." USAO*

[1285] RCC § 22E-1301(f)(5)(D)(v) ("The actor is reckless as to the fact that the complainant is a vulnerable adult"); RCC § 22E-701 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impairs the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.").

[1286] For example, 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. If there is a successful effective consent defense, the actor would not have liability for forceful sexual assault (a Class 4 felony), but would have liability for second degree sexual abuse of a minor (a Class 5 felony).

also notes that, "the maximum penalty for an offense should be sufficiently high to account for the worst possible version of an offense."

- The RCC does not incorporate this recommendation because it risks disproportionate penalties. As USAO notes, 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, and with the repeat offender enhancement in RCC § 22E-606, there would be a maximum penalty of 336 months and 408 months, respectively.
- Recent adult sentencing statistics indicate that the RCC penalties would cover 90-100% of court sentences for unenhanced first degree sexual assault, and about 85-90% of enhanced first degree sexual abuse sentences.[1287] As there were 53 convictions for first degree sexual abuse enhanced in the ten year time period analyzed by the CCRC, this indicates there were about 10-12 sentences that appear to exceed the RCC Class designations for first degree and enhanced sexual abuse. The maximum sentence in any of these cases appears to be 480 months (6 years more than the 408 months authorized in the RCC for enhanced first degree sexual abuse with a felony repeat offender enhancement).
- The circumstances of these approximately 10-12 sentences merit further examination as to how the RCC may or may not affect the overall punishment faced by those individuals. To date, the CCRC has identified through a search of public records one case that accounts for two 480 month sentences for enhanced first degree sexual abuse and notes that the case involved many other convictions for conduct related to the sex offenses, including kidnapping and robbery which independently carried dozens of years of additional charges. Overall, the defendant was sentenced to life without release, with over 200 years of various sentences. In this case, any lower of one of the sexual assault sentences by a few years would not change the effective multiple-life sentences faced by the individual.
- As the CCRC has repeatedly stated, the RCC seeks to authorize proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. Where, for instance, under current law a person has been sentenced to a term of imprisonment higher than that authorized by the RCC offense that most closely corresponds, it may well be that

[1287] For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data. The range here depends chiefly on whether prior criminal history of the actor would make them subject to the RCC § 22E-606 felony repeat offender enhancement. Assuming the sentences were compliant with the DC Voluntary Sentencing Guidelines as is common, all the most serious sentences would have been for individuals who have prior convictions such that they would now be subject to the RCC § 22E-606 felony repeat offender enhancement. Consequently, it is likely the RCC authorized sentences will cover about 100% of unenhanced and 90% of enhanced first degree sexual abuse sentences in recent years.

sentencing under current law is using the sentence as a single "lead charge" that represents the time of actual imprisonment to which other charges run concurrent (not further increasing punishment). Looking at the totality of the criminal behavior, charges, and sentencing, however, it is often clear that sentence for the lead charge accounts for other crimes too. This may be the case in many or all the unidentified 8-10 or so most severe sex offense sentences that would exceed the RCC authorized maximums.

- In the RCC it remains that a judge can run sentences consecutive to one another such that a kidnapping, robbery, or other crime committed in the course of the first degree sexual assault can be added to the time sentenced for first degree sexual assault. Consequently, whether in practice the RCC lowered maximums for first degree sexual abuse and enhanced first degree sexual abuse will result in lower overall sentences for offenders in any of these 8-10 worst cases requires further research. The CCRC would welcome USAO or other Advisory Group member assistance in identifying instances where a person has been sentenced to more than 408 months for first degree sexual abuse.

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

(1) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for sixth degree sexual abuse of a minor to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that "[s]ince 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 RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law[1288] and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which a marriage or domestic partnership exists for such a young person with an older adult are rare. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are even more rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

[1288] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). The current D.C. Code sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02.

RCC § 22E-1303. Sexual Abuse by Exploitation.

(1) *OAG, App. C at 648-49, recommends revising subparagraphs (a)(2)(A) and (b)(2)(A) so that a semicolon follows the phrase "not including a coach who is a secondary school student" as opposed to a comma. With this change, subparagraphs (a)(2)(A) and (b)(2)(A) will read "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 . . . ." As previously drafted with a comma, OAG states that it was "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 . . .'".*

- The RCC incorporates this recommendation by replacing the comma with a semicolon in subparagraphs (a)(2)(A) and (b)(2)(A) of RCC § 22E-1303 and makes the same change in the revised definition of "position of trust with or authority over." This change improves the clarity of the revised statutes.

(2) *The CCRC recommends replacing "The actor knowingly and falsely represents that the actor is someone else who is personally known to the complainant" (subparagraphs (a)(2)(B) and (b)(2)(B)) with "The actor knowingly and falsely represents that the actor is someone else with whom the complainant is in a romantic, dating, or sexual relationship." "Personally known" is ambiguous and it is unclear whether it includes any individual with whom the complainant is acquainted or is limited to individuals with whom the complainant is in a relationship. Several RCC statutes use "in a romantic, dating, or sexual relationship," which tracks the language in the District's current definition of "intimate partner violence"[1289] and is intended to have the same meaning. The RCC nonconsensual sexual conduct statute (RCC § 22E-1307) provides liability for other instances of misrepresentation of the actor's identity that satisfy the requirements of the offense.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(3) *The CCRC recommends replacing "contract employee" with "contractor" in subparagraph (a)(2)(A), sub-subparagraph (a)(2)(D)(i), subparagraph (b)(2)(A), and sub-subparagraph (b)(2)(D)(i), for consistency with an OAG recommendation to the RCC definition of "position of trust with or authority over," discussed in this Appendix.*

- This change improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends deleting the previous definition of "official custody"[1290] from RCC § 22E-701, previously applicable only to the RCC sexual abuse by*

[1289] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[1290] RCC § 22E-701 previously defined "official custody" as:

exploitation statute, and instead incorporating the new definition of "official custody" in RCC § 22E-701—"full submission after an arrest or substantial physical restraint after an arrest." The new definition of "official custody" is narrower than the previous definition, but the RCC sexual abuse by exploitation offense codifies the substance of the previous definition with the possible exceptions of: 1) "Surrender in lieu of an arrest"; and 2) "Custody for purposes incident to any detention described in subparagraph (A) of [the deleted definition of "official custody"], including transportation, medical diagnosis or treatment, court appearance, work, and recreation." However, subparagraphs (a)(2)(D), (b)(2)(D), (a)(2)(E), and (b)(2)(E) will provide liability for these situations when they also satisfy the requirements of the offense. This revision distinguishes custody after an arrest from custody in other contexts in the RCC, such as parental custody.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for second degree sexual abuse by exploitation to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that "[s]ince 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 RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law[1291] and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or

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"Official custody" means:

(A) Detention for a legitimate police purpose, or detention following or pending:

(i) Arrest or surrender in lieu of arrest for an offense;

(ii) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;

(iii) Commitment as a material witness; or

(iv) Civil commitment proceedings, extradition, deportation, or exclusion; or

(B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation.

[1291] D.C. Code § 22-3017(b) ("That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."). The sexual abuse of ward statutes are codified at D.C. Code §§ 22-3013 and 22-3014 and the sexual abuse of a patient or client statutes are codified at D.C. Code §§ 22-3015 and 22-3016. As is discussed in the commentary to the RCC sexual abuse by exploitation statute, it is unclear whether the marriage or domestic partnership affirmative defense for the current sexual abuse of a child or minor statutes (D.C. Code § 22-3011(b)) applies to the current D.C. Code sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04).

domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

(6) *The CCRC recommends codifying a new paragraph (d)(3): "A person shall not be subject to prosecution for violation of this section and an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct." Under most ways of committing the offense,*[1292] *the elements of the offense overlap with the requirements of the penalty enhancement, and it would be disproportionate to subject the conduct to the penalty enhancement. For the other provisions in the offense, such as the actor falsely representing to be someone else with whom the complainant is in a romantic, dating, or sexual relationship, there either will be no overlap, in which case the enhancement would not apply anyway, or there will be a rare situation where the actor engages in the conduct under color or pretense of official right and the enhancement should not apply.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

[1292] *See* subparagraphs (a)(2)(A) and (b)(2)(A) (complainant is a secondary school student), subparagraphs (a)(2)(D) and (b)(2)(D) (actor works at a specified institution), and subparagraphs (a)(2)(E) and (b)(2)(E) (actor is a law enforcement officer in certain situations).

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

(1) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for sexually suggestive conduct with a minor to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that "[s]ince 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 RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law[1293] and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which a marriage or domestic partnership exists for such a young person with an older adult are rare. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are even more rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

[1293] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.). The current D.C. Code misdemeanor sexual abuse with a child or minor statute is codified at D.C. Code § 22-3010.01.

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

(1) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for enticing a minor into sexual conduct to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that "[s]ince 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 RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law[1294] and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which a marriage or domestic partnership exists for such a young person with an older adult are rare. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are even more rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

[1294] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). The current D.C. Code enticing statute is codified at D.C. Code § 22-3010.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

(1) *OAG, App. C at 671-72, objects to excluding from the offense a parent or other responsible individual that gives effective consent to the minor to engage in sexual activity that is illegal.*[1295] *OAG states that "[t]here is no reason to permit the parent to be complacent in this form of child of abuse" and, that "[w]hile the CCRC says that the parent might be chargeable as an accomplice, that would only be true if the parent was acting in coordination with the actual perpetrator."*

- The RCC does not adopt the proposed change because it would change current District law in a way that may result in disproportionate penalties. Current D.C. Code § 22–3010.02, arranging for a sexual contact with a real or fictitious child, does not include the liability that OAG wishes to include—a parent or other responsible individual giving effective consent to the minor to engage in an illegal sexual act or contact. The current statute only prohibits an actor directly arranging to engage in a sex act or contact with a complainant "who is or who is represented" to be a minor, or arranging for a third party to engage in a sex act or contact with a complainant "who is or who is represented" to be a minor. A parent (or other responsible person) only has liability under D.C. Code § 22–3010.02 with respect to their child as an accomplice or if directly arranging to engage in the sex act/contact with their child.
- The RCC likewise provides accomplice liability when a parent "purposely" encourages or facilitates conduct constituting an RCC sex offense and, in some circumstances, liability for RCC sex offenses when the parent "knowingly" (but not purposely) engages in conduct that causes the offense. The RCC, however, is also careful to avoid criminalizing parental conduct that supports their child's sexuality. The CCRC reincorporates its previous reasoning for this revision (Appendix D2, pages 138-139) and refers to the explanation in the commentary to this statute. The CCRC also emphasizes the extremely unusual nature of this offense, with no comparable offense identified by the CCRC in other jurisdictions.

[1295] OAG includes this comment under its discussion of the RCC sexual assault statute (RCC § 22E-1301), but the relevant RCC offense is RCC § 22E-1307, Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(1) *OAG, App. C at 549, recommends revising footnote 6, discussing deception as to the nature of the sexual act or sexual contact and the practice known as "stealthing," to include two situations specific to female birth control. OAG states that these examples make clear that the provision "is not meant to be gender specific."*

- The RCC partially incorporates this recommendation by including in footnote 6 the statement "Similar acts may be committed despite the gender of the actor." This clarifies that deception as to the nature of the sexual act or sexual contact is not gender specific without specific hypotheticals that may limit the scope of this type of deception. This change improves the clarity of the revised statutes.

RCC § 22E-1308. Incest.

(1) *USAO, App. C at 690-91, recommends deleting the requirement that the actor "obtains the consent of the other person by undue influence" from paragraphs (a)(3) and (b)(3). USAO states that it is "inappropriate" to use the RCC defined term "undue influence"*[1296] *in the revised incest offense. USAO states that it is "unclear at what point the complainant would no longer be deemed to be acting on their own free will," particularly in the context of grooming behavior. USAO further states that "it is unclear who would decide if the sexual abuse is 'inconsistent with his or her financial, emotional, mental, or physical well-being.'" USAO states that "[b]y criminalizing 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 . . . [b]ut a victim often will not internalize such abuse as being detrimental to their well-being . . . [n]or would a parent or guardian necessarily always characterize the abuse as detrimental, particularly where the parent or guardian is the perpetrator."*

- The RCC does not incorporate this recommendation because it would risk disproportionate penalties for the same conduct. When a minor complainant is under the age of 16 years and the actor is at least 4 years older, the RCC sexual abuse of a minor statute (RCC § 22E-1302) provides more serious penalties than the RCC incest statute, independent of the familial relationship and regardless of apparent consent, based on the ages of the parties. For minor complaints that are over the age of 16 years, but under the age of 18 years, third degree and sixth degree of the RCC sexual abuse of a minor statute criminalize otherwise consensual sexual conduct with many[1297] of the familial relationships in the RCC incest statute if the actor is at least 18 years of age and at least four years older, without an additional requirement of "undue influence." The "undue influence" element in the RCC incest statute ensures that the revised incest statute does not criminalize otherwise consensual sexual activity between adults or minors that are close in age.

(2) *PDS, App. C at 682, states that the conjunction between the second and third elements of first degree incest should be "and," not "or," which is consistent with the RCC commentary.*

- The RCC agrees that the conjunction should be "and." However, the correct conjunction appears in the RCC compilation and no changes were made.

[1296] RCC § 22E-701 defines "undue influence" as the "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 the person's financial, emotional, mental, or physical well-being."

[1297] As is discussed in this Appendix for the definition of "position of trust with or authority over" in RCC § 22E-701, the definition has been slightly narrowed as compared to the last RCC compilation.

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime

- *OAG App. C at 449-50 recommended an amendment to subparagraph (b)(1)(D).*
    - The RCC does not incorporate this recommendation as OAG withdrew the recommendation in a communication to the CCRC on 2/4/21.

RCC § 22E-1310. Admission of Evidence in Sexual Assault and Related Cases.

(1) *The CCRC recommends revising sub-subparagraph (b)(1)(B)(ii) to include "consent." With this change, the sub-subparagraph reads: "Past sexual behavior with the actor where the consent or effective consent of the complainant is at issue and is offered by the actor upon the issue of whether the complainant gave consent or effective consent to the sexual behavior that is the basis of the criminal charge." In the previous compilation, the sub-subparagraph was limited to "effective consent." However, the RCC definition of "effective consent" includes the RCC definition of "consent," and, in a limited number of RCC sex offenses, it may be relevant whether the defendant gave consent, such as second degree and fourth degree sexual assault. The commentary states that "The use of these terms in the revised admission of evidence statute is not intended to change the scope of D.C. Code § 22-3022 or the scope of the RCC sex offenses." The current D.C. Code admission of evidence statute refers to the "consent" of the complainant.*[1298]

- This change improves the clarity and consistency of the revised statutes.

[1298] D.C. Code § 22-3022(a)(2)(B) ("Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.").

RCC § 22E-1401. Kidnapping

(1) *OAG, App. C at 650-651, recommends that sub-subparagraph (a)(2)(B)(ii) be deleted, and that sub-subparagraph (a)(2)(B)(i)(I) be renumbered and re-drafted to read, "The complainant is an incapacitated individual or a person under the age of 16." OAG objects to the age requirements for the actor and complainant set forth in sub-subparagraph (a)(2)(B)(ii), which requires that the actor be 18 years of age or older and that the complainant be under the age of 16 and at least 4 years younger than the actor. OAG notes that the RCC's kidnapping offense does not include a 15 year old holding a 10 year old for ransom, or a 17 year old holding a 15 year old for ransom. OAG states that anytime an actor moves or restrains a person under the age of 16, kidnapping liability should apply (provided the actor had intent to hold the complainant for ransom, use the complainant as a shield or hostage, etc.)*

- The CCRC does not incorporate this recommendation. Sub-subparagraph (a)(2)(B)(ii) provides liability even if the complainant effectively consents to the confinement or movement. Confining or moving a person without effective consent still constitutes kidnapping regardless of the complainant's age. Under OAG's hypotheticals, kidnapping liability would apply if the complainant was confined or moved without effective consent, as would be highly likely if the actor is holding the complainant for ransom. In OAG's hypos, if the actor did have effective consent of the complainant, kidnapping liability would be disproportionately severe.
- Kidnapping also includes acting with intent to deprive a person with legal authority over the complainant of custody of the complainant, or to confine the person for 72 hours or more. Under OAG's proposal if one 15 year old convinces a 15 year old friend to run away from home (thereby depriving the friend's legal guardian of custody), and moves the friend, first degree kidnapping liability would apply. This would be disproportionately severe given the ages of the parties involved.

(2) *USAO App. C at 711-712 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. USAO notes that the current RCC language refers only to serious bodily injury.*

- The RCC adopts the USAO recommendation by adding references to "death" alongside serious bodily injury in these provisions. This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends updating the merger provision in subsection (e) to state that the two offenses must arise from the same act or course of conduct (as well as the confinement or movement being incidental to commission of the other offense) and the merger must follow the procedures in subsections (b) and (c) of the general merger provision in RCC § 22E-214.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-1402. Criminal Restraint.

(1) *OAG, App. C at 651-652, recommends that the defense under subparagraph (b)(2)(B) be deleted. Subparagraph (b)(2)(B) provides a defense to prosecution under paragraph (a)(2) if the actor 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. OAG states that this defense is unnecessary, because: "[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 RCC does not incorporate this recommendation because construing "confines or moves" as asserted by OAG would create a gap in liability. The "confines or moves" element in both the RCC kidnapping and criminal restraint statutes does not require direct physical force. Commentary to RCC § 22E-1402 states "Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of persuasion, threat, or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining another person can include either physically trapping a person in a location against his or her will, such as by locking a person in a room, or by causing the person to remain in a location by means of persuasion, threat, or deception." The breadth of the "confines or moves" element in the RCC, which OAG opposes, is narrowed by the other elements of the offense, but is necessary to cover some situations that merit criminal liability.
- For example, an adult who lures a young child into his home by truthfully promising to give the child candy has "moved" the child. This is true even though the child entered the home freely on his own accord. The adult has committed criminal restraint if the adult is reckless that a person with legal authority over the complainant (e.g. a parent) who is acting consistent with that authority has not given effective consent to the confinement or movement. This example is no different than a storeowner persuading a child to enter their store except that, per the defense which OAG recommends deleting, the storeowner has no liability when he "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." Apart from minors and incapacitated persons, the RCC also provides liability for confining or moving by deception and threats—regardless of age.
- Providing kidnapping and criminal restraint liability for verbal, non-physical means of movement or confinement is widely accepted in other

jurisdictions, though articulated in somewhat different ways, particularly with respect to minors and incapacitated persons.[1299]

- To clarify the operation of the statute, the CCRC recommends re-drafting kidnapping to break out and list the ways in which a complainant's effective consent is lacking rather than referring to a lack of effective consent. Instead, the kidnapping and criminal restraint offenses require: confining or moving the complainant by means of causing bodily injury or using physical force; making an explicit or implicit coercive threat; deception; or by any means including with acquiescence of the complainant when the complainant is under 16 or an incapacitated individual. This change clarifies the means of confining or moving a person that are criminalized under the kidnapping and criminal restraint statutes. This change also clarifies that there is no liability when an actor confines or moves without the person's affirmative consent someone 16 or older and not incapacitated, and without using force, coercive threats, or deception.
- This change improves the clarity and proportionality of the revised criminal code.

(2) *The CCRC recommends updating the merger provision in subsection (e) to state that the two offenses must arise from the same act or course of conduct (as well as the confinement or movement being incidental to commission of the other offense) and the merger must follow the procedures in subsections (b) and (c) of the general merger provision in RCC § 22E-214.*

- This change improves the clarity and consistency of the revised statutes.

[1299] § 18.1(d)Means, 3 Subst. Crim. L. § 18.1(d) (3d ed.) ("The Model Penal Code also specifies the means by which the asportation or confinement must be accomplished. This is done by the assertion that these actions must be done 'unlawfully' and that such is the case (putting aside for the moment the case of the minor or incompetent) if they are 'accomplished by force, threat or deception.' Several states have adopted that formulation exactly or have deviated only by stating the third element a bit differently. An even larger number have utilized the 'force, intimidation or deception' formulation, which would appear to have precisely the same coverage. A few other states that purport to specify the manner of committing the crime (several do not) appear to be more limited, either by specifically including only force, force plus threats but not deception, or force plus deception but not threats. The Model Penal Code definition of 'unlawfully' goes on to include as asportation or confinement, 'in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.' Nearly half of the states have a provision along these lines, although there is considerable variation in the age level set for minors among the following: 13, 14, 16, 18. This manifests considerable disagreement with the Model Penal Code's judgment that 14 is the proper age because it is 'just below the point in adolescence when youngsters commonly begin to exercise independent judgment as to choice of companions and freedom of movement.'" (internal citations omitted)).

RCC § 22E-1403. Blackmail.

(1) *OAG, App. C at 652-654, recommends deleting the effective consent defense under paragraph (c)(2). OAG states that if the blackmail involves a false allegation, no person would ever consent, but if the allegation is true the defense under paragraph (c)(1) applies. Additionally, OAG questions whether a person can possibly consent to being coerced.*

- The RCC does not incorporate this recommendation. OAG is correct that there is overlap between the defenses under (c)(1) and (c)(2). However, there may be instances in which a person consents to conduct that does not necessarily fall within (c)(1). Consider the following hypothetical: A has an affair and wants to return to his spouse but worries that he may not be faithful again in the future. He asks a close friend, B, to help prevent any future acts of infidelity, including by threatening to tell his spouse about other unrelated embarrassing secrets. If the B acts at A's direction, the defense under (c)(1) would not necessarily apply.
- The hypothetical also demonstrates how a person can consent to being "coerced." People may not trust their own will power in the future, and consent to the use of some coercive measures. Consent can be withdrawn at any time, but if an actor reasonably believes that he or she acted with the effective consent of the complainant, the defense appropriately bars liability.

- *The CCRC recommends adding the words "in fact" to subparagraph (c)(1)(A), which establishes an element of an affirmative defense to the blackmail offense. This change clarifies that there is no culpable mental state requirement as to whether 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.*
  - This change improves the clarity and consistency of the revised statutes.
- *The CCRC recommends codifying a new paragraph (d)(2): "A person convicted under subparagraph (a)(2)(A) of this section shall not be subject to an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct." Under subparagraph (a)(2)(A) (taking or withholding action as an official, or causing an official to take or withhold action), the elements of the offense overlap with the requirements of the penalty enhancement, and it would be disproportionate to subject the conduct to the penalty enhancement.*
  - This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

(1) *The CCRC recommends replacing the words "with recklessness that" with "reckless" in subsection (a)(3). This change clarifies that the complainant must actually be under 18 years of age, incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, or incapable of communicating willingness or unwillingness to engage in the commercial sex act.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 672-673, asks whether an actor's reasonable belief that the actor had effective consent necessarily means that the actor was not negligent as to lacking effective consent.*

- The commentary entry OAG quotes is generally an accurate description of law under the RCC, though the terms are not equivalent or co-extensive. Reasonable belief that a circumstance exists negates negligence as to the circumstance. Negligence as to a circumstance requires that the actor should have been aware that the circumstance exists and that the failure to perceive the risk is a gross deviation from the standard of conduct that a reasonable individual would observe in the person's situation. If a person reasonably believes that a circumstance exists, that person categorically cannot be negligent as to the circumstance not existing.

RCC § 22E-1803. Voyeurism

(1) *OAG App. C at 673 describes a commentary entry for this offense stating that the word "breast" would exclude the chest of a transmasculine man. OAG says it "is not certain this carve-out is consistent with the ordinary meaning of the word 'breast' in this context." OAG says that, "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." In a footnote, OAG says that "[o]nce 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.'"*

- The RCC does not incorporate this recommendation because it may make the revised statutes less clear. The issue of gender arises from the current D.C. Code voyeurism statute[1300] treating the "female" breast differently from other breasts, a feature of current law that the revised voyeurism statute replicates. The voyeurism statute also makes other categorical distinctions as to which body parts have a heightened privacy protection, though not based on gender. The RCC commentary entry regarding a transmasculine man merely makes the point, should the case arise, that the breast of such a person should not be considered "female." Codification of this clarificatory point is not necessary. OAG's suggestion that there be a definition of gender may be appropriate in the future, but this RCC statute and RCC § 22E-1804, Unauthorized Disclosure of a Sexual Recording, are the only places where a gender distinction arises.

[1300] D.C. Code § 22–3531(a)(2) ("'Private area' means the naked or undergarment-clad genitals, pubic area, anus, or buttocks, or female breast below the top of the areola."). See also § 22–3051, Non-consensual Pornography ("Private area" means the genitals, anus, or pubic area of a person, or the nipple of a developed female breast, including the breast of a transgender female.").

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

(1) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: "With intent, exclusively and in good faith, to … permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording." PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear. While it is true that RCC § 22E-502(a)(2) provides a defense to possession or distribution in certain weapon and drug offenses when the possession or distribution is "with intent, exclusively and in good faith, to…permanently dispose of the item," the elements of 22-1804, unauthorized disclosure of a sexual recording require proof that the distribution was either with a specified bad intent (e.g. to alarm or sexually abuse the complainant), to receive financial gain, or the actor came into possession of the image or recording by committing a crime. Proof to a preponderance (or a lesser standard) that the exclusive and good faith reason for distributing the image was to destroy it would undermine proof of the elements of the offense of 22-1804. A separate affirmative defense on this matter is therefore unnecessary and confusing.

(2) *USAO App. C at 716 recommends updating the penalty language in subsection (d)(2) to reflect a two class enhancement (to Class 9) as per the commentary and penalty recommendation in Report #69.*

- The RCC incorporates this recommendation, updating the penalty language in the statute to match the penalty recommendation in Report #69. The prior reference to a one class increase was an error. This change improves the clarity of the revised statutes.

RCC § 22E-1805. Distribution of an Obscene Image.

(1) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: "With intent, exclusively and in good faith, to … permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording." PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear and consistent. While it is true that the temporary possession defense of RCC § 22E-502(a) provides a defense to possession or distribution in certain weapon and drug offenses when the possession or distribution is "with intent, exclusively and in good faith, to…permanently dispose of the item," the elements of 22-1805, distribution of an obscene image require proof that the distribution was knowingly done without the complainant's effective consent. That element is present because the primary harm being addressed by the offense is an imposition of the obscene image on another. Proof to a preponderance (or a lesser standard) that the exclusive and good faith reason for distributing the image was to destroy it, while not strictly negating the element of lack of effective consent, is in tension with that element. Also, more basically, unlike the firearm and drug offenses that are addressed by temporary possession defense of RCC § 22E-502, the safe disposal of an obscene image or recording is not a difficult or lengthy process—for digital files it requires clicks of a button, and for physical files (print or audio tape) shredding or waste disposal. There simply isn't an underlying need to distribute in order to dispose of the object because self-disposal is readily accomplished. A separate affirmative defense on this matter is therefore unnecessary and confusing.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

(1) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: "With intent, exclusively and in good faith, to … permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording." PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear. While it is true that RCC § 22E-502 provides a defense to possession or distribution in certain weapon and drug offenses when the possession or distribution is "with intent, exclusively and in good faith, to…permanently dispose of the item," the elements of 22-1806, distribution of an obscene image to a minor, require proof that the distribution was to a complainant under 16 years of age. It is extremely unlikely that a person of such an age would have one of the described roles (e.g. attorney). See the related recommendation below to delete the affirmative defense in subsection (c)(2) in its entirety. A separate affirmative defense on this matter is therefore unnecessary and confusing.

(2) *The CCRC recommends eliminating the affirmative defense in subsection (c)(2). The defense reads: "It is an affirmative defense to liability under this section, that the actor with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator." Inclusion of this defense was a CCRC error and deletion is recommended because it is extremely unlikely that a minor under the age of 16 would be in such a role (e.g., an attorney) listed in the defense, yet distribution to a minor under 16 years of age is an element of the defense.*

- This change improves the clarity of the revised statutes.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (d)(2) to when "there is [no more than] a four year age difference" between the actor and a minor who is, or will be, depicted in the prohibited image. With this change, an actor that is under the age of 18 years would be guilty of creating or trafficking an obscene image of a minor when a minor complainant is more than four years younger than the actor. OAG states that it "agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity." However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses and that "[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent." OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience.*[1301] *OAG states that, as written, the affirmative defense in paragraph (d)(2) "would apply because the actor and both victims are under the age of 18 years" and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (d)(2) of the offense precludes liability for a minor actor that engages in creating, distributing, or displaying a prohibited image of a minor. The affirmative defense ensures that the offense targets predatory adults. The affirmative defense also does not apply to selling admission to or advertising a prohibited image of a minor (subparagraphs (a)(1)(E) and (b)(1)(E)); a minor actor can be liable for this conduct.
- The hypothetical posed by OAG would entail much more serious liability under other statutes for the underlying sexual activity with other minors. For example, in OAG's hypothetical, the 17 year old actor still appears to face liability as a principal under the RCC sexual abuse of a minor statute (RCC § 22E-1302) based on the ages of the parties.
- In addition, the affirmative defense in paragraph (d)(2) requires that the actor "reasonably believe" that a minor who is, or who will be, depicted in the image, gives "effective consent" to the conduct. The RCC definitions of "effective consent" and "consent" exclude consent that is given by a person that, "[b]ecause of youth . . . is unable to make a reasonable

[1301] OAG's hypothetical is specific to the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809), but OAG makes this recommendation for all RCC obscenity offenses with this affirmative defense. For purposes of this discussion, it is irrelevant whether the prohibited conduct involves an image or a live performance or broadcast, and the live performance hypothetical is used, even though RCC § 22E-1807 is specific to images.

judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." These definitions may preclude a factfinder from concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the creating, distribution, or display of prohibited images, particularly in OAG's hypothetical with an older minor actor (17 years) and two very young complainants.

(2) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: "With intent, exclusively and in good faith, to … permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording." PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear. Unlike the firearm and drug offenses that are addressed by temporary possession defense of RCC § 22E-502, the safe disposal of an obscene image or recording is not a difficult or lengthy process—for digital files it requires clicks of a button, and for physical files (print or audio tape) shredding or waste disposal. There simply isn't an underlying need to distribute in order to dispose of the object because self-disposal is readily accomplished. A separate affirmative defense on this matter is therefore unnecessary and confusing.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (d)(2) to when "there is [no more than] a four year age difference" between the actor and a minor who is depicted in the prohibited image. With this change, an actor that is under the age of 18 years would be guilty of possessing an obscene image of a minor when a minor complainant is more than four years younger than the actor. OAG states that it "agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity." However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses due to developmental incapacitation and that "[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent." OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience.*[1302] *OAG states that, as written, the affirmative defense in paragraph (d)(2) "would apply because the actor and both victims are under the age of 18 years" and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years. OAG does not recommend specific language for this revision.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (d)(2) of the offense precludes liability for a minor actor that possesses a prohibited image of a minor. However, the minor actor still has liability if the actor engaged in or caused the underlying sexual activity with other minors that are in the image. For example, in OAG's hypothetical, the 17 year old actor would be liable for first degree sexual abuse of a minor (RCC § 22E-1302), based on the ages of the parties. The affirmative defense ensures that the offense targets predatory adults.
- In addition, the affirmative defense in paragraph (d)(2) requires that the actor "reasonably believe" that a minor who is depicted in the image gives "effective consent" to the conduct. The RCC definitions of "effective consent" and "consent" exclude consent that is given by a person that, "[b]ecause of youth . . . 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." These definitions may preclude a factfinder from

[1302] OAG's hypothetical is specific to the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809), but OAG makes this recommendation for all RCC obscenity offenses with this affirmative defense for actors that are under the age of 18 years. For purposes of this discussion, it is irrelevant whether the prohibited conduct involves an image or a live performance or broadcast, and the live performance hypothetical is used, even though RCC § 22E-1807 is specific to possessing images.

concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the actor possessing a prohibited image, particularly in OAG's hypothetical with an older minor actor (17 years) and two very young complainants.

(2) *PDS App. C 682 recommends inclusion of an affirmative defense to this statute for when a person acts with intent, exclusively and in good faith, to permanently dispose of the item. PDS says such a provision would be comparable to that in the general temporary possession defense.*

- The RCC incorporates this recommendation by adding an affirmative defense in (d)(6) for possessing an image: "With intent, exclusively and in good faith, to permanently dispose of the item; and in fact, the actor does not possess the item longer than is reasonably necessary to permanently dispose of the item. Given the ease of disposal of an image, digital or paper, this defense covers only a very narrow band of behavior, but may avoid unjust liability in some instances. This change improves the proportionality of the revised statute.

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (c)(2) to when "there is [no more than] a four year age difference" between the actor and a minor that is, or will be, depicted in the live sexual performance. With this change, an actor that is under the age of 18 years would be guilty of arranging a live sexual performance of a minor when the minor complainant is more than four years younger than the actor. OAG states that it "agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity." However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses due to developmental incapacitation and that "[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent." OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience. OAG states that, as written, the affirmative defense in paragraph (c)(2) "would apply because the actor and both victims are under the age of 18 years" and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years. OAG does not recommend specific language for this revision.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (c)(2) of the offense precludes liability for a minor actor that engages in creating, directing, or selling admission to live sexual performances of a minor. However, the minor actor still has liability for the underlying sexual activity with other minors. For example, in OAG's hypothetical, the 17 year old actor would be liable for first degree sexual abuse of a minor (RCC § 22E-1302), based on the ages of the parties. The affirmative defense ensures that the offense targets predatory adults. The affirmative defense also does not apply to selling admission to or advertising a live performance with a minor (subparagraphs (a)(1)(C) and (b)(1)(C)); a minor actor can be liable for this conduct.
- In addition, the affirmative defense in paragraph (c)(2) requires that the actor "reasonably believe" that a minor who is, or who will be, depicted in the live sexual performance, gives "effective consent" to the conduct. The RCC definitions of "effective consent" and "consent" exclude consent that is given by a person that, "[b]ecause of youth . . . 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." These definitions may preclude a factfinder from concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the creation or selling of live sexual performances, particularly in OAG's hypothetical with an older minor actor (17 years) and two very young complainants.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (c)(2) to when "there is [no more than] a four year age difference" between the actor and a minor who is, or will be, depicted in the live performance or live broadcast. With this change, an actor that is under the age of 18 years would be guilty of attending or viewing a live sexual performance of a minor when the minor complainant is more than four years younger than the actor. OAG states that it "agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity." However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses due to developmental incapacitation and that "[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent." OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience. OAG states that, as written, the affirmative defense in paragraph (c)(2) "would apply because the actor and both victims are under the age of 18 years" and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years. OAG does not recommend specific language for this revision.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (c)(2) of the offense precludes liability for a minor actor that attends or views a live sexual performance or live broadcast of a minor. However, the minor actor still has liability if the actor engaged in or caused the underlying sexual activity with other minors that are in the performance or broadcast. For example, in OAG's hypothetical, the 17 year old actor would be liable for first degree sexual abuse of a minor (RCC § 22E-1302), based on the ages of the parties. The affirmative defense ensures that the offense targets predatory adults.
- In addition, the affirmative defense in paragraph (c)(2) requires that the actor "reasonably believe" that a minor who is, or who will be, depicted in the live sexual performance, gives "effective consent" to the conduct. The RCC definitions of "effective consent" and "consent" exclude consent that is given by a person that, "[b]ecause of youth . . . 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." These definitions may preclude a factfinder from concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the actor attending or viewing live sexual performances, particularly in OAG's hypothetical with an older minor actor (17 years) and two very young complainants.

RCC § 22E-2101. Theft.

(1) *USAO App. C at 716-717 says it, "continues to recommend decreasing the monetary thresholds for Theft, Fraud, and related offenses." USAO recommends maintaining the current threshold for felony (Class 9) theft, fraud, and other offenses be set at $1,000. USAO recommends there be only one misdemeanor gradation for these offenses (any value), a crime involving $5,000 or a motor vehicle be a Class 8 crime, and a crime involving $50,000 or more be a class 7 crime. USAO says, "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."*

- The RCC does not adopt the USAO recommendation because it may result in disproportionate penalties. The RCC property gradations make a theft: of any amount a class C offense (2 month): of $500 or more, or from a person, a class A offense (12 months); of $5,000 or more a class 9 offense (2 years); of $50,000 or more a class 8 offense (4 years); and of $500,000 or more a class 7 offense (8 years). In addition to the reasons previously given in responses, the CCRC notes again the following.
- The USAO recommendation to maintain the felony theft threshold at its current level ($1,000) and make theft of $5,000 or a motor vehicle (or fraud involving $5,000 subject to a Class 8, 4 year penalty would continue to authorize punishments well in excess of current District sentencing practice.[1303] CCRC analysis indicates that 75-90% of all first degree theft sentences in recent years were for 2 years or less (equal to or less than the Class 9 RCC penalty), with the 97.5% for all theft offenses being 41.7 months (under the 48 months for a Class 8 RCC penalty). Fraud penalties are substantially lower in current court practice, with 75-90% of sentences for first degree fraud (involving $1,000 or more) receiving sentences of 12 months or less (at or under the 12 month penalty for a Class A RCC misdemeanor). At the 97.5% of current sentences, the penalties for first degree fraud are 23.7 months (under the Class 9 RCC penalty).
- Because the court statistics do not provide a record of the amount of the property involved, it is unclear how current practice will map on to the RCC penalties. However, it is reasonable to estimate that RCC penalties will lower available penalties for a substantial number of thefts, beyond 0-10% of affected cases under most RCC penalty recommendations. Perhaps up to a quarter or a third of all cases would be affected—the estimate depends heavily on the unknown number of first degree theft cases that

[1303] For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

currently are in the range of $1,000-$5,000 (the range of the changed felony threshold). The amount that current cases would be lowered is also unclear, but given the availability of a 12 month penalty for thefts of $500 or more (below the current D.C. Code felony theft threshold), and that 75-90% of all current first degree theft sentences are for 24 months or less, the expected reduction in sentences generally would be 12 months or less for these crimes. For fraud, by contrast, the RCC penalty recommendations may not curtail current sentencing practice much if at all (0-10%).

- Current court practice, however, is just one indicator of an appropriate penalty. As the CCRC has pointed out, a consistent result of the public polling the agency conducted is that thefts of $5,000 are rated to be of a seriousness almost exactly between a bodily injury assault (Class B) and a significant bodily injury assault (Class 9)—the equivalent of the RCC 1 year misdemeanor (Class A).[1304] The RCC nonetheless penalizes such thefts or destruction of property of $5,000 at a higher, Class 9 felony.
- Lastly, the CCRC notes again that research indicates that raising the amount of the felony theft threshold is not correlated with property and theft rates.[1305] Several jurisdictions, including Texas with a $2,500 threshold, have felony theft thresholds higher than the District's current $1,000 threshold which USAO recommends. [1306]

[1304] Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).
[1305] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1 ("This chartbook, which updates and reinforces an analysis published in 2016, illustrates three important conclusions: Raising the felony theft threshold has no impact on overall property crime or larceny rates. States that increased their thresholds reported roughly the same average decrease in crime as the 27 states that did not change their theft laws. The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated with its property crime and larceny rates.").
[1306] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 3.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Movie Theater.[1307]

(1) *OAG, App. C at 655, recommends clarifying that the offense includes intending to record part of a motion picture. Specifically, OAG recommends revising paragraph (a)(3) to read "With the intent to record a motion picture, or any part of it."*

- The RCC incorporates this recommendation by revising paragraph (a)(3) to read "With the intent to record a motion picture, or any part of it." This change improves the clarity of the revised statute.

[1307] This offense was previously "Unlawful Operation of a Recording Device in a Motion Picture Theater."

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

(1) *The CCRC recommends replacing the words "with recklessness that" with "reckless" in paragraph (e)(3). This change clarifies that the complainant must actually be a vulnerable adult or elderly person.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-2601. Trespass

(1) *OAG App C at 656-57 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." OAG says that this will clarify that no change in law was intended to limit the issuance of a bar notice to DCHA officials. Correspondingly, OAG recommends that the commentary be redrafted to state: "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]*

- The RCC adopts the language recommended by OAG, both for (d)(1) and the commentary. This change clarifies the revised statutes.

RCC § 22E-2701. Burglary.

(1) *OAG App. C at 657 recommends burglary be amended to make an exception to the requirement that the victim directly perceive the perpetrator when the burglary is in a dwelling. OAG says it disagrees with the requirement that an actor is only guilty of third degree burglary when they are inside an occupied home but are not directly perceived by the victim. OAG does not provide specific language.*

- The RCC does not adopt further changes because the text already specifies that entry into any dwelling without a privilege or license to do so under civil law, whether or not occupied and whether or not the intruder is perceived, constitutes second degree burglary—a felony offense. Commentary makes this point too.

(2) *OAG App. C at 701 recommends an increase by one class of the penalties for first degree burglary and enhanced first degree burglary, from 4 and 8 years to 8 and 12 years. OAG says its recommendation is to "recognize the seriousness of a burglary of an occupied residence, including the trauma and potential harm to a victim" and cites to the current statutory penalty for burglary of up to 30 years for unarmed first degree burglary and 5-60 years for armed first degree burglary. OAG does not cite any other authority for its position.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties.
- OAG does not respond to the prior rationales offered by the CCRC in responses to comments by OAG and USAO regarding the penalty for burglary, and does not compare its proposed classification to other offenses. In addition to repeating its prior responses, the CCRC notes the following:
    - The RCC first degree burglary and enhanced first degree burglary statutes, like current District law, do not require any threat or bodily injury be experienced by the occupant of a dwelling, nor any taking or damage to property. The gravamen of the offense is an invasion of privacy and fear of a victim who perceives a person in their dwelling. The RCC ranks that harm as a felony offense that may receive years of incarceration without any physical injury, threat, or damage. However, more severe punishment would be disproportionate.
    - Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.

- A recent Bureau of Justice Statistics (BJS) report provided to Advisory Group members found that nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when burglary was the most serious crime (so presumably not concurrent to another penalty).[1308] These BJS statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon. The National Corrections Reporting Program (NCRP) data that are the basis of the BJS report indicate that, the percentage of inmates who served at least five years in prison for burglary was higher in DC than in 37 of the 43 other reporting states, and, conversely, the proportion of D.C. residents serving less than two years for a burglary charge was lower than that of 31 of the 43 other states. [1309]
- Despite the District's current broad definition of burglary including less-serious conduct, the District's authorized maximum statutory penalties are among the harshest maximum penalties in the U.S. A 2014 review[1310] of statutes found that D.C. is tied for second in longest imprisonment penalty for what was categorized as simple[1311] burglary, as well as tied for third in longest imprisonment penalty for what was categorized as aggravated[1312] burglary—and that was without accounting for the District's many penalty enhancements such as the mandatory minimum and additional 30 years for burglary while armed, D.C. Code § 22–4502.
- Not only does the District have statutory maximums for burglary higher than most other states, but persons convicted of burglary in D.C. spend more of their sentence behind bars than their counterparts in other states. In 2018, the Bureau of Justice Statistics released a report using data collected through the National Corrections Reporting Program (NCRP) on Time-Served in state prisons – the amount of time "from their date of initial

[1308] U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016*, November 2018.

[1309] CCRC recently contacted BJS and obtained access to the underlying data. These percentages are based on CCRC analysis of the NCRP data.

[1310] Phillip Kopp, *Is Burglary A Violent Crime? An Empirical Investigation Of Classifying Burglary As A Violent Felony And Its Statutory Implications* 119 (2014).

[1311] *Id.* "Simple burglary" was defined as "when an actor *enters or remains in a structure with the intent to commit any crime therein*." Four states were tied for first in sentence length for simple burglary with a max of 20 years, followed by the District's second-degree burglary.

[1312] *Id.* "Aggravated burglary" definitions varied by state with elements such as whether the structure was residential and/or occupied, whether there was the presence or threatened use of a weapon, and whether there was a threat or use of violence elevating simple burglary to aggravated burglary. Two states are tied for second longest with a maximum of 40 years while one state carries a maximum of 50 years for aggravated burglary.

admission to their date of initial release."[1313] Based on the NCRP data, as of 2016, the percentage of inmates who served at least five years in prison for burglary was higher in DC than in 37 of the 43 other reporting states.[1314] Conversely, the proportion of D.C. residents serving less than two years for a burglary charge was lower than that of 31 of the 43 other states.

- The OAG recommendation would punish first degree burglary the same as an aggravated assault that causes serious bodily injury, risking death. Such a ranking is out of step with polling of District voters comparing burglary hypotheticals to causing serious bodily injury. More generally, while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and more violent felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).[1315] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC.
- National opinion research also indicates that most people rank burglary at a much lower severity level compared to violent crimes (rape, assault, robbery, and murder). A survey of 50,000 participants conducted by the Bureau of Justice Statistics, found that respondents ranked the severity of burglarizing a home and stealing up to $100 as even less severe than someone knowingly passing a bad check.[1316] Unsurprisingly, as the level of violence coincident with the burglary went up, so did the severity ranking. However, in burglary scenarios that did not coincide with a separate crime of violence (e.g., rape, murder), severity rankings were in the bottom twenty percent among mean severity scores.

[1313] Danielle Kaeble, *Time Served in State Prison, 2016*, BUR. JUSTICE STAT. (2018).

[1314] "New Mexico, North Dakota, and Oregon did not submit any NCRP data for 2016. Vermont did not submit prison release records. Alaska and Idaho could not distinguish between admission types. In addition, admission types were not reported in Virginia's 2016 NCRP release file." *Id.*

[1315] Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

[1316] Marvin E Wolfgang et al., *National Survey of Crime Severity* 186 (1985).

(3) *The CCRC recommends reordering all the subsections to place the "with intent" clause first.*

- This change improves the clarity of the revised statutes.

(4) *The CCRC recommends reordering the subsections in first degree burglary to match the order of elements in second and third degree.*

- This change improves the clarity of the revised statutes.

(5) *The CCRC recommends reordering the language within subsection (a)(3) and sub-paragraph (b)(1)(B)(ii) to first reference entering with the actor then someone already being inside who, in fact, directly perceives the actor while inside. The culpable mental state of "in fact" means that there need be no proof as to the actor's awareness of being perceived.*

- This change improves the clarity of the revised statutes.

RCC § 22E-3401. Escape from a Correctional Facility or Officer

(1) *OAG App. C at 673 repeats its recommendation to redraft the statute in (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." OAG says its "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."*

- The RCC does not incorporate this change because it may make the statute less clear and consistent. RCC § 22E-207 clearly states that: "Any culpable mental state or strict liability specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state or strict liability is specified." This is a foundational rule of drafting in the RCC and there is no exception for prepositional phrases. Commentary also leaves no doubt on the point.

(2) *USAO App. C at 711 says it "continues to recommend that the CCRC increase the penalty classifications for Escape." USAO says it recommends, "at a minimum," that the penalty classification for 3rd degree escape be increased. USAO doesn't in this comment say what the new penalty should be but notes that it previously recommended that all gradations of escape be felonies. USAO says the CCRC recommendation, particularly with respect to making RCC third degree escape a Class C (60 day maximum) offense, would be "substantially lower than current sentencing practice in Superior Court." USAO notes several statistics from the Appendix G provided by the CCRC and says that "[m]ost 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."*

- The RCC partially incorporates this change by raising the penalty classification for third degree escape to a Class B misdemeanor (6 month maximum. This change improves the proportionality of the revised statutes.
- The extent to which the RCC penalties accommodate current court sentences appears to turn principally on whether, as USAO asserts, the court statistics in Appendix G that come from the court with a general code of D.C. Code § 22-2601 and the code for D.C. Code § 22-2601(a)(1) correspond to the RCC third degree escape—which is specifically for halfway houses and failure to return or report to a correctional facility when on work release and similar situations. The RCC first degree escape covers any other situation than reporting to or failing to return to a correctional facility, as well as secure juvenile facilities, and carries a much higher Class 9 (24 month) penalty. (Second degree is a Class A (12 month) misdemeanor.)

- The CCRC is not aware of evidence that "[m]ost likely, many of the convictions categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1)" corresponds to third degree escape. However, even if some conduct categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) corresponds to RCC third degree assault, the updated Class B penalty for third degree would encompass between the 25th and 50th quantile of sentences for those provision.[1317] As third degree conduct presumably would be the least serious under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) (compared to escape from a correctional facility or officer), it appears the RCC penalties generally cover most, if not all, current sentences under those provisions.
- With respect to court codes for 22DC2601(a)(2) and 22DC2601(a)(3), the CCRC notes that there are relatively few convictions for these offenses and the RCC penalties appear to cover between 75th and 90th quantile of sentences for each of those provisions.

(3) *The CCRC recommends replacing the term "custody" in paragraphs (b)(1) and (b)(2) with the term "official custody." As is discussed in this Appendix for RCC § 22E-701, what was previously the definition of "custody" is now the definition of "official custody." The definition itself is unchanged.*

- This change improves the clarity and consistency of the revised statutes.

[1317] For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

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

(1) *USAO App. C at 691 recommends removing subsection (b), which states: "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." USAO says that this RCC language, added based on a USAO comment in App. C at 358, is confusing and suggests that D.C. Code §23-1303(d) precludes PSA from divulging detection device information in other contexts.*

- The RCC adopts the recommendation by striking subsection (b). This change clarifies the revised statute.

(2) *The CCRC recommends changing the culpable mental state in paragraph (a)(2) from "intentionally" to "knowingly" (applicable through use of "knows" in paragraph (a)(1)) to clarify that the elements in subparagraphs (a)(2)(A) and (a)(2)(B) are not inchoate and must be proven. The use of "intentionally" was in error and the updated language is consistent with the prior commentary.*

- This change clarifies the revised statutes.

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

(1) *The CCRC recommends adding to first degree a subparagraph that lists a "ghost gun" as within the scope of the offense, and adding a cross-reference to the term in subsection (f). The term recently was defined and added to D.C. Code § 22–4514 (Definitions [for firearm offenses]) and D.C. Code § 22–4514 (Possession of certain dangerous weapons prohibited; exceptions) by the recently enacted Omnibus Public Safety and Justice Amendment Act of 2020 (projected law date May 18, 2021). Accordingly, the CCRC recommends inclusion of the term in RCC § 22E-701 and the revised possession of a prohibited weapon or accessory statute, RCC § 22E-4101.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

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

(1) *PDS, App. C at 682-683, recommends barring attempt liability when the actor does not actually possess a dangerous weapon. PDS agrees that attempt liability is appropriate if an actor possesses an object falsely believing that the object is a dangerous weapon. However, if the defendant does not actually possess the weapon, or object that the defendant believes is a weapon, then attempt liability is unwarranted.*

- The CCRC adopts this recommendation by adding a new subsection to RCC § 22E-4103 that bars attempt liability in cases in which the actor did not actually possess an item with intent to use it to commit an offense. If an actor possesses an item falsely believing it is a weapon prohibited under RCC §22E-4103, attempt liability may still apply.[1318]
- Possession of a Dangerous Weapon with Intent to Commit Crime is a semi-inchoate offense, which criminalizes *potentially* harmful conduct. Attempt liability under RCC § 22E-301 requires that the actor comes "dangerously close" to completing the offense. RCC § 22E-4103 broadens the scope of liability by providing criminal penalties when a person possesses a weapon with intent to use it to commit an offense, even if the person is not "dangerously close" to committing the offense.

[1318] For example, if a person purchases what he believes is a bomb, with intent to use the bomb to commit an offense, attempt liability may still apply even if the item is not actually a bomb.

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

(1) *OAG App. C at 659 recommends subsection (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." OAG says that while a person should have a reasonable time to dispossess themselves of a firearm there may be special circumstances where the judicial officer finds reason to give less than 24 hours.*

- The RCC adopts this recommendation, changing the subsection (c) statutory language to read: "An actor does not commit an offense under this section for, in fact, possessing a firearm within the first 24 hours of the prior conviction or service of the protection order, or, when 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, within the time specified by the judicial officer." Commentary is adjusted accordingly. This change improves the proportionality of the revised statutes.

(2) *PDS App. C at 683 recommends switching the word order "so 'is a fugitive from justice' is at (A) and the prior conviction paragraph is at (B)." PDS says that this will ensure that the culpable mental state "knowingly" applies to the phrase "is a fugitive from justice," consistent with the commentary. The current drafting, contrary to the commentary's description, seems to indicate that strict liability applies to the status as a fugitive from justice.*

- The RCC adopts this recommendation, switching the word order as recommended. This change clarifies the revised statutes.

(3) *USAO App. C at 691-692 recommends changing the words "sexual conduct" to "a sexual act, a sexual contact" and notes that "sexual conduct" is not a defined term and not used as an element in RCC offenses.*

- The RCC adopts this recommendation, replacing the word "sexual conduct" with "a sexual act, a sexual contact."

(4) *USAO App. C at 692 recommends changing the type of judicial orders referenced in subsection (b)(2)(C) of the offense. USAO recommends expanding the scope of the provision to include "stay away orders imposed as part of a criminal case, either as a condition of release pending trial or as a condition of probation." USAO also notes that stay away orders could also be imposed as part of civil anti-stalking orders. USAO recommends specific language, including reference in its proposed language to requiring either actual or personal notice.*

- The RCC partially adopts this recommendation by adding to subsection (b)(2)(C) the language "or a final anti-stalking order issued under D.C. Code § 16-1064." This language treats new anti-stalking orders as equivalent to civil protection orders that are no-contact and No HATS orders (both covered by the RCC reference to a final protection order). However, the revised statute does not extend subsection (b)(2)(C) to

include other court orders in criminal cases, which would seem to be a different approach than under current law. Current D.C. Code § 22-4503(A)(5)(B) does not appear to reach criminal cases, as evidenced by its reference to a "petitioner." The revised statute also does not include specific language regarding "personal notice" being sufficient for a hearing at which an order is issued; the revised statute maintains the notice requirements for protection orders under D.C. Code § 16-1005 and anti-stalking orders under D.C. Code § 16-1064. This change improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends deleting "in fact" from sub-paragraph (b)(2)(C) because it is duplicative of the "in fact" mental state in sub-paragraph (b)(2)(B).*

- This change improves the clarity of the revised statutes.

(6) *The CCRC has defined the term "crime of violence" which is used in the revised RCC § 22E-4105 statute. The revised definition is similar in scope to the definition of "crime of violence" in current D.C. Code § 23–1331(4). See commentary to "crime of violence" in RCC § 22E-701.*

- This change improves the clarity of the revised statutes.

(7) *The CCRC recommends amending the statutory language to clarify that qualifying prior convictions must be for offenses committed within ten or five years of the current possession of a firearm. The prior statutory language and commentary set the time period based on the date of conviction rather than commission of the offense. However, as the primary aim of the statute is to punish possession of a firearm within a window of time after the actor engages in a specified criminal act (and there may be heightened dangerousness), the more appropriate starting point for the five or ten year window is the date of commission of a crime. Liability for other firearm offenses (e.g., § 7-2502.01A, Possession of an Unregistered Firearm, Destructive Device, or Ammunition) is available for firearm possession outside this window of time. The updated language also is consistent with the updated language regarding prior convictions in RCC § 22E-606, Repeat Offender Penalty Enhancement.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles

(1) *OAG App. C 659-660 recommends that the nuisance provision in this section be amended to include an antique firearm. OAG says that "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."*

- The RCC does not adopt further changes because the text, in the definition of "firearm" in RCC § 22E-701[1319] already includes an "operable antique firearm." An inoperable antique firearm is not a nuisance.

[1319] "Firearm" has the meaning specified in D.C. Code § 7-2501.01, except that in Chapter 41 of this title the term "firearm":

(A) Shall not include a firearm frame or receiver;
(B) Shall not include a firearm muffler or silencer; and
(C) Shall include operable antique pistols.

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

(1) *OAG App. C 660-661 recommends that (1) 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, and (2) any sentences issued pursuant to this paragraph run concurrently. OAG says this will clarify how practice will proceed under the revised statute.*

- The RCC adopts this recommendation, amending RCC § 22E-4119 as well as RCC § 22E-214 to clarify that the sentencing court may either vacate all but one of the offenses that merge prior to initial sentencing, or go ahead and enter judgment and sentence the actor for the offenses that merge. But, if the latter course is chosen the sentences must run concurrently and the convictions for all but one (assuming all are not overturned on appeal) must be vacated after the time for appeal has expired or there is a judgment on appeal. This change improves the clarity and consistency of the revised statutes.

(2) *OAG App. C 660-662 recommends redrafting the commentary "to make it clear that the unit of prosecution and conviction for possessing an unregistered firearm remains each weapon." OAG says that the commentary incorrectly states in one location that "Under current District case law, multiple convictions for a possession of an unregistered firearm merge …" while in footnote 11 the commentary cites* Hammond v. United States*, 77 A.3d 964, 968 (D.C. 2013) for the holding that "the unit of prosecution for possessing an unregistered firearm is each weapon." OAG says it would be disproportionate to limit convictions with multiple unregistered firearms to a single conviction.*

- The RCC adopts this recommendation by deleting the incorrect sentence indicating that multiple convictions for a possession of an unregistered firearm merge, and moving the first sentence of the cited footnote into the body of the commentary. The CCRC did not intend to change this unit of prosecution case law and the sentence was in error. This change clarifies the revised statutes.

(3) *OAG App. C 662 recommends amending the statute to permit multiple convictions for possession of an unregistered firearm and one or more of the following based on the same act or course of conduct. Carrying a Dangerous Weapon under RCC § 22E-4102, Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103, or Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104. OAG argues that multiple convictions should be*

permitted for possession of an unregistered firearm and other offenses because the interests to society are different.

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The RCC clearly recognizes that there is a distinct and significant social interest in failure to register a firearm by codifying as a separate offense possession of an unregistered firearm under RCC § 7-2502.01A, for which a person may be convicted and sentenced to the same imprisonment time as under current law. However, the purpose of RCC § 22E-4119, limitation on convictions for multiple related weapon offenses, is to address imprisonment penalties to ensure that overall punishments for similar weapon offenses remain proportionate. The CCRC does not believe, upon review of court data and public opinion surveys, that it would be proportionate to stack penalties for possession of an unregistered firearm on top of felony penalties for these other offenses which involve possessing a firearm in circumstances where the firearm isn't displayed or used.
- OAG's recommendation concerns subsection (a) of RCC § 22E-4119 which addresses weapon offenses where the weapon was not actually used or displayed to a person. Possession of an unregistered firearm under RCC § 7-2502.01A notably does *not* merge with offenses involving use/display (see subsection (b) of RCC § 22E-4119). The other offenses in subsection (a) that OAG recommends allowing multiple convictions for all carry felony imprisonment penalties for a firearm, so the practical effect of OAG's recommendation would be to allow stacking of the one-year maximum penalty for RCC § 7-2502.01A (unregistered firearm) on top of these other felony penalties for possessory crimes that do not involve use/display.
- OAG's comment makes no reference to penalties in its comment and does not discuss whether stacking imprisonment terms for RCC § 7-2502.01A on top of other (felony) firearm offenses that don't involve actual use or display of the firearm is proportionate. Analysis of court data over 2010-2019 indicates that about 18% of convictions for possession of an unregistered firearm were sentenced consecutive to any other offense,[1320] although analysis of what those sentences were and whether the sentences were suspended is not available. So, depending on what proportion of this 18% of consecutive sentences involve other charges targeting possession or carrying of a firearm, there may be a small but limited practical effect that results from inclusion of unregistered firearm alongside other felony charges in RCC § 22E-4119(a).

[1320] *See* CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions for a more complete description of this analysis. Memo #40 also includes important caveats on the CCRC analysis of court data.

(4) *PDS, App. C at 683, recommends that the statute refer to penalty enhancements. PDS notes that under prior versions of specific offenses using or displaying a weapon was an element of higher penalty grades, whereas more recent versions apply a penalty enhancement for using or displaying a weapon.*

- The RCC adopts this recommendation. The statute will be amended to clarify that the limitation on convictions applies to offenses that have penalty enhancements for using or displaying weapons. This change improves the clarity of the revised statute.

(5) *PDS, App. C at 683 recommends that § 22E-4119(b)(3) should apply to all offenses under the RCC, not just offenses under Subtitle II. 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." PDS says "[t]his 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."*

- The RCC partially adopts this recommendation by revising (b)(3) to include all offenses under Subtitle II and III with such a display or use of a dangerous weapon gradation or enhancement. At present, only one Subtitle III offense, RCC § 22E-2701, burglary, is included by this reference to Subtitle III. This change improves the proportionality of the revised statutes.

RCC § 22E-4120. Endangerment with a Firearm

(1) *USAO App. C 711 says it "continues to recommend increasing the penalty for Endangerment with a Firearm." USAO quotes part of a prior CCRC response which in part said, "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." USAO then says that, "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) 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."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The particular example previously used by CCRC was not on point, and USAO is correct that its proposal to raise RCC § 22E-4120, endangerment with a firearm to a Class 8 penalty would still be lower than the Class 7 penalty for assaulting someone and causing bodily injury with a dangerous weapon which is a Class 6 offense under the RCC. However, it remains that heightened punishment for RCC § 22E-4120, endangerment with a firearm, would be disproportionate for multiple reasons.
    - First, CCRC notes that while the RCC § 22E-4120, endangerment with a firearm offense is primarily a new offense, its closest counterpart in the current D.C. Code is § 22–4503.01, Unlawful discharge of a firearm, which carries a one year penalty, is more regulatory in nature, and requires only negligently mishandling a firearm. The CCRC believes raising penalties in this instance, from a misdemeanor to a felony, is justified where a person knowingly discharges a firearm in a manner that creates a substantial risk of death or serious bodily injury, or otherwise occurs in a public place. A felony is appropriate for such a terrifying event, even though no one is harmed.
    - However, this offense is intended to cover lower-level conduct that falls short of attempted assaults or murders or threatening with a gun, and raising the penalty as recommended by USAO would allow the government to effectively circumvent the requirements of those offenses. This endangerment with a firearm offense has a lesser culpability requirement than such attempts (which require the actor *plan* to commit the harm) and doesn't require an intent to threaten. More severe penalties such as those requested by USAO

	are available under other RCC offenses, e.g. for attempted second degree assault (trying but not actually causing someone serious bodily injury) which carries a 4 year penalty (equal to the USAO proposed Class 8 penalty for this offense). Attempted murder by shooting a firearm at another person carries much higher penalties still, potentially dozens of years. Another similar offense, enhanced first degree threats, provides a Class 8 penalty, the level here requested by USAO, when a person knowingly engages in an enhanced criminal threat of another person with a firearm under RCC § 22E-1204. This offense, while similar to such attempts and threats, is broader in scope and serves to capture any knowing shooting in an area where someone might be seriously injured.

RCC § 22E-4201. Disorderly Conduct

(1) *OAG App. C at 662 says in a footnote that it believes the word "criminal" in the disorderly conduct and rioting statutory text is a typo and should be stricken as unnecessary.*

- The RCC does not adopt the OAG recommendation because it would make the statute less clear and proportionate. The commentary discusses the use of the word criminal, noting the example: "Consider, for example, a person who becomes afraid that a repossession officer will tow away their car, due to delinquent payments. That harm (alone) is not a criminal taking of property and, without more, the officer's conduct is not disorderly." Part of one footnote in the commentary to the disorderly offense did misleadingly indicate that there would need to be fear of a particular criminal offense, versus a criminal harm generally, and that part of the footnote has been deleted.

(2) *OAG App. C at 662-663 recommends*[1321] *the statute be amended to provide liability in a location that is inside a public conveyance or a station for a public conveyance. OAG says that this expanded scope recognizes that being inside the fare gates of a metro station or on a bus (which requires payment to enter) is still an area generally considered open to the public where disorderly conduct can occur. OAG also notes that the current D.C. Code disorderly statute includes a provision regarding public conveyances.*[1322]

- The RCC adopts the OAG recommendation by adding a new sub-paragraph (a)(1)(B) that reads: "Inside a public conveyance or a rail transit station;". In RCC § 701, the RCC already specifies: "'Public conveyance' means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat" and ""Rail transit station' has the meaning specified in D.C. Code § 35-251." This change improves the clarity and proportionality of the revised statutes.

(3) *OAG App. C at 663 recommends that either of the RCC offenses of disorderly conduct or public nuisance "add back some of the language…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." OAG says that it "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*

[1321] By email to the CCRC on 2/4/21 the OAG representative indicated that OAG's preferred language for updating the scope of disorderly conduct in paragraph (a)(1) is to include sub-paragraph (B) as follows:
(1) In fact, is in a location that is:
(A) Open to the general public at the time of the offense;
(B) Inside a public conveyance or a train station servicing a public conveyance; or
(C) A communal area of multi-unit housing;

[1322] D.C. Code § 22-1321(c) ("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.").

(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." OAG says that its "recommendation does not include the term "disturbs" as we want to make clear that this offense should be reserved more than mere disturbance," but does not further clarify what specific language from current law it wishes to insert.

- The RCC does not adopt the OAG recommendation to further add in language from current law because it may make the revised statute less clear and proportionate. The specific scenario discussed by OAG, if significant, is already addressed by RCC § 22E-4202, public nuisance. ("An actor commits public nuisance when the actor purposely causes significant interruption to … a person's lawful use of a public conveyance.")

RCC § 22E-4202. Public Nuisance.

(1) *OAG App. C at 663 recommends that either of the RCC offenses of disorderly conduct or public nuisance "add back some of the language…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." OAG says that it "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." OAG says that its "recommendation does not include the term "disturbs" as we want to make clear that this offense should be reserved more than mere disturbance," but does not further clarify what specific language from current law it wishes to insert.*

- The RCC does not adopt the OAG recommendation to further add in language from current law because it may make the revised statute less clear and proportionate. The specific scenario discussed by OAG, if significant, is already addressed by RCC § 22E-4202, public nuisance. ("An actor commits public nuisance when the actor purposely causes significant interruption to … a person's lawful use of a public conveyance.")

RCC § 22E-4203. Blocking a Public Way.

(1) *OAG App. C 663-664 recommends including in commentary a reference to prior Council legislative history providing examples of when having a prior warning for blocking is sufficiently related to current conduct to provide for liability.*

- The RCC incorporates the Council legislative history recommended by OAG,[1323] placing the language in a footnote in the commentary. This change clarifies the revised statute.

(2) *OAG App. C 664-65 recommends amending paragraph (a)(2) to include "the blocking of entrances and exits to private property." OAG says that it is a common situation that, for example, "a person stands on the sidewalk in front of a CVS drug store blocking people from entering and exiting the store." OAG says that, "[b]ecause the CVS is not located in a government building, this offense does not apply[, h]owever, because the person is standing on the sidewalk, the offense of trespass does not apply."*

- The RCC does not incorporate the OAG recommendation because the statutory language already covers the scenario described by OAG. Contrary to the OAG assertion, the plain language of the statute applies to blocking any street, sidewalk, bridge, path, entrance, exit, or passageway, whether or not it goes to private or public property. The statute does require that the actor be on government land (such as a sidewalk) or in a government building but the adjective "government" is not in paragraph (a)(1). To clarify this point a sentence and footnote explaining it has been added to the commentary on (a)(1): "The location blocked may be a privately owned location, so long as the other requirements of the offense are met.[1324]"

[1323] Committee on the Judiciary and Public Safety, Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010 (Nov. 18, 2010) at 7 ("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.").

[1324] For example, RCC § 22E-4203 is applicable when the actor is on a public sidewalk immediately abutting a private entrance on private land (or in a private building), effectively blocking the entrance to the private entrance (or building). The list of locations that may be blocked in paragraph (a)(1) is not limited to government property, however the actor must themselves be on government land or in a government building under paragraph (a)(2).

RCC § 22E-4206. Indecent Exposure.

(1) *OAG, App. C at 665, recommends deleting the exclusion from liability for a person under the age of 12 years (previously paragraph (c)(1)). OAG states that it is unnecessary because the Developmental Incapacity Affirmative Defense (now Minimum Age for Offense Liability in RCC § 22E-216) "relates to all criminal conduct."*

- The RCC incorporates this recommendation by deleting what was previously paragraph (c)(1) from the revised indecent exposure statute. This change improves the clarity and consistency of the revised statutes.

RCC § 22E-4401. Prostitution.

(1) *OAG App. C at 674 repeats the CCRC response to the prior OAG comment at App. C at 558-560 and states: "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."*

- The RCC does not adopt the OAG prior or repeated recommendation regarding changes to record sealing provisions at this time, for the reasons previously stated. The CCRC has noted this in Appendix K as an issue that needs addressing in the future.

(2) *The CCRC recommends deleting the deferred disposition provision (previously subsection (c)) from the revised prostitution statute and instead relying on the general deferred disposition provision in RCC § 22E-602. The provisions are largely identical, the main difference being the deferred disposition provision in RCC § 22E-602 permits sealing instead of expungement upon successful completion of probation, discharge, and dismissal of proceedings. In the previous RCC compilation, only the revised prostitution, patronizing for prostitution, and drug possession statutes had a deferred disposition provision and it permitted expungement because it was modeled on the current D.C. Code drug possession statute. Now, however, RCC § 22E-602 has a general deferred disposition provision that applies to all Class A, B, C, D, and E offenses in the RCC and provides for record sealing under D.C. Code § 16–803(l) and (m) upon successful completion of probation, discharge, and dismissal of proceedings. The maintenance of a non-public file concerning prior utilization of deferred disposition proceedings under RCC § 22E-602(c) may facilitate better decision making by the court and prosecutors regarding use of deferral and diversion mechanisms.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-4402. Patronizing Prostitution.

(1) *The CCRC recommends deleting the deferred disposition provision (previously subsection (b)) from the revised patronizing prostitution statute and instead relying on the general deferred disposition provision in RCC § 22E-602. The provisions are largely identical, the main difference being the deferred disposition provision in RCC § 22E-602 permits sealing instead of expungement upon successful completion of probation, discharge, and dismissal of proceedings. In the previous RCC compilation, only the revised prostitution, patronizing for prostitution, and drug possession statutes had a deferred disposition provision and it permitted expungement because it was modeled on the current D.C. Code drug possession statute. Now, however, RCC § 22E-602 has a general deferred disposition provision that applies to all Class A, B, C, D, and E offenses in the RCC and provides for record sealing under D.C. Code § 16–803(l) and (m) upon successful completion of probation, discharge, and dismissal of proceedings. The maintenance of a non-public file concerning prior utilization of deferred disposition proceedings under RCC § 22E-602(c) may facilitate better decision making by the court and prosecutors regarding use of deferral and diversion mechanisms.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-4601. Contributing to the Delinquency of a Minor.

(1) *OAG, App. C at 674-75, recommends revising subparagraphs (a)(3)(A) and (a)(3)(B) to read "a District offense, a violation of D.C. Official Code § 25-1002, or a comparable offense or violation in another jurisdiction" or something similar. The subparagraphs currently read, in relevant part, "a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction," based on a previous OAG recommendation.[1325] OAG states 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."*

- The RCC incorporates this recommendation by revising subparagraphs (a)(3)(A) and (a)(3)(B) to read, in relevant part, "a District offense, a violation of D.C. Code § 25-1002, or a comparable offense or violation in another jurisdiction." This change improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 676, recommends revising the exclusion from liability in subsection (b) so that "during a demonstration" modifies the remaining requirements. With this revision, the exclusion now reads: "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."*

- The RCC adopts this recommendation. This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends codifying an exclusion in paragraph (b)(2): "An actor does not commit an offense under this section when, in fact, the actor satisfies the requirements specified under D.C. Code § 7-403." This is consistent with current law,[1326] although the current D.C. Code contributing to the delinquency of a minor*

[1325] App. D2 at 293.

[1326] D.C. Code § 7-403 states that contributing to the delinquency of a minor under current D.C. Code § 22-811(a)(2) and (b)(1) "shall not be considered crimes and shall not serve as the basis for revoking or modifying a person's supervision status" when healthcare is sought for an overdose:

> (a) Notwithstanding any other law, the offenses listed in subsection (b) of this section shall not be considered crimes and shall not serve as the sole basis for revoking or modifying a person's supervision status:
>
> (1) For a person who:
>
> (A) Reasonably believes that he or she is experiencing a drug or alcohol-related overdose and in good faith seeks health care for himself or herself;
>
> (B) Reasonably believes that another person is experiencing a drug or alcohol-related overdose and in good faith seeks healthcare for that person; or
>
> (C) Is reasonably believed to be experiencing a drug or alcohol-related overdose and for whom health care is sought; and

statue doesn't reference D.C. Code § 7-403. Both the commentary to the revised contributing to the delinquency of a minor statute and the Appendix K that accompanies this review note that D.C. Code § 7-403 will need conforming amendments to reflect the revised contributing to the delinquency of a minor statute.

- This change improves the clarity and consistency of the revised statutes.

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(2) The offense listed in subsection (b) of this section arises from the same circumstances as the seeking of health care under paragraph (1) of this subsection.

(b) The following offenses apply to subsection (a) of this section:

. . .

(5) Provided that the minor is at least 16 years of age and the provider is 25 years of age or younger:

(B) Contributing to the delinquency of a minor with regard to possessing or consuming alcohol or, without a prescription, a controlled substance as prohibited by § 22-811(a)(2) and subject to the penalties provided in § 22-811(b)(1) . . . ."

D.C. Code § 7-403(a), (b)(5)(B).

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

(1) *The CCRC recommends amending the commentary to RCC § 7-2502.01A to clarify the burden of proof for the listed exclusions from liability. The commentary in two places incorrectly referred to the burden of proof being on the defendant and had not been updated to reflect the general provision in RCC § 22E-201(b)(1) that "If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of at least one element of the exclusion from liability beyond a reasonable doubt."*

- This change improves the clarity and consistency of the revised statutes.

RCC § 7-2502.15. Possession of a Stun Gun

(1) *OAG App. C 665 recommends deletion of paragraph (e)(2) which states: "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." OAG says that the provision 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."*

- The RCC incorporates the OAG recommendation by deleting the provision. This change clarifies the revised statutes.

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner

(1) *OAG App 666 recommends adding the phrase "whichever is least" to subparagraph (4)(A). OAG says that this will ensure the rule of lenity does not apply to that part of the statute, noting that the commentary makes the 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."*

- The RCC partially incorporates this recommendation by deleting the phrase "whichever is least" in the commentary sentence cited. The plain language specifies that the government can meet its burden either way. Deleting "whichever is least" from the commentary makes the entry more consistent with the statutory language. This improves the clarity and consistency of the revised statutes.

§ 16–710. Suspension of imposition or execution of sentence.

(1) *PDS App. C at 707 recommends the RCC reduce the length of probation to a maximum of two years. PDS notes that the RCC at present does not address probation. PDS further says that, "to increase the positive impacts of probation and minimize intrusive, 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." PDS also recommends that there should be a one-year review of probation with a presumption that probation should be terminated absent a compelling reason for continuance. PDS cites relevant research by the Pew Institutes.*

- The RCC does not incorporate this recommendation at this time. The CCRC may issue future recommendations regarding probation.

RCC § 16-1022. Parental Kidnapping.

(1) *PDS, App. C at 666, recommends that the exclusion to liability under paragraph (e)(1) be amended to require that the parent reasonably believes he or she is fleeing from imminent physical harm.*

- The RCC adopts this recommendation. This change improves the clarity and proportionality of the revised statute.

D.C. Code § 16-705. Jury trial; trial by court.

(1) *USAO App. C 692 says that it opposes the RCC proposal that three years after enactment all offenses punishable by imprisonment be jury demandable. USAO says it "incorporates its arguments made in previous submissions regarding the significant expansion of jury trials proposed by the CCRC."*

- The RCC does not incorporate this recommendation for the reasons stated in prior responses to USAO and described in the commentary. Only a dozen states do not provide a jury trial for all crimes carrying an imprisonment penalty. A three year delay in implementation gives ample time for the court and practitioners to adjust to possible changes in caseflow and capacity.

D.C. Code § 23-586. Failure to Appear After Release on Citation or Bench Warrant Bond.

(1) *USAO App. C 693 recommends eliminating the element requiring that the defendant "fail to make reasonable efforts" to appear or remain for a hearing. USAO says that it is unclear how the government could meet its burden for this element given that many relevant facts (e.g. bus delay or a technological problem connecting to a virtual hearing, or hospitalization) are uniquely within the knowledge of the defendant. In the alternative, USAO says that if the CCRC wishes to account for such situations the RCC could make it an affirmative defense "that the defendant made all reasonable efforts to appear or remain for the hearing." USAO says an affirmative defense is more appropriate than a defense because the defendant typically will be the only party able to provide proof that they made all reasonable efforts to appear.*

- The RCC partially incorporates this recommendation by eliminating the requirement that the defendant "knowingly fails to make reasonable efforts to appear or remain for the hearing," requiring knowledge as to failure to appear or remain, and creating a defense for when the actor, "in fact, makes good faith, reasonable efforts to appear or remain for the hearing." The RCC adopts the same approach in both the revised D.C. Code § 23-586 and D.C. Code § 23-1327, as both address failure to appear circumstances. While USAO rightly points to difficulty in proving as an element whether reasonable efforts were made to appear, simply striking the subsection would leave a strict liability requirement as to the failure to appear, contrary to current law. Also, the USAO recommended language that the defendant take "all reasonable efforts" (as opposed to merely "reasonable efforts") to appear invites speculation as to overlooked means by which appearance could have been secured. The revised statute, accordingly, refers to "good faith, reasonable efforts." As to whether the defense should be an affirmative defense, the CCRC notes that the current case law on the meaning of "willfulness" as used in D.C. Code § 23-586 and D.C. Code § 23-1327, statutory presumptions about prima facie evidence in D.C. Code § 23-1327, and the burden of production in the court-recognized "special circumstances defense"[1327] to the provision in D.C. Code § 23-1327—while far from clear—appear to impose an initial burden of production on the defendant but do not clearly establish the

[1327] *Raymond v. United States*, 396 A.2d 975, 978 (D.C.1979); *Laniyan v. United States*, 226 A.3d 1146, 1151 (D.C. 2020) ("Our cases hold that where, as here, a defendant presents special circumstances explaining his failure to appear as inadvertent, the judge (in a bench trial) must either discredit the defendant's evidence or credit some or all of it while pointing to other evidence overcoming it. In other words, if a defendant puts forward a colorable defense to a finding of willfulness, and if the judge credits that defense, then the judge must discuss in sufficient detail the proffered reasons for failing to appear and what other evidence overcomes those reasons, in order to find the defendant's failure to appear willful. In those situations, the judge cannot simply rely on the statutory inference alone.").

defense as an affirmative defense with a preponderance standard. The CCRC notes that, as is described in the commentary, voluntariness may often be decisive in instances where unexpected external events (e.g. bus delay) cause the failure to appear. This change improves the clarity and proportionality of the revised statutes.

D.C. Code § 23-1327. Failure to Appear in Violation of a Court Order.

(1) *USAO App. C 693 recommends eliminating the element requiring that the defendant "fail to make reasonable efforts" to appear or remain for a hearing. USAO says that it is unclear how the government could meet its burden for this element given that many relevant facts (e.g. bus delay or a technological problem connecting to a virtual hearing, or hospitalization) are uniquely within the knowledge of the defendant. In the alternative, USAO says that if the CCRC wishes to account for such situations the RCC could make it an affirmative defense "that the defendant made all reasonable efforts to appear or remain for the hearing." USAO says an affirmative defense is more appropriate than a defense because the defendant typically will be the only party able to provide proof that they made all reasonable efforts to appear.*

- The RCC partially incorporates this recommendation by eliminating the requirement that the defendant "knowingly fails to make reasonable efforts to appear or remain for the hearing," requiring knowledge as to failure to appear or remain, and creating a defense for when the actor, "in fact, makes good faith, reasonable efforts to appear or remain for the hearing." The RCC adopts the same approach in both the revised D.C. Code § 23-586 and D.C. Code § 23-1327, as both address failure to appear circumstances. While USAO rightly points to difficulty in proving as an element whether reasonable efforts were made to appear, simply striking the subsection would leave a strict liability requirement as to the failure to appear, contrary to current law. Also, the USAO recommended language that the defendant take "all reasonable efforts" (as opposed to merely "reasonable efforts") to appear invites speculation as to overlooked means by which appearance could have been secured. The revised statute, accordingly, refers to "good faith, reasonable efforts." As to whether the defense should be an affirmative defense, the CCRC notes that the current case law on the meaning of "willfulness" as used in D.C. Code § 23-586 and D.C. Code § 23-1327, statutory presumptions about prima facie evidence in D.C. Code § 23-1327, and the burden of production in the court-recognized "special circumstances defense"[1328] to the provision in D.C. Code § 23-1327—while far from clear—appear to impose an initial burden of production on the defendant but do not clearly establish the

[1328] *Raymond v. United States*, 396 A.2d 975, 978 (D.C.1979); *Laniyan v. United States*, 226 A.3d 1146, 1151 (D.C. 2020) ("Our cases hold that where, as here, a defendant presents special circumstances explaining his failure to appear as inadvertent, the judge (in a bench trial) must either discredit the defendant's evidence or credit some or all of it while pointing to other evidence overcoming it. In other words, if a defendant puts forward a colorable defense to a finding of willfulness, and if the judge credits that defense, then the judge must discuss in sufficient detail the proffered reasons for failing to appear and what other evidence overcomes those reasons, in order to find the defendant's failure to appear willful. In those situations, the judge cannot simply rely on the statutory inference alone.").

defense as an affirmative defense with a preponderance standard. The CCRC notes that, as is described in the commentary, voluntariness may often be decisive in instances where unexpected external events (e.g. bus delay) cause the failure to appear. This change improves the clarity and proportionality of the revised statutes.

D.C. Code § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000

(1) *OAG App. C at 702-704 recommends that subsection (a) delete the phrase "committed on or after August 5, 2000" which limits the scope of the purposes of sentencing that follows in subsection (a). OAG says few people are likely to be sentenced for offenses committed at least 22 years before the RCC, there is no reason that an indeterminate sentence should not reflect the stated goals, and by removal of the date "we avoid an issue concerning how people should be sentenced for offenses that where committed between August 2000 and the effective [date] of the RCC." OAG also recommends that commentary clarify that the removal of the date is not intended to require resentencing.*

- The RCC does not incorporate the OAG recommendation at this time. In the future the CCRC may recommend broader reform recommendations as to the purposes of sentencing in D.C. Code § 24-403.01. Notably, the current articulation of purposes—unrevised in the RCC amendments to D.C. Code § 24-403.01–specifically refers to "criminal history" and lacks reference to a principle of parsimony and other goals, contrary to the best practice recommendation in the recent model language issued by the American Law Institute.[1329] While it is certainly true that very few cases are likely to arise from pre-2000 acts, the CCRC is not willing to expand the current D.C. Code articulation of the purposes of sentencing to any more offenses without further analysis. Also, while the OAG comment says that it is not saying "that the remainder of D.C. Code § 24-403.01 should apply to offenses that occurred before the RCC is enacted," the elimination of the date reference in subsection (a) may give rise to that appearance.

(2) *PDS App. C at 707-708 recommends reducing the time required to spend on supervised release and set two years as the maximum period of supervision. PDS says that "[l]ong 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." PDS cites national statistics and also cites data from the Criminal Justice*

[1329] *See* Model Penal Code: Sentencing § 1.02(2) PFD (2017) ("The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii); and (iv) to avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct.").

Coordinating Council that, in February 2021 "nearly 13 percent of non-federal detentions at the DC Department of Corrections were for alleged parole and supervised release violations." PDS also states concern about supervision requirements because they must be enforced by the Court Services Offender Supervision Agency (CSOSA), a federal agency following "federal prerogatives that have often run afoul of local interests."

- The RCC does not incorporate this recommendation at this time because it may result in disproportionate penalties. The RCC revises D.C. Code § 24-403.01 to make the length of supervised release imposed under subsection (b)(2) a matter of judicial discretion. However, it is unclear how further changes to the length of supervised release may affect judicial decision making with respect to imprisonment time. The maximum possible length of supervised release may be reexamined in concert with further review of sentencing procedures by the CCRC and, perhaps, feedback based on the change to making the length of supervised release discretionary rather than mandatory.

(3) *USAO App. C at 711 recommends removing subsection (b)(2)(C) which states that the court If the court imposes a sentence of more than one year, the court 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 eight years. USAO recommends that up to three years of supervised release be permitted or required for these low-felony offenses. USAO says that these offenses "can be relatively serious" and "a 1-year term of supervision may not be a sufficient period of supervised release." USAO says that 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)." USAO says, "*). *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" and "[t[his logic applies equally—if not more forcefully—to felony offenses." USAO also says, "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."*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The CCRC does not agree that the Council "implicitly recognized" that a period of supervised release of less than two years after conviction for stalking or other low felonies is inappropriate, nor that the "logic" in the civil protection order for stalking context should be applied to the criminal context. The CCRC is not aware of any such statement or reasoning in the legislative record of the Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020" (B23-181), and none is cited by USAO.
- A civil protection order is an entirely different level of intervention than criminal supervised release—and may still be ordered by the court in addition to any imprisonment or supervised release. The very fact that the

CPO remedy exists and has been lengthened under the recent Council legislation cuts against the need for lengthy criminal supervised release conditions. Anti-stalking legislation (D.C. Code 16-1062(a)) is tailored to provide an immediate civil remedy—a protection order—that lasts up to two years and possibly extended. But, this civil remedy is available against the alleged stalker only if the petition is within 90 days of an incident; it is an immediate response that starts the clock very shortly after the alleged behavior. In contrast, for any of the felony convictions described in subsection (b)(2)(C), the actor is subject to 2 or 4 years (Class 8 or 9) imprisonment before the term of supervised release even begins. The criminal sanctions, imprisonment and supervised release, recommended for RCC Class 8 and 9 offenses is proportionate to the severity of these crimes and operates in addition to the robust civil protection order system the District has for such offenses.

- There are a wide range of views on the necessity, length, and costs and benefits of post-release supervision. Some states, e.g. Virginia, do not have any general requirement for post-release supervision. Some experts, such as the former New York Commissioner of Corrections have recommended[1330] an end to all post-release supervision in favor of greater provision of transitional services. Other states and experts recommend long, mandatory periods of supervised release. Reasonable differences of opinion on this matter exist; the CCRC's recommendations seek to authorize a significant, proportionate period of supervised release during the period when a person is most likely to recidivate.

(4) *The CCRC recommends changing references in the statute from "offender" to various other terminology—"person," "incarcerated person," and "person found guilty."*

- This change clarifies the revised statutes.

[1330] Martin F. Horn, *Rethinking Sentencing*, 5 Correctional Management Quarterly 34, 16 38 (2001).

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

(1) *The CCRC recommends updating the text to reflect changes to the statute Omnibus Public Safety and Justice Amendment Act of 2020, Act A23-0568 (Projected Law Date, May 18, 2021) except that, consistent with the prior recommendation to make the second look procedure available to persons of all ages at the time of their offense, the updated text strikes the under 25 age references in the Omnibus text in: 1) the title of the section; 2) the prefatory language in subsection (a); 3) paragraph (b)(1); and subparagraph (b)(3)(B). No other changes to the text of the Omnibus are recommended.*

- This change improves the clarity of the revised statutes.

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

(1) The CCRC recommends amending subsection (b) to include as an exclusion to liability that the actor satisfies the requirements under D.C. Code § 7-403. Under current law, D.C. Code § 7-403 applies to Unlawful use or possession with intent to use drug paraphernalia as prohibited by § 48-1103(a)[.]" The prior version of RCC § 48-904.10 did not include reference to D.C. Code § 7-403 as an exclusion to liability.

- This change improves the clarity and proportionality of the revised statutes.

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

(1) *The CCRC recommends replacing the words "with recklessness that" with "reckless" in subparagraph (h)(6)(C). This change clarifies that the actor must enlist, hire, contract, or encourage a person who is actually under the age of 18.*

- This change improves the proportionality of the revised statutes.