DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION

2018 ANNUAL REPORT*

January 24, 2019

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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*This document also serves as the agency's report on activities for the quarter that ended Dec. 31, 2018.

INTRODUCTION

The D.C. Criminal Code Reform Commission (CCRC) is pleased to present its Annual Report for calendar year 2018, in compliance with its statutory mandate.[1] To avoid unnecessary duplication, this Annual Report also serves as the agency's quarterly report on activities for the first quarter of fiscal year 2019 that ended on December 31, 2018.[2]

The CCRC began operation as an independent District agency on October 1, 2016, pursuant to language in the Council of the District of Columbia's Fiscal Year 2017 Budget Support Act of 2016. The CCRC is tasked with submitting to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes within specified parameters, with a current statutory deadline of October 1, 2019.[3] In preparing these reform recommendations, the CCRC is required to consult with a Code Revision Advisory Group ("Advisory Group"), a statutorily designated group of stakeholders who review and provide information and suggestions on proposals prepared by the CCRC. The Advisory Group consists of 5 voting members and 2 nonvoting members.[4] A majority vote of the Advisory

[1] The CCRC's statutory mandate for an annual report requires that:

> The Commission shall file an annual report with the Council before March 31 of each year that includes: (1) A summary and copy of all recommendations for reforms to criminal statutes developed by the Commission during the previous calendar year; (2) A summary and copy of comments received from the Advisory Group during the previous calendar year and their disposition; (3) A summary of other Commission activities during the previous calendar year; (4) A description of any problems discovered with prior Commission work or changes to prior work that are necessary due to legislative changes or court rulings; (5) A description of any issues that could delay or prevent the Commission from timely fulfilling its statutory duties; and (6) A work plan and schedule, or revisions to an existing work plan and schedule, for carrying out the responsibilities of the Commission to meet statutory requirements.

D.C. Code § 3-154(b).

[2] The CCRC's statutory mandate for quarterly reports states that: "The Commission shall file quarterly reports with the Council that provide a summary of activities during the prior quarter." D.C. Code § 3-154(a).

[3] The CCRC's mandate states:

> By September 30, 2019, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes to: (1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3) Describe all elements, including mental states, that must be proven; (4) Reduce unnecessary overlap and gaps between criminal offenses; (5) Eliminate archaic and unused offenses; (6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties; (7) Organize existing criminal statutes in a logical order; (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate; (9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment; (10) Propose such other amendments as the Commission believes are necessary; and (11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.

D.C. Code § 3-152(a).

[4] The current voting members of the Advisory Group are: Don Braman, Associate Professor of Law, George Washington University School of Law (Council Appointee); Paul Butler, Professor of Law, Georgetown University Law Center (Council Appointee); Renata Kendrick Cooper, Special Counsel for Policy and Legislative Affairs, United States Attorney's Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia); Laura Hankins, General Counsel, Public Defender Service for the District of Columbia (Designee of the Director of the Public Defender Service for the District of Columbia); and Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General (Designee of the Attorney General for the District of Columbia).

Group is required for any recommendations to be submitted to the Council and the Mayor.[5] In preparing its reform recommendations the CCRC also reviews criminal code reforms in other jurisdictions, changes to criminal offenses recommended by the American Law Institute, and best practices recommended by criminal law experts.[6]

This Annual Report is divided into six sections, corresponding to the six statutory requirements for the CCRC's Annual Report.[7]

I. SUMMARY OF REFORM RECOMMENDATIONS DEVELOPED IN 2018

The agency's development of reforms to criminal statutes in 2018 followed the general approach described in the agency's Work Plan and Schedule issued with its 2016 Annual Report on February 9, 2017. Under that Work Plan and Schedule, the agency's work is divided into four overlapping phases:

- Phase 1 (Enactment of Title 22 of the D.C. Code and other technical amendments to criminal statutes);[8]
- Phase 2 (Creation of a General Part providing definitions, interpretive rules, and culpability principles);
- Phase 3 (Revision of specific offenses' elements); and
- Phase 4 (Review and revision to improve penalty proportionality).

The CCRC's activities in 2018 focused on Phases 2 and 3, with preliminary work on Phase 4.

Phase 2.

Regarding Phase 2, in 2018 the CCRC developed refined prior draft recommendations and developed a variety of new recommendations that were circulated to the CCRC Advisory Group for review. Work for this phase addresses several of the agency's statutory mandates,[9] and began in late 2016, shortly after the agency's inception.[10] The CCRC's Phase 2

The current non-voting members of the Advisory Group are: Kevin Whitfield, Policy Advisor, Committee on the Judiciary and Public Safety (Designee of the Chairperson of the Council Committee on the Judiciary and Public Safety); and Helder Gil, Chief of Staff, Office of the of the Deputy Mayor for Public Safety and Justice (Designee of the Deputy Mayor for Public Safety and Justice).

[5] Criminal Code Reform Commission Establishment Act of 2016, Bill 21-669, Section 3123, Fiscal Year 2017 Budget Support Act of 2016 (June 21, 2016).

[6] *Id.*

[7] *See supra,* note 1.

[8] This phase was completed with the CCRC's issuance to the Council and Mayor on May 5, 2017 of Report #1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes.

[9] D.C. Code § 3-152(a) ("(1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3) Describe all elements, including mental states, that must be proven; (7) Organize existing criminal statutes in a logical order; (10) Propose such other amendments as the Commission believes are necessary . . . .").

[10] *See* First Draft of Report #2, Recommendations for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability (December 21, 2016). The report contained general provisions establishing a voluntariness requirement, a causation requirement, a culpable mental state requirement, a hierarchy of culpable mental states, and rules of interpretation applicable to the culpable mental state requirement.

recommendations for a set of general provisions are intended to prescribe definitions and rules of liability that apply to all revised offenses (e.g. theft, assault, etc.). Such general provisions are essential tools to improve the completeness, consistency, and precision of specific offenses. In 2018 also included in its Phase 2 work the development of recommendations regarding inchoate offenses (attempts, conspiracy, accessory liability). The CCRC's draft general provisions follow the basic design of the American Law Institute's Model Penal Code (MPC), which has been adopted by most states and has recently been adopted by the D.C. Court of Appeals (DCCA) in particular cases to resolve statutory ambiguities.[11]

Specifically in 2018, the CCRC issued new draft recommendations concerning the following[12]:

- § 22E-302. Solicitation. [D.C. Code § 2-2107][13]
- § 22E-305. Renunciation Defense to Attempt, Conspiracy, and Solicitation.[14]
- § 22E-210. Accomplice Liability. [D.C. Code § 22-1805][15]
- § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person. [16]
- § 22E-214. Merger of Related Offenses.[17]
- § 22E-304. Exceptions to General Inchoate Liability.[18]
- § 22E-305. Renunciation Defense to Attempt, Conspiracy, and Solicitation. [19]
- § 22E-215. De Minimus Defense.[20]

The CCRC discussed, or in the planning months has plans to discuss, these new draft recommendations with its Advisory Group. The agency received many written comments from Advisory Group members on the materials (see Annual Report section II, below).

Phase 3.

Regarding Phase 3, in 2018 the CCRC refined prior draft recommendations and developed a variety of new recommendations that were circulated to the CCRC Advisory Group for review. Work for this phase addresses several of the agency's statutory mandates.[21] The Phase 3

[11] *See, e.g., Carrell v. United States*, 165 A.3d 314, 320, 324 (D.C. 2017) (*en banc*).
[12] The designation "§ 22E-XXXX" is used to denote the location of the provision in the CCRC's draft recommendations, while corresponding D.C. Code offenses, where applicable, are listed in square brackets.
[13] First Draft of Report #18 – Solicitation and Renunciation (March 16, 2018).
[14] *Id.*
[15] First Draft of Report #22 - Accomplice Liability and Related Provisions (May 15, 2018).
[16] *Id.*
[17] First Draft of Report #25 - Merger (July 20, 2018).
[18] First Draft of Report #30 - Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability (September 26, 2018).
[19] *Id.*
[20] First Draft of Report #34 – De Minimus Defense (December 28, 2018).
[21] D.C. Code § 3-152(a) ("(1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3) Describe all elements, including mental states, that must be proven; 4) Reduce unnecessary overlap and gaps between criminal offenses; (5) Eliminate archaic and unused offenses . . . (7) Organize existing criminal statutes in a logical order; (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate . . . (10) Propose such other amendments as the Commission believes are necessary . . . .").

recommendations modernize the structure and language of the most serious, frequently-sentenced District offenses, consistent with the general definitions, rules, and principles for establishing liability established by the general provisions developed in Phase 2. Draft recommendations for specific offenses differentiate gradations in liability but do not propose specific penalties or fines, a matter for Phase 4.

Specifically in 2018, the CCRC issued new draft recommendations concerning the following[22]:

- § 22E-1101. Murder. [D.C. Code §§ 22-2101; 22-2102; 22-2103, 22-2104; 22-2104.01; 22-2106][23]
- § 22E-1102. Manslaughter. [D.C. Code § 22-2105] [24]
- § 22E-1103. Negligent Homicide. [D.C. Code § 50-2203.01] [25]
- § 22E-1501. Criminal Abuse of a Minor. [D.C. Code §§ 22-1101; 22-1102] [26]
- § 22E-1502. Criminal Neglect of a Minor. [D.C. Code §§ 22-1101; 22-1102] [27]
- § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person. [D.C. Code §§ 22-933; 22-934; 22-935; 22-936] [28]
- § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person. [D.C. Code §§ 22-933; 22-934; 22-935; 22-936] [29]
- § 22E-1401. Kidnapping. [D.C. Code § 22-2001][30]
  § 22E-1402. Criminal Restraint. [D.C. Code § 22-2001] [31]
- § 22E-4201. Disorderly Conduct. [D.C. Code §§ 22-1301; 22-1321][32]
- § 22E-4202. Public Nuisance. [D.C. Code § 22-1321] [33]
- § 22E-4301. Rioting. [D.C. Code § 22-1322][34]
- § 22E-4302. Failure to Disperse[35]
- § 22E-1301. Sexual Assault. [D.C. Code §§ 22-3002; 22-3003; 22-3004; 22-3005; 22-3007; 22-3018; 22-3019; 22-3020][36]
- § 22E-1302. Sexual Abuse of a Minor. [D.C. Code §§ 22-3008; 22-3009; 22-3009.01; 22-3009.02; 22-3009.03; 22-3009.04; 22-3011; 22-3012; 22-3018; 22-3019; 22-3020] [37]
- § 22E-1303. Sexual Exploitation of an Adult. [D.C. Code §§ 22-3013; 22-3014; 22-3015; 22-3016; 22-3017; 22-3018; 22-3019; 22-3020] [38]

[22] The designation "§ 22E-XXXX" is used to denote the location of the provision in the CCRC's draft recommendations, while corresponding D.C. Code offenses, where applicable, are listed in square brackets.
[23] First Draft of Report #19 - Homicide (March 16, 2018).
[24] *Id.*
[25] *Id.*
[26] First Draft of Report #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults (March 16, 2018).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] First Draft of Report #21 - Kidnapping and Related Offenses (May 18, 2018).
[31] *Id.*
[32] First Draft of Report #23 - Disorderly Conduct and Public Nuisance (July 20, 2018).
[33] *Id.*
[34] First Draft of Report #24 – Failure to Disperse and Rioting (July 20, 2018).
[35] *Id.*
[36] First Draft of Report #26 – Sexual Assault and Related Provisions (September 26, 2018).
[37] *Id.*
[38] *Id.*

- § 22E-1304. Sexually Suggestive Conduct with a Minor. [D.C. Code §§ 22-3010.01; 22-3012; 22-3018; 22-3019; 22-3020] [39]
- § 22E-1305. Enticing a Minor. [D.C. Code §§ 22-3010; 22-3012; 22-3018; 22-3019; 22-3020] [40]
- § 22E-1306. Arranging for Sexual Conduct with a Minor. [D.C. Code §§ 22-3010.02; 22-3018; 22-3019; 22-3020] [41]
- § 22E-1307. Nonconsensual Sexual Conduct. [D.C. Code §§ 22-3006; 22-3007; 22-3018; 22-3019; 22-3020] [42]
- § 22E-1308. Limitations on Liability for RCC Chapter 13 Offenses[43]
- § 22E-1601. Forced Labor or Services. [D.C. Code §§ 22-1832; 22-1837] [44]
- § 22E-1602. Forced Commercial Sex. [D.C. Code § 22-1833] [45]
- § 22E-1603. Trafficking in Labor or Services. [D.C. Code §§ 22-1833; 22-1837] [46]
- § 22E-1604. Trafficking in Commercial Sex. [D.C. Code §§ 22-1833; 22-1837] [47]
- § 22E-1605. Sex Trafficking of Minors. [D.C. Code §§ 22-1834; 22-1837] [48]
- § 22E-1606. Benefitting from Human Trafficking. [D.C. Code §§ 22-1836, 22-1837] [49]
- § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking. [D.C. Code §§ 22-1835; 22-1837] [50]
- § 22E-1608. Sex Trafficking Patronage[51]
- § 22E-1609. Forfeiture. [D.C. Code § 22-1838] [52]
- § 22E-1610. Reputation or Opinion Evidence. [D.C. Code § 22-1839] [53]
- § 22E-1611. Civil Action. [D.C. Code § 22-1840] [54]
- § 22E-1612. Limitations on Liability and Sentencing for RCC Chapter 16 Offenses[55]
- § 22E-1206. Stalking. [D.C. Code §§ 22-3131; 22-3132; 22-3133; 22-3134; 22-3135] [56]
- D.C. Code § 5-115.03. Failure to Make Arrest for Offense Committed in Presence.[57]
- § 22E-3401. Escape from Institution or Officer. [D.C. Code §§ 22-2601; 10-509.01a][58]
- § 22E-3402. Tampering with a Detection Device. [D.C. Code § 22-1211][59]

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[39] *Id.*
[40] First Draft of Report #26 – Sexual Assault and Related Provisions (September 26, 2018).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] First Draft of Report #27 – Human Trafficking and Related Statutes (September 26, 2018).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] First Draft of Report #28 – Stalking (September 26, 2018).
[57] First Draft of Report #29 – Failure to Arrest (September 26, 2018).
[58] First Draft of Report #31 – Escape from Institution or Officer (December 28, 2018).
[59] First Draft of Report #32 – Tampering with a Detection Device (December 28, 2018).

- § 22E-3403. Correctional Facility Contraband. [D.C. Code §§ 22-2603.01 -22-2603.04].[60]

The CCRC discussed, or in the planning months has plans to discuss, these new draft recommendations with its Advisory Group. The agency received many written comments from Advisory Group members on the materials (see Annual Report section II, below).

Phase 4.

Regarding Phase 4, in 2018 the CCRC, with the help of the Lab in the Office of the City Administrator, completed a preliminary analysis of Superior Court data for misdemeanor and felony dispositions 2010-2016. The results of that preliminary analysis were shared with the CCRC's Advisory Group in July 2018. The CCRC also completed a test survey of District public opinion regarding the relative severity of offenses, in anticipation of a more robust survey in 2019. Along with consideration of the District's current statutorily-authorized penalties and the Voluntary Sentencing Guidelines used in Superior Court, analysis of Superior Court data on charging and sentencing, and public opinion on relative offense severity will be considerations in the CCRC's development in 2019 of reform recommendations to improve penalty proportionality.

The recommendations developed in Phases 2, 3, and 4 will be combined, forming a single, cohesive set of reformed crimes in a new, enacted Title 22. The combined reform recommendations will be presented in the CCRC's second (and final) major report to the Council and Mayor by the agency's statutory deadline.

The draft recommendations for new statutory language developed in 2018 for Phases 2 & 3 is included in the compilation of draft statutory language that the CCRC has developed to-date, attached as Appendix A. Draft recommendations for both statutory language and commentary released to the CCRC Advisory Group in 2018 total over 750 pages in length and are available on the CCRC website at https://ccrc.dc.gov/page/ccrc-documents.

II. SUMMARY OF COMMENTS RECEIVED FROM THE CCRC ADVISORY GROUP IN 2018

In preparing its reform recommendations, the CCRC is statutorily required to consult with a Code Revision Advisory Group, a statutorily designated group of stakeholders who review and provide information and suggestions on proposals prepared by the CCRC. The Advisory Group consists of 5 voting members and 2 nonvoting members.[61] Advisory Group members have the opportunity to provide written comments[62] on all draft recommendations developed by the

[60] First Draft of Report #33 – Correctional Facility Contraband (December 28, 2018).
[61] See note #4, above, for a list of current members of the Advisory Group.
[62] D.C. Code § 3-153(c) ("The Commission shall provide drafts of its recommended reforms to criminal statutes to the Advisory Group in the form of reports. Advisory Group members may provide to the Commission written

CCRC, and additional oral discussion on draft recommendations is held during the Advisory Group's monthly meetings. All Advisory Group recommendations are considered, reconciled consistent with each other and the agency's statutory mandate, and the CCRC's final recommendations are based on the comments received.[63]

In 2018 the CCRC received oral feedback from the Advisory Group on a wide array of its draft recommendations, meeting regularly on the request of some members to discuss their questions and concerns. In addition, in 2018 the CCRC received over 100 pages of written comments from the Office of the Attorney General for the District of Columbia and the Office of the Public Defender Service for the District of Columbia. The Advisory Group written comments received in 2018 are included in the compilation of Advisory Group written comments on recommendations developed to-date, attached as Appendix B.

III. SUMMARY OF OTHER COMMISSION ACTIVITIES IN 2018

In addition to its primary mission of developing criminal code reform recommendations, the agency has engaged in a variety of supporting activities, including the following.

Data.

- On February 2, 2018 the D.C. Superior Court ("Court") provided to the CCRC a corrected data set providing information on certain charging and sentencing dispositions for the time period 2010-2016. This data set was a response to the agency's September 8, 2017 request for a data set that would include important information (e.g. regarding attempted crimes) missing from the data set the Court had provided August 7, 2017. On receipt of the corrected data set, the CCRC began work to clean and analyze the data with the help of the Lab in the Office of the City Administrator.
- On July 13, 2018 the CCRC's Data Use Agreement (DUA) with the Court concerning use of a dataset with information on adult criminal charges, convictions, and related information from 2010-2016 was amended to extend the expiration date through FY 19. Currently the DUA with the Court is set to expire September 30, 2019.
- On October 17, 2018 the CCRC's Memorandum of Understanding (MOU) with the Office of the City Administrator (OCA) concerning provision of analyses on criminal information datasets was amended to extend the expiration date through FY19 and ensure compliance with the Superior Court DUA. Currently the MOU with OCA is set to expire September 30, 2019.
- On November 5, 2018 the CCRC requested amendment of the existing DUA with the Court to add a few additional data fields and the years 2009, 2017, and 2018 to the dataset previously provided by the Court. The request was received and, apparently, in

comments in response to those recommendations within a reasonable period of time, to be determined by the Executive Director, but not less than one month.").

[63] D.C. Code § 3-153(d) ("The Commission shall consider all written comments that are timely received from Advisory Group members under subsection (c) of this section and propose all final recommendations to the Council based on the comments received.").

process before the federal shutdown occurred and the agency's point of contact was furloughed. To date, the Superior Court has not provided the updated dataset or amended the DUA.

Council Testimony.

- On February 15, 2018 CCRC Executive Director Richard Schmechel testified on behalf of the agency before the Committee on the Judiciary and Public Safety at the agency's annual performance oversight hearing.
- On July 11, 2018 CCRC Executive Director Richard Schmechel testified on behalf of the agency before the Committee on the Judiciary and Public Safety at its hearing on the Protection from Sexual Extortion Amendment Act of 2017.
- On October 4, 2018 CCRC Executive Director Richard Schmechel testified on behalf of the agency before the Committee on the Judiciary and Public Safety at its hearing on Protecting Immigrants from Extortion Amendment Act of 2018.

Staffing & Training.

- On April 2, 2018, Ms. Patrice Sulton was hired as an Attorney Advisor to fill a vacancy left by an employee's resignation.
- Over the summer months of 2018 four legal interns joined the agency, providing *pro bono* legal research in aid of the CCRC's mission for the following ten weeks.
- On October 12, 2018 the Executive Director attended an American Law Institute meeting entitled "Model Penal Code: Sexual Assault and Related Offenses" as a liaison from the CCRC.

Transparency & Outreach.

- On January 24, 2018, the CCRC Executive Director gave a public presentation as part of the Lab in the Office of the City Administrator's luncheon series at the John A. Wilson building on redesigning the District's criminal code. The presentation was followed by a question and answer session and an interview that became part of the Lab's podcasts.
- Throughout 2017 the agency posted all its draft and final recommendations regarding criminal code reform to the agency's website to provide maximum transparency.

IV. STATUS OF PRIOR COMMISSION WORK

The CCRC is not aware of any problems with or changes that are necessary to its prior recommendations to the Council and Mayor due to legislative changes or court rulings.

The agency monitors appellate decisions and legislation on a weekly basis and continually incorporates changes into its draft recommendations as necessary. For example, the agency's draft recommendations for revising the District's disorderly conduct statute were recently rewritten (and soon will be re-released to the Advisory Group for review) in light of the D.C. Court of Appeals' recent decision in *Solon v. United States,* 17-CM-1118, 2018 WL 6214210 (D.C. Nov. 29, 2018), which for the first time interpreted the current D.C. Code statutory

language for disorderly conduct. Similarly, changes to the CCRC's draft definition of "coercion," affecting multiple revised offenses, was partially rewritten in light of the Council's recent passage into law of the *Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018*.

V. ISSUES POTENTIALLY DELAYING OR PREVENTING COMMISSION WORK

As described in the agency's Work Plan and Schedule, Appendix C, the CCRC cannot revise all District crimes with its currently authorized time and resources. Rather the agency is prioritizing the development of reform recommendations for offenses that are the most common and serious in the District, increasing the number of crimes it reviews within the time provided by the Mayor and Council.

With that general caveat regarding the scope of the agency's work, there are several variables that may diminish the number of statutory sections that the CCRC plans to review under its Work Plan and Schedule. These variables include:

- Agency staff loss or unanticipated extended leave;
- New court decisions or legislation (District or federal) affecting draft recommendations;
- Delays in preparation of recommendations for statutory sections other than current offenses (see below);
- Advisory Group comments requiring additional drafts of issued recommendations; and
- Advisory Group disagreement that delays a vote to approve the final recommendations.

Of these matters, two are of particular concern. The first is the possibility of significant staff attrition and/or extended leave. The agency's staff is comprised of just five people and has developed unique expertise with the code revision process. In case of staff departure, it will be extremely difficult to attract highly qualified individuals (given the time-limited nature of the employment) and train them in time to significantly advance agency work before the agency's statutory deadline. Extended leave by agency staff also could significantly diminish the number of criminal statutes for which the agency will develop recommendations.

Second, under the agency's statute, the CCRC's Advisory Group's voting members must approve by majority vote all final recommendations of the CCRC before they may be transmitted to the Mayor and Council. To date, no Advisory Group members have stated that they cannot support the agency's draft recommendations, and the differences of opinion that are apparent in Advisory Group members' comments to the agency do not appear to jeopardize final approval. However, the possibility remains that Advisory Group members, perhaps even a majority, may raise fundamental objections to the agency's proposals prior to a final vote. Should such objections be raised, significant additional time may be needed for staff to restructure its proposals and reengage the Advisory Group with respect to revisions.

Lastly, it should also be noted that the federal government shutdown that began in late 2018 has adversely affected the operation of the CCRC's Advisory Group, two of whom are federal employees. With these Advisory Group members unavailable, the CCRC has had to cancel Advisory Group meetings, with consequent delays in the review of draft recommendations. The federal shutdown has also delayed a D.C. Superior Court response to the agency's latest data request.

VI. WORK PLAN AND SCHEDULE FOR COMMISSION WORK

See Appendix C, attached.

Appendix A

CCRC 2018 Annual Report –

Compilation of Draft Revised Criminal Code Statutes to Date (12-28-18)

Compilation of Draft Revised Criminal Code Statutes To Date

December 28, 2018

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This document presents the latest compilation of the draft recommendations for a Revised Criminal Code (RCC). **Please note this is a draft document—none of the statutory language or commentary in the compilation has been finalized by the CCRC or received final approval from the CCRC's Advisory Group.** The draft Commentary intended to accompany this draft RCC language is available on the Commission's website at www.ccrc.dc.gov.

This compilation will be regularly updated to reflect successive drafts of prior recommendations and recommendations on new topics.

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Subtitle I. General Part.
Chapter 1. Preliminary Provisions.

§ 22A-101. Short Title and Effective Date.
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§ 22A-104. Applicability of the General Part.

RCC § 22A-101. Short Title and Effective Date.[1]

(a) *Short title.* This title may be cited as the "Revised Criminal Code."
(b) *Effective date.* This title takes effect at 12:01 am on [A DATE AT LEAST ONE YEAR FROM ENACTMENT].
(c) *Prior offenses.* Offenses committed prior to the effective date of the Revised Criminal Code are subject to laws in effect at that time. For purposes of this subsection, an offense is "committed prior to the effective date" if any one of the elements of the offense was satisfied prior to the effective date.

RCC § 22A-102. Rules of Interpretation.[2]

(a) *Generally*. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary, the structure, purpose, and history of the provision also may be examined.
(b) *Rule of Lenity*. If two or more reasonable interpretations of a statutory provision remain after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies.
(c) *Effect of Headings and Captions*. Headings and captions that appear at the beginning of chapters, subchapters, sections, and subsections of this title, may aid the interpretation of statutory language.

RCC § 22A-103. Interaction of Title 22A With Other District Laws.[3]

(a) *General Interaction of Title 22A with Provisions in Other Laws*. Unless otherwise provided by law, a provision in this title applies to this title alone.
(b) *Interaction of Title 22A with Civil Provisions in Other Laws*. The provisions of this title do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action.

[1] Per First Draft of Report #4 (March 13, 2017).
[2] Per First Draft of Report #4 (March 13, 2017).
[3] Per First Draft of Report #4 (March 13, 2017).

RCC § 22A-104. APPLICABILITY OF THE GENERAL PART.[4]

Unless otherwise provided by law, provisions in subtitle I of Title 22A apply to all other provisions of Title 22A.

[4] Per First Draft of Report #4 (March 13, 2017).

Subtitle I. General Part
Chapter 2. Basic Requirements of Offense Liability

§ 22A-201. Proof of Offense Elements Beyond a Reasonable Doubt.
§ 22A-202. Conduct Requirement.
§ 22A-203. Voluntariness Requirement.
§ 22A-204. Causation Requirement.
§ 22A-205. Culpable Mental State Requirement.
§ 22A-206. Hierarchy of Culpable Mental States.
§ 22A-207. Rules of Interpretation Applicable to Culpable Mental State Requirement.
§ 22A-208. Principles of Liability Governing Accident, Mistake, and Ignorance.
§ 22A-209. Principles of Liability Governing Intoxication.
§ 22A-210. Accomplice Liability.
§ 22A-211. Liability for Causing Crime by an Innocent or Irresponsible Person.
§ 22A-212. Exceptions to Legal Accountability.
§ 22A-213. Withdrawal Defense to Legal Accountability.
§ 22A-214. Merger of Related Offenses.
§ 22A-215. De Minimus Defense.

RCC § 22A-201. Proof of Offense Elements Beyond a Reasonable Doubt.[5]

(a) *Proof of Offense Elements Beyond a Reasonable Doubt*. No person may be convicted of an offense unless each offense element is proven beyond a reasonable doubt.

(b) *Offense Element Defined.* "Offense element" includes the objective elements and culpability requirement necessary to establish liability for an offense.

(c) *Objective Element Defined*. "Objective element" means any conduct element, result element, or circumstance element. For purposes of this Title:

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

(2) "Result element" means any consequence that must have been caused by a person's conduct in order to establish liability for an offense.

(3) "Circumstance element" means any characteristic or condition relating to either a conduct element or result element the existence of which is required to establish liability for an offense.

(d) *Culpability Requirement Defined*. "Culpability requirement" includes each of the following:

(1) The voluntariness requirement, as provided in § 22A-203;

(2) The causation requirement, as provided in § 22A-204; and

(3) The culpable mental state requirement, as provided in § 22A-205.

RCC § 22A-202. Conduct Requirement.[6]

(a) *Conduct Requirement.* No person may be convicted of an offense unless the person's liability is based on an act, omission, or possession.

[5] Per First Draft of Report #2 (December 21, 2016).
[6] Per First Draft of Report #2 (December 21, 2016).

(b) *Act Defined*. "Act" means a bodily movement.

(c) *Omission Defined.* "Omission" means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. For purposes of this Title, a legal duty to act exists when:

(1) The failure to act is expressly made sufficient by the law defining the offense; or

(2) A duty to perform the omitted act is otherwise imposed by law.

(d) *Possession Defined*. "Possession" means knowingly exercising control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property.

RCC § 22A-203. VOLUNTARINESS REQUIREMENT.[7]

(a) *Voluntariness Requirement*. No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.

(b) *Scope of Voluntariness Requirement*.

(1) *Voluntariness of Act.* Where a person's act provides the basis for liability, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort or determination, or was otherwise subject to the person's control.

(2) *Voluntariness of Omission.* Where a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when the person had the physical capacity to perform the required legal duty, or the failure to act was otherwise subject to the person's control.

RCC § 22A-204. CAUSATION REQUIREMENT.[8]

(a) *Causation Requirement.* No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result.

(b) *Factual Cause Defined.* "Factual cause" means:

(1) The result would not have occurred but for the person's conduct; or

(2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) *Legal Cause Defined.* "Legal cause" means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's liability.

[7] Per First Draft of Report #2 (December 21, 2016).

[8] Per First Draft of Report #2 (December 21, 2016).

RCC § 22A-205. CULPABLE MENTAL STATE REQUIREMENT.[9]

(a) *Culpable Mental State Requirement*. No person may be convicted of an offense unless the person acts with a culpable mental state with respect to every result and circumstance required by the offense, with the exception of any result or circumstance for which that person is strictly liable under § 22A-207(b).

(b) *Culpable Mental State Defined*. "Culpable mental state" means purpose, knowledge, recklessness, negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

(c) *Strictly Liability Defined*. "Strictly liable" or "strict liability" means liability in the absence of purpose, knowledge, recklessness, or negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

RCC § 22A-206. HIERARCHY OF CULPABLE MENTAL STATES.[10]

(a) *Purpose Defined*.

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

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

(b) *Knowledge Defined.*

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

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

(c) *Intent Defined*.

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

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

(d) *Recklessness Defined.*

(1) A person acts recklessly with respect to a result when:

(A) That person is aware of a substantial risk that conduct will cause the result; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(2) A person acts recklessly with respect to a circumstance when:

(A) That person is aware of a substantial risk that the circumstance exists; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(3) A person's reckless conduct occurs "under circumstances manifesting extreme indifference" to the interests protected by an offense when the conduct

[9] Per First Draft of Report #2 (December 21, 2016).
[10] Per Third Draft of Report #2 (December 21, 2017).

constitutes an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

(e) *Negligence Defined*.

(1) A person acts negligently with respect to a result when:

(A) That person should be aware of a substantial risk that conduct will cause the result; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(2) A person acts negligently with respect to a circumstance when:

(A) That person should be aware of a substantial risk that the circumstance exists; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(f) *Proof of Greater Culpable Mental State Satisfies Requirement for Lower.*

(1) *Proof of Negligence.* When the law requires negligence as to a result or circumstance, the requirement is also satisfied by proof of recklessness, intent, knowledge, or purpose.

(2) *Proof of Recklessness.* When the law requires recklessness as to a result or circumstance, the requirement is also satisfied by proof of intent, knowledge, or purpose.

(3) *Proof of Intent*. When the law requires intent as to a result or circumstance, the requirement is also satisfied by proof of knowledge or purpose.

(4) *Proof of Knowledge.* When the law requires knowledge as to a result or circumstance, the requirement is also satisfied by proof of purpose.

RCC § 22A-207. RULES OF INTERPRETATION APPLICABLE TO CULPABLE MENTAL STATE REQUIREMENT.[11]

(a) Distribution of Enumerated Culpable Mental States. Any culpable mental state specified in an offense applies to all subsequent results and circumstances until another culpable mental state is specified, with the exception of any result or circumstance for which the person is strictly liable under § 22A-207(b).

(b) *Identification of Elements Subject to Strict Liability*. A person is strictly liable for any result or circumstance in an offense:

(1) That is modified by the phrase "in fact," or

(2) To which legislative intent explicitly indicates strict liability applies.

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

[11] Per First Draft of Report #2 (December 21, 2016).

RCC § 22A-208. PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE.[12]

(a) *Effect of Accident, Mistake, and Ignorance on Liability.* A person is not liable for an offense when that person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense.

(b) *Correspondence Between Mistake and Culpable Mental State Requirements*. For purposes of determining when a particular mistake as to a matter of fact or law negates the existence of a culpable mental state applicable to a circumstance:

(1) *Purpose.* Any reasonable or unreasonable mistake as to a circumstance negates the existence of the purpose applicable to that element.

(2) *Knowledge.* Any reasonable or unreasonable mistake as to a circumstance negates the existence of the knowledge applicable to that element.

(3) *Recklessness.* Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake.

(4) *Negligence.* Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake.

(c) *Imputation of Knowledge for Deliberate Ignorance.* When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if:

(1) The person was reckless as to whether the circumstance existed; and

(2) The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability.\

RCC § 22A-209. PRINCIPLES OF LIABILITY GOVERNING INTOXICATION.[13]

(a) *Relevance of Intoxication to Liability*. A person is not liable for an offense when that person's intoxication negates the existence of a culpable mental state applicable to a result or circumstance in that offense.

(1) *Definition of Intoxication.* "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.

(b) Correspondence Between Intoxication and Culpable Mental State Requirements.

(1) *Purpose.* A person's intoxication negates the existence of the culpable mental state of purpose applicable to a result or circumstance when, due to the person's intoxicated state, that person does not consciously desire to cause that result or that the circumstance exists.

(2) *Knowledge*. A person's intoxication negates the existence of the culpable mental state of knowledge applicable to a result or circumstance when, due to

[12] Per First Draft of Report #3 (March 13, 2017).
[13] Per First Draft of Report #3 (March 13, 2017).

the person's intoxicated state, that person is not practically certain that the person's conduct will cause that result or that the circumstance exists.

(3) *Recklessness*. A person's intoxication negates the existence of the culpable mental state of recklessness applicable to a result or circumstance when, due to the person's intoxicated state, that person is not aware of a substantial risk that the person's conduct will cause that result or that the circumstance exists, unless that person's conduct satisfies subsection (c), in which case the culpable mental state of recklessness is established.

(c) *Imputation of Recklessness for Self-Induced Intoxication.* When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if:

(1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and

(2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.

RCC § 22A-210. ACCOMPLICE LIABILITY.[14]

(a) *Definition of Accomplice Liability*. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

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

(2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) *Principle of Culpable Mental State Elevation Applicable to Circumstances of Target Offense*. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) *Principle of Culpable Mental State Equivalency Applicable to Results When Determining Degree of Liability*. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) *Relationship Between Accomplice and Principal*. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

(1) Has not been prosecuted or convicted; or

(2) Has been convicted of a different offense or degree of an offense; or

(3) Has been acquitted.

RCC § 22A-211. LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON.[15]

(a) *Using Another Person to Commit an Offense*. A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that

[14] Per First Draft of Report #22 (May 18, 2018).

[15] Per First Draft of Report #22 (May 18, 2018).

person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(b) *Innocent or Irresponsible Person Defined*. An "innocent or irresponsible person" within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense:

(1) Lacks the culpable mental state requirement for that offense; or

(2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.

RCC § 22A-212. EXCEPTIONS TO LEGAL ACCOUNTABILITY.[16]

(a) *Exceptions to General Principles of Legal Accountability.* A person is not legally accountable for the conduct of another under RCC § 210 or RCC § 211 when:

(1) The person is a victim of the offense; or

(2) The person's conduct is inevitably incident to commission of the offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense.* The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

RCC § 22A-213. WITHDRAWAL DEFENSE TO LEGAL ACCOUNTABILITY.[17]

(a) *Withdrawal Defense.* It is an affirmative defense to a prosecution under RCC § 210 and RCC § 211 that the defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:

(1) Wholly deprives his or her prior efforts of their effectiveness;

(2) Gives timely warning to the appropriate law enforcement authorities; or

(3) Otherwise makes proper efforts to prevent the commission of the offense.

(b) *Burden of Proof for Withdrawal Defense.* The defendant has the burden of proof for this affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

RCC § 22A-214. MERGER OF RELATED OFFENSES.[18]

(a) *Presumption of Merger Applicable to Commission of Multiple Related Offenses*. There is a presumption that multiple convictions for two or more offenses arising from the same course of conduct merge whenever:

(1) One offense is established by proof of the same or less than all the facts required to establish the commission of the other offense;

(2) The offenses differ only in that:

(A) One prohibits a less serious harm or wrong to the same person, property, or public interest;

(B) One may be satisfied by a lesser kind of culpability; or

[16] Per First Draft of Report #30 (September 26, 2018).
[17] Per First Draft of Report #30 (September 26, 2018).
[18] Per First Draft of Report #25 (July 20, 2018).

(C) One is defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct;

(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense;

(4) One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each;

(5) One offense consists only of an attempt or solicitation toward commission of:

(A) The other offense; or

(B) A different offense that is related to the other offense in the manner described in paragraphs (1)-(4); or

(6) Each offense is a general inchoate offense designed to culminate in the commission of:

(A) The same offense; or

(B) Different offenses that are related to one another in the manner described in paragraphs (1)-(4).

(b) *Presumption of Merger Inapplicable Where Legislative Intent Is Clear.* The presumption of merger set forth in subsection (a) is inapplicable whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses arising from the same course of conduct.

(c) *Alternative Elements*. The court shall, in applying subsections (a) and (b) to an offense comprised of alternative elements that protect distinct societal interests, limit its analysis to the elements upon which a defendant's conviction is based.

(d) *Rule of Priority*. When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be:

(1) The most serious offense among the offenses in question; or

(2) If the offenses are of equal seriousness, any offense that the court deems appropriate.

(e) *Final Judgment of Liability.* A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:

(1) The time for appeal has expired; or

(2) The judgment appealed from has been affirmed.

RCC § 22A-215. DE MINIMUS DEFENSE.[19]

(a) *De Minimis Defense Defined.* It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.

(b) *Relevant Factors.* In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:

(1) The triviality of the harm caused or threatened by the person's conduct;

(2) The extent to which the person was unaware that his or her conduct would cause or threaten that harm;

[19] Per First Draft of Report #34 (December 28, 2018).

(3) The extent to which the person's conduct furthered or was intended to further legitimate societal objectives; and
(4) The extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law.

(c) Burden of Proof. The defendant has the burden of proof and must prove all requirements of this affirmative defense by a preponderance of the evidence.

Subtitle I. General Part
Chapter 3. Inchoate Liability

§ 22A-301. Criminal Attempt.
§ 22A-302. Solicitation.
§ 22A-303. Criminal Conspiracy.
§ 22A-304. Exceptions to General Inchoate Liability.
§ 22A-305. Renunciation Defense to Attempt, Conspiracy, and Solicitation.

RCC § 22A-301 CRIMINAL ATTEMPT.[20]

(a) *Definition of Attempt*. A person is guilty of an attempt to commit an offense when that person engages in conduct planned to culminate in that offense:

(1) With the intent to cause any result required by that offense;

(2) With the culpable mental state, if any, applicable to any circumstance required by that offense; and

(3) The person is either:

(A) Dangerously close to committing that offense; or

(B) Would be dangerously close to committing that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to commission of that offense.

(b) *Proof of Completed Offense Sufficient Basis for Attempt Conviction*. A person may be convicted of an attempt to commit an offense based upon proof that the person actually committed the target offense, provided that no person may be convicted of both the target offense and an attempt to commit the target offense arising from the same conduct.

(c) *Penalties for Criminal Attempts*.

(1) An attempt to commit an offense is subject to one-half the maximum imprisonment or fine or both applicable to the offense attempted, unless a different punishment is specified in RCC § 301(c)(2).

(2) Notwithstanding RCC § 301(c)(1), attempts to commit the following offenses may be punished accordingly:

[RESERVED: List of exceptions and accompanying penalties.]

§ 22A-302 SOLICITATION.[21]

(a) *Definition of Solicitation.* A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person:

(1) Purposely commands, requests, or tries to persuade another person;

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

(3) The offense solicited is, in fact, [a crime of violence].

(b) *Principles of Culpable Mental State Elevation Applicable to Results and Circumstances of Target Offense.* Notwithstanding subsection (a), to be guilty of a

[20] Per First Draft of Report #7 (June 7, 2017) and First Draft of Report #13 (December 21, 2017).
[21] Per First Draft of Report #18 (March 16, 2018).

solicitation to commit an offense, the defendant must intend to bring about any results and circumstances required by that offense.

(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 communication provided that the defendant does everything he or she plans to do to effect the communication.

(d) *Penalty*. [Reserved].

§ 22A-303 CRIMINAL CONSPIRACY.[22]

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

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

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

(b) *Principles of Culpable Mental State Elevation Applicable to Results and Circumstances of Target Offense*. Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense.

(c) *Jurisdiction When Object of Conspiracy is Located Outside the District of Columbia.* When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia, the conspiracy is a violation of this section if:

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

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

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

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

(d) *Jurisdiction When Conspiracy is Formed Outside the District of Columbia*. A conspiracy formed in another jurisdiction to engage in conduct within the District of Columbia is a violation of this section if:

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

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

(e) *Legality of Conduct in Other Jurisdiction Irrelevant*. Under circumstances where §§ (d)(1) and (2) can be established, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed.

(f) *Penalty*. [Reserved].

[22] Per First Draft of Report #12 (June 7, 2017).

RCC § 304. EXCEPTIONS TO GENERAL INCHOATE LIABILITY.[23]

(a) *Exceptions to General Inchoate Liability.* A person is not guilty of solicitation to commit an offense under RCC § 302 or conspiracy to commit an offense under RCC § 303 when:

(1) The person is a victim of the target offense; or

(2) The person's criminal objective is inevitably incident to commission of the target offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense.* The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

§ 22A-305. RENUNCIATION DEFENSE TO ATTEMPT, CONSPIRACY, AND SOLICITATION.[24]

(a) *Defense for Renunciation Preventing Commission of the Offense.* In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that:

(1) The defendant engaged in conduct sufficient to prevent commission of the target offense;

(2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

(b) *Voluntary and Complete Renunciation Defined*. A renunciation is not "voluntary and complete" within the meaning of subsection (a) when it is motivated in whole or in part by:

(1) A belief that circumstances exist which:

(A) Increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or

(B) Render accomplishment of the criminal plans more difficult; or

(2) A decision to:

(A) Postpone the criminal conduct until another time; or

(B) Transfer the criminal effort to another victim or similar objective.

(c) *Burden of Proof for Renunciation*. The defendant has the burden of proof for this affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

[23] Per First Draft of Report #30 (September 26, 2018).

[24] Per First Draft of Report #18 (March 16, 2018).

Subtitle I. General Part
Chapter 8. Offense Classes, Penalties, & Enhancements

§ 22A-801. Offense Classifications.
§ 22A-802. Authorized Dispositions.
§ 22A-803. Authorized Terms of Imprisonment.
§ 22A-804. Authorized Fines.
§ 22A-805. Limitations on Penalty Enhancements.
§ 22A-806. Repeat Offender Penalty Enhancements.
§ 22A-807. Hate Crime Penalty Enhancement.
§ 22A-808. Pretrial Release Penalty Enhancements

RCC § 22A-801. Offense Classifications.[25]

(a) *Offense Classifications.* Each offense in this title is classified as a:
(1) Class 1 felony;
(2) Class 2 felony;
(3) Class 3 felony;
(4) Class 4 felony;
(5) Class 5 felony;
(6) Class 6 felony;
(7) Class 7 felony;
(8) Class 8 felony;
(9) Class A misdemeanor;
(10) Class B misdemeanor;
(11) Class C misdemeanor;
(12) Class D misdemeanor; or a
(13) Class E misdemeanor.

(b) *Definitions*. For purposes of this title:
(1) "Felony" means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death.
(2) "Misdemeanor" means an offense with an authorized term of imprisonment that is one (1) year or less.

RCC § 22A-802. Authorized Dispositions.[26]

(a) *Authorized Dispositions*. Except as otherwise provided by statute, a court may sentence a defendant upon conviction to sanctions that include one or more of the following:
(1) Imprisonment as authorized in D.C. Code § 22A-803;
(2) Fines as authorized in D.C. Code § 22A-804;
(3) Probation as authorized in D.C. Code § 16-710;
(4) Restitution or reparation as authorized in D.C. Code § 16-711;

[25] Per First Draft of Report #5 (May 5, 2017).
[26] Per First Draft of Report #5 (May 5, 2017).

(5) Community service as authorized in § 16-712;
(6) Postrelease supervision as authorized in D.C. Code § 24-903; and
(7) Work release as authorized in D.C. Code § 24-241.01.

RCC § 22A-803. AUTHORIZED TERMS OF IMPRISONMENT.[27]

(a) *Authorized Terms of Imprisonment.* Except as otherwise provided by law, the maximum term of imprisonment authorized for an offense is:
(1) For a Class 1 felony, life without possibility of release;
(2) For a Class 2 felony, not more than forty-five (45) years;
(3) For a Class 3 felony, not more than thirty (30) years;
(4) For a Class 4 felony, not more than twenty (20) years;
(5) For a Class 5 felony, not more than fifteen (15) years;
(6) For a Class 6 felony, not more than ten (10) years;
(7) For a Class 7 felony, not more than five (5) years;
(8) For a Class 8 felony, not more than three (3) years;
(9) For a Class A misdemeanor, not more than one (1) year;
(10) For a Class B misdemeanor, not more than one hundred and eighty (180) days;
(11) For a Class C misdemeanor, not more than ninety (90) days;
(12) For a Class D misdemeanor, not more than thirty (30) days; and
(13) For a Class E misdemeanor, no imprisonment.

(b) *Attempts*. A court shall decrease the authorized terms of imprisonment for an attempt to commit an offense pursuant to § 22A-301.

(c) *Penalty Enhancements*. A court may increase the authorized terms of imprisonment for an offense with a penalty enhancement pursuant to § 22A-805.

RCC § 22A-804. AUTHORIZED FINES.[28]

(a) *Authorized Fines*. Except as otherwise provided by law, the maximum fine for an offense is:
(1) For a Class 1 felony, not more than $500,000;
(2) For a Class 2 felony, not more than $250,000;
(3) For a Class 3 felony, not more than $75,000;
(4) For a Class 4 felony, not more than $50,000;
(5) For a Class 5 felony, not more than $37,500;
(6) For a Class 6 felony, not more than $25,000;
(7) For a Class 7 felony, not more than $12,500;
(8) For a Class 8 felony, not more than $6,000;
(9) For a Class A misdemeanor, not more than $2,500;
(10) For a Class B misdemeanor, not more than $1,000;
(11) For a Class C misdemeanor, not more than $500;
(12) For a Class D misdemeanor, not more than $250; and
(13) For a Class E misdemeanor, not more than $250.

[27] Per First Draft of Report #5 (May 5, 2017).
[28] Per First Draft of Report #5 (May 5, 2017).

(b) *Limits on Maximum Fine Penalties.* A court may not impose a fine that would impair the ability of the defendant to make restitution or deprive the defendant of sufficient means for reasonable living expenses and family obligations.

(c) *Alternative Maximum Fine Based on Pecuniary Loss or Gain*. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

(1) Not more than twice the pecuniary loss,

(2) Not more than twice the pecuniary gain, or

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

(d) *Alternative Maximum Fine for Organizational Defendants*. Subject to the limits on maximum fine penalties in subsection (b) of this section, if an organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section.

(e) *Attempts*. A court shall decrease the authorized fines for an attempt to commit an offense pursuant to Section 22A-301.

(f) *Penalty Enhancements*. A court may decrease the authorized fines for an offense pursuant to § 22A-805.

(g) *Definitions*. For purposes of this section:

(1) "Organizational Defendant" means any person other than an individual human being. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

(2) "Pecuniary loss" means actual harm that is monetary or readily measurable in money.

(3) "Pecuniary gain" means before-tax profit, including additional revenue or cost savings.

RCC § 22A-805. LIMITATIONS ON PENALTY ENHANCEMENTS.[29]

(a) *Penalty Enhancements Not applicable To Offenses with Equivalent Elements*. Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

(b) *Charging of Penalty Enhancements.* A person is not subject to additional punishment for a penalty enhancement unless notice of the penalty enhancement is provided by an information or indictment.

(c) *Standard of Proof for Penalty Enhancements*. Except for the establishment of prior convictions as provided in D.C. Code § 23-111, a person is not subject to additional punishment for a penalty enhancement unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

[29] Per First Draft of Report #6 (June 7, 2017).

(d) *Multiple Penalty Enhancements Permitted in Charging and Proof*. Multiple penalty enhancements may be applied to an offense for purposes of charging and proof at trial. However an offense with multiple penalty enhancements is subject to § 22A-70[X] of this Title.

RCC § 22A-806. REPEAT OFFENDER PENALTY ENHANCEMENTS.[30]

(a) *Misdemeanor Repeat Offender Penalty Enhancement.* A misdemeanor repeat offender penalty enhancement applies to a misdemeanor when the defendant, in fact, has two or more prior convictions for District of Columbia offenses or offenses equivalent to current District of Columbia offenses.

(b) *Felony Repeat Offender Penalty Enhancement.* A felony repeat offender penalty enhancement applies to a felony when the offender, in fact, has two or more prior convictions for District of Columbia felonies or offenses equivalent to current District of Columbia felonies.

(c) *Crime of Violence Repeat Offender Penalty Enhancement.* A crime of violence repeat offender penalty enhancement applies to a crime of violence when the offender, in fact, has one or more prior convictions for a District of Columbia crime of violence or an offense equivalent to a current District of Columbia crime of violence.

(d) *Additional Procedural Requirements.* No person shall be subject to additional punishment for a repeat offender penalty enhancement in this section unless the requirements of § 23-111 are satisfied.

(e) *Penalties.*

(1) *Misdemeanor Repeat Offender.* A misdemeanor repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(2) *Felony Repeat Offender.* A felony repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(3) *Crime of Violence Repeat Offender.* A crime of violence repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(f) *Definitions.*

(1) *Crime of Violence.* For purposes of this section, "crime of violence" has the meaning defined in §22A-[XXX]. .

(2) *Equivalent.* For purposes of this section, "equivalent" means a criminal offense with elements that would necessarily prove the elements of a District criminal offense.

(3) *Felony.* "Felony" has the meaning specified in §22A-801.

(4) *Misdemeanor.* "Misdemeanor" has the meaning specified in §22A-801.

(5) *Prior Convictions.* For purposes of this section, "prior convictions" means convictions by any court or courts of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, provided that:

[30] Per First Draft of Report #6 (June 7, 2017).

(i) Convictions for two or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction;
(ii) A conviction for an offense with a sentence that was completed more than 10 years prior to the commission of the instant offense shall not be counted for determining repeat misdemeanor offender and repeat felony offender penalty enhancements;
(iii) An offense that was committed when the defendant was a minor shall not be counted for determining misdemeanor repeat offender or felony repeat offender penalty enhancements; and
(iv) A conviction for which a person has been pardoned shall not be counted as a conviction.

RCC § 22A-807. HATE CRIME PENALTY ENHANCEMENT.[31]

(a) *Hate Crime Penalty Enhancement.* A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person's perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation.
(b) *Penalty.* A hate crime penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].
(c) *Definitions.*
(1) *Definition of Gender Identity or Expression.* For purposes of this section, "Gender identity or expression" shall have the same meaning as provided in section 2-1401.02 (12A).
(2) *Definition of Homelessness.* For purposes of this section, "Homelessness" means:
(i) The status or circumstance of an individual who lacks a fixed, regular, and adequate nighttime residence; or
(ii) The status or circumstance of an individual who has a primary nighttime residence that is:
(iii) A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including welfare motels, hotels, congregate shelters, and transitional housing for the mentally ill;
(iv) An institution that provides a temporary residence for individuals intended to be institutionalized; or
(v) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

RCC § 22A-808. PRETRIAL RELEASE PENALTY ENHANCEMENTS.[32]

[31] Per First Draft of Report #6 (June 7, 2017).

(a) *Misdemeanor Pretrial Release Penalty Enhancement.* A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense.

(b) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement applies to a felony when the offender committed the felony while on release pursuant to D.C. Code § 23-1321 for another offense.

(c) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement applies to a crime of violence when the defendant committed the crime of violence while on release pursuant to D.C. Code § 23-1321 for another offense.

(d) *Penalty Enhancement Not Applicable Where Conduct Punished as Contempt or Violation of Condition of Release.* Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense when a person is convicted of contempt pursuant to D.C. Code § 11-741 or violation of a condition of release pursuant to D.C. Code § 23-1329 for the same conduct.

(e) *Penalties.*

(1) *Misdemeanor Pretrial Release Penalty Enhancement.* A misdemeanor pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(2) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(3) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(f) *Definitions.*

(1) *Crime of Violence.* For purposes of this section, "crime of violence" has the meaning defined in § 22A-XXX].

(2) *Felony.* "Felony" has the meaning specified in § 22A-801.

(3) *Misdemeanor.* "Misdemeanor" has the meaning specified in § 22A-801.

[32] Per First Draft of Report #6 (June 7, 2017).

Subtitle II. Offenses Against Persons.
Chapter 10. Offenses Against Persons Subtitle Provisions.

§ 22A-1001. Offense Against Persons Definitions.
§ 22A-1002. [Reserved].

RCC § 22A-1001. OFFENSE AGAINST PERSONS DEFINITIONS.[33]

In this subtitle, the term:

(1) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(2) "Citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for District of Columbia neighborhoods with the goal of crime prevention.

(3) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:
- (A) Inflict bodily injury on another person;
- (B) Damage or destroy the property of another person;
- (C) Kidnap another person;
- (D) Commit any other offense;
- (E) Accuse another person of a crime;
- (F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;
- (G) Notify a law enforcement official about a person's undocumented or illegal immigration status;
- (H) Take, withhold, or destroy another person's passport or immigration document;
- (I) Inflict a wrongful economic injury on another person;
- (J) Take or withhold action as an official, or take action under color or pretense of right; or
- (K) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

(4) (A) "Consent" means words or actions that indicate an agreement to particular conduct.

(B) For offenses against property in Subtitle III of this Title:

(i) Consent includes words or actions that indicate indifference towards particular conduct; and

(ii) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

(5) "Dangerous weapon" means:
- (A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;
- (B) A prohibited weapon as defined at § 22A-1001(14);

[33] Per First Draft of Report #14 (December 21, 2017) and Second Draft of Report #14 (March 16, 2018, for the definitions of "adult," "child," "duty of care," elderly person," and "serious mental injury" in subsections (22)-(26)).

(C) A sword, razor, or a knife with a blade over three inches in length;
(D) A billy club;
(E) A stun gun; or
(F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.

(6) (A) "Deceive" and "deception" mean:
(i) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;
(ii) Preventing another person from acquiring material information;
(iii) 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
(iv) 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.

(B) The terms "deceive" and "deception" do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

(7) "District official or employee" means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.

(8) "Effective consent" means consent obtained by means other than coercion or deception.

(9) "Family member" means an individual to whom a person is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.

(10) "Imitation dangerous weapon" means an object used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon.

(11) "Law enforcement officer"
(A) A sworn member or officer of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;
(B) A sworn member or officer of the District of Columbia Protective Services;
(C) A licensed special police officer;
(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Court Services and Offender Supervision Agency or the Pretrial Services Agency;
(F) Metro Transit police officers;

(G) An employee of the Family Court Social Services Division of the Superior Court charged with intake, assessment, or community supervision; and

(H) 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.

(12) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

(13) "Physical force" means the application of physical strength.

(14) "Prohibited weapon" means:

(A) A machine gun or sawed-off shotgun, as defined at D.C. Code § 7-2501;

(B) A firearm silencer;

(C) A blackjack, slungshot, sandbag cudgel,or sand club;

(D) Metallic or other false knuckles as defined at D.C. Code § 22-4501; or

(E) A switchblade knife.

(15) "Protected person" means a person who is:

(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;

(B) 65 years old or older;

(C) A vulnerable adult;

(D) A law enforcement officer, while in the course of official duties;

(E) A public safety employee while in the course of official duties;

(F) A transportation worker, while in the course of official duties;

(G) A District official or employee, while in the course of official duties; or

(H) A citizen patrol member, while in the course of a citizen patrol.

(16) "Public safety employee" means:

(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and

(B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.

(17) "Serious bodily injury" means bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement; or

(C) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(18) "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.

(19) "Strangulation or suffocation" means a restriction of normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

(20) "Transportation worker" means:

(A) A person who is licensed to operate, and is operating, a publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia;

(B) Any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station within the District of Columbia;

(C) A person who is licensed to operate, and is operating, a taxicab within the District of Columbia; and

(D) A person who is registered to operate, and is operating within the District of Columbia, a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company as defined by D.C. Code § 50-301.03(16B).

(21) "Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.

(22) "Adult" means a person who is 18 years of age or older.

(23) "Child" mean a person who is less than 18 years of age.

(24) "Duty of care" means a legal responsibility for the health, welfare, or supervision for another person.

(25) "Elderly person" means a person who is 65 years of age or older.

(26) "Serious mental injury" means substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.

RCC § 22A-1002. [Reserved].

Chapter 11. Homicide

§ 22A-1101. Murder.
§ 22A-1102. Manslaughter.
§ 22A-1103. Negligent Homicide.

RCC § 22A-1101. MURDER.[34]

(a) Aggravated Murder. A person commits the offense of aggravated murder when that person:
(1) Knowingly causes the death of another person; and
(2) Either:
(A) The death is caused with recklessness as to whether the decedent is a protected person; or
(B) The death is caused with the purpose of harming the decedent because of the decedent's status as a:
(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;
(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;
(D) The defendant mutilated or desecrated the decedent's body;
(E) The defendant committed the murder after substantial planning;
(F) The defendant committed the murder for hire;
(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;
(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or
(I) In fact, the death is caused by means of a dangerous weapon.
(b) *First Degree Murder.* A person commits the offense of first degree murder when that person:
(1) Knowingly causes the death of another person; or
(2) Commits second degree murder and either:
(A) The death is caused with recklessness as to whether the decedent is a protected person;
(B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:
(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;

[34] Per First Draft of Report #19 (March 16, 2018).

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

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

(1) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or
(2) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnaping, or kidnapping]; provided that the person or an accomplice committed the lethal act.

(d) *Penalties.*

(1) *Aggravated Murder*. Aggravated murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *First Degree Murder*. First degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) *Second Degree Murder*. Second degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "purpose," "knowledge," "recklessness," "negligence," and "circumstances manifesting extreme indifference" have the meanings specified in § 22A-206; the terms "protected person," "law enforcement officer," "public safety employee," "District official or employee," and "citizen patrol" have the meanings specified in § 22A-1001.

(f) *Defenses.*

(1) *Mitigation Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:
(A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be;
(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent the decedent from unlawfully causing death or serious bodily injury; or
(C) Any other legally-recognized partial defense which substantially diminishes either the defendant's culpability or the wrongfulness of the defendant's conduct.
(2) *Burden of Proof for Mitigation Defense*. If evidence of mitigation is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

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

RCC § 22A-1102. MANSLAUGHTER.[35]

(a) *Aggravated Manslaughter.* A person commits the offense of aggravated manslaughter when that person:
(1) Knowingly causes the death of another;
(2) Recklessly, under circumstances manifesting extreme indifference for human life, causes death of another; or
(3) Negligently causes the death of another person in the course of and in furtherance of committing or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnaping, or kidnapping], provided that the person or an accomplice committed the lethal act; and
(4) Either:
  (A) The death is caused with recklessness as to whether the decedent is a protected person;
  (B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:
    (i) Law enforcement officer;
    (ii) Public safety employee;
    (iii) Participant in a citizen patrol;
    (iv) District official or employee; or
    (v) Family member of a District official or employee; or
  (C) In fact, the death is caused by means of a dangerous weapon.

(b) *First Degree Manslaughter***.** A person commits the offense of first degree manslaughter when that person:
(1) Knowingly causes the death of another,
(2) Recklessly, under circumstances manifesting extreme indifference for human life, causes death of another;
(3) Negligently causes the death of another person in the course of and in furtherance of committing or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnaping, or kidnapping], provided that the person or an accomplice committed the lethal act; or

[35] Per First Draft of Report #19 (March 16, 2018).

(4) Recklessly causes the death of another and:
  (A) The death is caused with recklessness as to whether the decedent is a protected person;
  (B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:
    (i) Law enforcement officer;
    (ii) Public safety employee;
    (iii) Participant in a citizen patrol;
    (iv) District official or employee; or
    (v) Family member of a District official or employee; or
  (C) In fact, the death is caused by means of a dangerous weapon.

(c) *Second Degree Manslaughter*. A person commits the offense of second degree manslaughter when that person recklessly causes the death of another person.

(d) *Penalties*.
  (1) *Aggravated manslaughter.* Aggravated manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First degree manslaughter*. First degree manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second degree manslaughter*. Second degree manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "knowledge," "recklessness," "negligence," and "circumstances manifesting extreme indifference," have the meanings specified in § 22A-206; the terms "protected person," "law enforcement officer," "public safety employee," "District official or employee," and "citizen patrol" have the meanings specified in § 22A-1001.

RCC § 22A-1103 NEGLIGENT HOMICIDE.[36]

(a) *Offense Definition.* A person commits the offense of negligent homicide when that person negligently causes the death of another person.

(b) *Penalties*. Negligent homicide is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The term "negligently" has the meaning specified in § 22A-206.

[36] Per First Draft of Report #19 (March 16, 2018).

Chapter 12. Robbery, Assault, and Threat Offenses

§ 22A-1201. Robbery.
§ 22A-1202. Assault.
§ 22A-1203. Criminal Menacing.
§ 22A-1204. Criminal Threats.
§ 22A-1205. Offensive Physical Contact.

RCC § 22A-1201. ROBBERY.[37]

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

(1) Commits Third degree robbery; and

(2) In the course of doing so:

(A) Recklessly causes serious bodily injury to someone physically present, other than an accomplice, by means of what, in fact, is a dangerous weapon; or

(B) Recklessly causes serious bodily injury to someone physically present, other than an accomplice, who is a protected person.

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

(1) Commits Third degree robbery and;

(2) Either:

(A) In the course of doing so:

(i) Recklessly causes serious bodily injury to someone physically present, other than an accomplice;

(ii) Recklessly causes significant bodily injury to someone physically present, other than an accomplice, by means of what, in fact, is a dangerous weapon; or

(iii) Recklessly causes significant bodily injury to someone physically present, other than an accomplice, who is a protected person; or

(B) Knowingly takes or exercises control over, or attempts to take or exercise control over what is, in fact, a motor vehicle, by means of a dangerous weapon.

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

(1) Commits Third degree robbery; and

(2) Either:

(A) In the course of doing so:

(i) Recklessly causes significant bodily injury to someone physically present, other than an accomplice; or

(ii) Recklessly causes bodily injury to, or commits a first degree criminal menace as defined in RCC 22A-1203(a) against, someone physically present other than an accomplice, who is a protected person; or

[37] Per First Draft of Report #16 (December 21, 2017).

(B) In fact, the property that is the object of the offense is a motor vehicle.

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

(1) Knowingly takes, exercises control over, or attempts to take or exercise control over;

(2) The property of another;

(3) That is in the immediate actual possession or control of another person;

(4) By means of or facilitating flight by:

(A) Using physical force that overpowers any other person present, other than an accomplice;

(B) Causing bodily injury to any other person present, other than an accomplice, or

(C) Committing conduct constituting a second degree criminal menace as defined in RCC 22A-1203(b) against any other person present, other than an accomplice;

(5) With intent to deprive the owner of the property.

(e) *Penalties.*

(1) *Aggravated Robbery.* Aggravated robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *First Degree Robbery.* First degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second Degree Robbery.* Second degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Third Degree Robbery.* Third degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly," "with intent," and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "serious bodily injury," "protected person," "significant bodily injury," "dangerous weapon" and "bodily injury," "physical force" and "" have the meanings specified in § 22A-1001.

RCC § 22A-1202. ASSAULT.[38]

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

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

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

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

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

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

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

[38] Per First Draft of Report #15 (December 21, 2017).

(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;

(b) *First Degree Assault*. A person commits the offense of first degree assault when that person:
(1) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; or
(2) Recklessly causes significant bodily injury to another person by means of what, in fact, is a dangerous weapon;

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

(d) *Third Degree Assault.* A person commits the offense of third degree assault when that person recklessly causes significant bodily injury to another person;

(e) *Fourth Degree Assault.* A person commits the offense of fourth degree assault when that person:
(1) Recklessly causes bodily injury to, or uses physical force that overpowers, another person; and
(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;
(2) Negligently causes bodily injury to another person by means of what, in fact, is a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(f) *Fifth Degree Assault.* A person commits the offense of fifth degree assault when that person recklessly causes bodily injury to, or uses physical force that overpowers, another person.

(g) *Penalties.*

(1) *Aggravated Assault.* Aggravated assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *First Degree Assault.* First degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second Degree Assault.* Second degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Third Degree Assault.* Third degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Assault.* Fourth degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(6) *Fifth Degree Assault.* Fifth degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions.* The terms "purposely," "recklessly, under circumstances manifesting extreme indifference to human life," "recklessly," and "negligently" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "serious bodily injury," "protected person," "law enforcement officer," "citizen patrol," "District official or employee," "significant bodily injury," "dangerous weapon" "bodily injury," "physical force," "public safety officer," "family member," and "effective consent" have the meanings specified in § 22A-1001.

(i) *Defenses.*

(1) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if:

(A) The conduct did not inflict significant bodily injury or serious bodily injury, or involve the use of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or

(B) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

(3) *Limitation on Justification and Excuse Defenses To Assault on a Law Enforcement Officer.* For prosecutions brought under this section, it is neither a justification nor an excuse for a person to actively oppose the use of force by a law enforcement officer when:

(A) The person was reckless as to the fact that the complainant was a law enforcement officer;

(B) The use of force occurred during an arrest, stop, or detention for a legitimate police purpose; and

(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary.

(j) *Jury Demandable Offense.* When charged with a violation or inchoate violation of subsection (f) of this section and either the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer, the defendant may demand a jury trial. If the defendant demands a jury trial, then the court shall impanel a jury.

RCC § 22A-1203. CRIMINAL MENACE.[39]

(a) *First Degree Criminal Menace.* A person commits first degree criminal menace when that person:
  (1) Knowingly communicates to another person physically present;
  (2) By displaying or making physical contact with a dangerous weapon or imitation dangerous weapon;
  (3) That the defendant or an accomplice immediately will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Homicide, as defined in RCC § 22A-1101;
    (B) Robbery, as defined in RCC § 22A-1201;
    (C) Sexual assault, as defined in RCC § 22A-13XX;
    (D) Kidnapping, as defined in RCC § 22A-14XX; or
    (E) Assault, as defined in RCC § 22A-1202;
  (4) With intent that the communication would be perceived as a threat; and
  (5) In fact, the communication would cause a reasonable recipient to believe that the harm would immediately take place.

(b) *Second Degree Criminal Menace.* A person commits criminal menace when that person:
  (1) Knowingly communicates to another person physically present;
  (2) That the defendant or an accomplice immediately will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Homicide, as defined in RCC § 22A-1101;
    (B) Robbery, as defined in RCC § 22A-1201;
    (C) Sexual assault, as defined in RCC § 22A-13XX;
    (D) Kidnapping, as defined in RCC § 22A-14XX; or
    (E) Assault, as defined in RCC § 22A-1202;
  (3) With intent that the communication would be perceived as a threat; and
  (4) In fact, the communication would cause a reasonable recipient to believe that the harm would immediately take place.

(c) *Penalties.*
  (1) *First Degree Criminal Menace.* First degree criminal menace is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[39] Per First Draft of Report #17 (December 21, 2017).

(2) *Second Degree Menace.* Second degree criminal menace is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "dangerous weapon" and "imitation weapon" have the meanings specified in § 22A-1001.

(e) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is a defense to prosecution under this section. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable mistake that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

RCC § 22A-1204. CRIMINAL THREAT.[40]

(a) *First Degree Criminal Threat.* A person commits a first degree criminal threat when that person:
  (1) Knowingly communicates to another person;
  (2) That the defendant or an accomplice will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Homicide, as defined in RCC § 22A-1101;
    (B) Robbery, as defined in RCC § 22A-1201;
    (C) Sexual assault, as defined in RCC § 22A-13XX;
    (D) Kidnapping, as defined in RCC § 22A-14XX; or
    (E) Assault, as defined in RCC § 22A-1202(a)-(d);
  (3) With intent that the communication would be perceived as a threat; and
  (4) In fact, the communication would cause a reasonable recipient to believe that the harm would take place.

(b) *Second Degree Criminal Threat.* A person commits a second degree criminal threat when that person**:**
  (1) Knowingly communicates to another person;
  (2) That the defendant or an accomplice will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Assault, as defined in RCC § 22A-1202(e)-(f); or
    (B) Criminal damage to property, as defined in RCC § 22A-2503(c)(1) – (c)(4);
  (3) With intent that the communication be perceived as a threat; and
  (4) In fact, the communication would cause a reasonable recipient to believe that the harm would take place.

(c) *Penalties.*
  (1) First Degree Criminal Threat. First degree criminal threat is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[40] Per First Draft of Report #17 (December 21, 2017).

(2) *Second Degree Criminal Threat.* Second degree criminal threat is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "dangerous weapon," "imitation weapon," and effective consent have the meanings specified in § 22A-1001.

(e) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is a defense to prosecution under this section. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable mistake that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

(f) *[Jury Demandable Offense.* When charged with a violation of this section or an inchoate violation of this section, the defendant may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

RCC § 22A-1205. OFFENSIVE PHYSICAL CONTACT.[41]

(a) *First Degree Offensive Physical Contact.* A person commits the offense of first degree offensive physical contact when that person:

(1) Knowingly causes physical contact with another person;

(2) With bodily fluid or excrement;

(3) With intent that the physical contact be offensive to that other person; and

(4) In fact, a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.

(b) *Second Degree Offensive Physical Contact.* A person commits the offense of second degree offensive physical contact when that person:

(1) Knowingly causes physical contact with another person;

(2) With intent that the physical contact be offensive to that other person; and

(3) In fact, a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.

(c) *Penalty.*

(1) *First Degree Offensive Physical Contact.* First degree offensive physical contact is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Offensive Physical Contact.* First degree offensive physical contact is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definition*s. The terms "knowingly" and "intent" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "law enforcement officer" and "effective consent" have the meaning specified in § 22A-1001.

(e) *Defenses.*

[41] Per First Draft of Report #15 (December 21, 2017).

(1) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an defense to prosecution under this section.

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

(3) *Limitation on Justification and Excuse Defenses to Offensive Physical Contact Against a Law Enforcement Officer.* For prosecutions brought under this section, it is neither a justification nor an excuse for a person to actively oppose the use of force by a law enforcement officer when:

(A) The person was reckless as to the fact that the complainant was a law enforcement officer;

(B) The use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose; and

(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary.

(f) *Jury Demandable Offense.* When charged with a violation or inchoate violation of subsection (b) of this section and either the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer, the defendant may demand a jury trial. If the defendant demands a jury trial, then the court shall impanel a jury.

Chapter 13. Sexual Assault and Related Provisions.

§ 22A-1301. Sexual Offense Definitions.
§ 22A-1302. Limitations on Liability and Sentencing for RCC Chapter 13 Offenses.
§ 22A-1303. Sexual Assault.
§ 22A-1304. Sexual Abuse of a Minor.
§ 22A-1305. Sexual Exploitation of an Adult.
§ 22A-1306. Sexually Suggestive Conduct with a Minor.
§ 22A-1307. Enticing a Minor.
§ 22A-1308. Arranging for Sexual Conduct with a Minor.
§ 22A-1309. Nonconsensual Sexual Conduct.

RCC § 22A-1301. Sexual Offense Definitions.[42]

For the purposes of this chapter, the term:

(1) "Actor" means a person accused of any offense proscribed under this chapter.

(2) "Bodily injury" means significant physical pain, illness, or any impairment of physical condition.

(3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:

(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;

(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;

(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;

(D) Take or withhold action as an official, or cause an official to take or withhold action;

(E) Inflict a wrongful economic injury;

(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

(4) "Complainant" means a person who is alleged to have been subjected to any offense proscribed under this chapter.

(5) "Consent" means words or actions that indicate an agreement to particular conduct. Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances. In addition, for offenses against property in Subtitle III of this Title:

(A) Consent includes words or actions that indicate indifference towards particular conduct; and

[42] Per First Draft of Report #26 (September 26, 2018).

(B) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

(6) "Domestic partner" shall have the same meaning as provided in D.C. Code § 32-701(3).

(7) "Domestic partnership" shall have the same meaning as provided in D.C. Code § 32-701(4).

(8) "Effective consent" means consent obtained by means other than physical force, coercion, or deception.

(9) "Person of authority in a secondary school" includes any teacher, counselor, principal, or coach in a secondary school.

(10) "Physical force" means the application of physical strength.

(11) "Position of trust with or authority over" includes a relationship with respect to a complainant of:

(A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;

(B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the complainant;

(C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and

(D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, 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.

(12) "Serious bodily injury" means bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement; or

(C) Protracted loss or impairment of the function of a bodily member or organ.

(13) "Sexual act" means:

(A) The penetration, however slight, of the anus or vulva of any person by an object or body part, with intent to sexually degrade, arouse, or gratify any person; or

(B) Contact between the mouth of any person and the penis of any person, the mouth of any person and the vulva of any person, or the mouth of any person and the anus of any person with intent to sexually degrade, arouse, or gratify any person.

(14) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with intent to sexually degrade, arouse, or gratify any person.

RCC § 22A-1302. LIMITATIONS ON LIABILITY AND SENTENCING FOR RCC CHAPTER 13 OFFENSES.[43]

[43] Per First Draft of Report #26 (September 26, 2018).

(a) *Age of Liability.* Notwithstanding any other provision of law, a person under the age of 12 is not subject to liability for offenses in this subchapter other than:
  (1) RCC § 22A-1303(a) first degree sexual assault; or
  (2) RCC § 22A-1303(c) third degree sexual assault.

(b) *Merger of Related Sex Offenses.* Multiple convictions for two or more offenses in this Chapter arising from the same course of conduct shall merge in accordance with the rules and procedures established in RCC § 212(d)-(e).

RCC § 22A-1303. SEXUAL ASSAULT.[44]

(a) *First Degree Sexual Assault.* An actor commits the offense of first degree sexual assault when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act;
  (2) In one or more of the following ways:
    (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant;
    (B) By threatening:
      (i) To kill or kidnap any person;
      (ii) To commit an unwanted sexual act or cause significant bodily injury to any person; or
    (C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
      (i) With intent to impair the complainant's ability to express unwillingness; and
      (ii) In fact, the drug, intoxicant, or other substance renders the complainant:
        (I) Asleep, unconscious, or passing in and out of consciousness;
        (II) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or
        (III) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act.

(b) *Second Degree Sexual Assault.* An actor commits the offense of second degree sexual assault when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act;
  (2) In one or more of the following ways:
    (A) By coercion; or
    (B) When the complainant is:
      (i) Asleep, unconscious, or passing in and out of consciousness;
      (ii) Mentally or physically incapable of appraising the nature of the sexual act; or

[44] Per First Draft of Report #26 (September 26, 2018).

(iii) Mentally or physically incapable of communicating unwillingness to engage in the sexual act.

(c) *Third Degree Sexual Assault.* An actor commits the offense of third degree sexual assault when that actor:

(1) Knowingly causes the complainant to engage in or submit to sexual contact;

(2) In one or more of the following ways:

(A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant;

(B) By threatening:

(i) To kill or kidnap any person;

(ii) To commit an unwanted sexual act or cause significant bodily injury to any person; or

(C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:

(i) With intent to impair the complainant's ability to express unwillingness; and

(ii) In fact, the drug, intoxicant, or other substance renders the complainant:

(I) Asleep, unconscious, or passing in and out of consciousness;

(II) Substantially incapable, mentally or physically, of appraising the nature of the sexual contact; or

(III) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual contact.

(d) *Fourth Degree Sexual Assault.* An actor commits the offense of fourth degree sexual assault when that actor:

(1) Knowingly causes the complainant to engage in or submit to sexual contact;

(2) In one or more of the following ways:

(A) By coercion; or

(B) When the complainant is:

(i) Asleep, unconscious, or passing in and out of consciousness;

(ii) Mentally or physically incapable of appraising the nature of the sexual contact; or

(iii) Mentally or physically incapable of communicating unwillingness to engage in the sexual contact.

(e) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancements in subsection (i) of this section:

(1) First degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Fourth degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Offense Penalty Enhancements.* 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:

(1) The actor recklessly caused the sexual conduct by displaying or using what, in fact, was a dangerous weapon or imitation dangerous weapon;

(2) The actor knowingly acted with one or more accomplices that were present at the time of the offense;

(3) The actor recklessly caused serious bodily injury to the complainant during the sexual conduct; or

(4) At the time of the offense:

(A) The complainant, in fact, was under 12 years of age and the actor was, in fact, at least four years older than the complainant;

(B) The actor recklessly disregarded that the complainant was under 16 years of age and the actor was, in fact, at least four years older than the complainant;

(C) The actor recklessly disregarded that the complainant was under 18 years of age, that the actor was in a position of trust with or authority over the complainant, and that the actor, in fact, was at least four years older than the complainant;

(D) The actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least 2 years older than the complainant;

(E) The actor recklessly disregarded that the complainant was 65 years of age or older and the actor was, in fact, under 65 years old; or

(F) The actor recklessly disregarded that the complainant was a vulnerable adult.

(g) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "serious bodily injury," "significant bodily injury," "dangerous weapon," "imitation dangerous weapon," "bodily injury," "physical force," "effective consent," "coercion," "sexual act," "sexual contact," "position of trust with or authority over," and "vulnerable adult" have the meanings specified in § 22A-1301.

(h) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the actor's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section, provided that:

(1) The conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon; or

(2) At the time of the conduct, none of the following is true:

(A) The complainant is under 16 years of age and the actor is more than four years older than the complainant;

(B) 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 four years older than the complainant;

(C) The complainant is legally incompetent; or

(D) The complainant is substantially incapable, mentally or physically, of appraising the nature of the proposed sexual act or sexual contact.

(3) If evidence is present at trial of the complainant's effective consent or the actor's reasonable belief that the complainant gave effective consent to the actor's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

RCC § 22A-1304. SEXUAL ABUSE OF A MINOR.[45]

(a) *First Degree Sexual Abuse of a Minor.* An actor commits the offense of first degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to a sexual act; and

(2) In fact:

(A) The complainant is under 12 years of age; and

(B) The actor is at least four years older than the complainant.

(b) *Second Degree Sexual Abuse of a Minor.* An actor commits the offense of second degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to a sexual act; and

(2) In fact:

(A) The complainant is under 16 years of age; and

(B) The actor is at least four years older than the complainant.

(c) *Third Degree Sexual Abuse of a Minor.* An actor commits the offense of third degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to a sexual act;

(2) While in a position of trust with or authority over the complainant; and

(3) In fact:

(A) The complainant is under 18 years of age; and

(B) The actor is at least 18 years of age and at least four years older than the complainant.

(d) *Fourth Degree Sexual Abuse of a Minor.* An actor commits the offense of fourth degree sexual abuse of a minor when that actor:

(1) Knowingly engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact; and

(2) In fact:

(A) The complainant is under 12 years of age; and

(B) The actor is at least four years older than the complainant.

(e) *Fifth Degree Sexual Abuse of a Minor.* An actor commits the offense of fifth degree sexual abuse of a minor when that actor:

(1) Knowingly engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact; and

(2) In fact:

(A) The complainant is under 16 years of age; and

(B) The actor is at least four years older than the complainant.

[45] Per First Draft of Report #26 (September 26, 2018).

(f) *Sixth Degree Sexual Abuse of a Minor.* An actor commits the offense of sixth degree sexual abuse of a minor when that person:
  (1) Knowingly engages in sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact;
  (2) While in a position of trust with or authority over the complainant; and
  (3) In fact:
    (A) The complainant is under 18 years of age; and
    (B) The actor is, in fact, at least 18 years of age and at least four years older than the complainant.

(g) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:
  (1) First degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) Fourth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) Fifth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (6) Sixth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions*. The term "knowingly," has the meaning specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "domestic partnership," and "position of trust with or authority over" have the meanings specified in § 22A-1001.

(i) *Defenses.* In addition to any defenses otherwise applicable to the actor's conduct under District law:
  (1) It is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.
  (2) It is an affirmative defense to prosecution under subsections (b) and (e), which the actor must prove by a preponderance of the evidence, that the actor reasonably believed that the complainant was 16 years of age or older at the time of the offense.
  (3) It is an affirmative defense to prosecution under subsections (c) and (f), which the actor must prove by a preponderance of the evidence, that the actor reasonably believed that the complainant was 18 years of age of older at the time of the offense.

RCC § 22A-1305. SEXUAL EXPLOITATION OF AN ADULT.[46]

(a) *First Degree Sexual Exploitation of an Adult.* An actor commits the offense of first degree sexual exploitation of an adult when that actor:

[46] Per First Draft of Report #26 (September 26, 2018).

(1) Knowingly causes the complainant to engage in or submit to a sexual act;
(2) In one or more of the following ways:
(A) The actor is a person of authority in a secondary school and recklessly disregards that the complainant is an enrolled student in the same school system and is under the age of 20 years;
(B) The actor knowingly and falsely represents that he or she is someone else who is personally known to the complainant;
(C) The actor is a healthcare provider or member of the clergy, or purports to be a healthcare provider or member of the clergy, and:
(i) Falsely represents that the sexual act is for a bona fide professional purpose;
(ii) Commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services; or
(iii) Commits the sexual act while the complainant is a patient or client of the actor, and recklessly disregards that the mental, emotional, or physical condition of the complainant is such that he or she is impaired from declining participation in the sexual act; or
(D) The actor knowingly works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian of persons at such an institution, and recklessly disregards that the complainant is a ward, patient, client, or prisoner at such an institution.

(b) *Second Degree Sexual Exploitation of an Adult.* An actor commits the offense of second degree exploitation of an adult when that actor:
(1) Knowingly causes the complainant to engage in or submit to sexual contact;
(2) In one or more of the following ways:
(A) The actor is a person of authority in a secondary school and recklessly disregards that the complainant is an enrolled student in the same school system and is under the age of 20 years;
(B) The actor knowingly and falsely represents that he or she is someone else who is personally known to the complainant.
(C) The actor is a healthcare provider or member of the clergy, or purports to be a healthcare provider or member of the clergy:
(i) Falsely represents that the sexual contact is for a bona fide professional purpose;
(ii) Commits the sexual contact during a consultation, examination, treatment, therapy, or other provision of professional services; or
(iii) Commits the sexual contact while the complainant is a patient or client of the actor, and recklessly disregards that the mental, emotional, or physical condition of the complainant is such that he or she is impaired from declining participation in the sexual contact; or
(D) The actor knowingly works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian of persons at such an institution, and recklessly disregards that the complainant is a ward, patient, client, or prisoner at such an institution.

(c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:
  (1) First degree sexual exploitation of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree sexual exploitation of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. In this section, the terms "knowingly" and "recklessly" have the meaning specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "person of authority in a secondary school," and "domestic partnership" have the meanings specified in § 22A-1001.

(e) *Defenses.* In addition to any defenses otherwise applicable to the actor's conduct under District law it is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

RCC § 22A-1306. SEXUALLY SUGGESTIVE CONDUCT WITH A MINOR.[47]

(a) *Sexually Suggestive Contact with a Minor.* An actor commits the offense of sexually suggestive contact with a minor when that actor:
  (1) With intent to cause the sexual arousal or sexual gratification of any person;
  (2) Knowingly:
    (A) 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; or
    (D) Touches the actor's genitalia or that of a third person in the sight of the complainant; and
  (3) The actor, in fact, is at least 18 years of age and at least four years older than the complainant; and:
    (A) The actor recklessly disregarded that the complainant is under 16 years of age; or
    (B) The actor recklessly disregarded that the complainant is under 18 years of age and the actor knows that he or she is in a position of trust with or authority over the complainant.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "position of trust with or authority over," and "domestic partnership" have the meanings specified in § 22A-1001.

(d) *Marriage or Domestic Partnership Defense.* In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

[47] Per First Draft of Report #26 (September 26, 2018).

RCC § 22A-1307. ENTICING A MINOR.[48]

(a) *Enticing a Minor.* An actor commits the offense of enticing a minor when that actor:
  (1) Knowingly:
    (A) Persuades or entices, or attempts to persuade or entice, the complainant to engage in or submit to a sexual act or sexual contact; or
    (B) Persuades or entices, or attempts to persuade or entice, the complainant to go to another location in order to engage in or submit to a sexual act or sexual contact; and
  (2) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:
    (A) The actor recklessly disregards that the complainant is under 16 years of age; or
    (B) The actor recklessly disregards that the complainant is under 18 years of age, and the actor is in a position of trust with or authority over the complainant; or
    (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "position of trust with or authority over," "law enforcement officer," and "domestic partnership" have the meanings specified in § 22A-1001.

(d) *Marriage or Domestic Partnership Defense.* In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

RCC § 22A-1308. ARRANGING FOR SEXUAL CONDUCT WITH A MINOR.[49]

(a) *Arranging for Sexual Conduct with a Minor.* An actor commits the offense of arranging for sexual conduct with a minor when that actor:
  (1) Knowingly arranges for a sexual act or sexual contact between:
    (A) The actor and the complainant; or
    (B) A third person and the complainant; and
  (2) The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant; and
  (3) The actor recklessly disregards that:

[48] Per First Draft of Report #26 (September 26, 2018).
[49] Per First Draft of Report #26 (September 26, 2018).

(A) The complainant is under 16 years of age;
(B) The complainant is under 18 years of age, and the actor knows that he or she or the third person is in a position of trust with or authority over the complainant; or
(C) The complainant purports to be a person under 16 years of age, while, in fact, the complainant a law enforcement officer.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "law enforcement officer" and "position of trust with or authority over" have the meanings specified in § 22A-1001.

RCC § 22A-1309. NONCONSENSUAL SEXUAL CONDUCT.[50]

(a) *First Degree Nonconsensual Sexual Conduct.* An actor commits the offense of first degree nonconsensual sexual conduct when that actor recklessly causes the complainant to engage in or submit to a sexual act without the complainant's effective consent.

(b) *Second Degree Nonconsensual Sexual Conduct.* An actor commits the offense of second degree nonconsensual sexual contact when that actor recklessly causes the complainant to engage in or submit to sexual contact without the complainant's effective consent.

(c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:
(1) First degree nonconsensual sexual conduct of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree nonconsensual sexual conduct of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The term "recklessly" has the meaning specified in § 22A-206; the terms "sexual act," and "sexual contact," and "effective consent" have the meanings specified in § 22A-1001.

(e) *Exclusion from Liability.* An actor shall not be subject to prosecution under this section for a use of deception to induce the complainant to consent to the sexual act or sexual contact. An actor may be subject to prosecution under this section for a use of deception as to the nature of the sexual act or sexual contact.

[50] Per First Draft of Report #26 (September 26, 2018).

Chapter 14. Kidnapping and Criminal Restraint

§ 22A-1401. Aggravated Kidnapping.
§ 22A-1402. Kidnapping.
§ 22A-1403. Aggravated Criminal Restraint.
§ 22A-1404. Criminal Restraint.

RCC § 22A-1401. AGGRAVATED KIDNAPPING.[51]

(a) *Offense Definition*. A person commits aggravated kidnapping when that person:
  (1) Commits kidnapping as defined in RCC 22-1402;
  (2) In one or more of the following ways:
    (A) Reckless as to the fact that the complainant is a protected person;
    (B) With the purpose of harming the complainant because of the complainant's status as a:
      (A) Law enforcement officer;
      (B) Public safety employee;
      (C) Participant in a citizen patrol;
      (D) District official or employee; or
      (E) Family member of a District official or employee; or
    (C) By means of knowingly displaying or touching another person with a dangerous weapon or imitation dangerous weapon.

(b) *Penalty.* Aggravated kidnapping is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section, the terms "reckless," "purpose," and "knowingly," have the meanings specified in § 22A-206; and the terms "citizen patrol," "dangerous weapon," "District official or employee," "family member," "imitation dangerous weapon," "law enforcement officer," "protected person," and "public safety employee" have the meanings specified in § 22A-1001.

(d) *Multiple Convictions for Related Offenses*. A person may not be sentenced for aggravated kidnapping if the interference with another person's freedom of movement was incidental to commission of any other offense.

RCC § 22A-1402. KIDNAPPING.[52]

(a) *Offense Definition*. A person commits the offense of kidnapping when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) Without that person's consent;
    (B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;
    (C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or

[51] Per First Draft of Report #21 (May 18, 2018).
[52] Per First Draft of Report #21 (May 18, 2018).

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

(D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person how has assumed the obligations of a parent, or legal guardian; and

(3) With intent to:

(A) Hold the complainant for ransom or reward;

(B) Use the complainant as a shield or hostage;

(C) Facilitate the commission of any felony or flight thereafter;

(D) Inflict bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;

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

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

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

(b) *Penalty.* Kidnapping is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:

(1) The terms "knowingly," and "with intent," have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "bodily injury," "consent," "deception," "effective consent," and "significant bodily injury" have the meanings specified in § 22A-1001.

(2) The term "relative" means a parent, grandparent, sibling, cousin, aunt, or uncle.

(d) *Defenses*. It is a defense to prosecution under this section that the defendant is a relative of the complainant, acted with intent to assume personal custody of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant.

(e) *Multiple Convictions for Related Offenses*. A person may not be sentenced for kidnapping if the interference with another person's freedom of movement was incidental to commission of offense.

RCC § 1403. AGGRAVATED CRIMINAL RESTRAINT.[53]

(a) *Offense Definition*. A person commits the offense of aggravated criminal restraint when that person:

(1) Commits criminal restraint as defined in RCC § 22-1404;

(2) In one or more of the following ways:

(A) Reckless as to the fact that the complainant is a protected person;

(B) With the purpose of harming the complainant because of the complainant's status as a:

(A) Law enforcement officer;

(B) Public safety employee;

(C) Participant in a citizen patrol;

[53] Per First Draft of Report #21 (May 18, 2018).

(D) District official or employee; or
(E) Family member of a District official or employee; or

(C) By means of knowingly displaying or touching another person with a dangerous weapon or imitation dangerous weapon.

(b) *Penalty.* Aggravated criminal restraint is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section, the terms "reckless," "purpose," and "knowingly," have the meanings specified in § 22A-206; and the terms "citizen patrol," "dangerous weapon," "District official or employee," "family member," "imitation dangerous weapon," "law enforcement officer," "protected person," and "public safety employee" have the meanings specified in § 22A-1001.

(d) *Multiple Convictions for Related Offenses*. A person may not be sentenced for aggravated criminal restraint if the interference with another person's freedom of movement was incidental to commission of any other offense.

RCC § 1404. CRIMINAL RESTRAINT.[54]

(a) *Offense Definition*. A person commits the offense of criminal restraint when that person:
(1) Knowingly interferes to a substantial degree with another person's freedom of movement;
(2) In one of the following ways;
(A) Without that person's consent;
(B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;
(C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
(D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person how has assumed the obligations of a parent, or legal guardian.

(b) *Penalty.* Criminal restraint is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:
(1) The term "knowingly" has the meaning specified in § 22A-206; the terms "bodily injury," "consent," "deception," and "effective consent" have the meanings specified in § 22A-1001.
(2) The term "relative" means a parent, grandparent, sibling, aunt, uncle, or any other person related to the person by consanguinity to the second degree.

(d) *Defenses*. It is a defense to prosecution under subsection (a)(2)(D) that the defendant is a relative of the complainant.

(e) *Multiple Convictions for Related Offenses*. A person may not be sentenced for criminal restraint if the interference with another person's freedom of movement was incidental to commission of any other offense.

[54] Per First Draft of Report #21 (May 18, 2018).

Chapter 15. Abuse and Neglect of Children and Vulnerable Persons

§ 22A-1501. Child Abuse.
§ 22A-1502. Child Neglect.
§ 22A-1503. Abuse of a Vulnerable Adult or Elderly Person.
§ 22A-1504. Neglect of a Vulnerable Adult or Elderly Person.

§ 22A-1501. CHILD ABUSE.[55]

(a) *First Degree Child Abuse.* A person commits the offense of first degree child abuse when that person:

(1) Either:

(A) Purposely causes serious mental injury to another person, with recklessness that the other person is a child; or

(B) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person, with recklessness that the other person is a child; and

(2) In fact:

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

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

(b) *Second Degree Child Abuse.* A person commits the offense of second degree child abuse when that person:

(1) Recklessly:

(A) Causes serious mental injury to a child; or

(B) Causes significant bodily injury to a child; and

(2) In fact:

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

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

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

(1)

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

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

(2) In fact:

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

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

(d) *Penalties*.

[55] Per First Draft of Report #20 (March 16, 2018).

(1) *First Degree Child Abuse*. First degree child abuse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Child Abuse*. Second degree child abuse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Child Abuse*. Third degree child abuse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions:* The terms "purposely," "recklessly, under circumstances manifesting extreme indifference to human life," and "recklessly" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "bodily injury," "physical force," "child," and "adult," have the meanings specified in § 22A-1001.

(f) *Defenses*.

(1) *Parental Discipline Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, it is an affirmative defense to third degree child abuse if:

(A) A parent, legal guardian, or other person who has assumed the obligations of a parent:

(i) Caused bodily injury to a child 18 months or older, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(ii) Used overpowering physical force against any child, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or

(iii) Committed harassment per RCC § 22A-XXXX, menacing per RCC § 22A-1203, threats per RCC § 22A-1204, restraint per RCC § 22A-XXXX, or first degree offensive physical contact per RCC § 22A-1205(a) against any child, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(B) The bodily injury, use of overpowering physical force, or harassment, menacing, threats, restraint, or offensive physical contact was for the purpose of exercising discipline;

(C) The exercise of such discipline was reasonable in manner and degree; and

(D) The conduct did not include:

(i) Burning, biting, or cutting;

(ii) Striking with a closed fist;

(iii) Shaking, kicking, or throwing; or

(iv) Interfering with breathing.

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

§ 22A-1502. CHILD NEGLECT.[56]

(a) *First Degree Child Neglect.* A person commits the offense of first degree child neglect when that person:
  (1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a child would experience serious bodily injury or death;
  (2) That person knows he or she has a duty of care to the child; and
  (3) In fact, that person violated his or her duty of care to the child.

(b) *Second Degree Child Neglect.* A person commits the offense of second degree child neglect when that person:
  (1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a child would experience:
    (A) Significant bodily injury; or
    (B) Serious mental injury;
  (2) That person knows he or she has a duty of care to the child; and
  (3) In fact, that person violated his or her duty of care to the child.

(c) *Third Degree Child Neglect.* A person commits the offense of third degree child neglect when that person:
  (1) Either:
    (A) Recklessly fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child; or
    (B) Knowingly leaves a child in any place with intent to abandon the child; and
  (2)
    (A) That person knows she or he has a duty of care to the child; and
    (B) In fact, that person violated his or her duty of care to the child.

(d) *Penalties*.
  (1) *First Degree Child Neglect.* First degree child neglect is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Child Neglect.* Second degree child neglect is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Third Degree Child Neglect.* Third degree child neglect is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions:* The terms "recklessly" and "knows" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "duty of care," and "child" have the meanings specified in § 22A-1001.

(f) *Exception to Liability for Newborn Safe Haven.* No person shall be guilty of child neglect for the surrender of a newborn child in accordance with D.C. Code § 4-1451.01 *et seq*.

[56] Per First Draft of Report #20 (March 16, 2018).

§ 22A-1503. ABUSE OF A VULNERABLE ADULT OR ELDERLY PERSON.[57]

(a) *First Degree Abuse of a Vulnerable Adult or Elderly Person.* A person commits the offense of first degree abuse of a vulnerable adult or elderly person when that person:
  (1) Purposely causes serious mental injury to a another person, with recklessness that the other person is a vulnerable adult or elderly person; or
  (2) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person, with recklessness that the other person is a vulnerable adult or elderly person.

(b) *Second Degree Abuse of a Vulnerable Adult or Elderly Person.* A person commits the offense of second degree abuse of a vulnerable adult when that person:
  (1) Recklessly causes serious mental injury to a vulnerable adult or elderly person; or
  (2) Recklessly causes significant bodily injury to a vulnerable adult or elderly person.

(c) *Third Degree Abuse of a Vulnerable Adult or Elderly Person.* A person commits the offense of third degree abuse of a vulnerable adult or elderly person when that person:
  (1) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a vulnerable adult or elderly person; or
  (2) Recklessly causes bodily injury to, or uses physical force that overpowers, a vulnerable adult or elderly person.

(d) *Penalties*.
  (1) *First Degree Abuse of a Vulnerable Adult or Elderly Person*. First degree abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Abuse of a Vulnerable Adult or Elderly Person*. Second degree abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Third Degree Abuse of a Vulnerable Adult or Elderly Person*. Third degree abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) Definitions: The terms "purposely," "recklessly, under circumstances manifesting extreme indifference to human life," and "recklessly" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "bodily injury," "physical force," "effective consent," "vulnerable adult," and "elderly person" have the meanings specified in § 22A-1001.

(f) *Defenses*.
  (1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the victim gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if:

[57] Per First Draft of Report #20 (March 16, 2018).

(A) The conduct did not inflict significant bodily injury, serious bodily injury, serious mental injury, or involve the use of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or

(B) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or

(C) The conduct involved was the use of religious prayer alone, in lieu of medical treatment which the defendant otherwise had a duty to provide.

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

§ 22A-1504. NEGLECT OF A VULNERABLE ADULT OR ELDERLY PERSON.[58]

(a) *First Degree Neglect of a Vulnerable Adult or Elderly Person.* A person commits the offense of first degree neglect of a vulnerable adult or elderly person when that person:

(1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience serious bodily injury or death;

(2) That person knows he or she has a duty of care to the vulnerable adult or elderly person; and

(3) In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.

(b) *Second Degree Neglect of a Vulnerable Adult or Elderly Person.* A person commits the offense of second degree neglect of a vulnerable adult or elderly person when that person:

(1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience:

(A) Significant bodily injury; or

(B) Serious mental injury;

(2) That person knows he or she has a duty of care to the vulnerable adult or elderly person; and

(3) In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.

(c) Third Degree Neglect of a Vulnerable Adult or Elderly Person. A person commits the offense of third degree neglect of a vulnerable adult or elderly person when that person:

(1) Recklessly fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine or other items or care essential for the physical health, mental health, or safety of a vulnerable adult or elderly person;

(2) That person knows she or he has a duty of care to the vulnerable adult or elderly person; and

(3) In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.

[58] Per First Draft of Report #20 (March 16, 2018).

(d) *Penalties*.

(1) *First Degree Neglect of a Vulnerable Adult or Elderly Person.* First degree neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Neglect of a Vulnerable Adult or Elderly Person.* Second degree neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Neglect of a Vulnerable Adult or Elderly Person.* Third degree neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions:* The terms "recklessly" and "knows" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "effective consent," "duty of care," "vulnerable adult," and "elderly person" have the meanings specified in § 22A-1001.

(f) *Defenses*.

(1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if the conduct did not involve a firearm, as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

Chapter 16. Human Trafficking

§ 22A-1601. Human Trafficking Definitions.
§ 22A-1602. Limitations on Liability and Sentencing for RCC Chapter 16 Offenses.
§ 22A-1603. Forced Labor or Services.
§ 22A-1604. Forced Commercial Sex.
§ 22A-1605. Trafficking in Labor or Services.
§ 22A-1606. Trafficking in Commercial Sex.
§ 22A-1607. Sex Trafficking of Minors.
§ 22A-1068. Benefitting from Human Trafficking.
§ 22A-1609. Misuse of Documents in Furtherance of Human Trafficking.
§ 22A-1610. Sex Trafficking Patronage.
§ 22A-1611. Forfeiture.
§ 22A-1612. Reputation or Opinion Evidence.
§ 22A-1613. Civil Action.

RCC § 22A-1601. HUMAN TRAFFICKING DEFINITIONS.[59]

For the purposes of this chapter, the term:

(1) "Business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, joint stock, trust, and any legal entity through which business is conducted.

(2) "Coercion" means threatening that any person will do any one of, or a combination of, the following:

(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;

(B) Accuse another person of a criminal offense or failure to comply with an immigration regulation;

(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or business repute;

(D) Take or withhold action as an official, or cause an official to take or withhold action;

(E) Inflict a wrongful economic injury;

(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

(3) "Commercial sex act" means 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.

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

[59] Per First Draft of Report #27 (September 26, 2018).

(A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;
(B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or
(C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

(5) "Labor" means work that has economic or financial value, other than a commercial sex act.
(6) "Service" means legal or illegal duties or work done for another, whether or not compensated, other than a commercial sex act.
(7) "Sexual act" shall have the same meaning as provided in RCC § 22A-1301.
(8) "Sexual contact" shall have the same meaning as provided in RCC § 22A-1301.

RCC § 22A-1602. LIMITATIONS ON LIABILITY AND SENTENCING FOR RCC CHAPTER 16 OFFENSES.[60]

(a) *Merger.* Multiple convictions for two or more offenses in Chapter 16 arising from the same course of conduct shall merge in accordance with the rules and procedures established in RCC § 212(d)-(e).
(b) *Exceptions to Liability*. Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:
(1) Burning, biting, or cutting;
(2) Striking with a closed fist;
(3) Shaking, kicking, or throwing; or
(4) Interfering with breathing.

RCC § 22A-1603. FORCED LABOR OR SERVICES.[61]

(a) Offense Definition. An actor or business commits the offense of forced labor or services when that actor or business:
(1) Knowingly causes another person to engage in labor or services;
(2) By means of coercion or debt bondage.
(b) Penalties. Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, forced labor or services is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) Offense Penalty Enhancements. 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, one or more of the following is proven:

[60] Per First Draft of Report #27 (September 26, 2018).
[61] Per First Draft of Report #27 (September 26, 2018).

(1) The person or business was reckless that the complainant was under 18 years of age; or

(2) The complainant was held or provides services for more than 180 days.

(d) Definitions. The terms "knowingly," and "recklessly" have the meanings specified in RCC § 22A-206. The terms "business," "labor," "services," "coercion" and "debt bondage" have the meanings specified in § 22A-1601.

(e) Exclusions from Liability. An actor or business shall not be subject to prosecution under this section for threats of ordinary and legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services.

RCC § 22A-1604. FORCED COMMERCIAL SEX.[62]

(a) Forced Commercial Sex. A person or business commits the offense of forced commercial sex when that person or business:

(1) Knowingly causes another person to engage in a commercial sex act;

(2) By means of coercion or debt bondage.

(b) Penalties. Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, forced commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) Offense Penalty Enhancements. 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, one or more of the following is proven:

(1) The person or business was reckless that the complainant was under 18 years of age; or

(2) The complainant was held or provides commercial sex acts for more than 180 days.

(d) Definitions. The terms "knowingly," and "recklessly" have the meanings specified in § 22A-206. The terms "business," "commercial sex act," "coercion," and "debt bondage" have the meanings specified in RCC § 22A-1601.

RCC § 22A-1605. TRAFFICKING IN LABOR OR SERVICES.[63]

(a) Offense Definition. A person or business commits the offense of trafficking in labor or services when that person or business:

(1) Knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person;

(2) With recklessness that the person is being caused, or will be caused to provide labor or services;

(3) By means of coercion or debt bondage.

(b) Penalties. Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in labor

[62] Per First Draft of Report #27 (September 26, 2018).

[63] Per First Draft of Report #27 (September 26, 2018).

or services is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) Offense Penalty Enhancements. 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, one or more of the following is proven:

(1) The person or business was reckless that the complainant was under 18 years of age; or

(2) The complainant was held or provides services for more than 180 days.

(d) Definitions. The terms "knowingly," and "recklessly" have the meanings specified in § 22A-206. The terms "business," "coercion," and "debt bondage" have the meanings specified in § 22A-1601.

RCC § 22A-1606. TRAFFICKING IN COMMERCIAL SEX.[64]

(a) Offense Definition. A person or business commits the offense of trafficking in commercial sex when that person or business:

(1) Knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person;

(2) With recklessness that the person is being caused, or will be caused to engage in a commercial sex act;

(3) By means of coercion or debt bondage.

(b) Penalties. Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) Offense Penalty Enhancements. 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, one or more of the following is proven:

(1) The person or business was reckless that the complainant was under 18 years of age; or

(2) The complainant was held or provides commercial sex acts for more than 180 days.

(d) Definitions. The terms "knowingly," and "recklessly" have the meanings specified in § 22A-206. The terms "business," "coercion," "debt bondage," and "commercial sex act" have the meanings specified in § 22A-1601.

RCC § 22A-1607. SEX TRAFFICKING OF MINORS.[65]

(a) A person or business commits the offense of sex trafficking of minors when that person or business:

(1) Knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person;

(2) Who will be caused to engage in a commercial sex act;

(3) With recklessness as to the complainant being under the age of 18.

[64] Per First Draft of Report #27 (September 26, 2018).

[65] Per First Draft of Report #27 (September 26, 2018).

(b) *Penalties*. Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Offense Penalty Enhancements.* The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days.
(d) *Definitions.* The terms "knowingly," and "recklessly" have the meanings specified in § 22A-206. The term "commercial sex act" has the meaning specified in § 22A-1601.

RCC § 22A-1608. BENEFITING FROM HUMAN TRAFFICKING.[66]

(a) *First Degree Benefiting from Human Trafficking.* A person or business commits the offense of first degree benefiting from human trafficking when that person or business:
    (1) Knowingly obtains any financial benefit or property;
    (2) By participation in a group of two or more persons;
    (3) Reckless that the group has engaged in conduct constituting forced commercial sex under RCC 22A-1604 or trafficking in commercial sex under RCC 22A-1606.
(b) *Second Degree Benefiting from Human Trafficking.* A person or business commits the offense of second degree benefiting from human trafficking when that person or business:
    (1) Knowingly obtains any financial benefit or property;
    (2) By participation in a group of two or more persons;
    (3) Reckless that the group has engaged in conduct constituting forced labor or services under RCC 22A-1603 or trafficking in labor or services under RCC 22A-1605.
(c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (d) of this section:
    (1) First degree benefitting from human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
    (2) Second degree benefitting from human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The terms "knowingly," and "reckless" have the meanings specified in § 22A-206.

RCC § 22A-1609. MISUSE OF DOCUMENTS IN FURTHERANCE OF HUMAN TRAFFICKING.[67]

(a) *Offense Definition.* A person or business commits the offense of misuse of documents in furtherance of human trafficking when that person or business:
    (1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;

[66] Per First Draft of Report #27 (September 26, 2018).
[67] Per First Draft of Report #27 (September 26, 2018).

(2) With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.

(b) *Penalty.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, misuse of documents in furtherance of human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly," and "with intent" have the meanings specified in § 22A-206. The terms "commercial sex act," "labor," and "service" have the meanings specified in § 22A-1601.

RCC § 22A-1610. SEX TRAFFICKING PATRONAGE.[68]

(a) *First Degree Sex Trafficking Patronage.* A person commits the offense of first degree sex trafficking patronage when that person:
   (1) Knowingly engages in a commercial sex act;
   (2) When coercion or debt bondage was used to cause the person to submit to or engage in the commercial sex act;
   (3) With recklessness that the complainant is under 18 years of age.

(b) *Second Degree Sex Trafficking Patronage.* A person commits the offense of first degree sex trafficking patronage when that person:
   (1) Knowingly engages in a commercial sex act;
   (2) When coercion or debt bondage was used to cause the person to submit to or engage in the commercial sex act.

(c) *Third Degree Sex Trafficking Patronage.* A person commits the offense of third degree sex trafficking patronage when that person:
   (1) Knowingly engages in a commercial sex act;
   (2) When the complainant was recruited, enticed, harbored, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act;
   (3) With recklessness that the complainant is under 18 years of age.

(d) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:
   (1) First degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
   (2) Second degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
   (3) Third degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "knowingly," and "reckless" have the meanings specified in § 22A-206. The terms "coercion," "commercial sex act," "debt bondage" have the meanings specified in § 22A-1601.

RCC § 22A-1611. FORFEITURE.[69]

[68] Per First Draft of Report #27 (September 26, 2018).
[69] Per First Draft of Report #27 (September 26, 2018).

(a) In imposing sentence on any individual or business convicted of a violation of this chapter, the court shall order, in addition to any sentence imposed, that the individual or business shall forfeit to the District of Columbia:
    (1) Any interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of the violation; and
    (2) Any property, real or personal, constituting or derived from any proceeds that the individual or business obtained, directly or indirectly, as a result of the violation.
(b) The following shall be subject to forfeiture to the District of Columbia and no property right shall exist in them:
    (1) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.
    (2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

RCC § 22A-1612. REPUTATION OR OPINION EVIDENCE.[70]

In a criminal case in which a person or business is accused of trafficking in commercial sex, as prohibited by § 22A-1606; sex trafficking of minors, as prohibited by § 22A-1607; or benefitting from human trafficking, as prohibited by § 22A-1608; reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with § 22-3022(b), and is constitutionally required to be admitted.

RCC § 22A-1613. CIVIL ACTION.[71]

(a) An individual who is a victim of an offense prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court of the District of Columbia. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages shall be awarded on proof of actual damages where a defendant's acts were willful and malicious.
(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later.
(c) If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.

[70] Per First Draft of Report #27 (September 26, 2018).
[71] Per First Draft of Report #27 (September 26, 2018).

Chapter 17. Terrorism [Reserved]

Chapter 18. Invasions of Privacy

§ 22A-1805. Stalking.

RCC § 22A-1801. STALKING.[72]

(a) *Stalking.* A person commits stalking when that person:
  (1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:
    (A) Physically following or physically monitoring;
    (B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having received notice from the individual, directly or indirectly, to cease such communication; or
    (C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses;
  (2) Either:
    (A) With intent to cause that individual to:
      (i) Fear for his or her safety or the safety of another person; or
      (ii) Suffer significant emotional distress; or
    (B) Negligently causing that individual to:
      (i) Fear for his or her safety or the safety of another person; or
      (ii) Suffer significant emotional distress.

(b) *Penalty*. Stalking is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Offense Penalty Enhancements*. The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, one or more of the following is proven:
  (1) The person, in fact, was subject to a court order or condition of release prohibiting contact with the specific individual;
  (2) The person, in fact, has one prior conviction in any jurisdiction for stalking any person within the previous 10 years;
  (3) The person recklessly disregarded that the individual 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 individual; or
  (4) The person caused more than $2,500 in financial injury.

(d) *Definitions*. In this section:
  (1) The terms "purposely", "with intent", "recklessly", and "negligently" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207;
  (2) The term "comparable offense" means a criminal offense 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 the corresponding District criminal threat offense or predicate property offense;

[72] Per First Draft of Report #28 (September 26, 2018).

(3) The term "pattern of conduct" means conduct on two or more separate occasions, with continuity of purpose. Where conduct is of a continuing nature, each 24-hour period constitutes one occasion.

(4) The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:

(A) The costs of replacing or repairing any property that was taken or damaged;

(B) The costs of clearing the specific individual's name or his or her credit, criminal, or any other official record;

(C) Medical bills;

(D) Relocation expenses;

(E) Lost employment or wages; and

(F) Attorney's fees.

(5) The term "physically monitoring" means being in the immediate vicinity of the specific individual's residence, workplace, or school to detect the individual's whereabouts or activities;

(6) The term "predicate property offense" means:

(A) Theft as defined in § 22A-2101;

(B) Unauthorized use of property as defined in § 22A-2102;

(C) Forgery as defined in § 22A-2204;

(D) Identity theft as defined in § 22A-2205;

(E) Arson as defined in § 22A-2501;

(F) Damage to property as defined in § 22A-2503;

(G) Graffiti as defined in § 22A-2504;

(H) Trespass as defined in § 22A-2601; or

(I) Trespass of motor vehicle as defined in § 22A-2602;

(7) The term "safety" means ongoing security from unlawful intrusions on one's bodily integrity or bodily movement; and

(8) The term "significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling.

(e) *Exclusions from Liability*.

(1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution or the First Amendment Assemblies Act of 2004 codified at § 5-331.01 et al.

(2) A person shall not be subject to prosecution under this section for a communication that:

(A) Is directed to a government official, candidate for elected office, or employee of a business that serves the public;

(B) While that person is involved in their official duties; and

(C) Expresses an opinion on a political or public matter.

(3) A person shall not be subject to prosecution under this section for conduct, if:

(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, *pro se* litigant, or compliance investigator; and

(B) Is acting within the reasonable scope of his or her official duties.

(f) *Defenses*.

(1) *Parental Discipline Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, it is an affirmative defense to stalking if:

(A) A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person's minor child;

(B) The conduct constituting stalking was for the purpose of exercising discipline; and

(C) The exercise of such discipline was reasonable in manner and degree.

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

Subtitle III. Property Offenses.
Chapter 20. Property Offense Subtitle Provisions.

§ 22A-2001. Property Offense Definitions.
§ 22A-2002. Aggregation To Determine Property Offense Grades.
§ 22A-2003. Limitation on Convictions for Multiple Related Property Offenses.

RCC § 22A-2001. PROPERTY OFFENSE DEFINITIONS.[73]

In this subtitle, the term:

(1) "Attorney General" means the Attorney General for the District of Columbia.

(2) "Building" means a structure affixed to land that is designed to contain one or more human beings.

(3) "Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

(4) "Check" means any written instrument for payment of money by a financial institution.

(5) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:

(A) Inflict bodily injury on another person;

(B) Damage or destroy the property of another person;

(C) Kidnap another person;

(D) Commit any other offense;

(E) Accuse another person of a crime;

(F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;

(G) Notify a law enforcement official about a person's undocumented or illegal immigration status.

(H) Inflict a wrongful economic injury on another person;

(I) Take or withhold action as an official, or take action under color or pretense of right; or

(J) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

(6) "Consent" means words or actions that indicate an agreement to particular conduct. Consent includes words or actions that indicate indifference towards particular conduct. Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

(7) "Court" means the Superior Court of the District of Columbia.

(8) "Deceive" and "deception" mean:

(A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions.

(B) Preventing another person from acquiring material information;

(C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or

[73] Per First Draft of Report #8 (August 11, 2017).

which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

(D) Failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record;

(E) Provided that the term "deception" does not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

(9) "Deprive" means:

(A) To withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to that person; or

(B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

(10) "Dwelling" means a structure that is either designed for lodging or residing overnight, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each unit is an individual dwelling.

(11) "Effective consent" means consent obtained by means other than coercion or deception.

(12) "Elderly person" means a person who is 65 years of age or older.

(13) "Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

(14) "Financial injury" means all monetary costs, debts, or obligations incurred by a person as a result of another person's criminal act, including, but not limited to:

(A) The costs of clearing the person's credit rating, credit history, criminal record, or any other official record;

(B) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person,;

(C) The costs of repairing or replacing damaged or stolen property;

(D) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages; and

(E) Legal fees.

(15) "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, moped, truck, truck tractor, truck tractor with semitrailer or trailer, bus, or other vehicle propelled by an internal-combustion engine or electricity, including any non-operational vehicle that is being restored or repaired.

(16) "Occupant" means a person holding a possessory interest in property that the accused is not privileged to interfere with."

(17) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

(18) "Payment card" means an instrument of any kind, including an instrument known as a credit card or debit card, issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.

(19) "Person" means an individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity.

(20) "Property" means anything of value. The term "property" includes, but is not limited to:
- (A) Real property, including things growing on, affixed to, or found on land;
- (B) Tangible or intangible personal property;
- (C) Services;
- (D) Credit;
- (E) Debt; and
- (F) A government-issued license, permit, or benefit.

(21) "Property of another" means any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property. The term "property of another" does not include any property in the possession of the accused that the other person has only a security interest in.

(22) "Services" includes, but is not limited to:
- (A) Labor, whether professional or nonprofessional;
- (B) The use of vehicles or equipment;
- (C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
- (D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;
- (E) Admission to public exhibitions or places of entertainment; and
- (F) Educational and hospital services, accommodations, and other related services.

(23) "United States Attorney" means the United States Attorney for the District of Columbia.

(24) "Value" means:
- (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:
  - (i) For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;
  - (ii) 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
  - (iii) 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].

(25) "Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.

(26) "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) A will, contract, deed, or any other document purporting to have legal or evidentiary significance;

(C) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(D) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(E) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(F) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

RCC § 22A-2002. AGGREGATION TO DETERMINE PROPERTY OFFENSE GRADES.[74]

When a single scheme or systematic course of conduct could give rise to multiple charges of the same offense, the government instead may bring one charge and aggregate the values, amounts of damage, or quantities of the property in the scheme or systematic course of conduct to determine the grade of the offense. This rule applies to the following offenses:

(a) § 22A-2101 Theft;
(b) § 22A-2105 Unlawful Creation or Possession of a Recording;
(c) § 22A-2201 Fraud;
(d) § 22A-2202 Payment Card Fraud;
(e) § 22A-2203 Check Fraud;
(f) § 22A-2204 Forgery;
(g) § 22A-2205 Identity Theft;
(h) § 22A-2206 Unlawful Labeling of a Recording;
(i) § 22A-2208 Financial Exploitation of a Vulnerable Adult;
(j) § 22A-2301 Extortion;
(k) § 22A-2401 Possession of Stolen Property;
(l) § 22A-2402 Trafficking of Stolen Property;
(m) § 22A-2403 Alteration of Motor Vehicle Identification Number; and,
(n) § 22A-2503 Criminal Damage to Property.

RCC § 22A-2003. LIMITATION ON CONVICTIONS FOR MULTIPLE RELATED PROPERTY OFFENSES.[75]

(a) *Theft, Fraud, Extortion, Stolen Property, or Property Damage Offenses.* A person may be found guilty of any combination of offenses contained in Chapters 21, 22, 23, 24 or 25

[74] Per First Draft of Report #8 (August 11, 2017).
[75] Per First Draft of Report #8 (August 11, 2017).

for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct.

(b) *Trespass and Burglary Offenses.* A person may be found guilty of any combination of offenses contained in Chapters 26 and 27 for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct.

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

Chapter 21. Theft Offenses

§ 22A-2101. Theft.
§ 22A-2102. Unauthorized Use of Property.
§ 22A-2103. Unauthorized Use of a Vehicle.
§ 22A-2104. Shoplifting.
§ 22A-2105. Unlawful Creation or Possession of a Recording.

RCC § 22A-2101. THEFT.[76]

(a) *Offense.* A person commits the offense of theft if that person:
  (1) Knowingly takes, obtains, transfers, or exercises control over;
  (2) The property of another;
  (3) Without the consent of the owner; and
  (4) With intent to deprive that person of the property.

(b) *Definitions.* The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "consent," "property," "property of another," "owner," and "value," have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Theft.* A person is guilty of aggravated theft if the person commits theft and the property, in fact, has a value of $250,000 or more. Aggravated theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Theft*.
    (A) A person is guilty of first degree theft if the person commits theft and:
      (i) The property, in fact, has a value of $25,000 or more; or
      (ii) The property, in fact: is a motor vehicle, and the value of the motor vehicle is $25,000 or more.
    (B) Second degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Theft.*
    (A) A person is guilty of second degree theft if the person commits theft and:
      (i) The property, in fact, has a value of $2,500 or more; or
      (ii) The property, in fact, is a motor vehicle.
    (B) Second degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Theft*.
    (A) A person is guilty of third degree theft if the person commits theft and:
      (i) The property, in fact, has a value of $250 or more; or
      (ii) The property, in fact, is taken from the immediate actual possession of another person.

[76] Per Second Draft of Report #9 (December 28, 2018).

(B) Third degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Theft*. A person is guilty of fourth degree theft if the person commits theft and the property, in fact, has any value. Fourth degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2102. UNAUTHORIZED USE OF PROPERTY.[77]

(a) *Offense.* A person commits the offense of unauthorized use of property if that person:
(1) Knowingly takes, obtains, transfers, or exercises control over;
(2) The property of another;
(3) Without the effective consent of the owner.

(b) *Definitions.* The term "possess" has the meaning specified in § 22A-202, the term "knowingly" has the meaning specified in § 22A-206, and the terms "effective consent," "consent," "property," "property of another," and "owner," have the meanings specified in § 22A-2001.

(c) *Penalty*: Unauthorized use of property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2103. UNAUTHORIZED USE OF A MOTOR VEHICLE.[78]

(a) *Offense.* A person commits the offense of unauthorized use of a motor vehicle if that person:
(1) Knowingly operates or rides as a passenger in;
(2) A motor vehicle;
(3) Without the effective consent of the owner.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206, and the terms "motor vehicle," "effective consent," "consent," and "owner," have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.
(1) *First Degree Unauthorized Use of a Motor Vehicle*. A person is guilty of first degree unauthorized use of a motor vehicle if the person commits unauthorized use of a motor vehicle by knowingly operating the motor vehicle. First degree unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *Second Degree Unauthorized Use of a Motor Vehicle.* A person is guilty of first degree unauthorized use of a motor vehicle if the person commits unauthorized use of a motor vehicle by knowingly operating or riding as a passenger in the motor vehicle. Second degree unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *No Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking.* No person may be convicted of unauthorized use of a motor vehicle and either unauthorized use of a rented or leased motor vehicle, D.C. Code § 22-3215, or carjacking, RCC § 22A-1XXX based on the same act or course of conduct. A person may be found guilty of any combination of these offenses, but only one judgment of

[77] Per First Draft of Report #9 (August 11, 2017).
[78] Per First Draft of Report #9 (August 11, 2017).

conviction may be entered pursuant to the procedural requirements in RCC § 22A-2003(c).

RCC § 22A-2104. SHOPLIFTING.[79]

(a) *Offense*. A person commits the offense of shoplifting if that person:

(1) Knowingly:

(A) Conceals or takes possession of;

(B) Removes, alters, or transfers the price tag, serial number, or other identification mark that is imprinted on or attached to; or

(C) Transfers from one container or package to another container or package;

(2) Personal property of another that is displayed, held, stored, or offered for sale;

(3) With intent to take or make use of the property without complete payment.

(b) *Definitions.* The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent," have the meanings specified in § 22A-206, and the terms "property" and "property of another" have the meanings specified in § 22A-2001.

(c) *Penalty*. Shoplifting is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *No Attempt Shoplifting Offense*. It is not an offense to attempt to commit the offense described in this section.

(e) *Qualified Immunity.* A person who displays, holds, stores, or offers for sale personal property as specified in subsection (a)(2), or an employee or agent of such a person, who detains or causes the arrest of a person in a place where such property is displayed, held, stored, or offered for sale shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest, in any proceeding arising out of such detention or arrest, if:

(1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section;

(2) The manner of the detention or arrest was reasonable;

(3) Law enforcement authorities were notified within a reasonable time; and

(4) The person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time.

RCC §22A-2105. UNLAWFUL CREATION OR POSSESSION OF A RECORDING.[80]

(a) *Offense*. A person commits the offense of unlawful creation or possession of a recording if that person:

(1) Knowingly makes, obtains, or possesses;

(2) Either:

(A) A sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or

(B) A sound recording or audiovisual recording of a live performance;

(3) Without the effective consent of the owner;

[79] Per First Draft of Report #9 (August 11, 2017).

[80] Per First Draft of Report #9 (August 11, 2017).

(4) With intent to sell, rent, or otherwise use the recording for commercial gain or advantage.

(b) *Definitions*. In this section:

(1) "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any;

(2) "Sound recording" means 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; and

(3) The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent," have the meanings specified in § 22A-206, and the terms "property" "property of another," and "owner," have the meanings specified in § 22A-2001.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit:

(1) Copying or other reproduction that is in the manner specifically permitted by Title 17 of the United States Code; or

(2) Copying or other reproduction of a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use.

(d) *Permissive Inference.* A fact finder may, but is not required to, infer that a person had an intent to sell, rent or otherwise use the recording for commercial gain or advantage if the person possesses 5 or more unlawful recordings either of the same original sound recording or the same live performance.

(e) *Gradations and Penalties*.

(3) *First Degree Unlawful Creation or Possession of a Recording*. A person is guilty of first degree unlawful creation or possession of a recording if the person commits the offense and, in fact, the number of unlawful recordings made, obtained, or possessed was 100 or more. First degree unlawful creation or possession of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Second Degree Unlawful Creation or Possession of a Recording.* A person is guilty of second degree unlawful creation or possession of a recording if the person commits the offense and, in fact, any number of unlawful recordings were made, obtained, or possessed. Second degree unlawful creation or possession of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Forfeiture.* Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

Chapter 22. Fraud Offenses

§ 22A-2201. Fraud.
§ 22A-2202. Payment Card Fraud.
§ 22A-2203. Check Fraud.
§ 22A-2204. Forgery.
§ 22A-2205. Identity Theft.
§ 22A-2206. Identity Theft Civil Provisions.
§ 22A-2207. Unlawful Labeling of a Recording.
§ 22A-2208. Financial Exploitation of a Vulnerable Adult.
§ 22A-2209. Financial Exploitation of a Vulnerable Adult Civil Provisions.

RCC § 22A-2201. FRAUD.[81]

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

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "property of another," "consent," "deception," "deprive," and "value" have the meanings specified in § 22A-2001.

(c) Gradations and Penalties.

(1) *Aggravated Fraud.* A person is guilty of aggravated fraud if the person commits fraud and the property, in fact, has a value of $250,000 or more. Aggravated fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2)*First Degree Fraud*. A person is guilty of first degree fraud if the person commits fraud and the property, in fact, has a value of $25,000 or more. First degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second Degree Fraud.* A person is guilty of second degree fraud if the person commits fraud and the property, in fact, has a value, of $2,500 or more. Second degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4)*Third Degree Fraud*. A person is guilty of third degree fraud if the person commits fraud and the property, in fact, has a value of $250 or more. Third degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Fraud*. A person is guilty of fourth degree fraud if the person commits fraud and the property, in fact, has any value. Fourth degree fraud is a Class [X]

[81] Per First Draft of Report #10 (August 11, 2017).

crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2202. PAYMENT CARD FRAUD.[82]

(a) *Offense.* A person commits the offense of payment card fraud if that person:
  (1) Knowingly obtains or pays for property;
  (2) By using a payment card:
    (A) Without the effective consent of the person to whom the payment card was issued;
    (B) After the payment card was revoked or cancelled;
    (C) When the payment card was never issued; or
    (D) 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.

(b) *Definitions.* In this section:
  (1) "Revoked or canceled" means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer.
  (2) The terms "knowingly," and "intent," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "payment card" and "property" have the meanings specified in § 22A-2001.

(c) Gradations and Penalties.
  (1) *Aggravated Payment Card Fraud*. A person is guilty of aggravated payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $250,000 or more. Aggravated payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Payment Card Fraud*. A person is guilty of first degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $25,000 or more. First degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Payment Card Fraud*. A person is guilty of second degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $2,500 or more. Second degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Payment Card Fraud*. A person is guilty of third degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $250 or more. Third degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Payment Card Fraud*. A person is guilty of fourth degree payment card fraud if the person commits payment card fraud and obtains or pays

[82] Per First Draft of Report #10 (August 11, 2017).

for property that, in fact, has any value. Fourth degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Jurisdiction.* 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, 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.

RCC § 22A-2203. CHECK FRAUD.[83]

(a) *Offense.* A person commits the offense of check fraud if that person:

(1) Knowingly obtains or pays for property;

(2) By using a check;

(3) Which will not be honored in full upon its presentation to the bank or depository institution drawn upon.

(b) *Permissive Inference.* Unless the check is postdated, a fact finder may, but is not required to, infer that subsection (a)(3) is satisfied if:

(1) The person who obtained or paid for property;

(2) Failed to repay the amount not honored by the bank or depository institution and any associated fees;

(3) To the holder of the check;

(4) Within 10 days of receiving notice in person or writing that the check was not paid by the financial institution.

(c) *Definitions*. In this section:

(1) "Credit" means an arrangement or understanding, express or implied, with the bank or depository institution for the payment of a check.

(2) The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property" and "value" have the meanings specified in § 22A-2001.

(d) *Gradations and Penalties*.

(1) *First Degree Check Fraud*. A person is guilty of first degree check fraud if the person commits check fraud and, in fact: the amount of the loss to the check holder is $2,500 or more. First degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Check Fraud.* A person is guilty of second degree check fraud if the person commits check fraud and, in fact: the amount of the loss to the check holder is any amount. Second degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[83] Per First Draft of Report #10 (August 11, 2017).

RCC § 22A-2204. FORGERY.[84]

(a) *Offense.* A person commits the offense of forgery if that person:
  (1) Knowingly alters:
    (A) A written instrument
    (B) Without authorization; and
    (C) The written instrument is reasonably adapted to deceive a person into believing it is genuine; or
  (2) Knowingly makes or completes;
    (A) A written instrument;
    (B) That appears:
      (i) To be the act of another who did not authorize that act, or
      (ii) To have been made or completed at a time or place or in a numbered sequence other than was in fact the case, or
      (iii) To be a copy of an original when no such original existed; and
    (C) The written instrument is reasonably adapted to deceive a person into believing the written instrument is genuine; or
  (3) Knowingly transmits or otherwise uses:
    (A) A written instrument;
    (B) That was made, signed, or altered in a manner specified in subsections (a)(1) or (a)(2);
  (4) With intent to:
    (A) Obtain property of another by deception, or
    (B) Harm another person.

(b) *Definitions*. The terms "knowingly," and "intent," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "deception," "property," "property of another," and "value" have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.
  (1) *First Degree Forgery*.
    (A) A person is guilty of first degree forgery if the person commits forgery and the written instrument appears to be, in fact:
      (i) A stamp, legal tender, bond, check, or other valuable instrument issued by a domestic or foreign government or governmental instrumentality;
      (ii) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;
      (iii) A public record, or instrument filed in a public office or with a public servant;
      (iv) A written instrument officially issued or created by a public office, public servant, or government instrumentality;

[84] Per First Draft of Report #10 (August 11, 2017).

(v) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or

(vi) A written instrument having a value of $25,000 or more.

(B) First degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Forgery.*

(A) A person is guilty of second degree forgery if the person commits forgery and the written instrument appears to be, in fact:

(i) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;

(ii) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or

(iii) A check which upon its face appears to be a payroll check;

(iv) A written instrument having a value of $2,500 or more.

(B) Second degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Forgery*. A person is guilty of third degree forgery if the person commits forgery of any written instrument. Third degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2205. IDENTITY THEFT.[85]

(a) *Offense.* A person commits the offense of identity theft if that person:

(1) Knowingly creates, possesses, or uses;

(2) Personal identifying information belonging to or pertaining to another person;

(3) Without that other person's effective consent; and

(4) With intent to use the personal identifying information to:

(A) Obtain property of another by deception;

(B) Avoid payment due for any property, fines, or fees by deception; or

(C) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception.

(b) *Definitions.*

(1) In this section, the term "identifying information" shall include, but is not limited to, the following:

(A) Name, address, telephone number, date of birth, or mother's maiden name;

(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;

(C) Savings, checking, or other financial account number;

[85] Per First Draft of Report #10 (August 11, 2017).

(D) Social security number or tax identification number;
(E) Passport or passport number;
(F) Citizenship status, visa, or alien registration card or number;
(G) Birth certificate or a facsimile of a birth certificate;
(H) Credit or debit card, or credit or debit card number;
(I) Credit history or credit rating;
(J) Signature;
(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;
(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
(M) Place of employment, employment history, or employee identification number; and
(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.

(2) The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "consent," "deception," "financial injury," "property," "property of another," and "value." have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties.*

(1) Aggravated Identity Theft. A person is guilty of aggravated identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $250,000 or more. Aggravated identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) First Degree Identity Theft. A person is guilty of first degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $25,000 or more. First degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Second Degree Identity Theft. A person is guilty of second degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $2,500 or more. Second degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Third Degree Identity Theft. A person is guilty of third degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $250 or more. Third degree identity theft is a

Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Identity Theft*. A person is guilty of fourth degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is of any amount.. Fourth degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Unit of Prosecution and Calculation of Time to Commence Prosecution of the Offense.* Creating, possessing, or using a person's personal identifying information in violation of this section shall constitute a single course of conduct for purposes of determining the applicable time limitation under § 23-113(b). The applicable time limitation under § 23-113 shall not begin to run until after the course of conduct has been completed or terminated.

(e) *Jurisdiction.* The offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, 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.

(f) *Police reports*. The Metropolitan Police Department shall make a report of each complaint of identity theft and provide the complainant with a copy of the report.

RCC § 22A-2206. IDENTITY THEFT CIVIL PROVISIONS.[86]

(a) When a person is convicted, adjudicated delinquent, or found not guilty by reason of insanity of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of § 22A-2206.
(b) In all other cases, a person who alleges that he or she is a victim of identity theft may petition the court for an expedited judicial determination that a District of Columbia public record contains false information as a result of a violation of § 22A-2206. Upon a finding of clear and convincing evidence that the person was a victim of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of § 22A-2206.
(c) Notwithstanding any other provision of law, District of Columbia agencies shall comply with orders issued under subsection (a) of this section within 30 days of issuance of the order.
(d) For the purposes of this section, the term "District of Columbia public record" means any document, book, photographic image, electronic data recording, paper, sound recording, or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of public business by any officer or employee of the District of Columbia.

RCC §22A-2207. UNLAWFUL LABELING OF A RECORDING.[87]

[86] Per First Draft of Report #10 (August 11, 2017).

(a) A person commits the offense of unlawful labeling of a recording if that person:
  (1) Knowingly possesses;
  (2) A sound recording or audiovisual recording;
  (3) That does not clearly and conspicuously disclose the true name and address of the manufacturer on its label, cover, or jacket;
  (4) With intent to sell or rent the sound recording or audiovisual recording.

(b) *Definitions*. In this section:
  (1) "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any;
  (2) "Sound recording" means 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; and
  (3) "Manufacturer" means the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording.
  (4) The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the term "possess" has the meaning specified in § 22A-202.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit:
  (1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or
  (2) Any person who, in his own home, for his own personal use, transfers any sounds or images recorded on a sound recording or audiovisual work.

(d) *Permissive Inference.* A fact finder may, but is not required to, infer that a person had an intent to sell, rent or otherwise use the recording commercial advantage if the person possesses 5 or more recordings of the same sound or audiovisual material that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets.

(e) *Gradations and Penalties*.
  (1) *First Degree Unlawful Labeling of a Recording*. A person is guilty of first degree unlawful labeling of a sound and audiovisual recording if the person commits the offense by possessing, in fact, 100 or more recordings. First degree unlawful labeling of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Unlawful Labeling of a Recording.* A person is guilty of second degree unlawful labeling of a recording if the person commits the offense by possessing, in fact, any number of recordings. Second degree unlawful labeling of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Forfeiture.* Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition

[87] Per First Draft of Report #10 (August 11, 2017).

of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

RCC § 22A-2208. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT OR ELDERLY PERSON.[88]

(a) A person is guilty of financial exploitation of a vulnerable adult or elderly person if that person:
  (1) Knowingly:
    (A) Takes, obtains, transfers, or exercises control over;
    (B) Property of another;
    (C) With the consent of the owner;
    (D) Who is a vulnerable adult or elderly person;
    (E) The consent being obtained by undue influence; and
    (F) With intent to deprive that person of the property, or
  (2) Commits theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.

(b) *Definitions.* In this section:
  (1) The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "property of another," "coercion," "consent," "deprive," "vulnerable adult," "elderly person," and "value" have the meanings specified in §22A-2001.
  (2) The term "undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being.

(c) *Gradations and Penalties.*
  (1) Aggravated Financial Exploitation of a Vulnerable Adult or Elderly Person. A person is guilty of aggravated financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $250,000 or more. Aggravated financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) First Degree Financial Exploitation of a Vulnerable Adult or Elderly Person. A person is guilty of first degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $25,000 or more. First degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Second Degree Financial Exploitation of a Vulnerable Adult or Elderly Person. A person is guilty of second degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial

[88] Per First Draft of Report #10 (August 11, 2017).

injury, whichever is greater, in fact, is $2,500 or more. Second degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Third Degree Financial Exploitation of a Vulnerable Adult or Elderly Person. A person is guilty of third degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $250 or more. Third degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) Fourth Degree Financial Exploitation of a Vulnerable Adult or Elderly Person. A person is guilty of fourth degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is of any amount. Fourth degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Restitution.* In addition to the penalties set forth in paragraphs (c)(1)-(5) of this section, a person shall make restitution, before the payment of any fines or civil penalties.

RCC § 22A-2209. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT OR ELDERLY PERSON CIVIL PROVISIONS.[89]

(a) *Additional Civil Penalties.* In addition to other penalties provided by law, a person who violates § 22A-2207 shall be subject to the following civil penalties:
   (1) A fine of up to $5,000 per violation;
   (2) Revocation of all permits, certificates, or licenses issued by the District of Columbia authorizing the person to provide services to vulnerable adults or elderly persons; and
   (3) A temporary or permanent injunction.
   (4) Restitution under § 22A-2207 shall be paid before the payment of any fines or civil penalties under this section.

(b) *Petition for Injunctive Relief and Protections.* Whenever the Attorney General or the United States Attorney has reason to believe that a person has engaged in financial exploitation of a vulnerable adult or elderly person in violation of §22A-2207, the Attorney General or the United States Attorney may petition the court, which may be by ex-parte motion and without notice to the person, for one or more of the following:
   (1) A temporary restraining order;
   (2) A temporary injunction;
   (3) An order temporarily freezing the person's assets; or
   (4) Any other relief the court deems just.

(c) *Standard for Court Review of Petition.* The court may grant an ex-parte motion authorized by subsection (b) of this section without notice to the person against whom the

[89] Per First Draft of Report #10 (August 11, 2017).

injunction or order is sought if the court finds that facts offered in support of the motion establish that:

(1) There is a substantial likelihood that the person committed financial exploitation of a vulnerable adult or elderly person;

(2) The harm that may result from the injunction or order is clearly outweighed by the risk of harm to the vulnerable adult or elderly person if the inunction or order is not issued; and

(3) If the Attorney General or the United States Attorney has petitioned for an order temporarily freezing assets, the order is necessary to prevent dissipation of assets obtained in violation of § 22A-2207.

(d) *Effect of Order to Temporarily Freeze Assets.* (1) An order temporarily freezing assets without notice to the person pursuant to subsections (b)(3) and (c) of this section shall expire on a date set by the court, not later than 14 days after the court issues the order unless, before that time, the court extends the order for good cause shown. (2) A person whose assets were temporarily frozen under paragraph (1) of this subsection may move to dissolve or modify the order after notice to the Attorney General for the United States Attorney. The court shall hear and decide the motion or application on an expedited basis.

(e) *Appointment of Receiver or Conservator.* The court may issue an order temporarily freezing the assets of the vulnerable adult or elderly person to prevent dissipation of assets; provided, that the court also appoints a receiver or conservator for those assets. The order shall allow for the use of assets to continue care for the vulnerable adult or elderly person, and can only be issued upon a showing that a temporary injunction or temporary restraining order authorized by this section would be insufficient to safeguard the assets, or with the consent of the vulnerable adult or elderly person or his or her legal representative.

Chapter 23. Extortion

§ 22A-2301. Extortion.

RCC § 22A-2301. EXTORTION.[90]

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

(b) *Definitions.* The terms "knowingly," and "intent," in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "property of another," "consent," "coercion," "deprive," and "value" have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Extortion.* A person is guilty of aggravated extortion if the person commits extortion and the property, in fact, has a value of $250,000 or more. Aggravated extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Extortion*. A person is guilty of first degree extortion if the person commits extortion and the property, in fact, has a value of $25,000 or more. First degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Extortion.* A person is guilty of second degree extortion if the person commits extortion and the property, in fact, has a value of $2,500 or more. Second degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Extortion*. A person is guilty of third degree extortion if the person commits extortion and the property, in fact, has a value of $250 or more. Third degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Extortion*. A person is guilty of fourth degree extortion if the person commits extortion and the property, in fact, has any value. Fourth degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[90] Per First Draft of Report #11 (August 11, 2017).

Chapter 24. Stolen Property Offenses

§ 22A-2401. Possession of Stolen Property.
§ 22A-2402. Trafficking of Stolen Property.
§ 22A-2403. Alteration of Motor Vehicle Identification Number.
§ 22A-2404. Alteration of Bicycle Identification Number.

RCC § 22A-2401. POSSESSION OF STOLEN PROPERTY.[91]

(a) *Offense.* A person commits the offense of receiving stolen property if that person:
  (1) Knowingly buys or possesses;
  (2) Property;
  (3) With intent that the property be stolen; and
  (4) With intent to deprive the owner of the property.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the term "possess" has the meaning specified in § 22A-202, and the terms "property" and "deprive" have the meaning specified in §22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Possession of Stolen Property.* A person is guilty of aggravated possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $250,000 or more. Aggravated possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Possession of Stolen Property*. A person is guilty of first degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $25,000 or more. Second degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Possession of Stolen Property.* A person is guilty of second degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $2,500 or more. Second degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Possession of Stolen Property*. A person is guilty of third degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $250 or more. Third degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Possession of Stolen Property*. A person is guilty of fourth degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has any value. Fourth degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2402. TRAFFICKING OF STOLEN PROPERTY.[92]

[91] Per First Draft of Report #10 (August 11, 2017).

(a) *Offense.* A person commits the offense of trafficking of stolen property if that person:
  (1) Knowingly buys or possesses;
  (2) Property;
  (3) On two or more separate occasions;
  (4) With intent that the property be stolen; and
  (5) With intent to sell, pledge as consideration, or trade the property.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the term "possess" has the meaning specified in § 22A-202, and the term "property" has the meaning specified in §22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Trafficking of Stolen Property.* A person is guilty of aggravated trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $250,000 or more. Aggravated trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Trafficking of Stolen Property*. A person is guilty of first degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $25,000 or more. Second degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Trafficking of Stolen Property.* A person is guilty of second degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $2,500 or more. Second degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Trafficking of Stolen Property*. A person is guilty of third degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $250 or more. Third degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Trafficking of Stolen Property*. A person is guilty of fourth degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has any value. Fourth degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2403. ALTERATION OF MOTOR VEHICLE IDENTIFICATION NUMBER.[93]

(a) A person commits the offense of altering a vehicle identification number if that person:
  (1) Knowingly alters;
  (2) An identification number;
  (3) Of a motor vehicle or motor vehicle part;

[92] Per First Draft of Report #10 (August 11, 2017).
[93] Per First Draft of Report #10 (August 11, 2017).

(4) With intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part.

(b) *Definitions.* In this section, "identification number" means a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification. The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the term "motor vehicle" has the meaning specified in § 22A-2001.

(c) *Gradations and Penalties*.

(1) *First Degree Altering Vehicle Identification Number*. A person is guilty of first degree altering a vehicle identification number if the person commits the offense and the value of the motor vehicle or motor vehicle part, in fact, is $1,000 or more. First degree altering a vehicle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Altering Vehicle Identification Number.* A person is guilty of second degree altering a vehicle identification number if the person commits the offense and the motor vehicle or motor vehicle part, in fact, has any value. Second degree altering a vehicle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2404. ALTERATION OF BICYCLE IDENTIFICATION NUMBER.[94]

(a) A person commits the offense of altering bicycle identification numbers if that person:

(1) Knowingly alters;

(2) An identification number;

(3) Of a bicycle or bicycle part;

(4) With intent to conceal or misrepresent the identity of the bicycle or bicycle part.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206. Definitions for the terms "bicycle" and "identification number" are provided in D.C. Code § 50-1609.

(c) *Penalty*. Alteration of a bicycle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[94] Per First Draft of Report #10 (August 11, 2017).

Chapter 25. Property Damage Offenses

§ 22A-2501. Arson.
§ 22A-2502. Reckless Burning
§ 22A-2503. Criminal Damage to Property.
§ 22A-2504. Criminal Graffiti.

RCC § 22A-2501. ARSON.[95]

(a) *Offense.* A person commits the offense of arson if that person:
  (1) Knowingly starts a fire or causes an explosion;
  (2) That damages or destroys;
  (3) A dwelling, building, business yard, watercraft, or motor vehicle.

(b) *Definitions.* The terms "knowingly" and "recklessly," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the terms "dwelling," "building," "business yard," and "motor vehicle," have the meanings specified in § 22A-2001, and the term "serious bodily injury" has the meaning specified in § 22A-XXXX.

(c) *Gradations and Penalties.*
  (1) *Aggravated Arson*.
    (A) A person is guilty of aggravated arson if that person commits arson:
      (i) Of what the person knows to be a dwelling or building;
      (ii) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building; and
      (iii) The fire or explosion, in fact, causes death or serious bodily injury to any person who is not a participant in the crime.
    (B) Aggravated arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Arson.*
    (A) A person is guilty of first degree arson if that person commits arson:
      (i) Of what the person knows to be a dwelling or building; and is
      (ii) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building.
    (B) First degree arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Arson.* A person is guilty of second degree arson if that person commits arson. Second degree arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Affirmative Defense.* It is an affirmative defense to commission of second degree arson that the defendant must prove by a preponderance of the evidence, that he or she had 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.

[95] Per First Draft of Report #9 (August 11, 2017).

RCC § 22A-2502. RECKLESS BURNING.[96]

(a) *Offense.* A person commits the offense of reckless burning if that person:
  (1) Knowingly starts a fire or causes an explosion;
  (2) With recklessness as to the fact that the fire or explosion damages or destroys;
  (3) A dwelling, building, business yard, watercraft, or motor vehicle.

(b) *Definitions.* The terms "knowingly" and "recklessly," have the meanings specified in § 22A-206, and the terms "dwelling," "building," "business yard," and "motor vehicle," have the meanings specified in § 22A-2001.

(c) *Penalty.* Reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Affirmative Defense.* It is an affirmative defense to commission of reckless burning that the defendant must prove by a preponderance of the evidence, that he or she had 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.

RCC § 22A-2503. CRIMINAL DAMAGE TO PROPERTY.[97]

(a) *Offense.* A person commits the offense of criminal damage to property if that person:
  (1) Recklessly damages or destroys;
  (2) What the person knows to be property of another;
  (3) Without the effective consent of the owner.

(b) *Definitions.* The terms "knowingly" and "recklessly," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "consent," "effective consent," "property," "property of another," and "owner," the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Criminal Damage to Property.* A person is guilty of aggravated criminal damage to property if the person commits criminal damage to property by knowingly damaging or destroying property and, in fact, the amount of damage is $250,000 or more. Aggravated criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Criminal Damage to Property*. A person is guilty of first degree criminal damage to property if the person commits criminal damage to property by knowingly damaging or destroying property and, in fact, the amount of damage is $25,000 or more. First degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Criminal Damage to Property.*
    (A) A person is guilty of second degree criminal damage to property if the person commits criminal damage to property and:

[96] Per First Draft of Report #9 (August 11, 2017).
[97] Per First Draft of Report #9 (August 11, 2017).

(i) Knowingly damages or destroys property and, in fact, the amount of damage is $2,500 or more;
(ii) Knowingly damages or destroys property that, in fact: is a cemetery, grave, or other place for the internment of human remains;
(iii) Knowingly damages or destroys property that, in fact: is a place of worship or a public monument; or
(iv) Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more.

(B) Second degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Third Degree Criminal Damage to Property*. A person is guilty of third degree criminal damage to property if the person commits criminal damage to property and, in fact, the amount of damage is $250 or more. Third degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Criminal Damage to Property*. A person is guilty of fourth degree criminal damage to property if the person commits criminal damage to property and, in fact, the amount of damage is any amount. Fourth degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2504. CRIMINAL GRAFFITI.[98]

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

(b) *Definitions.* In this section, "minor" means a person under 18 years of age. The term "knowingly" has the meaning specified in § 22A-XXX, and the terms "property," "property of another" "consent," "effective consent," and "owner" have the meanings specified in § 22A-2001.

(c) *Penalty.* Criminal graffiti is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both. However,

(d) *Mandatory Restitution*. The court shall order the person convicted to make restitution to the owner of the property for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.

(e) *Parental Liability.* The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.

[98] Per First Draft of Report #9 (August 11, 2017).

Chapter 26. Trespass Offenses

§ 22A-2601. Trespass.
§ 22A-2602. Trespass of a Motor Vehicle.
§ 22A-2603. Criminal Obstruction of a Public Road or Walkway.
§ 22A-2604. Unlawful Demonstration.
§ 22A-2605. Criminal Obstruction of a Bridge to Virginia.

RCC § 22A-2601. Trespass.[99]

(a) *Offense*. A person commits the offense of trespass when that person:
  (1) Knowingly enters or remains in;
  (2) A dwelling, building, land, or watercraft, or part thereof;
  (3) Without the effective consent of the occupant or, if there is no occupant, the owner.

(b) *Permissive Inference.* A jury may infer that a person lacks effective consent of the occupant or owner if the person enters or remains in a dwelling, building, land, or watercraft that:
  (1) Is vacant and secured in a manner that reasonably conveys that it is not to be entered; or
  (2) Displays signage that is reasonably visible from the person's point of entry, and that sign says "no trespassing" or reasonably indicates that the person may not enter.

(c) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206, and the terms "dwelling," "building," "effective consent," "occupant," and "owner" have the meanings specified in § 22A-2001.

(d) *Gradations and Penalties.*
  (1) *First Degree Trespass.* A person is guilty of first degree trespass if that person commits trespass knowing the location is a dwelling. First degree trespass is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Trespass.* A person is guilty of second degree trespass if the person commits trespass. Second degree trespass is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Jury Trial*. If the District of Columbia or federal government is alleged to be the occupant of the building or land entered upon, then the defendant may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

RCC § 22A-2602. Trespass of a Motor Vehicle.[100]

(a) *Offense*. A person commits the offense of unlawful entry of a motor vehicle when that person:

[99] Per First Draft of Report #11 (August 11, 2017).
[100] Per First Draft of Report #11 (August 11, 2017).

(1) Knowingly enters or remains in;
(2) A motor vehicle, or part thereof;
(3) Without the effective consent of the owner.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206, and the terms "motor vehicle," "effective consent," and "owner" have the meanings specified in § 22A-2001.

(c) *Penalty.* Unlawful entry of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2603. CRIMINAL OBSTRUCTION OF A PUBLIC WAY.[101]

(a) *Offense*. A person commits the offense of criminal obstruction of a public way when that person:
(1) Knowingly obstructs;
(2) A public street, public sidewalk, or other public way;
(3) After receiving a law enforcement order to stop such obstruction.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206. In this section, the term "obstruct" means to render impassable without unreasonable hazard to any person, the term "road" includes any road, alley, or highway, and the term "walkway" includes a sidewalk, trail, railway, bridge, passageway within a public building or public conveyance, or entrance of a public or private building or business yard.

(c) *Exclusion from Liability.* Nothing in this section prohibits conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(d) *Penalty.* Criminal obstruction of a public way is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

RCC § 22A-2604. UNLAWFUL DEMONSTRATION.[102]

(a) *Offense*. A person commits the offense of unlawful demonstration when that person:
(1) Knowingly engages in a demonstration;
(2) In a location where demonstration is otherwise unlawful;
(3) After receiving a law enforcement order to stop such demonstration.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206. In this section, the term "demonstration" includes any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(d) *Penalty.* Unlawful demonstration is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[101] Per First Draft of Report #11 (August 11, 2017).
[102] Per First Draft of Report #11 (August 11, 2017).

(e) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(f) *Jury Trial*. A defendant charged with violating this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

RCC § 22A-2605. UNLAWFUL OBSTRUCTION OF A BRIDGE TO THE COMMONWEALTH OF VIRGINIA.[103]

(a) *Offense*. A person commits the offense of unlawful obstruction of a bridge to the Commonwealth of Virginia when that person:
    (1) Purposely obstructs;
    (2) A bridge that connects the District of Columbia to the Commonwealth of Virginia.
(b) *Definitions.* The term "purposely" has the meaning specified in § 22A-206. In this section, the term "obstruct" means to render impassable without unreasonable hazard to any person.
(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq..
(d) *Penalty.* Unlawful obstruction of a bridge to the Commonwealth of Virginia is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[103] Per First Draft of Report #11 (August 11, 2017).

Chapter 27. Burglary Offenses

§ 22A-2701. Burglary.
§ 22A-2702. Possession of Burglary and Theft Tools.

RCC § 22A-2701. BURGLARY.[104]

(a) *Offense*. A person commits the offense of burglary when that person:
  (1) Knowingly enters or surreptitiously remains in;
  (2) A dwelling, building, watercraft, or business yard, or part thereof;
  (3) Without the effective consent of the occupant or, if there is no occupant, the owner; and
  (4) With intent to commit a crime therein.

(b) *Definitions.* The terms "knowingly," "intent," and "in fact," have the meanings specified in § 22A-206 and the terms "dwelling," "building," "business yard," "effective consent," "occupant," and "owner" have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties.*
  (1) *First Degree Burglary.* A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling. First degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Burglary.* A person is guilty of first degree burglary if that person commits burglary, either: knowing the location is a dwelling; or knowing the location is a building and, in fact, a person who is not a participant in the crime is present in the building. Second degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Third Degree Burglary.* A person is guilty of third degree burglary if the person commits burglary. Third degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

RCC § 22A-2702. POSSESSION OF BURGLARY AND THEFT TOOLS.[105]

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

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206.

(c) *Penalty*. Possession of burglary and theft tools is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

[104] Per First Draft of Report #11 (August 11, 2017).
[105] Per First Draft of Report #11 (August 11, 2017).

(d) *No Attempt Possession of Burglary and Theft Tools Offense*. It is not an offense to attempt to commit the offense described in this section.

Subtitle III. Offenses Against Government Operation.

Chapter 34. Government Custody Offenses.

§ 22A-3401. Escape from Institution or Officer.
§ 22A-3402. Tampering with a Detection Device.
§ 22A-3403. Correctional Facility Contraband.

RCC § 22E-3401. ESCAPE FROM INSTITUTION OR OFFICER.[106]

(a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
  (1) In fact:
    (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or
    (B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and
  (2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:
    (A) Leaves custody;
    (B) Fails to return to custody; or
    (C) Fails to report to custody.

(b) *Gradations and Penalties*.
  (1) *First Degree.* A person commits first degree escape from institution or officer when that person violates subsection (a)(2)(A). First degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree.* A person commits second degree escape from institution or officer when that person violates subsection (a)(2)(B) or (C). Second degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Consecutive Sentencing*. If the person is serving a sentence at the time escape from institution or officer is committed, the sentence for escape from institution or officer shall run consecutive to the sentence that is being served at the time of the escape from institution or officer.

(c) *Definitions*. In this section:
  (1) The term "knowingly" has the meaning specified in § 22E-206; "in fact" has the meaning specified in § 22E-207;
  (2) The term "effective consent" has the meaning specified in § 22E-1001;
  (3) The terms "law enforcement officer" and "building" have the meanings specified in § 22E-2001; and
  (4) The term "correctional facility" means:

[106] Per First Draft of Report #31 (December 28, 2018).

(A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

RCC § 22E-3402. TAMPERING WITH A DETECTION DEVICE.[107]

(a) *Tampering with a Detection Device*. A person commits tampering with a detection device when that person:
(1) Knows he or she is required to wear a detection device while:
(A) Subject to a protection order;
(B) On pretrial release;
(C) On presentence or predisposition release;
(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
(E) On supervised release, probation, or parole; and
(2) Purposely:
(A) Removes the detection device or allows an unauthorized person to do so;
(B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so.
(b) *Penalties*. Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions*. In this section:
(1) The terms "knows" and "purposely" have the meaning specified in § 22E-206; and
(2) The term "detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and
(3) The term "protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND.[108]

(a) Except as provided in subsection (d), a person commits correctional facility contraband when that person:
(1) With intent that an item be received by someone confined to a correctional facility:
(A) Knowingly brings the item to a correctional facility;

[107] Per First Draft of Report #32 (December 28, 2018).
[108] Per First Draft of Report #33 (December 28, 2018).

(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and

(C) The item, in fact, is Class A contraband or Class B contraband; or

(2) In fact, is someone confined to a correctional facility and:

(A) Knowingly possesses an item in a correctional facility;

(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and

(C) The item, in fact, is Class A contraband or Class B contraband.

(b) *Gradations and Penalties*.

(1) *First Degree.* A person commits first degree correctional facility contraband when the item is Class A contraband. First degree correctional facility contraband is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree.* A person commits second degree correctional facility contraband when the item is Class B contraband. Second degree correctional facility contraband is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:

(1) The terms "knowingly" and "intent" have the meanings specified in § 22E-206; "in fact" has the meaning specified in § 22E-207;

(2) The terms "effective consent," "dangerous weapon," and "imitation dangerous weapon" have the meanings specified in § 22E-1001;

(3) The term "building" has the meaning specified in § 22E-2001;

(4) The term "possession" has the meaning specified in § 22E-202; and

(5) The term "correctional facility" means:

(A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;

(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or

(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

(6) The term "Class A contraband" means:

(A) A dangerous weapon or imitation dangerous weapon;

(B) Ammunition or an ammunition clip;

(C) Flammable liquid or explosive powder;

(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;

(E) A shank or homemade knife;

(F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;

(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
(H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;
(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;
(J) Rope; or
(K) A correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, or any other uniform.

(7) The term "Class B contraband" means:
(A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];
(B) Any alcoholic liquor or beverage;
(C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or
(D) A portable electronic communication device or accessories thereto.

(d) *Exclusions from Liability*.
(1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution.
(2) A person does not commit correctional facility contraband when the item:
(A) Is a portable electronic communication device used by an attorney during the course of a legal visit; or
(B) Is a controlled substance prescribed to the person.

(e) *Detainment Authority*. If there is probable cause to suspect a person of possession of contraband, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

Subtitle IV. Public Order and Safety Offenses.

Chapter 40. Disorderly Conduct and Public Nuisance.

§ 22A-4001. Disorderly Conduct.
§ 22A-4002. Public Nuisance.

RCC § 22A-4001. DISORDERLY CONDUCT.[109]

(a) *Offense.* A person commits disorderly conduct when that person:
  (1) Recklessly engages in conduct that:
    (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      (i) Bodily injury to another person;
      (ii) Damage to property; or
      (iii) Taking of property; and
    (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

(b) *Penalty.* Disorderly conduct is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:
  (1) The term "recklessly," has the meaning specified in § 22A-206;
  (2) The terms "bodily injury" and "law enforcement officer" have the meanings specified in § 22A-1001;
  (3) The term "property" has the meaning specified in § 22A-2001;
  (4) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave.

(d) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(e) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

RCC § 22A-4002. PUBLIC NUISANCE.[110]

(a) *Offense.* A person commits public nuisance when that person:
  (1) Purposely engages in conduct that causes an unreasonable interruption of:
    (A) a lawful public gathering;
    (B) the orderly conduct of business in a public building;
    (C) any person's lawful use of a public conveyance; or

[109] Per First Draft of Report #23 (July 20, 2018).
[110] Per First Draft of Report #23 (July 20, 2018).

(D) any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;

(2) While that person is in a location that, in fact, is:

(A) Open to the general public; or

(B) A communal area of multi-unit housing.

(b) *Penalty.* Public nuisance is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:

(1) The term "purposely," has the meaning specified in § 22A-206;

(2) The term "bodily injury" has the meaning specified in § 22A-1001;

(3) The term "property" has the meaning specified in § 22A-2001;

(4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;

(5) The term "public building" means a building that is occupied by the District of Columbia or federal government;

(6) The term "public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat; and

(7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.

(d) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(e) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

Chapter 41. Rioting and Failure to Disperse.

§ 22A-4101. Rioting.
§ 22A-4102. Failure to Disperse.

RCC § 22A-4101. RIOTING.[111]

(a) *Offense.* A person commits rioting when that person:
  (1) Commits disorderly conduct as defined in § 22A-4001;
  (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  (3) And the conduct is committed:
    (A) With intent to commit or facilitate the commission of a crime involving:
      (i) Bodily injury to another person;
      (ii) Damage to property of another; or
      (iii) The taking of property of another;
    (B) While knowingly possessing a dangerous weapon; or
    (C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

(b) *Penalties*. Rioting is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:
  (1) The terms "reckless", "with intent", and "knowing" have the meanings specified in § 22A-206;
  (2) The terms "bodily injury" and "dangerous weapon" have the meaning specified in § 22A-1001; and
  (3) The term and "property of another" has the meaning specified in § 22A-2001.

(d) *Exclusion from Liability*. Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

RCC § 22A-4102. FAILURE TO DISPERSE.[112]

(a) *Offense.* A person commits failure to disperse when that person:
  (1) In fact:
    (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  (2) The person knowingly fails to obey a law enforcement officer's dispersal order;
  (3) When the person could safely have done so.

[111] Per First Draft of Report #24 (July 20, 2018).
[112] Per First Draft of Report #24 (July 20, 2018).

(b) *Penalties*. Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:

(1) The term "knowingly" has the meaning specified in § 22A-206;

(2) The term "in fact" has the meaning specified in § 22A-207; and

(3) The term "law enforcement officer" has the meaning specified in § 22A-1001.

(d) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

(e) *Jury Trial*. A defendant charged with violating this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

Appendix B

CCRC 2018 Annual Report –

Advisory Group Comments To Date (12-31-18)

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

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

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

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

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

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

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

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

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

o Legal Cause

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

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

- Culpable Mental State Requirement: § 22A-205

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: February 22, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

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

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

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

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

§ 22A-202, Conduct Requirement

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

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

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

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

§ 22A-203, Voluntariness Requirement

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

§ 22A-204, Causation Requirement

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

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

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

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

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

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

§ 22A-206, Hierarchy of Culpable Mental States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 24, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

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

§ 22A-209, Principles of Liability Governing Intoxication

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 24, 2017

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

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

COMMENTS ON THE DRAFT REPORT

§ 22A-102, Rules of Interpretation

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

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

plain meaning of that provision shall be examined first. If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined."

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

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: April 24, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Specifically, PDS recommends the following definition:

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

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

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

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

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

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

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

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

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

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

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

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

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

- § 22A-102: RULES OF INTERPRETATION

  - Rule of Lenity

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

  - Effect of Headings and Captions

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 15, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-206, Hierarchy of Culpable Mental States

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

(a) PURPOSE DEFINED.

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

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

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

(b) KNOWLEDGE & INTENT DEFINED.

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 15, 2017

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

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

COMMENTS ON THE DRAFT REPORT

§ 22A-801, Offense Classifications

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

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

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

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

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

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

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

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

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

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

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

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

§ 22A-803, Authorized Terms of Imprisonment

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

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

RCC § 22A-804. AUTHORIZED FINES.

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

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

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

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

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

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

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

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

(A) Up to twice the pecuniary loss;

(B) Up to twice the pecuniary gain; or

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: June 16, 2017

Re: Comments on First Draft of Report No. 5: Recommendations for Chapter 8 of the Revised Criminal Code: Offense Classes & Penalties

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

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

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

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

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

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

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

[4] D.C. Code § 24-101.

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

[6] *Defining Violence* at page 20.

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

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

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

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

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

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

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

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

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

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

[9] D.C. Code § 16-705(a).

[10] D.C. Code § 16-705(b)(1).

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

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

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

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

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

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

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

[15] D.C. Code § 3-152(a)(6).

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 17, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-805, Limitations on Penalty Enhancements

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

Section 22A-805 (a) states:

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

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

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

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

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

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

§ 22A-806, Repeat Offender Penalty Enhancements

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

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

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

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

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

§ 22A-807, Hate Crime Penalty Enhancement

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

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

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

§ 22A-808, Pretrial Release Penalty Enhancement

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

MEMORANDUM

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

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

PDS has the following concerns and makes the following suggestions:

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

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

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

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

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

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

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

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

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

[5] *Id*.

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

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

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

[9] *Id*.

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

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

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

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

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

[12] D.C. Code § 24-403.01(a)(1).

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

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

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

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

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

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

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

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: July 18, 2017

Re: Comments on First Draft of Report No. 7: Recommendations for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submitted July 21, 2017

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2001. Property Offense Definitions

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

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

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

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

(1) Knowingly:

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

(B) Property of another;

(C) With consent of the owner;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

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

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

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

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

COMMENTS ON THE DRAFT REPORT

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

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

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

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

§ 22A-2104. Shoplifting

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

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

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

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

RCC § 22A-2504. Criminal Graffiti

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2201. Fraud.

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

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

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

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

RCC § 22A-2205. Identity Theft.

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

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

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

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

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

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

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

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

[5] D.C. Code § 22-722(6).

[6] D.C. Code § 5-117.05.

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

[8] RCC § 22A-XXXX.

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT[2]

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

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

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

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

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

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

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

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

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

(1) To crowd, obstruct, or incommode:

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

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

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

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

[8] See D.C. Code § 22-1307(a)(1)(D).

RCC § 22A-2604. Unlawful Demonstration

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

RCC § 22A-2701. Burglary

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

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

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

Paragraph (a) states:

(a) Offense. A person commits the offense of possession of burglary and theft tools if that person:

(1) Knowingly possesses;

(2) A tool, or tools, created or specifically adapted for picking locks, cutting chains, bypassing an electronic security system, or bypassing a locked door;

(3) With intent to use the tool or tools to commit a crime.

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

[9] See RCC § 22A-2701(c)(1).

MEMORANDUM

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

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

The Public Defender Service makes the following comments.

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

1. Coercion.[1]

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

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

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

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

[1] RCC § 22A-2001(5).

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

2. Deceive and deception.[3]

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

3. Dwelling. [4]

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

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

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

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

[3] RCC § 22A-2001(8).

[4] RCC §22A-2001(10).

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

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

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

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

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

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

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

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

4. Financial Injury. [8]

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

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

[8] RCC §22A-2001(14).

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

[10] Report #8 at page 28.

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

5. Motor vehicle. [11]

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

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

6. Services. [12]

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

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

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

[11] RCC § 22A-2001(15).

[12] RCC § 22A-2001(22).

[13] D.C. Code § 35-253.

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

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

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

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

7. Limitation on Convictions for Multiple Related Property Offenses.

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

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

[15] RCC §22A-2602.

[16] RCC § 22A-2103.

[17] RCC § 22A-2102.

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

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

1. Theft.[18]

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

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

[18] RCC § 22A-2101.

[19] RCC § 22A-2101(c).

[20] RCC § 22A-2001(24)(A).

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

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

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

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

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

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

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

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

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

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

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

[25] 8 hours is one workday.

[26] RCC § 22A-2103.

3. Shoplifting.[27]

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

4. Arson. [31]

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

[27] RCC § 22A-2104.

[28] Report #9 at page 36.

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

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

[31] RCC § 22A-2501.

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

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

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

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

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

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

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

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

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

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

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

[37] RCC § 22A-2001(3).

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

[39] RCC § 22A-2503.

[40] RCC § 22A-2502.

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

5. Reckless Burning. [41]

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

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

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

6. Criminal Damage to Property. [42]

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

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

[41] RCC § 22A-2502.

[42] RCC § 22A-2503.

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

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

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

7. Criminal Graffiti. [46]

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

Report #10: Recommendations for Fraud and Stolen Property Offenses

1. Check Fraud.[47]

PDS recommends amending the offense for clarity.

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

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

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

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

[46] RCC § 22A-2504.

[47] RCC § 22A-2203.

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

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

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

2. Unlawful Labeling of a Recording.[51]

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

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

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

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

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

[50] *Id*.

[51] RCC §22A-2207.

[52] RCC §22A-2403.

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

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

1. Trespass.[53]

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

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

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

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

[53] RCC § 22A-2601.

[54] See Report #11 at page 12.

[55] Report #11 at page 12.

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

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

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

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

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

2. Burglary.[61]

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

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

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

[58] Report #11 at page 20.

[59] RCC §22A-2603.

[60] RCC §22A-2604.

[61] RCC § 22A-2701.

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

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

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

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: December 18, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] Report #12 at page 41.

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

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

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

§ 22A-303 CRIMINAL CONSPIRACY

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

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

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

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

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

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

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

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

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

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

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

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

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

(__) PENALTY. [Reserved].

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 19, 2017

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-303 CRIMINAL CONSPIRACY

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

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

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

RCC § 22A-303 (a) states:

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

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

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

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[2] See footnote 7, on page 2, and related text.

[3] In addition, Report #12, on page 26, notes that the unilateral approach to conspiracy, the one that permits prosecution for conspiracy where the other party is an undercover officer, "reflects the majority practice in American criminal law…" See page 25 of Report #12 for an explanation of the "unilateral approach to conspiracy."

[4] See *Springer v. United States*, 388 A.2d 846, where the appellant was convicted by a jury of conspiracy to commit first-degree murder and of solicitation to commit a felony based upon evidence of tape recordings -- and transcripts thereof -- of conversations between the appellant and an undercover MPD detective.

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-206 HIERARCHY OF CULPABLE MENTAL STATES

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #13, Penalties for Criminal Attempts. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-301 CRIMINAL ATTEMPTS

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1202. Assault[2]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: First Draft of Report #16 Recommendations for Robbery

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #16 Recommendations for Robbery. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1201. Robbery

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: March 9, 2017

Re: Comments on First Draft of Report 13, Penalties for Criminal Attempts

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

[1] Report #13, page 14.

[2] D.C. Code § 22- 1803.

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: March 9, 2017

Re: Comments on First Drafts of Reports 14 through 17, Offenses Against Persons

The Public Defender Service makes the following comments.

Report #14: Recommendations for Definitions for Offenses Against Persons

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

[1] Report #15, page 52.

[2] Report #15, page 50.

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

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

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

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

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

[3] See RCC § 22A-1001(4)(F).

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

[5] RCC § 22A-1202(e)(1).

[6] See D.C. Code § 3601.

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

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

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

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

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

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

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

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

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

…

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

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

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

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

"**Section 1202. Assault**

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

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

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

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

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

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

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

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

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

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

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

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

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

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

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

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

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

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

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

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

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

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

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

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

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

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

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

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

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

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

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

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

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

[13] See RCC §22A-1001(4)(A) – (E).

[14] See RCC §22A-1001(4)(F).

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

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

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

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

[16] See RCC § 22A-1001(4)(A).

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

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

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

Report #16: Recommendations for Robbery

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

[17] RCC §22A-1201(d)(4)(C).

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

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

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

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

[20] Report #16, page 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #18 Solicitation and Renunciation

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #18 Solicitation and Renunciation. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #19. Homicide

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #19, Homicide. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1101. Murder

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

COMMENTS ON THE DRAFT REPORT

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

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

RCC § 22A- Section 1501. Child Abuse.

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

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

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

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

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: May 11, 2018

Re: Comments on First Draft of Report No. 18, Solicitation and Renunciation

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

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

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

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

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

[2] Report # 18, page 49.

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

[3] Report #18, page 49.

MEMORANDUM

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

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

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

1. Elimination of Aggravated Murder and Reconsideration of Aggravating Circumstances

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

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

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

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

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

2. Reconsideration of Aggravators

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

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

[3] RCC §§ 22A-1101(b)(2), (c).

[4] RCC § 22A-1101(b)(2)(E).

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

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

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

3. Elevation of Mens Rea in First Degree Murder

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

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

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

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

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

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

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

5. Drafting Recommendation for First Degree Murder

RCC § 22A-1101 Murder.

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

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

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

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

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

6. Drafting Recommendation for Second Degree Murder

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

PDS therefore recommends the following language:

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

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

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

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

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

7. Availability of Mitigation Defense

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

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

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

8. Burden of Proof for Mitigation Defense

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

[11] Report #19, page 18.

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

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

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

9. Manslaughter

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

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

[12] *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009); *see also Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (internal citations omitted) "Generally, when a defendant requests an instruction on a theory of the case that negates his guilt of the crime charged, and that instruction is supported by any evidence, however weak, an instruction stating the substance of the defendant's theory must be given."

[13] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: The Public Defender Service for the District of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Public Defender Service makes the following comments RCC Section 1501, Child Abuse.

1. Age Difference between the Child and the Adult

RCC § 22A-1501(a)-(c), first through third degree child abuse, prohibits abusive acts committed against children by parents, guardians, individuals acting in a parental role and by anyone, regardless of any parental role, who is more than two years older than the child. Under this definition, an 18 year old who fights with a 15 year old may be found guilty of child abuse. This would be the case although the 15 and 18 year old go to school together, take the same classes and play sports together. In this context, 15 and 18 year olds are very much peers, and physical conflicts between them should not be given the label of child abuse. The label does not make sense given the close age of the individuals involved and the comparable vulnerability of the 15 year old. A 15 year old is often as large and as strong as an 18 year old. A 15 year old often has a substantial degree of independence and the ability to seek help from members of his neighborhood or school community. A conviction for child abuse comes with significantly more stigma and probable collateral consequences than a conviction for assault. This is the case in part because the offense of child abuse connotes predatory and violent conduct towards young children who are incapable of defending themselves against adults. When the actors are 15 and 18 and the age difference is a little more than two years, the label of child abuse should not apply. PDS proposes the age difference be four years as it is with child sexual abuse at D.C. Code §§ 22-3008, 22-3009.

PDS therefore suggests the following modification to RCC§ 1501(a)-(c):

(2) In fact:

(A) that person is an adult at least ~~two~~ four years older than the child; or

(B) that person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

2. Criminalizing the Use of Physical Force that Overpowers a Child

RCC §22A-1501(c), third degree child abuse, criminalizes any use of physical force that overpowers a child. Young children who are so much smaller than adults are easy to overpower with physical force without causing any physical or emotional harm. For instance, a child who is pushing in line, or cutting in line, could be carried to the back of a line by an adult with no relationship to the child. Physically removing a 10 year old to the back of a line in a way that does not cause any injury to the child should not be criminalized as child abuse. That contact may be a fourth or fifth degree assault pursuant to RCC § 22A-1202(e) and (f) and should be charged as such. Charging it as assault will adequately address the conduct without exaggerating the harm to the child by labeling the offense as child abuse.

PDS therefore recommends that the RCC amend third degree child abuse as follows:

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

(A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child; or

(B) Recklessly causes bodily injury to~~, or uses physical force that overpowers,~~ a child; and

(2) In fact:

(A) That person is an adult at least ~~two~~ four years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

3. Burden of Proof for Parental Discipline Defense

PDS also recommends a change in the RCC's language for the trigger for the reasonable parental discipline defense. RCC § 22A-1501(f)(2) provides that "if evidence is present at trial of the defendant's purpose of exercising reasonable parental discipline, the government must prove the

absence of such circumstances beyond a reasonable doubt."[1] The question of whether any exercise of parental discipline is reasonable is uniquely within the province of the jury. It is a fact-based inquiry that, according to the District of Columbia Jury Instructions, involves consideration of the child's age, health, mental and emotional development, alleged misconduct on this and other occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence deemed relevant.[2] Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant's purpose was parental discipline, not on the reasonableness of that discipline. Therefore PDS recommends removing "reasonable" from the burden of proof language.

In addition, for consistency with requests in other provisions, PDS suggests the following language:

> (f)(2) Burden of Proof for Parental Discipline Defense. If some evidence, however weak, is present at trial of the defendant's purpose of exercising ~~reasonable~~ parental discipline, the government must prove the absence of such circumstances beyond a reasonable doubt

4. Merger Provision

In order to limit offense overlap and duplication, PDS recommends that the RCC include a specific merger provision to allow for the merger of offenses prohibiting the abuse and neglect of vulnerable persons and assault offenses.

[1] Emphasis added.

[2] Criminal Jury Instructions for the District of Columbia, No. 4.100 (5th ed., rev.2017).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins

Date: July 13, 2018

Re: Comments on First Draft of Report No. 21, Recommendations for Kidnapping and Related Offenses

In general, the Public Defender Service for the District of Columbia supports the Criminal Code Reform Commission's approach to reforming the District's kidnapping statute, D.C. Code § 22-2001, by narrowing the offense of "kidnapping" and creating the offense of "criminal restraint." PDS makes the following specific comments.

1. PDS proposes rewriting Criminal Restraint, RCC §22A-1404, to address a number of issues related to how the offense treats families and guardians.

    A. Criminal restraint needs to be rewritten to clarify that (a)(2)(A), (B), and (C) are for conduct involving adult complainants and (a)(2)(D) is the only alternative available for charging criminal restraint of a person who is a child under the age of 16. This approach is supported by the commentary, which notes that the current kidnapping statute fails to specify and the DCCA has failed to determine "whether a person can commit kidnapping by taking a child with the child's consent, but without the consent of a parent or legal guardian." The commentary goes on to explain, "[h]owever, the RCC criminal restraint statute specifies that a person may commit criminal restraint by interfering with the freedom of movement of a person under the age of 16, if a parent, legal guardian, or person who has assumed the obligations of a parent has not freely consented to the interference, *regardless of whether the person under 16 has provided consent*."[1] If the consent of the person under 16 can be disregarded, then it should be clear that a person cannot be charged with criminal restraint pursuant to (a)(2)(A), (B), or (C), all of which base liability on whether the defendant had the consent of the person with whose freedom s/he interfered.

[1] Report # 21, page 35 (emphasis added).

B. PDS agrees with the Commission's decision to "set the age of consent for interference with freedom of movement at 16 years."[2] However, the Commission failed to account for the fact that persons under age 18 are still "children," both under current D.C. law, see e.g., D.C. Code § 16-2301(3), and as proposed for the RCC, see §22A-1001(23). And children must follow the instructions of their parent(s) or they may be found to be a "child in need of supervision." D.C. Code § 16-2301(8) defines a "child in need of supervision" as a child who "is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable."[3] Thus, a 16-year-old cannot decide to live someplace other than where his parent says he must live. A parent who tells her 17-year-old, "Stay in your room or you'll be sorry," should not be committing a criminal offense, even if the words are considered a threat to cause bodily injury (assuming the "threat" is to exercise reasonable parental discipline). PDS proposes that the 16 and 17 year olds be able to give or withhold consent regarding their freedom of movement with respect to persons who are not their parent or guardian; however, if a parent or guardian substantially interferes with the freedom of movement of a 16 or 17-year-old, then the conduct should not be criminal restraint.[4]

C. PDS strongly objects to the elimination of the "parent to a minor exception" to Kidnapping in D.C. Code §22-2001.[5] Understood in the context of the breadth of the kidnapping statute, excepting the conduct of parents to minors is sound policy that recognizes that minors must obey their parents' lawful commands, perhaps particularly with respect to their freedom of movement. "We're going on a trip and you're coming with us." "Go to your room." Do not leave this house." "You're living with your grandmother for the summer." RCC § 22A-1404, as drafted in Report # 21, fails to recognize this relationship. It criminalizes the conduct of parents but provides a defense. PDS proposes that for Criminal Restraint the conduct of parents, with respect to their children under age 18, be excepted from criminal liability as under the current statute.

D. PDS agrees with the Commission's recognition that persons age 18 or older may have legal guardians with the legal authority to dictate the freedom of movement of their wards.[6] However, the Commission fails to define "legal guardian" or recognize the variety of "guardianships," and grants too much authority to "legal guardians" and not enough authority to wards.

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[2] Report # 21, page 35.

[3] D.C. Code § 16-2301(8)(A)(iii).

[4] The conduct of the parent or guardian could still be criminal under the child abuse and neglect statutes.

[5] "Whoever shall be guilty of …kidnapping… any individual by any means whatsoever, and holding or detaining…such individual … *except, in the case of a minor, by a parent thereof*, shall, upon conviction thereof, be punished by imprisonment…" D.C. Code § 22-2001 (emphasis added).

[6] See RCC §22A-1404(a)(2)(D) ("When that person is a child under the age of 16 *or a person assigned a legal guardian*…") (emphasis added).

District law allows for the appointment of a "guardian" to an "incapacitated individual" pursuant to Chapter 20 of Title 21 of the D.C. Code. An "incapacitated individual" is "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator."[7] An adult might also be only "an incapacitated individual for health-care decisions."[8] A "guardian" may be a "temporary guardian," who is appointed for a finite period of time to serve as an "emergency guardian," a "health-care guardian," or a "provisional guardian."[9] A guardian may also be a "general guardian," whose guardianship is neither limited in scope nor in time by the court,[10] or a "limited guardian," whose powers are limited by the court and whose appointment may be for a finite period of time or for an indeterminate period of time.[11] In guardianship proceedings, the court is to "exercise [its] authority …so as to encourage the development of maximum self-reliance and independence of the incapacitated individual."[12] "When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated individual in duration and scope…."[13] A general or a limited guardian may "take custody of the person of the ward and establish the ward's place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward."[14] However, no guardian to an incapacitated individual has the power "to impose unreasonable confinement or involuntary seclusion, including forced separation from other persons…."[15]

PDS proposes that the offense of "criminal restraint" follow the framework of the guardianship laws by maximizing the self-reliance and independence of the person, despite the fact that they have a guardian, and do so by recognizing their ability to consent or to withhold consent to the substantial interference with their movement. On the other hand, guardians who have the legal authority to take physical custody of their ward should not be criminally liable for exercising that authority. Relatedly, a guardian with the authority to take physical custody of a person, meaning they have authority to dictate or restrict their ward's freedom of movement at least to some degree, should have

[7] D.C. Code § 21-2011(11).

[8] D.C. Code § 21-2011(11A).

[9] D.C. Code § 21-2011(8)(A).

[10] D.C. Code § 21-2011(8)(B).

[11] D.C. Code § 21-2011(8)(C).

[12] D.C. Code § 21-2044(a).

[13] Id.

[14] D.C. Code § 21-2047(b)(2).

[15] D.C. Code § 21-2047.01(7).

that authority accorded respect in the criminal code by criminalizing the conduct of a person who substantially interferes with the ward's freedom of movement without the consent of the guardian.

E. PDS proposes that, rather than making it a defense to a prosecution under what is currently RCC §22A-1404(a)(2)(D) that a person is a "relative" of the complainant, "relatives" be excepted from (a)(2)(D). The result is the same, the "relative" will not be convicted. The difference is whether on the way to that inevitable result, the relative can be charged with a crime, have an arrest record, be subject to pretrial detention or restrictions on his or her life, such as requirements to wear a GPS monitor, to submit to drug testing, to observe a curfew or a stay away for person(s) and/or location(s). In addition, because (a)(2)(D) necessarily involves a person under the age of 16, the conduct which constitutes that offense is always aggravated if the relative is more than 2 years older than the child. Since the aggravated form of the offense can almost always be charged, the burdens and risks of arrest – a worse charge on the arrest record, a greater likelihood of pretrial detention - correspondingly increase. The more fair and merciful approach would be to except the conduct rather than make it a defense.

In light of the above objections and proposals, PDS proposes rewriting the offense definition for criminal restraint as follows:

(a) *Offense Definition*. A person commits the offense of criminal restraint when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age and the defendant is not the parent, legal guardian, or person who has assumed the obligations of a parent to that person:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately

would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or

(C) When that person is a child under the age of 16 and the defendant is not a relative or legal guardian of the child, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or

(D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian.

2. PDS proposes that criminal restraint have a "Good Samaritan" defense for instances when a person substantially interferes with another's freedom of movement because the person has a reasonable belief that such interference is necessary to prevent imminent bodily harm to the other person. For example, a stranger seeing a young child wandering alone might, even knowing he does not have the consent of the child's parent, detain the child while he calls the police for help. Or an adult child of an elderly parent with dementia or Alzheimer's but who is not the "guardian" of their parent might, despite the protestations of the parent, bolt the doors of their shared home to prevent the parent from wandering off in the night and getting lost or wandering into traffic. PDS proposes the following language –

(d) *Defenses*. (1) It is a defense to prosecution under this section that the defendant acted based on a reasonable belief that such action was necessary to protect the complainant from imminent physical harm.

(2) Burden of proof – If evidence, however weak, is present at trial of the defendant's purpose to protect the complainant from imminent physical harm, the government must prove the absence of such circumstances beyond a reasonable doubt.

3. PDS proposes rewriting Kidnapping, RCC §22A-1402, to change how parents and guardians are treated under the offense. As it did for criminal restraint, PDS proposes that guardians of adult wards be treated separately and have their consent tied to the guardian's authority to take physical custody of their ward. PDS also proposes separate sections for persons who are 18 years of age or older, persons who are 16 or 17 years of age, and persons who are children under the age of 16. Although both persons who are 18 years of age or older and 16 and 17 year old are of the age of consent, PDS proposes treating them separately in order to accommodate guardians. Persons who are 18 years of age may or may not have guardians who have the legal authority to take physical custody of them, and that possibility matters for whether the consent of the adult (ward) or the guardian controls. In contrast, 16 and 17 year olds, always have guardians with the legal authority to take them in physical custody; they are generally called "parents." However, PDS supports the decision to make 16 the "age of consent" for freedom of movement. Unlike with criminal restraint, where PDS proposed excepting parents and, in some instances relatives, from criminal liability, PDS recognizes that the "with intent" element in kidnapping sufficiently narrows the criminal conduct. With one exception, PDS does not disagree that a parent,

guardian, or other relative, may not hold their minor child for ransom or reward, use their minor child as a shield of hostage, to facilitate the commission of any felony, etc. However, a parent, guardian, or person who has assumed the obligations of a parent must be free (not criminally liable) to substantially interfere with the freedom of movement with their minor child (under age 18) with the intent to inflict bodily injury when that infliction is in the exercise of parental discipline.

Specifically, PDS recommends that the offense definition of Kidnapping be written as follows:

(a) *Offense Definition*. A person commits the offense of kidnapping when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (C) When that person is a child under the age of 16, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
    (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian; and
  (3) With intent to:
    (A) Hold the complainant for ransom or reward;
    (B) Use the complainant as a shield or hostage;
    (C) Facilitate the commission of any felony or flight thereafter;
    (D) Inflict bodily injury upon the complainant, <u>except in the exercise of parental discipline by a parent, legal guardian, or person who</u>

has assumed the obligations of a parent against a complainant under the age of 18;

(E) ~~or to commit~~ Commit a sexual offense as defined in RCC XX-XXXX against the complainant;

(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;

(G) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or

(H) Hold the person in a condition of involuntary servitude.

PDS also recommends adding the term "parental discipline" to subsection (c), Definitions, and defining it by reference to the "parental discipline defense" for child abuse at RCC §22A-1501(f).

4. PDS recommends adding a Good Samaritan defense to Kidnapping, using the same language as proposed for Criminal Restraint.

5. PDS objects to aggravating kidnapping or criminal restraint based on the aggravator "with the purpose of harming the complainant because of the complainant's status."[16] Conduct against a law enforcement officer, public safety employee, citizen patrol member, or District official or employee is aggravated pursuant to subsection (a)(2)(A), when that person is a "protected person." The additional aggravator at subsection (a)(2)(B) is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list.

[16] Subsection (a)(2)(B) of both aggravated kidnapping and aggravated criminal restraint.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	July 13, 2018
Re:	Comments on First Draft of Report 22, Accomplice Liability and Related Provisions

The Public Defender Service for the District of Columbia makes the following comments on Report #22, Accomplice Liability and Related Provisions.

1. RCC § 22A-210 provides that a person is an accomplice in the commission of an offense by another when that person is "acting with the culpability required by that offense." Report #22 at footnote 5, states that any broader aspect of culpability, such as "proof of premeditation, deliberation, or the absence of mitigating circumstances" is encompassed within culpability when required by the specific offense.

   PDS wholeheartedly agrees with footnote 5 and believes it is consistent with and required by *Wilson-Bey v. United States*.[1] PDS is concerned, however, that this view of what culpability encompasses will not be applied if it remains only in a footnote to the commentary. RCC § 22A-201(d), Culpability Requirement Defined states that "culpability requirement" includes each of the following: "(1) The voluntariness requirement, as provided in § 22A-203; (2) The causation requirement, as provided in § 22A-204; and (3) The culpable mental state requirement, as provided in § 22A-205." It is unclear whether "premeditation, deliberation, or the absence of mitigating circumstances" are "culpability requirements" for principle liability given this definition and also unclear whether, from this definition, premeditation and deliberation and any lack of mitigating circumstances would be necessary for accomplice liability. Without a statutory definition broad enough to encompass premeditation, deliberation, and absence of mitigating circumstances, there is a substantial risk that culpability for accomplice liability would be

[1] *Wilson-Bey v. United States*, 903 A.2d 818, 822 (2006) (holding that in any prosecution for premeditated murder, whether the defendant is charged as a principal or as an aider or abettor, the government must prove all of the elements of the offense, including premeditation, deliberation, and intent to kill).

watered down. Even if practitioners and judges found footnote 5 to argue from, the narrow culpability requirement definition could be read to supersede a footnote from the commentary. PDS proposes amending the definition of "culpability requirement" to include premeditation and deliberation and any lack of mitigation.

2. RCC § 22A-210(a)(2) allows for accomplices to be held liable when, with the requisite culpability required for the offense, the defendant "purposely encourages another person to engage in specific conduct constituting that offense." The act of encouraging a criminal offense, even with the intent required for the commission of the offense, extends criminal liability to those who merely utter words in support of an offense but who have no meaningful impact on whether the offense is carried out.

   For example, two friends may be walking together after leaving a bar when one friend sees her ex-husband's car. The ex-wife hates her ex-husband and her friend knows all the reasons behind the hatred. The ex-wife sees a piece of metal on the ground and raises it to smash the windshield of her ex-husband's car. As she raises the piece of metal, she says to her friend, "I'm going to smash his windshield." The friend replies "go for it." Under RCC §22A-2503, criminal damage to property, the friend who said "go for it" would only need to possess a mental state of recklessness to be held liable as an accomplice for criminal damage to property. RCC § 22A-206 states that a person acts with recklessness with respect to a result when "(A) that person is aware of a substantial risk that conduct will cause the result; and (B) the person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation." It is PDS's understanding from the commentary to Report #22 and from the position of the CRCC that any causation requirement from RCC 22A § 201(d) would not apply to the substantive offense of criminal damage to property. Thus, the friend's encouraging words, "go for it" do not have to be a but for cause for the criminal damage to property.

   It unfair to hold people criminally liable for mere words, even if they are specific, when those words have no meaningful impact on the commission of an offense. The ex-wife was going to smash the window even in the absence of the encouraging words of "go for it." In such circumstances only one individual should be criminally liable for the conduct. Therefore, for the encouragement prong of RCC 22A-210, PDS recommends that the CRCC insert causation language to prevent punishment for de minimus conduct.

PDS suggests the following revision:

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or

(2) Purposely encourages another person to engage in specific conduct constituting that offense and the encouragement is a substantial factor in the commission of the offense.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report #21. Recommendations for Kidnapping and Related Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #21 - Recommendations for Kidnapping and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1401. Aggravated Kidnapping

The offense definition of aggravated kidnapping includes when a person commits kidnapping with the purpose of harming the complainant because of the complainant's role in public safety or their status as a District official or employee, or a family member of a District official or employee.[2] The word "harm", however, is not defined. Merriam-Webster defines harm as

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] RCC § 22A-1401 (a)(2)(B) establishes that one of the ways that a person commits aggravated kidnapping is when they commit kidnapping as defined in RCC § 22A-1402 and who does this "With the purpose of harming the complainant because of the complainant's status as a [:] Law enforcement officer; Public safety employee; Participant in a citizen patrol; District official or employee; or Family member of a District official or employee…"

"physical or mental damage."[3] Therefore, one would assume that this word has a broader meaning then the phrase "bodily injury" which is contained in the definition of the underlining offense of kidnapping or that term would have been used in the aggravated assault provision. See RCC § 22A-1402(a)(3)(D). To avoid needless litigation, the Commission should either define the word "harm" or explain in the Commentary the difference between the definitions of "harm" and "bodily injury."

RCC § 22A-1401(d) states, "Multiple Convictions for Related Offenses. A person may not be sentenced for aggravated kidnapping if the interference with another person's freedom of movement was incidental to commission of any other offense."[4] This limitation appears to be included to address the situation where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can immediately be robbed). What is left unanswered, however, is the boundaries of this exception. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can be robbed but because a movie lets out the victim is kept in the alley for 20 minutes until everyone walks by.) The Commentary should give examples of what is clearly incidental to the commission of another crime and what is not.[5]

RCC § 22A-1402. Kidnapping

The offense of kidnapping requires that the person interferes with the victim's freedom of movement in specified ways. Paragraph (a)(2) lists those ways.[6] One of the ways is "With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury…" See RCC § 22A-1402 (a)(2)(C). It is not apparent from the text or the Commentary how the government could prove this counterfactual. The

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[3] See https://www.merriam-webster.com/dictionary/harm

[4] The same limitation on sentencing is contained in the kidnapping, aggravated criminal restraint, and criminal restraint provisions. See RCC § 22A-1402 (e), RCC § 22A-1403 (d), and RCC § 22A-1404 (e).

[5] The same issue arises in the context of RCC § 1403, Aggravated Criminal Restraint, and RCC § 1404, Criminal Restraint. See RCC § 1403(a)(2)(B) and RCC § 1404(a)(2)(C).

6 RCC § 22A-1402 (a)(2) establishes the ways that a person's freedom of movement should not be substantially interfered with. They are:

> (A) Without that person's consent;
> (B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;
> (C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
> (D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian;

victim in this situation has been deceived. He or she would have no way of knowing what the person would have done had the deception failed and, so, the government would not have evidence that enables it to meet this offense prong. The Commentary does not shed any light either on how this element would be proved or whether any other Model Penal Code jurisdiction has adopted an element that requires the government to prove what would have happened, but did not.

Additionally, to be convicted of kidnapping the deceived victim, the government must prove the first element of the offense, that is that the person "knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But so long as the deception lasts, it cannot be said that the victim's freedom of movement was curtailed because the victim chose to be in the location where he or she was.

The same issue arises when the victim is under the age of 16. Paragraph (a)(2) states that a person can commit the offense of kidnapping, "When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian." See RCC § 22A-1402 (a)(2)(D). On page 12 of the Commentary it states, "enticing a child to get into a car and remain in the car as it drives away with the truthful promise of candy at the final destination may constitute kidnapping assuming the defendant also satisfied the intent requirement under subsection (a)(3)."[7] However, to be convicted of kidnapping a child the government must also prove the first element of the offense, that is that the person "Knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But if the child willingly goes into the car and happily stays there then it cannot be shown that the child's freedom of movement has been interfered with. The child has merely been persuaded to stay in the car.[8]

The offense of kidnapping requires that the person restrains the victim's movement with a specified intent. Subsection RCC 22A-1402 § (a)(3)(A) specifies that kidnapping includes acting with intent to hold the complainant for ransom or reward. However, the Commentary, on page 11 states, "Holding a person for ransom or reward requires demanding anything of pecuniary

[7] RCC § 22A-1402 (a)(3) establishes the intent element for kidnapping. They are to:

(A) Hold the complainant for ransom or reward;
(B) Use the complainant as a shield or hostage;
(C) Facilitate the commission of any felony or flight thereafter;
(D) Inflict bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;
(E) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
(F) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
(G) Hold the person in a condition of involuntary servitude.

[8] The same issues outlined in this section apply to the Criminal Restraint provision found in RCC § 22A-1404, Criminal Restraint.

value in exchange for release of the complainant." The problem is that the word "pecuniary" in the Commentary is too limited. Merriam-Webster defines "pecuniary" as either "consisting of or measured in money" or "of or relating to money."[9] Therefore, following the explanation in the Commentary, a person who was held until the perpetrators received specified jewelry of sentimental value or other property would not be guilty of kidnapping. The Commentary should be modified to read, "Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant."

[9] See https://www.merriam-webster.com/dictionary/pecuniary.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report # First Draft of Report No. 22. Accomplice Liability and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #22 - Accomplice Liability and Related Provisions. [1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-210. ACCOMPLICE LIABILITY

The text of RCC § 22A-210 should make it clear that an accomplice can be convicted for assisting or encouraging a person to commit an offense even if the principal does not complete all of the elements of the offense and would only be guilty of attempt. RCC § 22A-210(b), (c), and (d) all speak in terms the "commission of an offense."[2] While the phrase "commission of an

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] RCC § 22A-210 states:
(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

offense" in some sources is defined to include an attempt, in other sources it appears to require a completed offense.[3] Similarly, RCC § 22A-210(d) speaks in terms of establishing that an accomplice may be convicted of an offense even if the person claimed to have "committed the offense" has not been prosecuted or convicted, convicted of a different offense or degree of an offense, or has been acquitted. Subparagraph (d) does not specifically include attempts. A modification of the illustration on page 56 demonstrates the need for clarifying this issue. The illustration and explanation contained in the Report is modified as follows:

> a drug dealer asks his sister—who is unaware of her brother's means of employment—to deliver a package for him to a restaurant and to collect money for the package from the cashier. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police as she is about to deliver the package in transit to the restaurant, the drug dealer cannot be deemed an accomplice to the attempted distribution of narcotics by the sister since the sister cannot herself be convicted of that offense. Although she has engaged in conduct that satisfies the *objective elements* of the attempted offense, the sister nevertheless does not act with the

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> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
> (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

> (1) Has not been prosecuted or convicted; or
> (2) Has been convicted of a different offense or degree of an offense; or
> (3) Has been acquitted.

[3] The phrase "commission of an offense" is defined in one source as "The attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense in some dictionaries, see https://www.lectlaw.com/def/c065.htm. However, another source explains, the phrase "commission of an offense" is "The act of doing or perpetrating an offense or immediate flight after doing an offense is called commission of an offense", see https://definitions.uslegal.com/c/commission-of-an-offense/.

> required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance she attempted to deliver and receive cash for. Under these circumstances, the drug dealer can, however, be held criminally responsible for attempted distribution as a principal under a different theory of liability: the "innocent instrumentality rule."

As demonstrated above, there is no reason why the brother should not be guilty of attempted distribution of the narcotics. The language in RCC § 22A-210 should be modified to clarify accomplice liability for attempts.

The Commentary to RCC § 22A-210(c) makes clear that a person can have accomplice liability through omission.[4] The Commentary states, "Typically, the assistance prong will be satisfied by conduct of an affirmative nature; however, an omission to act may also provide a viable basis for accomplice liability, provided that the defendant is under a legal duty to act (and the other requirements of liability are met)." Footnote 7, on the same page, states "… For example, if A, a corrupt police officer, intentionally fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery…" The Commentary should distinguish this form of liability from the related, but distinct accomplice liability of a person encouraging another person to commit an offense by omission. For example, if AA, a corrupt police officer, talks his partner A, another corrupt police officer, to intentionally fail to stop a bank robbery committed by P, based upon P's promise to provide AA with a portion of the proceeds, AA may be deemed an accomplice to the robbery. In this example, AA purposely encouraged A to engage in specific conduct constituting an offense of omission.

RCC § 22A-210(c) states that "[a]n accomplice in the commission of an offense that is divided into degrees based on distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability." As the Report notes,[5] this means an accomplice can be convicted of a grade of an offense that is either higher or lower than that committed by the principal actor where the variance is due to distinctions between the two (or more) actors' state of mind. However, the example in the Commentary, does not demonstrate this principle.[6] The example demonstrates that an accomplice could be convicted of manslaughter when the principal is convicted of murder. However, manslaughter is not a "degree" of murder, nor is murder described as "aggravated" manslaughter. The question raised by the example, is not merely whether the Commentary should have used as an example an offense that was divided into degrees, but does the principle of culpable mental state equivalences applicable to results also apply between greater and lesser included offenses that are contained in different code provisions? If it does, as the example would suggest, RCC § 22A-210(c) should be split into two subparagraphs: one where the accomplice and principal commit an offense that is divided into

[4] See page 4.
[5] See page 6.
[6] See footnote 15 on page 6.

degrees based upon distinctions in culpability and another where distinctions in culpability is but one distinction between greater and lesser included offenses.

RCC § 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON

RCC § 22A-211 (a) states that "A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."[7] In the last sentence of the first paragraph of the Commentary it states, "Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement necessary to support criminal liability for causing another person to commit a crime." The problem is that the text of RCC § 22A-211 does not define the term "legally accountable," nor does it explicitly state that a person who is legally accountable for the actions of another is guilty of the offense.

RCC § 22A-211 (a) is titled, "USING ANOTHER PERSON TO COMMIT AN OFFENSE." [emphasis in original] The title is misleading. As drafted, it implies that the person acted with some intentionality in causing another person to act. As the Commentary makes clear, however, a person is legally accountable for the conduct of another – and thus guilty of an offense - even when the person does not intentionally use an innocent or irresponsible person to commit a crime. On page 61 of the Commentary it states:

> This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, "a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense." For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care. [internal footnotes omitted]

In the example given in the Commentary, the person who is liable for reckless manslaughter cannot be said to having "used" the other person to commit a crime.

[7] See page 52.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins

Date: September 11, 2018

Re: Comments on First Draft of Report No. 23, Disorderly Conduct and Public Nuisance

PDS has the following comments about the RCC disorderly conduct and public nuisance offenses.

1. PDS recommends that both disorderly conduct[1] and public nuisance[2] have a third element: "[and] the person knowingly fails to obey a law enforcement officer's order that the person cease engaging in the conduct."

   The public order and safety benefit of a crime such as disorderly conduct is that it can allow for law enforcement intervention at a low level of harm (or disorder), before the conduct has a chance to escalate into more serious criminal conduct or provoke a criminal response by a third party. The challenge of criminalizing low-level conduct is that it increases the opportunities for negative contacts with law enforcement particularly in communities that many view as over-policed.[3] PDS agrees with the general approach the Commission takes with respect to disorderly conduct and public nuisance but thinks ultimately the Commission's proposal still allows too much room for over-policing and over-criminalizing the lives of marginalized persons. For example, RCC § 22A-4001 requires that the "apparent danger of bodily injury … must be unlawful, such as assaultive conduct."[4] "Horseplay" and other legal group activities would not, according to the Commentary, be disorderly conduct unless the conduct created a likelihood of

[1] RCC § 22A-4001.

[2] RCC § 22A-4002.

[3] As the D.C. Council Committee on Public Safety and the Judiciary explained "[t]he disorderly conduct [offense] is clearly important to quality of life as well as the public peace" while also noting that the D.C. Office of Police Complaints' detailed 2003 report on arrests for disorderly conduct "not surprisingly" included a finding that the disorderly conduct statutes were subject to abuse by arresting officers. See Council of the District of Columbia Committee on Public Safety and the Judiciary Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010, at pages 2-3.

[4] Report #23, page 4.

immediate bodily injury to someone not participating in the legal group activity.[5] However, the offense does not actually require that the conduct be unlawful. The crime is recklessly causing another to *reasonably believe* that the conduct is unlawful. While horseplay might be lawful, if the "horseplayers" are aware of a substantial risk that someone observing them will "reasonably believe" that their (lawful) conduct is in fact unlawful, then the "horseplayers" would be guilty of committing "disorderly conduct." Layer into this the widely accepted notion that certain behavior is often viewed as being "violent" when committed by African-Americans and recognizing that African-Americans are well aware that their innocent conduct creates a "substantial risk" that it will be viewed "reasonably" (as in, a belief commonly held by a majority of persons) as unlawful and potentially injurious to others or their property[6] and it is clear that, despite its best efforts to construct clear and narrow boundaries around this offense, the Commission left the back door unlocked, if not open.

That said, PDS also strongly supports intervention and defusing of situations while they are at a low-level rather than waiting until more serious offenses are committed. Adding an element that the person must fail to obey a law enforcement order that she cease engaging in the conduct creates a better balance between the desirable goals of a disorderly conduct statute to keep the peace and the risks of police abuse and over-criminalization. It allows, actually requires, law enforcement interaction – the order to cease – which will usually be sufficient to defuse a potentially unlawful situation or to establish that the conduct is lawful.[7] Plus, it provides an additional safeguard for the individual before she is subject to arrest and prosecution.

2. PDS recommends eliminating "taking of property" as a means of committing disorderly conduct." The basic offenses of assault (unlawful bodily injury to another person) and "[criminal] damage to property" only require "recklessly" as a mental state.[8] Theft, however, requires *knowingly* taking the property of another.[9] *Recklessly* engaging in behavior that causes another to reasonably believe there is likely to be an immediate [*reckless*] bodily injury to another or that there is likely to be immediate [*reckless*] damage to property makes sense and is plausible. In contrast, disorderly conduct (taking property) would require that a person

[5] Id.

[6] See e.g., driving while Black, walking while Black, swimming while Black, selling water while Black, sleeping while Black, barbecuing while Black, waiting for the subway while Black, playing with a toy in a public park while Black, being in one's own backyard while Black, being in one's own apartment located above a police officer's apartment while Black, etc., etc., etc.

[7] If the law enforcement interaction establishes that the conduct is lawful – e.g., the people involved explain they are actually playing rugby – then the law enforcement official will have no basis on which to order the conduct to cease. The officer's interaction will have established that it would be *unreasonable* to believe there is likely to be immediate and unlawful bodily injury to another person except, exactly at the Commentary explains, in situations where the conduct creates a likelihood of immediate bodily injury to a third party, a person not engaged consensually in the lawful group activity.

[8] See RCC § 22A-1202(f); §22A-2503(a).

[9] See RCC § 22A-2101(a).

recklessly engage in conduct that causes another to *reasonably* believe there is likely to be the immediate *knowing* taking of property. Conduct that is "dangerously close" to taking property should be prosecuted as attempt theft. As currently drafted, disorderly conduct (taking of property) either overlaps with attempt theft or criminalizes conduct that is *less than* "dangerously close" to theft. Including "taking of property" as a means to commit disorderly conduct weakens the offenses of theft and attempt theft; there is no point in requiring the knowing taking of property if one can be prosecuted for recklessly making someone believe property will be (knowingly) taken. PDS is concerned, assuming there even is reckless conduct that could create a reasonable belief about a knowing result, that the conduct would necessarily be very minor and ambiguous; so minor and ambiguous that to arrest and prosecute someone for it would be arbitrary and unjust.

3. PDS recommends that both disorderly conduct and public nuisance be jury demandable, regardless of the penalty attached. Because of the First Amendment implications of both offenses as well as the tension they create between preserving public order and over-policing/police abuse, the accountability that a jury provides is critical.

4. PDS recommends rewriting the definition of "lawful public gathering" in the public nuisance offense to narrow its reach.[10] The definition does not require that the gathering itself be public, so it would seem to be unlawful to intentionally interrupt a private gathering. The breadth and vagueness of the catch-all language, "similar organized proceeding," only reinforces the sweep of this provision. Are weddings "lawful public gatherings"? Is a high school graduation ceremony a "lawful public gathering?" PDS finds this means of committing the public nuisance offense troubling but would consent to a definition that is narrow and specific to funerals, that uses the word "means" instead of "includes," and that does not include any catch-all language.

5. PDS objects to the definition of "public building" in the public nuisance offense.[11] Although according to the Commentary, subsection (c)(4) is to "clarif[y] that a public building is a building that is occupied by the District of Columbia or federal government" and therefore is not meant to "apply to efforts to dissuade customers from patronizing a privately-owned business,"[12] the definition, by focusing on the physical building and by using the very general term "government", does not address situations where privately-owned business are co-located in buildings with any D.C. or federal government agency. The Commission clarified at its August 1 public meeting that subsection (c)(4) is "intended to prohibit purposeful (and not incidental) interruptions of [D.C.] Council hearings and similar proceedings, whether they occur at [the Wilson Building] or at an offsite location." [13] PDS recommends rewriting the definition of "public building" to more clearly convey that narrower intent.

[10] See RCC § 22A-4002(c)(4).

[11] See RCC § 22A-4002(c)(5).

[12] Report # 23, page 13.

[13] Minutes of Public Meeting, D.C. Criminal Code Reform Commission, August 1, 2018, page 4.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 24, Failure to Disperse and Rioting

PDS has the following comments about the RCC offenses of failure to disburse and rioting.

1. As reflected in the minutes of the CCRC meeting of August 1, 2018, PDS raised a concern about liability for failure to disperse where the individual does not know that a law enforcement officer has determined that her presence is substantially impairing the law enforcement officer's ability to stop a course of disorderly conduct. At the August 1, 2018 meeting staff clarified that a person must know that she is being ordered to disperse. Staff further noted that the person must be in the immediate vicinity of the course of disorderly conduct and that the officer's assessment about the need for the order to disburse must be objectively accurate. PDS requests that this clarification by staff be included in the commentary of RCC § 22A-4102.

2. RCC § 22A-4101 defines rioting, in part, as the commission of disorderly conduct when the defendant is "reckless" as to the fact that four or more people in the immediate vicinity are simultaneously engaging in disorderly conduct. PDS recommends that the CCRC substitute the mental state of recklessness with knowledge. Requiring that the defendant know that individuals in his immediate vicinity are engaging in disorderly conduct is appropriate given First Amendment concerns about rioting statutes. In the District, it is not uncommon for protests to involve thousands of people or even tens of thousands of people. Under these circumstances, during a mass protest, it may always be the case that a protester is aware of a substantial risk that others are engaging in disorderly conduct and that the standard of care that a reasonable person would observe is to remove himself from the protest.[1] Using a standard of recklessness would over-criminalize potentially constitutionally protected conduct. Just as the CCRC requires knowledge that a participant in the disorderly conduct is using or plans to use a weapon, the CCRC should require actual knowledge that others in the immediate vicinity are engaged in disorderly conduct.

[1] RCC § 22A-205.

3. PDS recommends eliminating "taking of property" as a means of committing rioting. Under the current RCC definition, an individual commits the offense of rioting when he commits disorderly conduct, reckless as to the participation of four or more people and when the conduct is committed with the intent to facilitate the commission of a crime involving bodily injury to another, damage to property of another, or the taking of property of another. Including taking of property within rioting has the potential of creating unnecessary overlap with the offenses of robbery and theft committed by codefendants. For example, under the current RCC definition of rioting, almost any robbery committed by four or more juveniles could also be charged as rioting. If the CCRC's inclusion of conduct "involving the taking of property of another" is intended to address crimes such as looting by multiple individuals, that conduct would already be covered by the inclusion of conduct "involving damage to the property of another." There are few instances when a group of four or more people could commit disorderly conduct and take property of another without also causing damage to property. Removing "the taking of property of another" from the definition would not cause any gaps in liability and would prevent overlap with property crimes committed by codefendants.

4. RCC § 22A-4101(3)(B) defines rioting as criminal conduct committed while "knowingly possessing a dangerous weapon." PDS recommends that this language be amended to "knowingly using or displaying a dangerous weapon." This amendment would mirror section (C) of rioting which establishes liability when the defendant "know[s] any participant in the disorderly conduct is using or plans to use a dangerous weapon."

   The possession of a dangerous weapon[2], such as false knuckles[3] or a knife with a blade over three inches in length, in a pocket, purse, or backpack while committing the offense of disorderly conduct does not increase danger to the community or elevate the fear experienced by bystanders. The possession of a dangerous weapon in a backpack would not be apparent to community members until the weapon is later recovered during a search incident to arrest. In such instances, where the weapon is not used or displayed, the possession of a weapon would be entirely ancillary to the offense of rioting.

   The possession of a dangerous weapon in a backpack, purse, or pocket would also be separately punishable as a stand-alone count of weapon possession. To decrease unnecessary overlap, the RCC should limit liability in rioting to occasions when the defendant knowing uses or displays a dangerous weapon.

[2] RCC § 22A-1001 (dangerous weapon defined).

[3] § 22A-1001(14) (prohibited weapon defined).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 25, Merger

PDS has the following comments about the RCC principle of merger.

1. PDS recommends that merger, RCC § 22A-212 be restructured as a rule instead of a presumption. Presumptions are often difficult to apply and require either additional drafting language or appellate interpretation.[1] As currently framed, RCC § 22A-212, establishes rules for merger and an exception when the legislature clearly manifests the intent to allow multiple convictions. However, the use of a presumption for those rules makes them much more difficult to apply. In order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles, the RCC should reframe the merger provision as a rule.

2. RCC § 22A-212(d)(1) establishes a rule of priority that when two offenses merge, the offense that remains shall be "the most serious offense among the offenses in question." Although footnote 27 to the Commentary explains what the most serious offense "will typically be," the phrase is still open to interpretation and argument by the parties in individual cases. Rather than leaving the matter of which offense is most serious to the parties to dispute, PDS recommends that for the purposes of clarity and certainty, the RCC define "most serious offense" as the offense with the highest statutory maximum. Further, the definition should be included in the statute, not relegated to the Commentary.

[1] *See, e.g.*, D.C. Code § 23-1322 (detention prior to trial); *Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006); *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #23, Disorderly Conduct and Public Nuisance

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #23 - Disorderly Conduct and Public Nuisance.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4001. Disorderly Conduct.

The proposed disorderly conduct statute varies from the current law in many ways. It appears to legalize a certain type of dangerous behavior. As the Comment section notes on page 4, to be disorderly conduct under the proposal, "The apparent danger of bodily injury must be to another person; a person cannot commit disorderly conduct where she poses a risk of harm to only herself." While we do not disagree with footnote 6 that "a person who is performing a dangerous skateboarding stunt, high wire act, or magic trick in a public square" should not be guilty of this offense, we disagree that "She has not committed disorderly conduct unless it appears likely that her conduct will cause bodily injury to someone other than herself or damage to property." D.C. Code § 22-1321(a)(3) currently makes it unlawful for a person to "Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

by that person or another person." So, under current law, a person can commit disorderly conduct where she poses a risk of harm only to herself.

RCC § 22A-4001[2] would exempt police from being the target of all disorderly conduct offenses. Current law only exempts them from being the target of "Direct abusive or offensive language or gestures at another person … in a manner likely to provoke immediate physical retaliation or violence by that person or another person." This was because the Council acknowledged the special training that police should have. It does not exempt them from being the victim of **"**Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken" or "Incite or provoke violence where there is a likelihood that such violence will ensue" e.g. It would be disorderly conduct for a person to incite a mob to hurt a police officer by chanting, "stone the cop, kill the cop" when there were rocks nearby.

As to the current state of the law concerning the exemption of police from being the target for disorderly conduct offenses, OAG disagrees with the conclusion in the Relation to Current District Law portion of the Commentary that the proposal would merely clarify existing law. On page 7 the report says D.C. Code § 22-1321 (a)(1) and (a)(2) are "silent as to whether they cover conduct directed at law enforcement officers and no District case law addresses this issue." True, (a)(1) and (a)(2) do not specifically reference law enforcement officers, but their plain terms unequivocally cover them, just as they unequivocally reach other groups that aren't specifically mentioned (*e.g.*, tourists). Paragraph (a)(1) is satisfied by reasonable fear to "another person," which logically includes law enforcement officers. And (a)(2) refers to incitement of provocation of violence, without regard to the identity of the potential victim. It is only (a)(3), dealing with abusive or offensive language or gestures, that carves out police officers – which is no more than what the legislative history the report cites says. On page 8 of the Committee Report it states, in relevant part, the following:

> Subsection (a) proscribes breach of the peace; it prohibits conduct and language (e.g., fighting words) that is likely to provoke an outbreak of violence (e.g., a

[2] The offense portion of RCC § 22A-4001 is as follows:

(a) A person commits disorderly conduct when that person:
  (1) Recklessly engages in conduct that:
    (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      (i) Bodily injury to another person;
      (ii) Damage to property; or
      (iii) Taking of property; and
    (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

> fight) … The Committee Print rejects language proposed by OAG/MPD/USAO for paragraph (3) of this subsection because it would undercut an important purpose of the language: that the crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen. (See *Shepherd v. District of Columbia,* 929 A.2d 417,419 (D.C. 2007)). The law should have a bright line: that offensive language directed at police officers is not disorderly conduct. Further, it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else (see *Comments of the OAG, MPD, and USAO* attached to this report). [emphasis added][3]

When the Council enacted the legislation it created that bright line in the part of the disorderly conduct statute that relates to "Direct abusive or offensive language or gestures at another person" and included the limitation on police officers only in that offense. RCC § 22A-4001 does not clarify the limitation concerning police officers. It expands it.[4]

RCC § 22A-4002. Public Nuisance.

RCC § 22A-4002 provides that:

(a) *Offense.* A person commits public nuisance when that person:
  (1) Purposely engages in conduct that causes an unreasonable interruption of:
    (A) a lawful public gathering;
    (B) he orderly conduct of business in a public building;
    (C) any person's lawful use of a public conveyance; or

[3] The proposal by "OAG/MPD/USAO" appeared in an attachment to a letter written to Mr. Silbert of the Council for Court Excellence. The topic heading of that section was "Abusive or offensive words – Proposed D.C. Official Code § 22-1321(a)(3)" and the recommended change only applied to that provision (which was the only provision that had a law enforcement carve out). See page 89 of the legislative history for the Disorderly Conduct Amendment Act of 2010. So, when the Council rejected our proposal, they were necessarily only talking about the proposed rewording of (a)(3) concerning law enforcement officers in the context of abusive or offensive words.

[4] Given that the Council enacted D.C. Code § 22-1321 (a)(1), (2), and (3) at the same time and the Council only exempted law enforcement officers from (a)(3), it is unclear why the Commission is even delving into the legislative history to try and glean the Council's intent. Even the Court of Appeals does not look to legislative history when the plain terms of the statute does not produce a result that is "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982). "[I]n absence of persuasive evidence to the contrary, [this Court is] not empowered to look beyond the plain meaning of a statute's language in construing legislative intent." *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976). The current disorderly conduct statute is not ambiguous on this point.

(D) any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;

(2) While that person is in a location that, in fact, is:

(A) Open to the general public; or

(B) A communal area of multi-unit housing.[5]

One of the ways to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of business in a public building. See paragraph (a)(1)(B). The term "public building" is defined as "a building that is occupied by the District of Columbia or federal government." See paragraph (c)(5). However, the term "occupied" is not defined. While it is clear that this offense applies to a person who disrupts the orderly conduct of public business, it is unclear which of the following locations are considered occupied by the government: a building that is owned by the public, where government offices are located, to any location where the public is invited and government business is held, or all of these locations. The focus of the prohibition, however, is in ensuring that public business can take place without undue interruption. It should not matter, therefore, where the location of the public business is held. In order to clarify and simplify this offense, we suggest that paragraph (B) be rewritten to say, "the orderly conduct of public business." The offense would then be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of public business." The term "public business" could then be defined as "business conducted by the District of Columbia or federal government."

RCC § 22A-4002 (a)(1)(c) states that a person commits this offense when the person purposely engages in conduct that causes an unreasonable interruption of any person's lawful use of a public conveyance. It is unclear if this formulation is more narrow than current law. D.C. Code § 22-1321 (c) states, "It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons." [emphasis added] So, under current law a person may be guilty of this offense if they stand in front of the bus and refuse to let the

[5] Paragraph (c) lists the definitions for words and terms used in this offense. It states:

(1) The term "purposely," has the meaning specified in § 22A-206;
(2) The term "bodily injury" has the meaning specified in § 22A-1001;
(3) The term "property" has the meaning specified in § 22A-2001;
(4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;
(5) The term "public building" means a building that is occupied by the District of Columbia or federal government;
(6) The term "public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat; and
(7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.

bus continue on its route. The person is clearly "disrupting the lawful use of a public conveyance." But is that person "caus[ing] an unreasonable interruption of any person's lawful use of a public conveyance"? While the bus may be stopped, is a person's use of the conveyance interrupted? The Comment does not help to explain the drafter's intent. In fact, it appears to limit the scope even further. That comment states "The accused must have the intent and effect of diverting a reasonable passenger's pathway."[6] Nowhere in the current law or in the actual language of RCC § 22A-4002 (a)(1)(C) is this offense limited to pathways.

Another way to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am. As the Comments note, this provision replaces D.C. Code § 22-1321(d). However, that provision is limited by paragraph (a) (2) which requires that the person be in a location that is, in fact, open to the general public or is a communal area of multi-unit housing when they engage in their conduct. See paragraph (a)(1)(D).[7] There is no reason for this limitation. In D.C. Code § 22-1321, the requirement that the disorderly conduct occur in a place that is open to the general public or in the communal areas of multi-unit housing only applies to the offenses that are covered by the disorderly conduct provision in RCC § 22A-4001.[8] There is no reason to extend this limitation to the parts of the disorderly conduct offense that is covered by the public nuisance provision of RCC § 22A-4001.[9]

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[6] See the last sentence on page 13 of the Report.

[7] Paragraph (a)(1)(D) states, "While that person is in a location that, in fact is … Open to the general public… or … a communal area of multi-unit housing," [emphasis added]. For purposes of this analysis, we assume that the "that person" refers to the person who commits the public nuisance and not the person referred to in the immediately preceding paragraphs (i.e. "(C) any person's lawful use of a public conveyance; or (D) any person's quiet enjoyment of his or her residence…").

[8] D.C. Code § 22-1321 (a) provides that:

> In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:
>
> **(1)** Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken;
>
> **(2)** Incite or provoke violence where there is a likelihood that such violence will ensue; or
>
> **(3)** Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person. [emphasis added]

[9] As noted in the text, both the disorderly conduct and the public nuisance provisions contain the requirement the person be in a location that is open to the general public. However, the definitions of what "open to the general public" is different in these two offenses. Subparagraph (c)(4) of the disorderly conduct provision states "The phrase 'open to the general public' excludes locations that require payment or permission to enter or leave." Subparagraph (c)(7) of

The possibility of arrest and prosecution under D.C. Code § 22-1321(d) has been an effective tool in quieting people who in their own house or apartment listen to their stereos, play musical instruments, or host parties that unreasonably annoy or disturb one or more other persons in their residences. In fact, D.C. Code § 22-1321(d) has been touted as the only effective tool used to combat noise that disrupts people's ability to enjoy their homes at night.[10]

There are other instances where the limitation of the location of the person who is engaging in the conduct that causes unreasonable interruptions, under (a)(2), is irrelevant. For example, "A person commits a public nuisance when that person [p]urposely engages in conduct that causes an unreasonable interruption of … a lawful public gathering…" See (a)(1)(A). Paragraph (c) (4) defines a "lawful public gathering as "any religious service, funeral or similar organized proceeding." It does not matter whether a person who wants to disrupt a funeral service is standing on a corner that is open to the public or is standing on the roof of a private building across the street when they use a megaphone to unreasonable interrupt the public gathering.

The revised public nuisance statute also eliminates urinating and defecating in a public place as a disturbance of the public peace offense. D.C. Code § 22-1321(e). OAG supports decriminalization. However, while public urination and defecation would be better handled as a civil infraction punishable by a civil summons and a fine, the District should seek to develop a robust civil infraction enforcement system.

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the public nuisance provision, on the other hand, states, "the phrase 'open to the general public' excludes locations that require payment or permission to enter or leave at the time of the offense." [emphasis added] It is unclear whether the difference was intentional and if it was why these two related offenses would vary on a basic element.

A separate issue with the definitions of "open to the general public" cited above, is that the phrase only gives a slice of a definition, by identifying a specific thing that's excluded from the definition ("excludes locations that require payment…"). Ordinarily, a definition should be exhaustive, covering the realm of what the term includes as well as excludes.

[10] The Criminal Code Reform Commission may want to listen to the hearing on Bill 22-839, the "Amplified Noise Amendment Act of 2018" which was held on July 2, 2018. Although the hearing was focused on why the noise regulations contained in the DCMR are inadequate to address various noise problems, Councilmembers and witnesses where in near agreement that D.C. Code § 22-1321 (d), as written, was the only effective tool in addressing noise issues.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #24, Failure to Disperse and Rioting

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #24 - Failure to Disperse and Rioting.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4102. Failure to Disperse.

The elements portion of the failure to disperse provision is as follows:

(a) *Offense.* A person commits failure to disperse when that person:
  (1) In fact:
    (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  (2) The person knowingly fails to obey a law enforcement officer's dispersal order;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(3) When the person could safely have done so.

One way that this offense can be committed is when a person "[is] in the immediate vicinity [of][2] a course of disorderly conduct…being committed by five or more persons…" See (a)(1)(A) above. On page 4, footnote 3, it states that the phrase "immediate vicinity," "as in the disorderly conduct statute, . . . refers to the area near enough for the accused to see or hear others' activities."[3] If this footnote is meant to articulate a specific definition for "immediate vicinity," that definition should be in the text (as it should be in the rioting statute).[4]

As noted above, one element of this offense may be "[t]he person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct…" [emphasis added] The Commentary notes, on page 4, that "Substantial impairment is more than trivial difficulty." There is a footnote to that statement that reads, "For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not alone amount to substantial impairment." The problem is that the word "substantial" is not defined in the proposal. It is a long way from "more than trivial difficulty" to "substantial." If the Commentary correctly captures the level of police impairment, then either the word "substantial" should be defined as "nontrivial" or the phrase in the Commentary should be substituted in the text of the offense.

Pursuant to paragraph (d), the "Attorney General for the District of Columbia shall prosecute violations of this section." We agree with this designation but would like to avoid needless litigation concerning the Council's authority to give prosecutorial authority to OAG. The penalty provision for the failure to disperse offense states, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." To avoid needless litigation over the history of this provision, whether it is a police regulation or a penal statute in the nature of police or municipal regulations, and its interplay with D.C. Code § 23-101, OAG recommends that the penalty provision be redrafted to state, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X] or a maximum fine of [X]."

In the Explanatory Note, and elsewhere in the Commentary it states, "The offense codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful

[2] The text of paragraph (a)(1)(A) states, "Is in the immediate vicinity a course of disorderly conduct …" This may be a typo. We assume that it was supposed to read, "Is in the immediate vicinity of a course of disorderly conduct …"

[3] The footnote should reference the rioting statute (RCC § 22A-4102(a)(2)), not the disorderly conduct statute (which doesn't use the phrase).

[4] The term "immediate vicinity", as noted in the text, is used in, but not defined in the redrafted rioting offense. Footnote 26 in the Commentary does state, "The term "immediate vicinity" in the revised rioting statute refers to the area near enough for the accused to see or hear others' activities" and then says, ". See *United States v. Matthews,* 419 F.2d 1177, 1185 (1969)." The Commission should include a definition in both the failure to disperse and rioting offenses based upon this footnote.

police order) in the context of group disorderly conduct."[5] It must be noted, that the regulation that this offence is codifying only relates to vehicular or pedestrian traffic. As the elements of the offense does not include reference to vehicular or pedestrian traffic, it appears to be broader in scope then the provision that it purports to be replacing. To the extent that it does not subsume the existing regulation, the explanation should be expanded and affirmatively state that the enactment of this provision is not intended to repeal that regulation. Examples of offenses covered by the existing regulation include when officers tells a woman who is double parked to move her vehicle and she does not, asks a man to partially roll down his window so that the officer can test for a tint infraction and he does not, or when an officer sees a woman lift the security tape labeled "POLICE LINE DO NOT CROSS" and she refuses to leave the area when told to do so by a police officer.

In the explanation of subsection (a)(1)(C) in the Commentary, it states, "The actor's engagement in conduct that is protected by the First Amendment, Fourth Amendment, or District law is not a defense to failure to disperse because such rights are outweighed by the need for law enforcement to effectively address group disorderly conduct."[6] While OAG agrees with this statement, at least as far as it speaks of the First Amendment and District law, the Fourth Amendment protects against unreasonable searches and seizures, as such, it is not apparent why it is referenced here.

RCC § 22A-4101. Rioting.[7]

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[5] The regulation states, "No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles."

[6] The Fourth Amendment to the U.S. Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[7] The offense portion of RCC § 22A-4101, rioting, is as follows:

(a) A person commits rioting when that person:
  (1) Commits disorderly conduct as defined in § 22A-4001;
  (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  (3) And the conduct is committed:
    (A) With intent to commit or facilitate the commission of a crime involving:
      (i) Bodily injury to another person;
      (ii) Damage to property of another; or
      (iii) The taking of property of another;
    (B) While knowingly possessing a dangerous weapon; or

Paragraph (a) states that a person commits rioting when a person "(1) Commits disorderly conduct … (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct … (3) And the conduct is committed . . ." [emphasis added] We read this sentence to mean that "the conduct" in subparagraph (a)(3) refers to the person's conduct in (a)(1) and not the group conduct in (a)(2) notwithstanding that the reference to "group conduct" appears between these two iterations. To clarify this point we recommend that subparagraph (3) be redrafted to read "And the person's conduct is committed…"

One way that this offense can be committed is when a person commits disorderly conduct, reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct and the conduct is committed with intent to commit or facilitate the commission of a crime involving bodily injury to another person. [emphasis added] See (a)(3)(A)(i). As to the offense "involving bodily injury to another person", the question arises whether this other person must be someone other than the person who is committing the disorderly conduct, the four or more other persons who are also committing disorderly conduct, or both. We agree that the offense of rioting should not include situations where the person who is committing disorderly conduct, with others, hurts himself. We want to be clear, in addition, that the text was not meant to exclude situations where a person intends to commit a crime involving bodily injury to someone else who is also being disorderly. We note that the Comment would not require such a reading.[8] Take for example the situation where there is meeting of international finance ministers in the District and protests and counter-protests occur. These protestors represent different and contradictory perspectives on the direction of world finance, just as the counter-protestors do. A subset of the protestors, say anarchists become disorderly, a different subset, say a group supporting funding a repressive country's regime, also becomes disorderly, and a group of the anarchists decide to injure a few of the regime protestors. There is no reason why the offense of rioting should not apply to these anarchists.

(C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

[8] See Comment on page 10 that "'Another person' means any person who is not a participant in the rioting." So, another person may include a person who is disorderly, but not rioting.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #25, Merger

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #25 - Merger.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-212. Merger of Related Offenses.

Section 22A-212 makes changes to District merger law as it has evolved under case law. On page 10 of the Commentary it states, "Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code."

Acknowledging that the current scope of the RCC does not include a redrafting of every District Code offence, the question not specifically addressed by the merger provision or its Commentary

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

is how this provision should be applied to merger questions where a defendant has been found guilty of both an RCC offense and another criminal offense that has not yet been redrafted.

While it is clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

RCC § 22A-212 (a) states that there is a presumption for merger in a number of circumstances. One of these is where "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense…" In the Commentary, on page 6, it states, "This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."[2] OAG believes that this clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision. It should state, "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."

Paragraph (d) establishes a rule of priority based upon the relative seriousness of the offenses as to which offense should remain when offenses merge. In the Commentary, on page 9, the Report says, "where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain." The term "serious", however, is not defined in the text. Footnote 27 offers something that can be used as definition.[3] We recommend incorporating the language of this footnote into the text of the merger provision.

OAG agrees with intent of paragraph (e), final judgment of liability, that no person should be subject to a conviction until after "[t]he time for appeal has expired; or … [t]he judgment appealed from has been affirmed."[4] [emphasis added] We make one technical suggestion. As the Court of Appeals may affirm, affirm in part, or remand, we suggest that paragraph (e)(2) be amended to say, "The judgment appealed from has been decided."

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[2] The Commentary cites to *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (en banc)) for this proposition.

[3] Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d)."

[4] This provision states:

> FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:
>
> (1) The time for appeal has expired; or
>
> (2) The judgment appealed from has been affirmed.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	December 20, 2018
Re:	Comments on First Draft of Report 26, Sexual Assault and Related Provisions

The Public Defender Service makes the following comments on Report #26, Sexual Assault and Related Provisions.

1. RCC § 22A-1301(9) and (11) define the phrases "person of authority in a secondary school" and "position of trust with or authority over." Rather than creating a limited and precise definition, in these two instances the RCC use the word "includes" to describe the scope of the legal terms. In other instances in this chapter and in other chapters, the RCC uses the word "means" when defining a term or statutory phrase. The use of the word "includes" falls short of Due Process requirements to provide notice of criminal offenses.[1] It also fails to correct existing ambiguity in D.C. Code § 22-3009.03 and 22-3009.04. Precise definitions in these two instances are particularly important because the terms relate to sexual offenses that are criminalized only because of the status of the complainant or the relationship between the complainant and the defendant. In the absence of the prohibited relationship between the defendant and the complainant, these interactions may be consensual and legal.
2. PDS makes several recommendations for the definition of "person of authority in a secondary school" and for other terms in RCC § 22A-1305(a) and (b).

   With respect to RCC § 22A-1301(9), person of authority in a secondary school, PDS recommends the following language.

   (9) "Person of authority in a secondary school" ~~includes~~ means any teacher, counselor, principal, or coach in a secondary school attended by the complainant or where the complainant receives services or attends regular programming.

[1] See, e.g., *McNeely v. United States*, 874 A.2d 371, 379 (D.C. 2005).

In addition to being more precise, the RCC's definition should correspond to the harm it seeks to prevent. The term "person of authority in a secondary school is used in RCC § 22A-1305, Sexual Exploitation of an Adult. RCC § 22A-1305(a)(2)(A) and RCC § 22A-1305(b)(2)(A) prohibit sexual acts or contact where the defendant is a person of authority in a secondary school and the complainant is under age 20 and "is an enrolled student in the same school system." Consent is not a defense to RCC § 22A-1305.

"Same school system" is not defined in RCC § 22A-1305. As such, it appears that it would prohibit otherwise consensual sexual contact between any 19 year old enrolled at a DCPS school and most DCPS employees. It would prohibit a consensual sexual relationship between a 19 year old student at Wilson High School and a 23 year old athletics coach at Brookland Middle School. RCC § 22A-1305 would hold the coach criminally liable, and would likely require ten years of sex offender registration although nothing about the "complainant's" status as a student in the same school system played a role in the consensual relationship. Across the District, DCPS employs more than 7,000 individuals.[2] Prohibiting consensual relationships between adults because of the defendant's status as a DCPS employee goes too far. Under circumstances where the complainant is legally capable of consent, there is no allegation of non-consent, and there is no inherently coercive environment created by the complainant's status as a student at one school and the defendant's status as an employee at another, the RCC should not criminalize the conduct.

The term "same school system" may also be under inclusive. Nearly half of the District's students attend charter schools. Each charter school organization forms its own local education agency. Under this definition a relationship between a coach at one charter school and a student at another unrelated charter school would not fall under RCC § 22A-1305 even if the two charter schools have a close relationship and the student participates in sports at both schools.[3] A definition that requires a closer connection between the student and the school employee would resolve this.

RCC §22A-1305(a) and (b) should criminalize consensual relationships between adults, or teens age 16 and older, only where the circumstances are truly coercive because of the defendant's power within the school. A definition that limits liability to relationships where the student and the defendant are assigned to the same school, not just the same school system, appropriately draws the line at preventing coercion but not being overly broad.

Within the RCC § 22A-1305, the age of consent for sexual conduct with persons of authority in secondary schools should be set at 18 instead of 20, as currently proposed. It makes sense to add protections for youth age 16 and 17 given the potential for coercion in a school setting and the potential for consent derived from the pressures of that setting. However, once a student reaches age 18, he or she should be free to engage in consensual sexual conduct with others, including individuals who may have positions of authority within the school setting. Those relationship may very well violate employee norms and in

[2] https://dcps.dc.gov/page/dcps-organization.

those instances should lead to the serious sanction of job loss, but they should not result in criminal liability. Relationships between students and school personnel can be prosecuted under RCC § 22A-1303(b), second degree sexual assault, when the power differential or other actions taken by the defendant result in the coercion of the student.[4]

3. With respect to RCC § 22A-1301(11), "position of trust with or authority over," PDS recommends the following changes.

   (11) "Position of trust with or authority over" ~~includes~~ means a relationship with respect to a complainant of:

   (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
   (B) A legal or de facto guardian or any person, more than 4 years older than the ~~victim~~ complainant, who resides intermittently or permanently in the same dwelling as the complainant;
   (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and
   (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution where the complainant is an active participant or member, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program where the complainant is an active participant or member, ~~including~~ meaning a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff that has regular contact with the complainant in the above settings.

   These recommendations mirror PDS's recommendations for RCC § 22A-1305. The term position of trust or authority is used in the RCC provisions that criminalize sexual abuse of a minor and in sentencing enhancements. A position of trust and authority should be more than a label based on the defendant's employment or status. The definition should capture situations where the defendant's close relationship to the complainant or minor allow for an abuse of trust or additional harm.

4. PDS makes the following recommendations for revisions to the definition of coercion at RCC § 22-1301(3).

   The RCC definition of coercion is employed primarily in second and fourth degree sexual assault, RCC § 22A-1303(b) and (d). As currently drafted the defendant must knowingly cause the complainant to submit to or engage in a sexual act or contact through some coercive conduct as defined in RCC §22-1301(3). While the requirement that the

[4] RCC § 22-22A-1301(3) defines coercion as threatening, among other things, to take or withhold action as an official, or to cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

defendant knowingly caused the sexual act or conduct through coercion provides some strength to the offense definition, the RCC definition of coercion allows seemingly minor conduct to qualify as coercion. This will require jurors to decide the causal question of the connection between the alleged coercion and the sexual act rather than more appropriately limiting the charges that may be brought under a coercion theory.

The current RCC definition includes sexual acts coerced by threats of ridicule. Ridicule should not be included within the specific definition of coercion. Without more, there is insufficient reason to believe that the threat of ridicule would cause a complainant to perform or submit to a sexual act. Where the ridicule is serious or where the defendant knows that the complainant is particularly vulnerable due to his or her background or particular circumstances, the conduct will fall within the catchall provision of coercion, RCC § 22A-1301(3)(G). Similarly, a threat to cause hatred or contempt of a deceased person should be considered coercive only when it meets the standard of RCC § 22A-1301(G) and should not be a standalone provision of coercion. A watered down definition of coercion brings the possibility of arrests and pretrial incarceration for circumstances that are not sufficiently serious to compel the submission of a reasonable person in the same circumstances.

PDS also has concerns about how the RCC addresses coercion in the context of controlled substances and prescription medication.[5] Generally speaking, this sub-definition of "coercion" needs to focus more precisely on what makes the conduct "coercive" or what makes a person feel *compelled* to submit to or engage in a sexual act or sexual contact. The conduct that makes engaging in a sexual act or sexual contact *compulsory* must be as serious as the other conduct proscribed in the definition, such as threatening to commit a criminal offense against the person.[6] According to the commentary, this sub-definition was modeled on the current definition of "coercion" in the human trafficking chapter of the D.C. Code.[7] That definition refers to controlling a person's access to "an addictive or controlled substance."[8] PDS recommends that "coercion" should be about restricting access to an addictive substance (that is also a controlled substance), not merely about restricting access to a controlled substance. What makes restricting access to a substance coercive or compelling conduct is that the substance is one to which the person is addicted. It would not be coercive to restrict a person's access to cocaine *unless the person is addicted to cocaine*. As the Commission notes, limiting a person's access to alcohol, which is an addictive substance, "is not as inherently coercive as limiting a person's access to a controlled substance, as it is relatively easy to obtain alcohol by other means."[9] PDS agrees with the point but posits that the Commission drew the wrong conclusion from it. Restricting access to alcohol is not "inherently" coercive and, unless one is addicted to it, neither is restricting a person's

[5] RCC § 22A-1301(3)(F).

[6] See RCC § 22A-1301(3)(A).

[7] Report #26, page 10.

[8] See D.C. Code § 22-1831(3)(F).

[9] Report #26, page 10, footnote 40.

access to a controlled substance. More to the point, restricting a person's access to alcohol is not coercive at all *precisely because* it is relatively easy for a person to obtain alcohol by other means. A person faced with the demand, "have sex with me or I won't give you this beer," is unlikely to feel compelled to submit to the sexual act, as the person can easily get beer elsewhere. A person faced with the demand, "have sex with me or I won't give you this heroin," is also unlikely to feel compelled to submit to the sexual act if (A) the person is not addicted to heroin and (B) the person can get heroin from another source. Thus, to be "coercive" restricting access should be about restricting access to a controlled substance to which the person is addicted and should be about more than a mere refusal to sell, exchange, or provide. Finally, PDS asserts that the coercive or compelling conduct involving addictive substances and prescription medication is the same. It is not clear what the difference would be between "limiting access to a controlled substance" and "restricting access to prescription medication" and it is certainly not clear that there should be a difference.

The term "limit access" is too broad to truly reach coercive acts. Limit access would seem to include the defendant not sharing his own controlled substances, to which the complainant has no right. It also criminalizes as second and fourth degree sexual abuse commercial sex where the currency is controlled substances. For instance, it should not be second degree sexual abuse if the defendant requires a sexual act as payment for controlled substances. The conduct of limiting access by refusing to sell drugs unless the complainant performs a sexual act should fall squarely within commercial sex and should not be second or fourth degree sexual abuse. With respect to prescription medication, it should be clear that the coercive conduct is limiting a person's access to their own prescribed medicine. A pharmacist refusing to fill a prescription unless a sexual act is performed in exchange is engaging in prostitution, not attempted sexual assault. Because there are other pharmacies, a person who is unwilling to pay that price for his or her prescribed medication, is not being compelled to engage in the sexual act. However, restricting a person's access to their own medicine would in many circumstances be coercive.

PDS recommends the statutory language below.

(3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:
  (A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
  (B) Accuse another person of a criminal offense or failure to comply with an immigration regulation;
  (C) Assert a fact about ~~another person~~ the complainant, ~~including a deceased person~~, that would tend to subject ~~that person~~ the complainant to hatred, or contempt, ~~or ridicule~~, or ~~to~~ would substantially impair that person's credit or business repute;
  (D) Take or withhold action as a~~n~~ public official, or cause a public official to take or withhold action;
  (E) Inflict a wrongful economic injury;

(F) Restrict ~~Limit~~ a person's access to a controlled substance, as defined in D.C. Code 48-901.02, to which the person is addicted and ~~controlled substance~~ or restrict a person's access to that person's prescription medication; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

In addition to the drafting changes above, PDS recommends that the following language be added to the commentary: Restricting a person's access to a substance to which the person is addicted is not the same as refusing to sell or provide an addictive substance or refusing to fill a person's prescription. Nor is restricting a person's access the same as suggesting a sexual act or sexual contact as a thing of value in exchange for a controlled substance to which the person is addicted or for prescription medication. Such suggestion, and such exchange, may constitute prostitution or soliciting prostitution, but it is not, standing alone, coercion for the purposes of second and fourth degree sexual abuse.

5. PDS recommends a minor modification to RCC § 22A-1303. RCC § 22A-1303(a)(C)(i) prohibits administering an intoxicant without the claimant's effective consent "with intent to impair the complainant's ability to express unwillingness." The RCC should explicitly add: "with intent to impair the complainant's ability to express unwillingness to participate in the sexual act." The above recommendation clarifies the phrase "ability to express unwillingness" and ensures that the motive in providing the intoxicant is connected to the sexual assault.

6. RCC § 22A-1303(f) provides for penalty enhancements for sexual offenses based on the characteristics of the complainant and/or the defendant. PDS objects to the use of enhancements generally. Sexual offenses carry lengthy terms of incarceration. The Sentencing Guidelines provide wide ranges of guidelines-compliant sentences for sex offenses. Given the high statutory maxima and the wide ranges available under the Sentencing Guidelines, sentencing enhancements are not necessary to guide judicial discretion. Judges will examine the facts of each case and sentence appropriately. Defendants convicted of sexual crimes against children younger than 12 will typically receive longer sentences without the effect of any enhancement because the facts of the case will warrant a longer sentence. Sentencing enhancements do not serve a meaningful purpose in guiding judicial discretion and if they are assigned a mandatory minimum or a particular offense severity group on the Sentencing Guidelines they may inappropriately cabin judicial discretion to sentence based on the particular facts of the case.

   If the RCC retains sentencing enhancements, PDS recommends re-evaluating the purpose of RCC § 22A-1303(f)(4)(E) which provides for a penalty enhancement where "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, under 65 years old." If the intent is to focus on the unique vulnerabilities of the complainant, the age should be raised to over age 75. If the intent of the RCC is to punish young defendants who may take advantage of an individual who is over age 65, then the enhancement should also provide for an age gap. In that instance, RCC § 22A-1303(f)(4)(E) should read: "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, at least ten years younger than the complainant."

RCC § 22A-1303(C) adds a sentencing enhancement for instances where the "actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least two years older than the complainant." PDS objects to this sentencing enhancement in particular. It does not address a particular harm and draws lines that may be entirely arbitrary. A sexual assault of a 17 year old by a 19 year old may be no different than a sexual assault of an 18 year old by a 21 year old. The age distinction drawn in the RCC in many instances will have no correlation to the particular harm of this conduct as opposed to other similar conduct. Sexual assault has devastating consequences for all and arbitrarily drawing this additional age-based line does not enhance the proportionality of punishment or meaningfully distinguish between the harms inflicted. As stated above, judges will have sufficient sentencing discretion to appropriately consider the particular harms caused and the circumstances of the defendant.

7. RCC § 22A-1306, sexually suggestive contact with a minor, prohibits instances where "with the intent to cause the sexual arousal or sexual gratification of any person knowingly… (D) [the actor] touches the actor's genitalia or that or a third person in the sight of the complaint." As written the RCC criminalizes a minor's incidental viewing of sexual activity as a result of sharing a room or a home with others. RCC § 22A-1306(a)(2)(D) would criminalize a sibling masturbating or parents engaging in consensual sex in a room shared with a minor. The unintentional result is to criminalize typical conduct that occurs in households without private space for each individual. RCC § 22A-1306(a)(2)(D) should include an intent element that is related to the minor child. PDS proposes: "[the actor] touches the actor's genitalia or that of a third person in the sight of ~~complaint~~ a minor child with the intent to gratify the actor's sexual desire with respect to the minor child or to humiliate or degrade the minor child.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: December 20, 2018

Re: Comments on First Draft of Report No. 27, Human Trafficking and Related Statutes

PDS has the following comments about RCC human trafficking and related offenses.

1. PDS recommends making the same changes to the definition of "coercion" as the term is used in the human trafficking chapter that PDS proposed for "coercion" for the sexual assault chapter.

2. PDS objects to the term "harbor" where it is used in Trafficking in Labor or Services,[1] Trafficking in Commercial Sex,[2] Sex Trafficking of Minors,[3] and Sex Trafficking Patronage.[4] Although it is used in the current D.C. Code,[5] that use is grammatically incorrect; the Revised Criminal Code should not perpetuate the misuse of the term. A "harbor" is a place of refuge. "To harbor" means to provide shelter or sanctuary. While we may speak of "harboring a fugitive" or "harboring a criminal," that is not an incorrect use of the term. Harboring a fugitive means to provide shelter for a fugitive. From the fugitive's perspective, the shelter is a "place of refuge;" it is simply that society does not want fugitives or criminals to have a place of refuge. In contrast, society likely supports persons and organizations that provide places of refuge to victims of trafficking.[6] PDS recommends replacing "harbor" with the term "house."

[1] RCC § 22A-1605(a)(1).

[2] RCC § 22A-1606(a)(1).

[3] RCC § 22A-1607(a)(1).

[4] RCC § 22A-1610(c)(2).

[5] For example, it is used at D.C. Code § 22-1833, Trafficking in labor or commercial sex acts, and at D.C. Code § 22-2704, Abducting or enticing a child from his or her home for purposes of prostitution, harboring such a child.

[6] See e.g., "Apple wins Stop Slavery Award, touts new initiative to hire human trafficking victims at retail stores," https://appleinsider.com/articles/18/11/14/apple-wins-stop-slavery-award-touts-new-initiative-to-hire-human-trafficking-victims-at-retail-stores.

3. PDS recommends changing the offense titles so the title better conveys the relative seriousness of the conduct. Forced labor or services and forced commercial sex make liable the person or the accomplice who, by means of coercion or debt bondage, causes another to engage in labor or services or in commercial sex. Whether or not the forced labor or services or forced commercial sex is part of a larger criminal enterprise, this conduct is at the core of the offense and is the most serious. The public perception of "trafficking" is that it is particularly serious, a form of modern-day slavery. Labeling the core offense as "forced commercial sex" and the supporting conduct as "trafficking" is precisely backwards. Thus, PDS recommends that "Forced Labor or Services" should be retitled to "Labor or Services Trafficking" and "Forced Commercial Sex" should be retitled to "Commercial Sex Trafficking." Further, "Trafficking in Labor or Services," "Trafficking in Commercial Sex," Sex Trafficking of Minors" should be retitled to "Assisting Labor or Services Trafficking," "Assisting Commercial Sex Trafficking," and "Assisting Sex Trafficking of Minors" respectively.

4. PDS recommends rewriting RCC § 22A-1605, Assisting Labor or Services Trafficking (formerly Trafficking in Labor or Services), and RCC § 22A-1606, Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex). The offenses criminalize conduct performed in aid of forced labor or services or forced commercial sex. As the Advisory Board discussed extensively with the Commission at the December 19, 2018 public meeting, there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime. Examples we discussed include the cab driver who drives someone he knows is a "trafficking victim" to the grocery store; the cab driver who one time drives someone she knows is being trafficked to a brothel; a pizza delivery person with a standing order to deliver pizza to a place the person knows houses trafficking victims; a hotel maid who cleans the room knowing it was a place where commercial sex trafficking took place. PDS strongly argues for a narrow offense and has a number of drafting recommendations. First, PDS agrees with the suggestion made during our Advisory Board discussion that the greatest concern is with persons who assist trafficking by housing, hoteling, [7] transporting, recruiting, and enticing. PDS therefore recommends narrowing the offense to criminalize only that conduct. Second, the offenses, including the penalties, and the commentary should make clear the seriousness of the offense and the culpability of the actors relative to each other. As stated above at PDS comment (3), labor or services trafficking or commercial sex trafficking, that is actually causing a person to engage in labor, services, or commercial sex by means of coercion or debt bondage, is the most serious conduct. A person who engages in conduct, such as transporting a person, *with the purpose* of assisting in the commission of the trafficking is liable as an accomplice and may be punished accordingly. Less serious, but still culpable, is an actor who knowingly recruits, entices, houses, hotels, or transports a person *with the intent* that the person be caused to engage in labor, services or commercial sex by means of coercion or debt bondage. "With intent" requires purpose or knowledge so it allows for a conviction based on a lower mental state than accomplice liability would require. But it solves the problem discussed at the December 19, 2018 Advisory Board meeting that the assisting offenses as currently drafted allow for criminal liability for an actor

[7] Though not commonly used as a verb, the Oxford English Dictionary confirms that "hotel" can be a verb.

who transports a person and who is aware of a substantial risk (or even knows) that the person is being trafficked, but the transportation does not aid the commission of the trafficking.

PDS recommends rewriting the offense elements of Assisting Labor Services Trafficking and Assisting Commercial Sex Trafficking as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports~~, provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to provide [labor or services][commercial sex];

(3) By means of coercion or debt bondage.

For the same reasons, PDS recommends rewriting the offense elements of RCC § 22A-1607, Assisting Sex Trafficking of Minors, as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports, ~~provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to engage in a commercial sex act;

(3) With recklessness as to the complainant being under the age of 18.

5. With respect to the RCC offenses of Commercial Sex Trafficking (formerly Forced Commercial Sex), Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex), and Assisting Sex Trafficking of Minors (formerly Sex Trafficking of Minors), PDS recommends clarifying that the provision or promise of something of value necessary to make the sex act "commercial" must be provided or promised by someone other than the actor who is "forcing" the commercial sex by coercion or debt bondage. This is necessary to distinguish those offenses from sexual assault. To understand how the offenses could currently overlap, imagine the following scenario: Actor restricts complainant's access to complainant's insulin by hiding it. Actor says, "I'll give you your insulin back if you have sex with me." If complainant complies, that would be second degree sexual assault by coercion.[8] PDS is concerned that, as currently drafted, the RCC forced commercial sex statute could be interpreted to also criminalize that conduct because the actor would be causing the complainant, by means of coercion, to engage in a sexual act that was made "commercial" by being in exchange for the insulin, a thing of value. The difference between sexual assault and forced commercial sex is that it is a third person who is giving something of value in exchange for the sexual act or sexual contact and that thing of value is different from that which is being used to coerce the complainant's compliance. PDS recommends rewriting Forced Commercial Sex as follows:

[8] See RCC § 22A-1303(b)(2)(A).

~~A person~~ An actor or business commits the offense of commercial sex trafficking ~~forced commercial sex~~ when that ~~person~~ actor or business:

(1) Knowingly causes a person to engage in a commercial sex act with another person;

(2) By means of coercion or debt bondage.

Assisting Commercial Sex Trafficking and Assisting Sex Trafficking of Minors should be rewritten similarly. For the same reason, Sex Trafficking Patronage should be modified to distinguish it from sexual assault. First Degree Sex Trafficking Patronage should be written as follows:

~~A person~~ An actor commits the offense of first degree sex trafficking patronage when that ~~person~~ actor:

(1) Knowingly engages in a commercial sex act;

(2) When coercion or debt bondage was used by another person or a business to cause the person to submit to or engage in the commercial sex act;

(3) With recklessness that the complainant is under 18 years of age.

Second and third degree sex trafficking patronage should be rewritten similarly.

6. With respect to RCC § 22A-1608, Benefitting from Human Trafficking, the RCC Commentary states that the offense "criminalizes knowingly obtaining any benefit or property by participating, other than through the use of physical force, coercion or deception, in an association of two or more persons…"[9] PDS questions where in the offense elements it is clear that the participation must be "other than through the use of physical force, coercion or deception." PDS recommends rewriting the offense to state more clearly the exclusion of the use of physical force, coercion or deception.

7. PDS recommends rewriting RCC § 22A-1608, Benefitting from Human Trafficking, to allow for greater differentiation between offender culpability. The only distinction between the two degrees of benefitting is whether the group, in which the actor participates, is engaged in forced commercial sex (first degree) or forced labor or services (second degree). Thus, the person who is a "kingpin" in a group and who gains significant benefits from their participation is treated the same as the person whose participation in the group is sufficiently marginal that they are only disregarding a substantial risk that the group participates in the forced commercial sex or labor or services. PDS recommends increasing the mental state for first and second degree to knowing that the group has engaged in conduct constituting forced commercial sex (first degree) or forced

[9] Report #27, page 49. The report also says "Subsection (a)(2) [of RCC § 22A-1608] specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." *Id*.

labor or services (second degree). PDS further proposes creating a third degree benefitting from human trafficking offense that encompasses both forced commercial sex and forced labor or services and that has the mental state of "recklessness" with respect to the forced conduct in which the group engages.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 28, Stalking

PDS has the following comments about the RCC offense of stalking.

1. PDS objects to the negligence mental state in the proposed stalking offense.[1] As currently proposed, a person commits stalking if the person purposely engages in a pattern of conduct directed at an individual and does so either (A) with intent to cause the individual to fear for his or her safety or with intent to cause the individual to suffer significant emotional distress or (B) negligently causing the individual to fear for his or her safety or to suffer significant emotional distress. Particularly because the purpose of the person's conduct (necessary to establish it as a pattern) need not be nefarious – for example, "a person might persistently follow someone with the goal of winning their affection"[2] – a negligence mental state standard is too low. Increasing the mental state to "recklessly," as PDS recommends, makes the second way of committing the offense on par with the first way. That a person's conduct is done with an awareness of a substantial risk that her conduct is causing the individual to fear for his safety is of similar seriousness as a person's conduct being done with the intent to cause such fear (whether or not it actually does). Allowing a conviction based only on proof that the person, who may otherwise have a benign or beneficent purpose, *should have been* aware that her conduct was causing the individual to fear for his safety would allow a conviction based on conduct that is of significantly lower culpability than the intentional conduct, yet the offense does not define them as different degrees.

2. PDS recommends increasing the separate occasions of conduct required to establish a pattern from two to three.[3] As the commentary explains, stalking concerns "longer-term apprehension," in contrast to breach of the peace statutes like disorderly conduct, rioting, and public nuisance

[1] See RCC § 22A-1801(a)(2)(B).

[2] Report #28, page 5, footnote 2.

[3] See RCC §22A-1801(d)(3).

which create "momentary fear of an immediate harm."[4] Requiring three occasions to establish a "pattern of conduct" does more to assure that the harm being punished is "longer-term apprehension" and better distinguishes between conduct that constitutes stalking and conduct that would constitute a breach of the peace.

3. PDS recommends rewriting the definition of "financial injury" to limit "attorney's fees" at sub-subsection (F) to only those attorney's fees "incurred for representation or assistance related to" the other forms of financial injury listed at (A) through (E). This is consistent with the objection and proposal PDS made on the definition of "financial injury" in its November 3, 2017 comments on Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions.

4. PDS appreciates the effort to protect the conduct of attorneys and private investigators acting within the reasonable scope of their official duties from prosecution pursuant to the revised stalking statute.[5] The list of excluded professionals is inadequate, however, to cover investigators employed by the Public Defender Service or by private attorneys appointed to represent indigent defendants pursuant to the Criminal Justice Act. PDS and CJA investigators are not "licensed private investigators." In addition, PDS and law school programs rely on college and law student interns to perform investigative tasks. PDS strongly urges rewriting the excluded professions list as follows: "(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, person acting as an agent of an attorney, process server, *pro se* litigant, or compliance investigator..."

5. PDS agrees with the explanation of "physically following" that is in the commentary.[6] PDS recommends including the term in the definitions subsection of the statute and using the explanation from the commentary. Specifically, PDS recommends adding to subsection (d) the following: "The term 'physically following' means to maintain close proximity to a person as they move from one location to another."

6. PDS suggests deleting footnote 10.[7] The Do Not Call Registry is not a good example of a government entity that might be the indirect source of notice to the actor to cease communications with the complainant. The Do Not Call Registry is for telemarketing calls only; it does not restrict calls from individuals.[8]

7. PDS recommends that the commentary clarify that the actor must know that the notice to cease communication is from the individual, even if the notice is indirect. The commentary should be clear that if the actor does not know that the person delivering the message to cease communicating with the individual is authorized to deliver such message on the individual's

[4] Report #28, page 10, footnote 40.

[5] See RCC § 22A-1801(e)(3).

[6] Report #28, pages 5-6.

[7] Report #28, page 6.

[8] Incidentally, the Registry does not restrict calls from charities or debt collectors either.

behalf, then the message does not qualify as the "notice" required by the offense. For example, the former paramour receives a message from the new paramour to stop calling and texting the individual will not satisfy the requirement that the actor (former paramour) "knowingly received notice from the individual" unless the actor knows that the new paramour is authorized to deliver the message to cease communications.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #26, Sexual Assault and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #26 - Sexual Assault and Related Provisions.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1301 (2), definition of bodily injury.

RCC § 22A-1301 (2) states that bodily injury "means significant physical pain, illness, or any impairment of physical condition." It is unclear from the text and the Commentary if the word "significant" is meant to modify only physical pain or whether it is meant to modify illness as well. Because of the wording of the definition of "bodily injury" in D.C. Code § 22-3001 (2), OAG assumes that the drafter's meant that bodily injury "means illness, significant physical pain, or any impairment of physical condition." OAG makes this assumption because the phrase "bodily injury", in DC Code § 22-3001(2), is defined as and "… injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." Note that there are no modifiers that apply to the words "disease" or "sickness" in the current law. However, if the drafter's meant the word "significant" to modify both words, then the definition should be

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

rewritten to say that it "means significant physical pain, significant illness, or any impairment of physical condition." The Commentary should then explain why it made that choice.

RCC § 22A-1301 (8), definition of effective consent, and, RCC § 22A-1301 (3), definition of coercion.

As written, an actor who threatens a complainant that they will expose or publicize a fact, whether true or false, that will subject the complainant to embarrassment cannot be charged with a sexual assault if the complainant acquiesces. In order to determine if a person has given "effective consent" in this context, we need to determine if the person was coerced. RCC § 22A-1301 (8) states that effective consent "means consent obtained by means other than physical force, coercion, or deception." RCC § 22A-1301 (3) defines coercion. One way that a person may be coerced is if the actor threatens the complainant that they will "assert a fact about another person, … that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute…"[2] The word "embarrassment" is notably missing from that list. However, the Council, as recently as December 4, 2018 recognized that persons may submit to unwanted sex rather than have something embarrassing made public when it passed the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018. In the legislation, a person commits the offense of blackmail if they threaten to "[e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation… or distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment or other injury to reputation…" [emphasis added][3]

The definition of "coercion" in paragraph (G) includes "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." For clarity, this phrase should explicitly

[2] The full definition of coercion is much broader. RCC § 22A-1301 (3) states that coercion "means threatening that any person will do any one of, or a combination of, the following:
(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;
(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;
(D) Take or withhold action as an official, or cause an official to take or withhold action;
(E) Inflict a wrongful economic injury;
(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or
(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and the same circumstances to comply."

[3] See lines 24 through 32 of the engrossed original of the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018 and the accompanying committee report. http://lims.dccouncil.us/Legislation/B22-0472?FromSearchResults=true

refer to another person. In other words, the phrase "same background and in the same circumstances" should have an object to which it refers. We suggest that the paragraph be rewritten to say, "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply"

RCC § 22A-1303, Sexual assault.

RCC § 22A-1303, and many of the other related provisions, ascribes the mental state of "knowingly" to many of the elements of the offense. As noted on page 58 of the Report, a consequence of using this mental state is that there will be a change in District law such that a person would be able to use self-induced intoxication as a defense.[4] While understanding why the Commission chose to use the mental state of knowingly in these offenses, a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense. If the Commission is going to use this mental state, then the Commission should create an exception that accounts for this situation. This exception would be similar to what the Commission is already proposing in § 22A-208 (c) concerning willful blindness.[5]

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[4] The relevant portion of this discussion is found on pages 58 and 59 of the Report. There it states:

> Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22A-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense, and similarly logic would appear to apply to third degree sexual abuse. This case law precludes ~~preclude~~ an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime. This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily presenting evidence in support of—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse. In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute. [internal footnotes omitted] [strikeout added for clarity]

[5] RCC § 22A-208 (c) states "IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if … The person was reckless as to whether the circumstance existed;

RCC § 22A-1303 (a)(2) makes it a first degree sexual assault when a person causes someone to submit to a sexual act "… (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant." It is unclear whether the drafters meant for the phrase "force that overcomes, restrains, or causes bodily injury to the complainant" to modify "physical force" or also modifies the use of "a weapon." OAG believes that when a person uses a weapon to cause a victim to engage in a sexual act it should be a first degree sexual assault, without having to prove the effect of the use of the weapon on the complainant; it should be assumed. For the sake of clarity, paragraph (A) should be redrafted.[6]

RCC § 22A-1303 (a)(2)(C)(ii) makes it a first degree sexual assault when a person causes someone to submit to a sexual act by drugging the complainant when the substance in fact renders the complainant "…(ii) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or (iii) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act." There are two issues with the way that this is phrased. First, it is unclear in subparagraph (ii) what the word "physically" adds. In other words, after a person has been drugged, what is the difference between a person being substantially incapable "mentally" of appraising the nature of the sexual act and a person being substantially incapable "physically" of appraising the nature of the sexual act? The second issue is that these two statements do not reach the situation where a victim is drugged, can still appraise the nature of the sexual act and can communicate that he or she is unwilling to engage in a sexual act, but is physically unable to move anything but their mouth. The provision should clarify that first degree sexual assault covers a person who has sex with a victim after administering a drug that physically incapacitates the victim, though allowing the victim to think and speak.

RCC § 22A-1305, Sexual Exploitation of an Adult.

In paragraph (a)(2)(C) the subparagraph criminalizes sexual acts between a complainant and "member of the clergy" under specified circumstances. The phrase "member of the clergy" is not defined. To improve clarity and avoid needless prosecutions and litigation the Commission should define this term. The Commission could base its definition of "member of the clergy" on the list of clergy that appears in D.C. Code § 22-3020.52. This is the Code provision that requires "any person" to report information concerning child victims of sexual abuse but exempts "a priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia" when those persons are involved in a confession or penitential communication.

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and …The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability."

[6] The Commission could redraft subparagraph (A) so that if follows the basic structure of subparagraph (B). It would look as follows:

"(A) By using:

(i) A weapon; or

(ii) Physical force that overcomes, restrains, or causes bodily injury to the complainant…"

RCC § 22A-1307, Enticing a minor.

One way that a person can commit the offense of enticing a minor is to knowingly persuade or entice, or attempt to persuade or entice, "the complainant to go to another location in order to engage in or submit to a sexual act or conduct." RCC § 22A-1307(a)(1)(B). As written, it is unclear if the phrase "in order to" refers to the actor's motivations or is part of what the actor must communicate to the complainant. The Commentary should clarify that "in order" refers to the actor's motivation for the communication to get the complainant to go to another location, not that the actor has to communicate to the complainant that a sexual act or contact is the reason for going to another place.

Pursuant to RCC § 22A-1307 (a)(2) a person can commit this offense when "The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and … (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age." There is a problem, however, with how this subparagraph is structured. Paragraph (C) is still subject to the overarching lead in language, so this law-enforcement language still doesn't apply unless the actor is 4 years older than the complainant. If the intent is to include any situation where an actor tries to entice a law enforcement officer who purports to be under 16 the provision should be restructured. For example, the Commission could redraft this provision to read:

> (2)(A) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:
>
> (1) The actor recklessly disregards that the complainant is under 16 years of age; or
>
> (2) The actor recklessly disregards that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant; or
>
> (B)(1) The actor, in fact, is at least 18 years of age,
>
> (2) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age; and
>
> (3) The actor recklessly disregards that complainant purports to be a person under 16 years of age.

RCC § 22A-1308, Arranging for sexual conduct of a minor.

A limitation on this offense is that "The actor and any third person, in fact are at least 18 years of age and at least four years older than the complainant" and that the actor recklessly disregards that the complainant is under 16, under RCC § 22A-1308 (a)((2).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #27, Human Trafficking and Related Statutes

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of First Draft of Report #27 - Human Trafficking and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1601 (2)(D), definition of Coercion.

RCC § 22A-1601 (2)(D) states that the definition of the word "coercion" includes when a person "Take[s] or withhold[s] action as an official…" The word "official" is not defined in the text nor is it specifically addressed in the Commentary. OAG assumes that the word was chosen to refer to government action and not to the official action of a corporation or other organization. It is unclear, however, whether the term should be read broadly as "takes or withholds government action" or more narrowly as "takes or withholds District government action." Because all government action is "official, we recommend that the definition be rewritten to refer to "government action" rather than "official action." We believe that this will aid clarity.

RCC § 22A-1602, Limitations on liability and sentencing for RCC Chapter 16 offenses.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

Paragraph (b) lists the "Exceptions to Liability." It states:

> Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:
>
> (1) Burning, biting, or cutting;
> (2) Striking with a closed fist;
> (3) Shaking, kicking, or throwing; or
> (4) Interfering with breathing.

There are a few problems with this formulation. As drafted, the paragraph implies that burning, biting, or cutting, etc. are typical forms of parental discipline.[2] Second, the term "typical" is not defined. Surely it should not mean that merely because a number of people do something harmful that it would qualify as an exception for liability. For example, just because it may be "typical" in some places for parents to neglect their child, see D.C. Code § 16-2301(9), those neglectful actions should not be an exception to liability when they are used as parental discipline. Finally, subparagraphs (1)-(4) are stated as an exclusive list. There are, however, other harms, including neglect, that a parent may typically inflict on a child that should also be excluded.[3]

RCC § 22A-1603, Forced labor or services.

Paragraph (b) establishes the penalties for the offense of forced labor or services. Though businesses can be convicted of this offense, the penalty structure is the same as for offenses that can only be charged against a person. As businesses cannot be subject to incarceration and as their collective motivation for this offense is financial, there should be a separate fine penalty structure for businesses that is substantial enough to act as a deterrent.

Paragraph (c) provides for a penalty enhancement when it is proven that "The complainant was held or provides services for more than 180 days." This sentence should be redrafted to make it clear that the enhancement should apply when the combined period of time that a person is held

[2] The paragraph can be read to say "Any parent… who requires his … child … to perform common household chores under threat of typical parental discipline shall not be liable for such conduct provided that the threatened discipline did not include… [b]urning, biting, or cutting…;" [emphasis added]

[3] Similarly, in RCC § 22A-1603 (e) the drafters use the word "ordinary." It is unclear what that term means in the context of that paragraph.

and forced to provide services – together – total more than 180 days.[4] The same comment applies to the penalty enhancement for RCC § 22A-1603 Forced commercial sex.

RCC § 22A-1607, Sex trafficking of minors.

It is unclear how the penalty provision in paragraph (b) should be read with the offense penalty enhancements in paragraph (c).[5] For example, in determining the penalty for a repeat offender who holds the complainant for more than 180days, do you apply the penalty enhancement in RCC §§ 22A-805 and then go to up one class or do you go up one class and then apply the enhancement in RCC §§ 22A-805?[6]

RCC § 22A-1608, Benefiting from human trafficking.

RCC § 22A-1608 (a)(2) states that the offense of first degree benefiting from human trafficking includes, as an element, "By participation in a group of two or more persons." It is unclear if whether this element is met when a business of two people are engaged in human trafficking. In other words, because its two people that participate is this element met? Or, because it is one business, albeit with two people, is this element not met?[7]

The Commentary to RCC § 22A-1608 (a)(2) states, "Subsection (a)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." Subsection (a)(2) does not contain this limitation. See text in previous paragraph.

RCC § 22A-1609, Misuse of documents in furtherance of human trafficking.

RCC § 22A-1609(a)(2) includes as an element of the offense that the person or business acted "With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person." [emphasis added] OAG recommends deleting the phrase "without lawful authority." The inclusion of the "without lawful authority" clause assumes that there are situations that it would be justified to, "With intent to prevent or restrict, or attempt to prevent or restrict the person's liberty to move or travel in order to maintain the labor, services,

[4] For example, the enhancement should apply to someone who holds a person in their basement for 90 days "while training them" and then forces them to provide services for the next 91 days.
[5] Paragraph (b) states, "Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." Paragraph (c) states, "The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days."
[6] This may be a global issue that applies to all penalty provisions where there are both general enhancements and offense specific enhancements.
[7] The same questions apply to element (b)(2) in the offense of second degree benefiting from human trafficking.

or performance of a commercial sex act by that person." We submit that that would never be the case. The Commentary does not explain why the phrase "without lawful authority" is necessary.

RCC § 22A-1609, Forfeiture.

It is unclear whether the forfeiture clause in RCC § 22A-1609 follows the holding in *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998). In that case, the government sought forfeiture of a vehicle valued at $15,500 that was owned by a person who was arrested for solicitation of a prostitute. The Court held that "the Constitution prevents the utilization of civil forfeiture as a penalty for the commission of an offense where the value of the property forfeited stands in gross disproportion to the gravity of the offense. Such a disproportion exists in the case at bar and the attempted forfeiture therefore violates the Excessive Fines Clause of the Eighth Amendment."

RCC § 22A-1613. Civil Action.

RCC § 22A-1613 permits victims of offenses prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court. The provision should explicitly state that the defendant in the civil action must be a person who can be charged as a perpetrator of one of those offenses.

RCC § 22A-1613 (b) contains the following provision. "(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later." OAG believes that a person who was a minor should have an opportunity to sue on their own behalf. As written, just as the minor was able to sue, because they reached the age of majority, they would be precluded from suing because they reached the age of majority. Instead, OAG suggests that the Commission adopt the language used in the engrossed original of B22-0021, the Sexual Abuse Statute of Limitations Amendment Act of 2018. That bill provides, "for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40, or 5 years from 40 when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;""

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #28, Stalking

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #28 - Stalking.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1801, Stalking.

RCC § 22A-1801(d)(4) contains the following definition, "The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:" [emphasis added] As written, the term "specific individual" refers to the person who is doing the staking. However, the lead in language to the stalking offense contains the sentence "Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following…" [emphasis added] See RCC § 22A-1801(a)(1). Using the term "specific individual" to refer to both the perpetrator and victim would be confusing. However, given the context, OAG believes that what The Commission meant in RCC § 22A-1801(d)(4) is, "as a result of the stalking of the specific individual."

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

RCC § 22A-1801(d)(8) states that the term "significant emotional distress" means "substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling." On page 10 of the Commentary it clarifies the government's obligation by stating, "The government is not required to prove that the victim sought or needed professional treatment or counseling." OAG believes that that for the sake of clarity and to avoid needless litigation. The sentence in the Commentary should be in the text of the substantive provision in RCC § 22A-1801(d)(8).

RCC § 22A-1801(e) contains the exclusions from liability. Subparagraph (e)(3) states:

> (e) A person shall not be subject to prosecution under this section for conduct, if:
> (A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, pro se litigant, or compliance investigator; and
> (B) Is acting within the reasonable scope of his or her official duties.

While it may be intuitive to understand what the official duties of a law enforcement officer, licensed private investigator, process server, and compliance investigator is within the context of this offense, it is unclear what the official duties of a pro se litigant is. Since a pro se litigant does not appear to have "official duties" (or "professional obligations," to borrow the phrase used on page 12 of the report) in the ordinary meaning of that phrase, OAG believes that the subparagraph needs to be redrafted. In addition, there are questions as to whether an attorney or journalist necessarily has "official duties" as opposed to professional obligations. Therefore, OAG recommends that this provision be redrafted as follows:

> (A) The person is a law enforcement officer, licensed private investigator, or compliance investigator and is acting within the reasonable scope of his or her official duties; or
> (B) The person is a journalist, attorney, or pro se litigant and is acting within the reasonable scope of that role.

RCC § 22A-1801(f) provides for the parental discipline affirmative defense. This defense is available to "A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person's minor child…" However, there are situations when this defense should not be given to a parent or legal guardian. For example, a parent or legal guardian may abuse their child and loose visitation rights or be subject to court orders limiting the person's contact with the child. The actions of these people in violating the provisions of RCC § 22A-1801 (a) may actually constitute stalking and, as such, these people should be subject to this offense.[2] RCC § 22A-1801(f) should be redrafted to ensure that

[2] RCC § 22A-1801(a) provides that a person commits stalking when that person:

"(1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:

(A) Physically following or physically monitoring;

(B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having

parents, legal guardians, or other people who have assumed the obligations of a parent can only avail themselves of this offense when they are exercising legitimate parental supervision and not when their rights are limited or nonexistent.

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received notice from the individual, directly or indirectly, to cease such communication; or

(C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses…"

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #30, Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #30 - Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 213, Withdrawal defense to legal accountability

RCC § 213 states that it as affirmative defense to a prosecution when

> a defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:
> (1) Wholly deprives his or her prior efforts of their effectiveness;
> (2) Gives timely warning to the appropriate law enforcement authorities; or
> (3) Otherwise makes proper efforts to prevent the commission of the offense.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

The RCC does not define the phrase "proper efforts." The Commentary does note, "This catchall "proper efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances." [internal footnotes omitted] Neither the RCC nor the Commentary, however, explain the parameters of this defense. For example, it is unclear if the phrase "proper efforts" is meant to be broader, narrower, or the same as "reasonable efforts." The RCC should give more guidance on the applicability of this defense.

Appendix C

CCRC 2018 Annual Report –

CCRC Work Plan and Schedule (1-24-19)

CCRC Agency Work Plan & Schedule (1-24-19)

This combined CCRC Agency Work Plan & Schedule (1-24-19) presents the planned activities of the D.C. Criminal Code Reform Commission (CCRC). The Work Plan & Schedule guides agency operations, subject to changes by the CCRC Executive Director to better meet the CCRC's statutory mandate with available resources.

This document consists of the following parts:

I. Overview.
II. Limitations & Assumptions.
III. General Sequence of Code Reform Recommendations.
IV. Ongoing Activities Supporting the Development of Recommendations.
V. Schedule.

I. Overview.

This Work Plan & Schedule (1-24-19) addresses all remaining aspects of the CCRC's core statutory mandate to develop comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes to:

(1) Use clear and plain language;
(2) Apply consistent, clearly articulated definitions;
(3) Describe all elements, including mental states, that must be proven;
(4) Reduce unnecessary overlap and gaps between criminal offenses;
(5) Eliminate archaic and unused offenses;
(6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties;
(7) Organize existing criminal statutes in a logical order;
(8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate;
(9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment;
(10) Propose such other amendments as the Commission believes are necessary; and
(11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.[1]

On May 5, 2017, the CCRC issued to the Council and Mayor *Report #1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes*. That report contained recommendations partially or wholly responding to items (1), (5), (8), (9), and (11) of the agency's statutory responsibilities.

This Work Plan & Schedule (1-24-19) addresses the CCRC's remaining statutory responsibilities with the goal of maximizing the recommendations for comprehensive criminal code reform that are issued by the agency's statutory sunset date. These recommendations will be issued to the Council and Mayor in the form of a second major report. The second report will provide

[1] D.C. Code § 3-151 *et seq*.

recommendations for reform of the most serious, routinely-sentenced District offenses currently in use. The second report will recommend that reformed offenses be codified chiefly in a new, enacted Title 22 (hereafter, "Title 22E"), with some reformed offenses remaining in their current locations in other titles.

Consistent with the past six decades of modern American criminal code reform efforts,[2] the recommended Title 22 will consist of two distinct components. First, Title 22E will contain a "General Part," which codifies key general definitions, essential interpretive rules, culpability principles applicable to all reformed offenses, as well as a coherent classification scheme for grading reformed offenses. Second, Title 22E will contain a "Special Part," which codifies clearly articulated, reformed versions of individual offenses. Collectively, the components of the new Title 22E will provide a full and accurate statutory description of the elements for every reformed offense.

The second report will consist of draft statutory language, as well as a commentary (suitable for adoption as legislative history) that explains how and why the reformed statutes change existing District law, and appends analyses of how other jurisdictions with reformed codes treat relevant points of law, and charging, sentencing, and other relevant statistics regarding affected offenses.

In preparing its reform recommendations, the CCRC will consult with its statutorily-created Advisory Group. The Advisory Group will review, comment, and ultimately vote on all CCRC recommendations that go to the Council and Mayor. The final recommendations will be based on the Advisory Group's comments, reconciled with each other and to be consistent with the agency's statutory mandate, and a copy of those comments will be appended to the report. In preparing its reform recommendations, the CCRC also will review criminal code reforms in other jurisdictions, recommend changes to criminal offenses by the American Law Institute, and survey best practices recommended by criminal law experts.

In sum, by the Commission's statutory deadline, the CCRC plans to issue final recommendations in a second report to the Council and Mayor that, per D.C. Code § 3-152, will include:

- Reformed statutory language for most serious and frequently-prosecuted District offenses;
- New statutory language that codifies consistent general provisions (e.g., mental state requirements, definitions), and at least some general defenses, applicable to reformed offenses;
- Written commentary explaining the meaning of the reformed language and how and why the reformed statutory language changes current District law;
- A record of Advisory Group written comments on draft recommendations and their disposition;
- Relevant statistical information; and
- A bill to enact Title 22 that incorporates the Commission's reform recommendations.

[2] For a brief summary of the history of modern American criminal code reform efforts, see CCRC Memorandum No. 2, *Adoption of a Comprehensive General Part in the Revised Criminal Code* (December 21, 2016) available on the agency's website at https://ccrc.dc.gov/page/ccrc-documents).

II. Limitations & Assumptions.

Due to time and resource constraints, the Work Plan & Schedule (1-24-19) excludes reform recommendations for many of the more than 700 criminal statutes scattered throughout the D.C. Code.[3] The majority of these criminal statutes are of a regulatory nature, impose misdemeanor penalties, or do not appear to have been sentenced in recent years (or ever). A list of statutes not expected to be revised by the CCRC is provided in the schedule at the end of this document.

With that general caveat regarding the scope of the agency's work, there are several variables that may diminish the number of statutory sections that the CCRC expects to be able to review. These variables include:

- Agency staff loss or unanticipated extended leave;
- New court decisions or legislation (District or federal) affecting draft recommendations;
- Delays in preparation of recommendations for statutory sections other than current offenses (see below);
- Advisory Group comments requiring additional drafts of issued recommendations; and
- Advisory Group disagreement that delays a vote to approve the final recommendations.

Of these matters, two are of particular concern. The first is the possibility of significant staff attrition and/or extended leave. The agency's staff is comprised of just five people and has developed unique expertise with the code revision process. In case of staff departure, it will be extremely difficult to attract highly qualified individuals (given the time-limited nature of the employment) and train them in time to significantly advance agency work before the agency's statutory deadline. Extended leave by agency staff also could significantly diminish the number of criminal statutes for which the agency will develop recommendations.

Second, under the agency's statute, the CCRC's Advisory Group's voting members must approve by majority vote all final recommendations of the CCRC before they may be transmitted to the Mayor and Council. To date, no Advisory Group members have stated that they cannot support the agency's draft recommendations, and the differences of opinion that are apparent in Advisory Group members' comments to the agency do not appear to jeopardize final approval. However, the possibility remains that Advisory Group members, perhaps even a majority, may yet raise fundamental objections to the agency's proposals. Should such objections be raised, significant additional time may be needed for staff to restructure its proposals and reengage the Advisory Group with respect to any revisions.

It should also be noted that the federal government shutdown that began in late 2018 has adversely affected the operation of the CCRC's Advisory Group, two of whom are federal employees. With these Advisory Group members unavailable, the CCRC has had to cancel Advisory Group meetings, with consequent delays in the review of draft recommendations. The federal shutdown has also delayed a D.C. Superior Court response to the agency's latest data request.

In making the work schedule at the end of this document, the CCRC has assessed these variables to the best of its ability based on its prior experience working on code reform. However, unexpected changes in these variables could affect the agency's timely completion.

[3] This estimate is based on an internal review by CCRC staff of the D.C. Code.

III. General Sequence of Code Reform Recommendations.

The CCRC's development of code reform recommendations follows four general sequential (though overlapping) phases, which can be summarized as follows:

- *Phase 1.* Facilitate enactment of Title 22 of the D.C. Code, which contains most District offenses, and propose other minor amendments to District criminal statutes. Phase 1 recommendations ease the administrative burden of future amendments to District criminal laws and redress technical errors.
    - Phase 1 was completed May 5, 2017, when the CCRC issued to the Council and Mayor *Report #1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes.*

- *Phase 2.* Develop key general definitions, essential interpretive rules, and the most important culpability principles applicable to all reformed offenses, including general defenses (e.g. self defense). Phase 2 recommendations facilitate the clear and comprehensive drafting of reformed offenses, which will be consistently interpreted and applied by the courts.

- *Phase 3.* Develop reformed individual offenses consistent with general provisions using language that is accessible, intuitive, and complete. Phase 3 recommendations facilitate the clear articulation and consistent interpretation of District offenses.

- *Phase 4.* Review all reformed offenses together as a whole, creating an ordinal ranking of offense severity and establishing the classification of all individual offenses. Phase 4 recommendations facilitate proportionate penalties for all reformed District offenses.

These four phases follow an overarching logic: prepare Title 22 for reform, create a general framework applicable to all reformed offenses, reform offenses using that general framework, and then reform the penalties for all offenses to be proportionate.

It is important to note, however, that it is neither possible nor desirable for the CCRC to issue or finalize all the recommendations for each phase before starting the next phase. The development of some of the Phase 2 recommendations (e.g., the planned recommendations regarding codification of general defenses) require significant staff time by one staff member, such that, in order to accomplish as much as possible by the CCRC's statutory deadline, work on Phase 3 recommendations must commence before completion of Phase 2. It is also expected, however, that work on later phases may reveal the need to rework aspects of earlier phases. Consequently, while the general sequence of code reform work is fixed, some overlap in the completion of phases is necessary. The CCRC has structured the planned release of individual recommendations to ensure that members of the Advisory Group have the information necessary to provide informed comments and feedback on distributed materials.

Below is a more detailed overview of how Phases 2, 3, and 4 are expected to operate in the remainder of 2019.

Phase 2. General Provisions for a Title 22E.

Per Phase 2, the CCRC is developing a standard toolkit of rules, definitions, and principles for establishing criminal liability, including general defenses, that will apply to all reformed offenses. The CCRC is also developing a coherent classification scheme for grading offenses and setting penalties, as well as penalty enhancements that apply to many or all offenses. (Note, however, that the development of draft recommendations for penalty classes and general penalty enhancements during this phase will describe the penalty classes and differentiate gradations in penalty enhancements, but will not propose specific penalties or fines for any offenses. Recommendations for specific penalties or fines, including for penalty enhancements, is addressed in Phase 4.) Phase 2 work addresses several of the agency's statutory mandates.[4]

- *Phase 2 New Recommendations to Be Drafted in 2019*[5]:
  - § 22E-4XX. General Provisions Governing Justification Defenses.
  - § 22E-4XX. Choice of Evils.
  - § 22E-4XX. Execution of Public Duty.
  - § 22E-4XX. Law Enforcement Authority.
  - § 22E-4XX. Special Responsibility for Care, Discipline, or Safety Defense.
  - § 22E-4XX. Effective Consent Defense.
  - § 22E-4XX. Defense of Person.
  - § 22E-4XX. Defense of Property.

- *Key Dates*:
  - An update to all draft general provisions that incorporates Advisory Group comments is planned for release in March 2019. A second cumulative update to all general provisions is planned for the fall of 2019.
  - To maximize the Advisory Group's time for review, the CCRC will issue new recommendations developed in Phase 2 as they become available. Draft recommendations regarding justification defenses for persons with special responsibilities and effective consent are planned for release to the Advisory Group in March 2019. A second issuance of justification defenses is planned on or by August 2019.

Phase 3. Reformed Offenses for a New Title 22E.

Per Phase 3, the CCRC is developing recommendations for modernizing the structure and language of the most serious, frequently-sentenced District offenses, consistent with the general definitions, rules, and principles for establishing liability established by the General Part. Draft recommendations for specific offenses differentiate gradations in liability but do not propose specific penalties or fines (work which is addressed in Phase 4). Work for this phase addresses several of the agency's statutory mandates.[6]

[4] D.C. Code § 3-152(a) ("(1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3) Describe all elements, including mental states, that must be proven;…(7) Organize existing criminal statutes in a logical order;…(10) Propose such other amendments as the Commission believes are necessary…").

[5] The designation "§ 22E-XXXX" is used to denote the location of the provision in the CCRC's draft recommendations, while corresponding D.C. Code offenses, where applicable, are listed in square brackets.

[6] D.C. Code § 3-152(a) ("(1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3)

- *Phase 3 New Recommendations to be Drafted in 2019*[7]:
  - Weapon possession offenses, including provisions corresponding to:
    - § 22E-41XX. While armed enhancement. [D.C. Code § 22-4502]
    - § 22E-41XX. Gun free zones enhancement. [D.C. Code § 22-4502.01]
    - § 22E-41XX. Unlawful Possession of a Firearm. [D.C. Code § 22-4503]
    - § 22E-41XX. Unlawful Discharge of a Firearm. [D.C. Code § 22-4503.01]
    - § 22E-41XX. Prohibition of Firearms from Public or Private Property. [D.C. Code § 22-4503.02]
    - § 22E-41XX. Carrying Concealed Weapons; Possession of Firearm During Crime of Violence or Dangerous Crime. [D.C. Code § 22-4504]
    - § 22E-41XX. Lack of Authority to Carry Firearm in Certain Places for Certain Purposes. [D.C. Code § 22-4504.01]
    - § 22E-41XX. Unlawful Transportation of a Firearm. [D.C. Code § 22-4504.02]
    - § 22E-41XX. Exceptions to 22-4504. [D.C. Code § 22-4505]
    - § 22E-41XX. Issue of a License to Carry a Pistol. [D.C. Code § 22-4506]
    - § 22E-41XX. Certain Sales of Pistols Prohibited. [D.C. Code § 22-4507]
    - § 22E-41XX. Transfers of Firearms Regulated. [D.C. Code § 22-4508]
    - § 22E-41XX. Dealers of Weapons to be Licensed. [D.C. Code § 22-4509]
    - § 22E-41XX. Licenses of Weapons Dealers. [D.C. Code § 22-4510]
    - § 22E-41XX. False Information in Purchase of Weapons. [D.C. Code § 22-4511]
    - § 22E-41XX. Alteration of Identifying Marks of Weapons. [D.C. Code § 22-4512]
    - § 22E-41XX. [Weapon Offense] Exceptions. [D.C. Code § 22-4513]
    - § 22E-41XX. Possession of a Prohibited Weapon. [D.C. Code § 22-4514]
    - § 22E-41XX. [Weapon Offense] Penalties. [D.C. Code § 22-4515]
    - § 22E-41XX. Manufacture, Transfer, Possession, or Use of an Explosive. [D.C. Code § 22-4515a]
    - § 22E-41XX. Severability. [D.C. Code § 22-4516]
    - § 22E-41XX. Dangerous articles, etc. [D.C. Code § 22-4517]
  - Controlled substance offenses, including provisions corresponding to:
    - D.C. Code § 48-904.01. [Controlled Substances] Prohibited Acts A.
    - D.C. Code § 48-904.02. [Controlled Substances] Prohibited Acts B.
    - D.C. Code § 48-904.03. [Controlled Substances] Prohibited Acts C.
    - D.C. Code § 48-904.03a. [Controlled Substances] Prohibited Acts D.
    - D.C. Code § 48-904.04. [Controlled Substances] Penalties Under Other Laws.
    - D.C. Code § 48-904.05. [Controlled Substances] Effect of Acquittal or Conviction Under Federal Law.

Describe all elements, including mental states, that must be proven; (4) Reduce unnecessary overlap and gaps between criminal offenses; (5) Eliminate archaic and unused offenses…(7) Organize existing criminal statutes in a logical order; (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate…(10) Propose such other amendments as the Commission believes are necessary…").

[7] The designation "§ 22E-XXXX" is used to denote the location of the provision in the CCRC's draft recommendations, while corresponding D.C. Code offenses, where applicable, are listed in square brackets.

- D.C. Code § 48-904.06. [Controlled Substances] Distribution to Minors.
- D.C. Code § 48-904.07. [Controlled Substances] Enlistment of Minors to Distribute.
- D.C. Code § 48-904.07a. [Controlled Substances] Drug Free Zones.
- D.C. Code § 48-904.08. [Controlled Substances] Second or Subsequent Offenses.
- D.C. Code § 48-904.09. [Controlled Substances] Attempt; Conspiracy.
- D.C. Code § 48-904.10. [Controlled Substances] Possession of Drug Paraphernalia.
- D.C. Code § 48-911.01. [Controlled Substances] Consumption of Marijuana in Public Space Prohibited; Impairment Prohibited.
- D.C. Code § 48-1103. [Controlled Substances] Prohibited Acts [Paraphernalia].

o Invasions of privacy, including provisions corresponding to:
- § 22E-1801. Nonconsensual Pornography. [D.C. Code §§ 22-3051; 22-3052; 22-3053; 22-3054; 22-3055; 22-3056; 22-3057].
- § 22E-1802. Sexual Performance Using Minors. [D.C. Code §§ 22-3101; 22-3102; 22-3103; 22-3104]
- § 22E-1803. Voyeurism. [D.C. Code § 22-3531]

- *Key Dates*:
  - To allow the Advisory Group to evaluate similar offenses together, the CCRC will distribute draft recommendations developed in Phase 3 in staggered clusters. Release of drug and weapon first draft recommendations are tentatively planned for release to the Advisory Group on or by June and July 2019, respectively. Draft recommendations for reform of crimes of invasion of privacy and other assorted offenses will be staggered throughout the year.
  - An update to all draft specific offenses issued prior to January 1, 2019, that incorporates Advisory Group comments is planned for release in March 2019. A second cumulative update to all specific offenses issued prior to August 1, 2019, is planned for the fall of 2019.

Phase 4. Proportionate Penalties for Title 22E Offenses.

Per Phase 4, the CCRC is evaluating the relative seriousness of reformed District offenses, and accordingly recommending proportionate penalties and fines in a manner that fulfills several CCRC mandates.[8] Draft recommendations regarding the ranking of offense severity and classification of offenses may be comprised of two or more alternatives for Council consideration.

- *Phase 4 New Recommendations to be Drafted in 2019*:
  - Ordinal ranking of revised offenses and their gradations severity.
  - Grouping revised offenses and their gradations (using the above ordinal ranking) into standardized penalty classes with specific imprisonment and fine punishments.
  - Review of statutory repeat offender penalty enhancements.

[8] D.C. Code § 3-152(a)(6) ("Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties.")

- Jury demandability of crimes punishable by less than 6-month sentences.
- Mandatory minimum sentencing.

- *Key Dates*:
  - Draft recommendations for these Phase 4 topics are tentatively scheduled for release to the Advisory Group on or by August 2019.

IV. Ongoing Activities Supporting the Development of Recommendations.

The CCRC's development of specific code reform recommendations is supported by a variety of ongoing agency work.

Monitoring District Criminal Legislation & Case Law.

The starting place for criminal code reform is existing District law, whether legislative or judicial. A sound understanding of current District law is critical to providing commentary to the Council on how CCRC recommendations affect District law, a statutory mandate for the agency.[9] Since the inception of the CCRC, staff has conducted regular reviews of legislative and judicial developments in the District and will continue to do so until all recommendations are finalized.

Monitoring Best Practices & Other Jurisdictions' Criminal Code Reforms.

By statute,[10] the process the CCRC uses to review District statutes also involves review of reforms in other jurisdictions' code reforms and the recommendations of criminal law experts. In recent years there has been a major surge in state-level criminal justice reforms, often through Justice Reinvestment Initiatives (JRIs) that seek to improve public safety and reduce costs. There also has been progress on new model recommendations for Sentencing and Sexual Assault through the American Law Institute (ALI). Recognizing that the public safety needs, norms and history of each jurisdiction are unique, the CCRC staff conducts a monthly review of new national developments that may be useful to the District's reform efforts.

Outreach & Collaboration.

To examine best practices and models of reform in other jurisdictions, and to better understand public perspectives on topics like penalty proportionality, the CCRC must conduct outreach to other organizations and individuals. Additional outreach to legal experts, criminal justice stakeholders, and the public is being planned for 2019.

Data Acquisition & Analysis.

The CCRC statute requires the agency to provide "charging, sentencing, and other relevant statistics" with its final recommendations to the Council and Mayor. However, such statistical information is also critical to the initial development of recommendations. For example, the sentences for a specific offense may show what District judges believe to be a proportionate

[9] D.C. Code § 3-152(b)(3).
[10] D.C. Code § 3-152(c)(2).

penalty for that offense. To acquire data, the CCRC is statutorily authorized to request information from other entities. An updated data request was made of the D.C. Superior Court in November 2018, and a new dataset is expected in 2019 that will include charging and sentencing data for the years 2009 – 2018 for all misdemeanors and felonies. The CCRC plans to work with social scientists in the Lab of the Office of the City Administrator in FY 19 to analyze the data it acquires.

Agency Legal Compliance.

The CCRC is a relatively new independent agency in the District government, and has both agency-specific[11] and District-wide responsibilities to operate efficiently, transparently, and lawfully. Since its inception on October 1, 2016, the CCRC has worked with a number of District agencies to set up appropriate financial, budgetary, human relations, facilities, ethics and other operations. To the best of its knowledge, the agency is fully in compliance with District rules and regulations. However, oversight of spending and the long-term development of a document retention system remain work activities for the CCRC in 2019.

Staff Development & Training.

The legal challenges of criminal code reform are unique, and the CCRC has been mostly fortunate in retaining a staff with significant experience working on such challenges. No new hiring is planned in 2019 at this time, and no vacancies are expected.

V. Schedule.

Currently, the CCRC's statutory authorization is set to expire on October 1, 2019. However, the agency is requesting of the Mayor's Office of Budget and Performance Management and Council a statutory extension and funding through the FY 20 District budget. The schedule below assumes continued agency operation beyond FY 19, but is designed to guide agency activity regardless of the length of the agency's further statutory authorization. It accomplishes this by specifying *groupings of offenses and group sequence for review*. The schedule below identifies:

(1) Most[11] crimes codified in the D.C. Code.
(2) All statutory sections in Title 22, including sections with non-crime provisions that must be part of enactment of a revised Title 22; and
(3) Those D.C. Municipal regulations that both include crimes and have been charged[12] against adults in Superior Court in recent years.

Columns A-C of the schedule specify statutory citations and names.

Column D then indicates the status of the statutory section in the CCRC's work plan using numbers and color coding. A "1" marks statutory sections for which the agency has issued to its Advisory

[11] The schedule was compiled from various sources. While the list includes all Title 22 crimes and other crimes actually charged in recent years, the list is likely under-inclusive. A conservative method was used for listing regulatory provisions that reference the same penalty provision. The schedule has been updated frequently, but may contain errors.

[12] Note that the listed DCMR regulations do *not* include provisions for which there was juvenile charging, or adult arrests.

Group draft reform recommendations. A "2" marks statutory sections for which the agency expects to issue draft recommendations to its Advisory Group in FY 19. A "3" marks statutory sections that the agency expects to prioritize next, in FY 20. The extent to which the agency will address these category "3" provisions depends largely on whether the agency's mandate is extended through all of FY 20 (allowing for reform recommendations on all or nearly all category "3" offenses) or only half of FY 20 (allowing for reform recommendations on few, if any, category "3" offenses). A "4" marks statutory sections that are second priorities, time permitting, in FY 20. A "5" marks statutory sections which are not currently planned for review by the agency through FY 20.

Column E indicates the current maximum imprisonment penalty authorized for the crime in the D.C. Code, in terms of years ("Y"), months ("M") or days ("D"). A crime subject to more than one year imprisonment is a felony, and crimes subject to 6 months or more imprisonment are jury-demandable.

Please note that, besides administrative duties, the below schedule does not include two key types of agency work. First, continued code reform recommendations as part of Phase 2 (described above) is not included in the schedule. These additional recommendations include general defenses (e.g. use of force in self-defense) and other general provisions. Work on general defenses began in FY 19 and, with a full year extension, is planned for completion by the end of FY 20. Secondly, the schedule does not account for preparation for public outreach, legislative hearings, or roundtables on the CCRC's preliminary or final recommendations. At this time, it is unclear whether and to what extent the agency may need to engage in these activities. The agency will work with the Council to determine whether and how it may be called upon to provide testimony or support to such legislative activity. Even though a major part of the agency's efforts involve the development of a written commentary on the meaning and effect of recommended changes to statutory language, the ability of the Mayor or Council to call on agency staff to speak to the meaning of the agency's final recommendations may prove critical to implementation of the agency's work.

If this schedule is successfully completed, by the close of FY 19, the agency will have issued draft recommendations to its Advisory Group covering crimes in the D.C. Code that constituted about 80% of all adult felony and misdemeanor convictions in recent (2010-2016) years based on the CCRC's analysis of Superior Court data. Those recommendations would be significantly reduced, however, if there is no extension of the agency's statutory authorization and funding. The last months of FY 19 would need to be focused on finalizing the agency's draft recommendations.[13]

Should the CCRC be extended through FY 20 and work proceed on schedule, the CCRC plans to issue draft recommendations to revise the approximately 250 crimes that accounted for over 96% of all adult convictions in recent years. Notably, operation through FY 20 would enable work on offenses against government operations, for example, obstruction of justice, bribery, and public corruption. Other offenses such as traffic crimes in Title 50 of the D.C. Code may also be reviewable with extension through FY 20.

[13] To finalize all outstanding draft recommendations, to draft Title 22 enactment legislation, and to develop introductory and summary materials to accompany the final recommendations is expected to take 4-6 months. Consequently, whatever the expiration of the statutory authorization for the agency, agency work on new recommendations must cease 4-6 months in advance.

	A	B	C	D
1	**D.C. Code Statute**	**Sub section**	**Name**	**CCRC Status 1= Draft issued; 2=Draft fy19; 3=fy20 #1 priority; 4=fy20 #2 priority; 5=No review plans**
2	01-0301.43		Obstruction of Council proceedings and investigations; penalty.	5
3	01-0739		Criminal penalties.	5
4	01-0909.08		Criminal penalties.	5
5	01-1001.08		Qualifications of candidates and electors; nomination and election of Delegate, Chairman of the Council, members of Council, Mayor, Attorney General, and members of Board of Education; petition requirements; arrangement of ballot.	5
6	01-1001.10		Election of electors.	5
7	01-1001.14	(a)	Corrupt election practices.	5
8	01-1001.14	(a-1)(2)	Corrupt election practices.	5
9	01-1001.14	(b)(1)	Corrupt election practices.	5
10	01-1001.14	(b)(2)	Corrupt election practices.	5
11	01-1001.14	(b)(3)	Corrupt election practices.	5
12	01-1001.14	(b)(4)	Corrupt election practices.	5
13	01-1162.21		Penalties	5
14	01-1162.32		Penalties; prohibition from serving as lobbyist; citizen suits.	5
15	01-1163.35	(b)	Penalties.	5
16	01-1163.35	(c)	Penalties.	5
17	01-301.44a		Independence of legislative branch information technology	5
18	01-623.27		Representation; attorneys; fees	5
19	01-744		Prohibition against certain persons holding certain positions	5
20	02-0114		Filing information; penalties; separate offenses.	5
21	02-0135		Regulation of plumbing; licensing of plumbers and gas-fitters; noncompliance.	5
22	02-0381.09		Penalties for false representations.	5
23	02-0537		Administrative appeals.	5
24	02-0562		Penalties.	5
25	02-0708	(a)	Penalties.	5
26	02-0708	(b)	Penalties.	5
27	02-0709	(a)	Unintentional violations.	5
28	02-0709	(b)	Unintentional violations.	5
29	02-0809		Penalty.	5
30	02-0827		Effective period of regulations and licenses; publication of regulations; penalties.	5
31	02-1402.64		Resisting the Office or Commission.	5
32	02-1402.65		Falsifying documents and testimony.	5

	A	B	C	D
33	02-1402.66		Arrest records.	5
34	02-1403.08		Posting of notice of complaint in housing accommodation.	5
35	02-1543		Curfew authority; defenses; enforcement and penalties	5
36	02-1602		Persons who may be represented; appointment of private attorneys; determination of financial eligibility	5
37	02-218.64		Identification of certified business enterprises in bids or proposals; false statements on certification; penalties.	5
38	03-0206		Unlawful acts.	5
39	03-0417		Penalties.	5
40	03-0608		Violations of Commission rules; penalties.	5
41	03-1205.09a		Licenses for foreign doctors of eminence and authority.	5
42	03-1210.01		Practicing without license, registration, or certification.	5
43	03-1210.03		Certain representations prohibited.	5
44	03-1210.04		Filing false document or evidence; false statements.	5
45	03-1210.05		Fraudulent sale, obtaining, or furnishing of documents.	5
46	03-1210.06		§ 3–1210.06. Restrictions relating to pharmacies.	5
47	03-1315		Sale of lottery and daily numbers games tickets by licensed agents; unauthorized sale.	5
48	03-1332		Aiding or abetting unauthorized bingo games, raffles, or Monte Carlo night parties; penalties.	5
49	03-1333		Forged, counterfeit or altered tickets.	5
50	03-1334		Gambling by minor prohibited.	5
51	04-0125		Assisting child to leave institution without authority; concealing such child; duty of police.	5
52	04-0218.01	(a)	Fraud in obtaining public assistance; repayment; liability of family members; penalties.	5
53	04-0218.01	(b)	Fraud in obtaining public assistance; repayment; liability of family members; penalties.	5
54	04-0218.03		Unauthorized use of identification card.	5
55	04-0218.05		Penalties.	5
56	04-0324		Medical assistance.	5
57	04-0513		False claims.	5
58	04-0802		Penalties; prohibited acts.	5
59	04-1303.07		Unauthorized disclosure of records.	5
60	04-1305.09	(a)	Penalties for violation of confidentiality.	5
61	04-1305.09	(b)	Penalties for violation of confidentiality.	5
62	04-1321.07		Failure to make report.	5
63	04-1371.14		Failure to make report.	5
64	04-1408		Violations; prosecution.	5

	A	B	C	D
65	04-1501.10		Penalties for disclosing confidential information.	5
66	05-0113.33		Penalties; private right of action.	5
67	05-0115.03		Neglect to make arrest for offense committed in presence.	1
68	05-0117.05		False or fictitious reports to Metropolitan Police.	3
69	05-0121.03		Acting without compliance with law.	5
70	05-0121.05		Compromise of felony; withholding information; receiving compensation from person arrested or liable to arrest; permitting escape.	5
71	05-0123.01		Prohibitions; affiliation with organization advocating strikes; conspiracy to interfere with operation of police force by strike; notice of intention to resign.	5
72	05-0123.02		Use of unnecessary or wanton force.	5
73	05-0125.03		Trachea hold prohibited; carotid artery hold restricted.	5
74	05-0132.21		School safe passage emergency zones.	5
75	05-0207		Rules and regulations.	5
76	05-0407		Resignation without notice; engaging in strike; conspiracy to obstruct operations of Department.	5
77	05-1308		Protection of emergency 2-way radio communications - Penalties.	5
78	05-1406		Deaths - Notification; penalties for noncompliance.	5
79	06-0506		Penalties.	5
80	06-0601.08		Violation of subchapter.	5
81	06-0731.04		Penalty.	5
82	06-0808		Occupation of unsafe structure.	5
83	06-0903		Condemnation procedure; occupancy of condemned buildings.	5
84	06-0904		Occupancy of condemned building.	5
85	06-0905		Owner to repair or demolish condemned building.	5
86	06-0907		Failure of owner to comply with order; repair or demolition of building; cost assessed against property	5
87	06-0911		Interference with inspection or work.	5
88	06-0912		Destruction, removal, or concealment of copy of order of condemnation affixed to building	5
89	06-0915		Neglect by tenants or occupants	5
90	06-1110		Penalties; remedies; enforcement.	5
91	06-1406		Penalties.	5
92	07-0131		Regulations to prevent spread of communicable diseases.	5
93	07-0136		Persons believed to be carriers of communicable diseases - Leaving detention without discharge.	5

	A	B	C	D
94	07-0138		Access to building for inspection	5
95	07-0139		Interference unlawful	5
96	07-0225		Penalties.	5
97	07-0304	(a)	Penalties; prosecutions.	5
98	07-0304	(b)	Penalties; prosecutions.	5
99	07-0627		Extent of medical liability; transfer of patient; criminal offenses.	5
100	07-0704.01	(c)	Enforcement; penalties.	5
101	07-0704.01	(d)	Enforcement; penalties.	5
102	07-0704.01	(e)	Enforcement; penalties.	5
103	07-0871.05		Penalties.	5
104	07-1007		Penalties.	5
105	07-1207.02	(a)	Criminal penalties.	5
106	07-1207.02	(b)	Criminal penalties.	5
107	07-1501.02		Penalties; prosecutions.	5
108	07-1531.15		Sale or purchase of parts prohibited.	5
109	07-1531.16		Other prohibited acts.	5
110	07-1541.04		Penalties; prosecutions.	5
111	07-1671.08		Penalties.	5
112	07-1721.02		Sale of tobacco to minors under 18 years of age.	5
113	07-1721.04		Self-service sale of tobacco.	5
114	07-1721.05		Package requirements.	5
115	07-1721.06		Prohibited sellers.	5
116	07-1803.06		Penalties and other remedies.	5
117	07-1912	(a)(1)	Penalties; enforcement.	5
118	07-1912	(a)(2)	Penalties; enforcement.	5
119	07-1912	(a)(3)	Penalties; enforcement.	5
120	07-2046		Criminal and civil penalties.	5
121	07-2108	(f)	Enforcement and penalties.	5
122	07-2108	(g)	Enforcement and penalties.	5
123	07-2341.24		Criminal and civil penalties.	5
124	07-246		Criminal penalties for unlawful use or disclosure	5
125	07-246		Criminal penalties for unlawful use or disclosure	5
126	07-2502.01		Registration requirements.	2
127	07-2502.13		Possession of self-defense sprays.	2
128	07-2505.01		Sales and transfers prohibited.	5
129	07-2506.01		Persons permitted to possess ammunition.	2
130	07-2507.02	(c)(1)	Responsibilities regarding storage of firearms.	5
131	07-2507.02	(c)(2)	Responsibilities regarding storage of firearms.	5
132	07-2507.06	(a)(1)	Penalties.	5
133	07-2507.06	(a)(2)(B	Penalties.	5
134	07-2507.06	(a)(3)(A	Penalties.	5
135	07-2507.06	(a)(3)(B	Penalties.	5
136	07-2508.07		Penalties; mandatory release condition.	5
137	07-2509.04	(c)	Failure to Carry a Concealed Pistol License	5
138	07-2854	(b)(1)	Penalties.	5
139	07-0744	((1)	Penalties.	5
140	07-0744	((2)	Penalties.	5

	A	B	C	D
141	07-0744	((3)	Penalties.	5
142	07-0804		Penalty.	5
143	08-0103.16	(a)(2)	Penalties.	5
144	08-0103.16	(a)(2)	Penalties.	5
145	08-0103.16	(b)(2)	Penalties.	5
146	08-0105.14		Penalties.	5
147	08-0111.09		Criminal action.	5
148	08-0203		Failure to make required connections.	5
149	08-0205		Definitions; repair, maintenance, and renewal of water service pipes and building sewers; compensation to property owners; false claims for compensation; severability.	5
150	08-0231.16		Criminal penalties.	5
151	08-0305		Penalty.	5
152	08-0418		Penalties.	5
153	08-0505		Violations of § 8-502, § 8-504, or § 8-507.	5
154	08-0604		Penalties.	5
155	08-0632.01		Liabilities.	5
156	08-0704		Collection and disposal of refuse authorized as municipal function; purchase or lease of facilities; sale of products; gratuities prohibited; mutual aid agreements for debris removal.	5
157	08-0708		Incinerators for combustible refuse - Penalties.	5
158	08-0902	(b)(2)	Prohibition and penalties.	5
159	08-0902	(b)(3)	Prohibition and penalties.	5
160	08-0902	(b)(4)	Prohibition and penalties.	5
161	08-101.05d		Criminal penalties.	5
162	08-101.05e		False statements.	5
163	08-1060	(g)	Remedies and penalties.	5
164	08-1060	(i)	Remedies and penalties.	5
165	08-1311		Penalties.	5
166	08-1404		Penalties.	5
167	08-1831.01		Release of animals.	5
168	08-1906		Penalties.	5
169	08-2103.05		Rodent harborage prohibited.	5
170	09-0431.01		Permit required; exceptions.	5
171	09-0433.01		Permit required; exceptions.	5
172	09-0705		Penalty.	5
173	09-0810		Penalty.	5
174	09-1115.03	58	Woodrow Wilson Bridge and Tunnel Compact.	5
175	09-1115.03	59	Woodrow Wilson Bridge and Tunnel Compact.	5
176	10-0137.01		Authority of the Director of the Department of Recreation and Parks to regulate District parks.	5
177	10-0503.12		Public travel in and occupancy of restricted.	5
178	10-0503.13		Obstruct Roadway on US Capitol Grounds	5
179	10-0503.14		Sale of goods, advertising, or begging forbidden.	5

	A	B	C	D
180	10-0503.15		Removal or Injury of Property Forbidden	5
181	10-0503.16	(a)	Unlawful conduct Capitol Grounds	5
182	10-0503.16	(b)	Unlawful conduct.	5
183	10-0503.17		Parades, assemblages, and displays forbidden.	5
184	10-0503.20	(d)	Protection of Congressional personnel by Capitol Police.	5
185	10-0509.03		Penalty for violation of rules and regulations.	5
186	10-1104.04		Penalties.	5
187	10-1181.07		Enforcement	5
188	11-0944		Contempt power.	5
189	11-1906	(c)(1)	Qualification of jurors.	5
190	11-1906	(d)	Qualification of jurors.	5
191	11-1907		Summoning of prospective jurors.	5
192	11-1913		Protection of employment of jurors.	5
193	11-1915		Fraud in the selection process.	5
194	11-2606		Receipt of other payments.	5
195	16-0402		Prohibitions and penalties.	5
196	16-1005	(f)	Hearing; evidence; protection order.	5
197	16-1005	(g)	Hearing; evidence; protection order.	5
198	16-1024	(a)	[Parental kidnapping] Penalties.	2
199	16-1024	(b)(1)	[Parental kidnapping] Penalties.	2
200	16-1024	(b)(1)	[Parental kidnapping] Penalties.	2
201	16-1024	(b)(2)	[Parental kidnapping] Penalties.	2
202	16-1024	(b)(2)	[Parental kidnapping] Penalties.	2
203	16-2336		Unlawful disclosure of records; penalties	5
204	16-2348		Parentage records; confidentiality; inspection and disclosure.	5
205	16-2364		Unlawful disclosure.	5
206	16-2394		Unlawful disclosure.	5
207	16-5102		Service of summons.	5
208	18-0112		Taking and carrying away, or destroying, mutilating, or secreting will.	5
209	19-0101.06		Penalties.	5
210	20-0102		Verification.	5
211	21-0591		Offenses and penalties.	5
212	22-0301		Definition and penalty. (Arson)	1
213	22-0302		Burning one's own property with intent to defraud or injure another.	1
214	22-0303		Malicious burning, destruction, or injury of another's property.	1
215	22-0303		Malicious burning, destruction, or injury of another's property.	1
216	22-0401		Assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse.	1
217	22-0402		Assault with intent to commit mayhem or with dangerous weapon.	1
218	22-0403		Assault with intent to commit any other offense.	1
219	22-0404	(a)(1)	Assault or threatened assault in a menacing manner; stalking.	1

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220	22-0404	(a)(2)	Assault or threatened assault in a menacing manner; stalking.	1
221	22-0404.01		Aggravated assault	1
222	22-0404.02		Assault on a public vehicle inspection officer.	1
223	22-0404.03		Aggravated assault on a public vehicle inspection officer.	1
224	22-0405	(b)	Assault on member of police force, campus or university special police, or fire department.	1
225	22-0405	(c)	Assault on member of police force, campus or university special police, or fire department.	1
226	22-0405.01		Resisting arrest by individual reasonably believed to be law enforcement officer	2
227	22-0406		Mayhem or maliciously disfiguring.	1
228	22-0407		Threats to do bodily harm.	1
229	22-0501		Bigamy.	5
230	22-0601		Breaking and entering vending machines and similar devices.	1
231	22-0704		Corrupt influence; officials.	3
232	22-0711		[Bribery] Definitions	3
233	22-0712		[Bribery] Prohibited acts; penalty.	3
234	22-0713		Bribery of witness; penalty.	3
235	22-0721		[Obstruction of Justice] Definitions.	3
236	22-0722		[Obstruction of Justice] Prohibited acts; penalty.	3
237	22-0723		Tampering with physical evidence; penalty.	3
238	22-0801	(a)	[First Degree Burglary] Definition and penalty.	1
239	22-0801	(b)	[Second Degree Burglary] Definition and penalty.	1
240	22-0811	(b)(1)	Contributing to the delinquency of a minor.	4
241	22-0811	(b)(2)	Contributing to the delinquency of a minor.	4
242	22-0811	(b)(3)	Contributing to the delinquency of a minor.	4
243	22-0811	(b)(4)	Contributing to the delinquency of a minor.	4
244	22-0811	(b)(5)	Contributing to the delinquency of a minor.	4
245	22-0851	(b)	Protection of District public officials.	2
246	22-0851	(c)	Protection of District public officials.	2
247	22-0851	(d)	Protection of District public officials.	2
248	22-0861	(b)(1)	Harassing, interfering with, injuring, or obstructing a police animal.	4
249	22-0861	(b)(2)	Harassing, interfering with, injuring, or obstructing a police animal.	4
250	22-0901		[Trademark Counterfeiting] Definitions	2
251	22-0902	(b)(1)	Trademark counterfeiting.	2
252	22-0902	(b)(2)	Trademark counterfeiting.	2
253	22-0902	(b)(3)	Trademark counterfeiting.	2
254	22-0931		Short Title	1
255	22-0932		Definitions	1
256	22-0933		Criminal abuse of a vulnerable adult.	1
257	22-0933		Criminal abuse of a vulnerable adult.	1
258	22-0933		Criminal abuse of a vulnerable adult.	1
259	22-0933.01		Financial exploitation of a vulnerable adult or elderly person	1

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260	22-0934		Criminal negligence.	1
261	22-0934		Criminal negligence.	1
262	22-0934		Criminal negligence.	1
263	22-0935		Exception	1
264	22-0936		Penalties	1
265	22-0936.01		Criminal penalties for financial exploitation of a vulnerable adult or elderly person	1
266	22-0937		Civil penalties for financial exploitation of a vulnerable adult or elderly person	1
267	22-0938		Injunctive relief and protections	1
268	22-0951	(a)(2)	Criminal street gangs.	3
269	22-0951	(b)(2)	Criminal street gangs.	3
270	22-0951	(c)(2)	Criminal street gangs.	3
271	22-1001	(a)(1)	Definitions and penalties.	4
272	22-1001	(d)	Definitions and penalties.	4
273	22-1002		Other cruelties to animals	4
274	22-1002.01		Reporting requirements	4
275	22-1003		Rest, water and feeding for animals transported by railroad company	4
276	22-1004		Arrests without warrant authorized; notice to owner	4
277	22-1005		Issuance of search warrants	4
278	22-1006		Prosecution of offenders; disposition of fines	4
279	22-1006.01		Penalty for engaging in animal fighting.	4
280	22-1007		Impounded animals to be supplied with food and water	4
281	22-1008		Relief of impounded animals	4
282	22-1009		Keeping or using place for fighting or baiting of fowls or animals; arrest without warrant	4
283	22-1011		Neglect of sick or disabled animals	4
284	22-1012		Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.	4
285	22-1013		Definitions	4
286	22-1015		Penalty for engaging in animal fighting	4
287	22-1101	(c)(1)	[Child cruelty] Definition and penalty.	1
288	22-1101	(c)(2)	[Child cruelty] Definition and penalty.	1
289	22-1102		Refusal or neglect of guardian to provide for child under 14 years of age.	1
290	22-1211		Tampering with a detection device.	1
291	22-1301		Affrays.	1
292	22-1307		Crowding, obstructing, or incommoding.	1
293	22-1308		Playing games in streets.	1
294	22-1309		Throwing stones or other missiles.	4
295	22-1310		Urging dogs to fight or create disorder.	4
296	22-1311	(b)	Allowing dogs to go at large.	4
297	22-1311	(a)	Allowing dogs to go at large.	4
298	22-1311	(a)	Allowing dogs to go at large.	4
299	22-1312		Lewd, indecent, or obscene acts; sexual proposal to a minor.	2

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300	22-1313		Kindling bonfires.	3
301	22-1314.01		[Access to Medical Facility] Definitions	4
302	22-1314.02		[Access to Medical Facility] Prohibited acts.	4
303	22-1317		Flying fire balloons or parachutes.	1
304	22-1318		Driving or riding on footways in public grounds.	1
305	22-1319	(a)	False alarms and false reports; hoax weapons.	3
306	22-1319	(a-1)	False alarms and false reports; hoax weapons.	3
307	22-1319	(b)(3)	False alarms and false reports; hoax weapons.	3
308	22-1319	(c)(3)	False alarms and false reports; hoax weapons.	3
309	22-1319	(d)(3)	False alarms and false reports; hoax weapons.	3
310	22-1321		Disorderly conduct.	1
311	22-1322	(b)	Rioting or inciting to riot	1
312	22-1322	(c)	Rioting or inciting to riot	1
313	22-1322	(d)	Rioting or inciting to riot	1
314	22-1323		Obstructing Bridges Connecting D.C. and Virginia	1
315	22-1341		Unlawful entry of a motor vehicle.	1
316	22-1402		Recordation of deed, contract, or conveyance with intent to extort money	1
317	22-1403		False personation before court, officers, notaries	4
318	22-1404		Falsely Impersonating Public officer or minister	4
319	22-1405		False personation of inspector of departments of District.	4
320	22-1406		False personation of police officer.	4
321	22-1409		Use of official insignia; penalty for unauthorized use.	4
322	22-1502		Forging or imitating brands or packaging of goods	2
323	22-1510		Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined.	1
324	22-1510		Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined.	1
325	22-1511		Fraudulent advertising.	2
326	22-1512		Prosecution under 22-1511	2
327	22-1513		Penalty under 22-2511	2
328	22-1514		Fraudulent interference or collusion in jury selection.	3
329	22-1701		Lotteries; promotion; sale or possession of tickets.	4
330	22-1702		Possession of lottery or policy tickets	4
331	22-1703		Permitting sale of lottery tickets on premises	4
332	22-1704		Gaming; setting up gaming table; inducing play	4
333	22-1705		Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses.	4

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334	22-1706		Three Card Monte	4
335	22-1707		"Gaming table" defined	4
336	22-1708		Gambling pools and bookmaking; athletic contest defined.	4
337	22-1713	(c)	Corrupt influence in connection with athletic contests.	4
338	22-1713	(d)	Corrupt influence in connection with athletic contests.	4
339	22-1714		Immunity of witnesses; record	4
340	22-1801		"Writing" and "paper defined.	2
341	22-1802		"Anything of value" defined.	2
342	22-1803		Attempts to commit crime	1
343	22-1804		Second Conviction	1
344	22-1804a		Penalty for felony after at least 2 prior felony convictions	1
345	22-1805		Persons advising, inciting, or conniving at criminal offense to be charged as principals	1
346	22-1805a	(a)(1)	Conspiracy	1
347	22-1805a	(a)(2)	Conspiracy	1
348	22-1806		Accessories after the fact	3
349	22-1807		Punishment for offenses not covered by provisions of Code	1
350	22-1808		Offenses commited beyond District	3
351	22-1809		Prosecutions.	3
352	22-1810		Threatening to kidnap or injure a person or damage his property.	1
353	22-1831		[Human trafficking] Definitions.	1
354	22-1832		[Human trafficking] Forced labor	1
355	22-1833		[Human trafficking] Trafficking in labor or commercial sex acts.	1
356	22-1834		[Human trafficking] Sex trafficking of children.	1
357	22-1835		[Human trafficking] Unlawful conduct with respect to documents in furtherance of human trafficking.	1
358	22-1836		[Human trafficking] Benefitting financially from human trafficking.	1
359	22-1837		[Human trafficking] Penalties.	1
360	22-1838		[Human trafficking] Forfeiture.	1
361	22-1839		[Human trafficking] Reputation or opinion evidence.	1
362	22-1840		[Human trafficking] Civil Action.	1
363	22-1841		[Human trafficking] Data collection and dissemination.	1
364	22-1842		[Human trafficking] Training program.	1
365	22-1843		[Human trafficking] Public posting of human trafficking hotline	1
366	22-1901		[Incest] Definition and penalty.	2
367	22-1931		Obstructing, preventing, or interfering with reports to or requests for assistance from law enforcement agencies, medical providers, or child welfare agencies.	3

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368	22-2001		[Kidnapping] Definition and penalty; conspiracy.	1
369	22-2101		Murder in the first degree - Purposeful killing; killing while perpetrating certain crimes.	1
370	22-2102		Murder in the first degree - Placing obstructions upon or displacement of railroads.	1
371	22-2103		Murder in the second degree.	1
372	22-2104		Penalty for murder in first and second degree.	1
373	22-2104.01		Sentencing procedure for murder in the first degree.	1
374	22-2105		Penalty for manslaughter. (Voluntary Manslaughter)	1
375	22-2105		Penalty for manslaughter. (Involuntary Manslaughter)	1
376	22-2106		Murder of law enforcement officer.	1
377	22-2107	(a)	Penalty for solicitation of murder or other crime of violence.	1
378	22-2107	(b)	Penalty for solicitation of murder or other crime of violence.	1
379	22-2201		Certain obscene activities and conduct declared unlawful	2
380	22-2301		[Panhandling] Definitions.	3
381	22-2302		[Panhandling] Prohibited acts.	3
382	22-2303		[Panhandling] Permitted activity.	3
383	22-2304		[Panhandling] Penalties.	3
384	22-2305		[Panhandling] Conduct of persecutions.	3
385	22-2306		[Panhandling] Disclosure.	3
386	22-2402		Perjury.	3
387	22-2403		Subornation of perjury.	3
388	22-2404		False swearing.	3
389	22-2405		False statements.	3
390	22-2501		Possession of implements of crime; penalty.	1
391	22-2601		Escape from institution or officer.	1
392	22-2603.01		[CONTRABAND] Definitions.	1
393	22-2603.02	(b)	Unlawful possession of contraband.	1
394	22-2603.02	(a)	Unlawful possession of contraband.	1
395	22-2603.02	(c)	Unlawful possession of contraband.	1
396	22-2603.03		[CONTRABAND] Penalties.	1
397	22-2603.04		[CONTRABAND] Detainment power.	1
398	22-2701		Engaging in prostitution or soliciting for prostitution.	3
399	22-2701.01		Definitions.	3
400	22-2703		Suspension of sentence; conditions; enforcement.	3
401	22-2704		Abducting or enticing child from his or her home for purposes of prostitution; harboring such child.	3
402	22-2705	(c)(1)	Pandering; inducing or compelling an individual to engage in prostitution.	3

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403	22-2705	(c)(2)	Pandering; inducing or compelling an individual to engage in prostitution.	3
404	22-2706	(b)(1)	Compelling an individual to live life of prostitution against his or her will.	3
405	22-2706	(b)(2)	Compelling an individual to live life of prostitution against his or her will.	3
406	22-2707	(b)(1)	Procuring; receiving money or other valuable thing for arranging assignation.	3
407	22-2707	(b)(2)	Procuring; receiving money or other valuable thing for arranging assignation.	3
408	22-2708		Causing spouse or domestic partner to live in prostitution.	3
409	22-2709		Detaining an individual in disorderly house for debt there contracted.	3
410	22-2710		Procuring for house of prostitution.	3
411	22-2711		Procuring for third persons.	3
412	22-2712		Operating house of prostitution.	3
413	22-2713		Premises occupied for lewdness, assignation, or prostitution declared nuisance.	3
414	22-2714		Abatement of nuisance under 22-2713 by injunction--temporary injunction.	3
415	22-2715		Abatement of nuisance under 22-2713 by injunction--trial; dismissal of complaint; prosecution; costs.	3
416	22-2716		Violation of injunction granted under § 22-2714.	3
417	22-2717		Order of abatement; sale of propoerty; entry of closed premises punishable as contempt.	3
418	22-2718		Disposition of proceeds of sale.	3
419	22-2719		Bond for abatement; order for delivery of premises; effect of release.	3
420	22-2720		Tax for maintaining such nuisance.	3
421	22-2722		Keeping bawdy or disorderly houses.	3
422	22-2723		Property subject to seizure and forfeiture.	3
423	22-2724		Impoundment	3
424	22-2725		Anti-prostitution vehicle impoundment proceeds fund.	3
425	22-2751		Definitions.	3
426	22-2752		Engaging in an unlawful protest targeting a residence	3
427	22-2801		Robbery.	1
428	22-2802		Attempt to commit robbery	1
429	22-2803	(b)(2)	Armed Carjacking.	1
430	22-2803	(a)(2)	Carjacking.	1
431	22-3001		[Sexual Abuse] Definitions.	1
432	22-3002		First degree sexual abuse.	1
433	22-3003		Second degree sexual abuse.	1
434	22-3004		Third degree sexual abuse.	1
435	22-3005		Fourth degree sexual abuse.	1
436	22-3006		Misdemeanor sexual abuse.	1
437	22-3007		Defense to sexual abuse.	1

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438	22-3008		First degree child sexual abuse.	1
439	22-3009		Second degree child sexual abuse.	1
440	22-3009.01		First degree sexual abuse of a minor.	1
441	22-3009.02		Second degree sexual abuse of a minor.	1
442	22-3009.03		First degree sexual abuse of a secondary education student	1
443	22-3009.04		Second degree sexual abuse of a secondary education student	1
444	22-3010		Enticing a child or minor.	1
445	22-3010.01		Misdemeanor sexual abuse of a child or minor.	1
446	22-3010.02		Arranging for a sexual contact with a real or fictitious child.	1
447	22-3011		Defenses to child sexual abuse and sexual abuse of a minor.	1
448	22-3012		State of mind proof requirement.	1
449	22-3013		First degree sexual abuse of a ward, patient, client, or prisoner.	1
450	22-3014		Second degree sexual abuse of a ward, patient, client, or prisoner.	1
451	22-3015		First degree sexual abuse of a patient or client.	1
452	22-3016		Second Degree Sexual Abuse of a Patient or Client	1
453	22-3017		Defenses to sexual abuse of a ward, patient, or client.	1
454	22-3018		Attempts to commit sexual offenses	1
455	22-3019		No immunity from prosecution for spuses or domestic partners.	1
456	22-3020		Aggravating circumstances.	1
457	22-3020.51		Definitions.	2
458	22-3020.52		Reporting requirements and privileges.	2
459	22-3020.53		Defense to non-reporting.	2
460	22-3020.54		Penalties.	2
461	22-3020.55		Immunity from liability.	2
462	22-3021		Reputation or opinion evidence of victim's past sexual behavior inadmissible.	2
463	22-3022		Admissibility of other evidence of victim's past sexual behavior.	2
464	22-3023		Prompt reporting.	2
465	22-3024		Privilege inapplicable for spouses or domestic partners	2
466	22-3051		[Non-consensual pornography] Definitions.	2
467	22-3052		Unlawful disclosure.	2
468	22-3053		First-degree unlawful publication.	2
469	22-3054		Second-degree unlawful publication.	2
470	22-3055		[Non-consensual pornography] Exclusions.	2
471	22-3056		[Non-consensual pornography] Affirmative defenses.	2
472	22-3057		[Non-consensual pornography] Jurisdiction.	2
473	22-3101		[Sexual performance using minors] Definitions.	2

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474	22-3102		[Sexual performance using minors] Prohibited acts.	2
475	22-3103		[Sexual performance using minors] Penalties	2
476	22-3104		[Sexual performance using minors] Affirmative defenses.	2
477	22-3131		[Stalking] Short title.	1
478	22-3132		[Stalking] Definitions.	1
479	22-3133		Stalking	1
480	22-3133		Stalking	1
481	22-3133		Stalking	1
482	22-3134		[Stalking] Penalties.	1
483	22-3135		[Stalking] Jurisdiction.	1
484	22-3151		[Terrorism] Short title.	3
485	22-3152		[Terrorism] Definitions.	3
486	22-3153		Acts of terrorism; penalties	3
487	22-3154		Manufacture or possession of a weapon of mass destruction.	3
488	22-3155		Use, dissemination, or detonation of a weapon of mass destruction.	3
489	22-3156		[Terrorism] Jurisdiction.	3
490	22-3201		Definitions.	1
491	22-3202		Aggregation of amounts received to dertermine grade of offense.	1
492	22-3203		Consecutive sentences.	1
493	22-3204		Case referral.	1
494	22-3211		Penalties for theft	1
495	22-3211		Theft	1
496	22-3212		Penalties for theft	1
497	22-3213		Shoplifting	1
498	22-3214		Commerical Piracy	1
499	22-3214.01		Deceptive Labeling	1
500	22-3214.01		Deceptive Labeling	1
501	22-3214.02		Unlawful operation of a recording device in a motion picture theater.	2
502	22-3215	(d)(1)	UUV	1
503	22-3215	(d)(2)(A	UUV	1
504	22-3215	(d)(2)(A	UUV	1
505	22-3215	(d)(4)	UUV	1
506	22-3216		TPWR	1
507	22-3218.01		[Theft of Utility Service] Definitions.	5
508	22-3218.02		Theft of Utility Service] Unlawful acts	5
509	22-3218.03		Theft of Utility Service] Presumptions and rebuttal evidence.	5
510	22-3218.04		Theft of Utility Service] Penalties for violation.	5
511	22-3221	(a)(1)	Fraud	1
512	22-3221	(a)(2)	Fraud	1
513	22-3221	(b)(1)	Fraud	1
514	22-3221	(b)(2)	Fraud	1
515	22-3222		Penalties for fraud.	1
516	22-3223	(d)(1)	Credit Card Fraud	1

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517	22-3223	(d)(2)	Credit Card Fraud	1
518	22-3224		Fraudulent registration.	1
519	22-3224.01		Jurisdiction.	1
520	22-3225.01		[Insurance fraud] Definitions.	5
521	22-3225.02		[Insurance fraud] Insurance fraud in the first degree	5
522	22-3225.03		Insurance fraud in the second degree	5
523	22-3225.03a		[Insurance fraud] Misdemeanor insurance fraud	5
524	22-3225.04		[Insurance fraud] Penalties.	5
525	22-3225.05		[Insurance fraud] Restitution.	5
526	22-3225.06		[Insurance fraud] Indemnity.	5
527	22-3225.07		[Insurance fraud] Practitioners.	5
528	22-3225.08		[Insurance fraud] Investigation and report of insurance fraud.	5
529	22-3225.09		[Insurance fraud] Insurance fraud prevention and detection.	5
530	22-3225.10		[Insurance fraud] Regulations.	5
531	22-3225.11		[Insurance fraud] Limited law enforcement authority.	5
532	22-3225.12		[Insurance fraud] Annual anti-fraud activity reporting requirement.	5
533	22-3225.13		[Insurance fraud] Immunity.	5
534	22-3225.14		[Insurance fraud] Prohibition of solicitation.	5
535	22-3225.15		[Insurance fraud] Jurisdiction.	5
536	22-3226.01		[Telephone fraud] Definitions.	5
537	22-3226.02		[Telephone fraud] Application for a certificate of registration of telephone solicitor.	5
538	22-3226.03		[Telephone fraud] Surety bond requirements for telephone solicitors.	5
539	22-3226.04		[Telephone fraud] Penalties.	5
540	22-3226.05		[Telephone fraud] Restitution.	5
541	22-3226.06		[Telephone fraud] Telephone Solicitation	5
542	22-3226.06		[Telephone fraud] Telephone Solicitation	5
543	22-3226.06		[Telephone fraud] Telephone Solicitation	5
544	22-3226.07		[Telephone fraud] Deceptive acts and practices prohibited.	5
545	22-3226.08		[Telephone fraud] Abusive telemarketing acts or practices.	5
546	22-3226.09		[Telephone fraud] Civil penalties.	5
547	22-3226.10		[Telephone fraud] Criminal penalties.	5
548	22-3226.11		[Telephone fraud] Private right of action.	5
549	22-3226.12		[Telephone fraud] Statute of limitations period.	5
550	22-3226.13		[Telephone fraud] Task force to combat fraud.	5
551	22-3226.15		[Telephone fraud] General disclosures.	5
552	22-3227.01		[Identity Theft] Definitions.	1
553	22-3227.02		[Identity Theft] Identify Theft	1
554	22-3227.02		[Identity Theft] Identify Theft	1
555	22-3227.03		[Identity Theft] Penalties for identity theft.	1

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556	22-3227.04		[Identity Theft] Restitution.	1
557	22-3227.05		[Identity Theft] Correction of public records.	1
558	22-3227.06		[Identity Theft] Jurisdiction.	1
559	22-3227.07		[Identity Theft] Limitations.	1
560	22-3227.08		[Identity Theft] Police reports.	1
561	22-3231		Trafficking in stolen property	1
562	22-3232	(c)(1)	Receiving stolen property	1
563	22-3232	(c)(2)	Receiving stolen property	1
564	22-3233	(b)(1)	Altering or removing motor vehicle identification numbers.	1
565	22-3233	(b)(2)	Altering or removing motor vehicle identification numbers.	1
566	22-3234		Altering or removing bicycle identification numbers.	1
567	22-3241	(a)	Forgery	1
568	22-3241	(b)	Forgery	1
569	22-3241	(c)	Forgery	1
570	22-3242		Penalties for forgery	1
571	22-3251		Extortion	1
572	22-3252		Blackmail	1
573	22-3301		Forcible entry and detainer	1
574	22-3302	(a)(1)	Unlawful Entry	1
575	22-3302	(b)	Unlawful Entry	1
576	22-3303		Grave robbery; buying or selling dead bodies.	1
577	22-3305		Placing explosives with intent to destroy or injure property.	1
578	22-3306		Defacing books, manuscripts, publications, or works of art.	1
579	22-3307		Destroying or defacing public records.	1
580	22-3309		Destroying boundary markers.	1
581	22-3310	((1)	Destroying vines, bushes, shrubs, trees or protections thereof; penalty.	1
582	22-3310	((2)	Destroying vines, bushes, shrubs, trees or protections thereof; penalty.	1
583	22-3311		Disorderly conduct in public buildings or grounds; injury to or destruction of United States property.	5
584	22-3312.01		Defacing public or private property.	1
585	22-3312.02		Defacing or burning cross or religious symbol; display of certain emblems	4
586	22-3312.03		Wearing hoods or masks.	4
587	22-3312.04	(d)	Penalties	1
588	22-3312.04	(e)	Penalties	1
589	22-3312.05		[Graffiti] Definitions.	1
590	22-3313		Destroying or defacing building material for streets	1
591	22-3314		Destroying cemetery railing or tomb.	1
592	22-3318		Malicious pollution of water	1
593	22-3319		Placing obstructions on or displacement of railway tracks	1
594	22-3320		Obstructing public road; removing milestones	1

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595	22-3321		Obstructing public highway	1
596	22-3322		Fines under 22-3321 to be collected in name of united states.	1
597	22-3401		Use of "District of Columbia" or similar designation by private detective or collection agency - Prohibited	4
598	22-3402		Use of "District of Columbia" or similar designation by private detective or collection agency - Penalty.	4
599	22-3403		Use of "District of Columbia" or similar designation by private detective or collection agency - prosecutions for violations.	4
600	22-3531	(f)(1)	Voyeurism	2
601	22-3531	(f)(2)	Voyeurism	2
602	22-3571.01		Fines for criminal offenses.	1
603	22-3571.02		Applicability of fine proportionality provision.	1
604	22-3601		Enhanced penalty for crimes against senior citizen victims.	2
605	22-3602		Enhanced penalty for committing certain dangerous and violent crimes against a citizen patrol member.	2
606	22-3611		Enhanced penalty for committing crime of violence against minors.	2
607	22-3701		[Bias-related crime] Definitions.	1
608	22-3702		[Bias-related crime] Collection and publication of data.	1
609	22-3703		[Bias-related crime] Bias-related crime.	1
610	22-3704		[Bias-related crime] Civil action.	1
611	22-3751		Enhanced penalties for offenses committed against taxicab drivers.	2
612	22-3751.02		Enhanced penalties for offenses committed against transit operators and Metrorail station managers.	2
613	22-3752		[Transportation worker enhancement] Enumerated offenses.	2
614	22-3803		[Sexual Psychopaths] Definitions.	5
615	22-3804		[Sexual Psychopaths] Filing of statement.	5
616	22-3805		[Sexual Psychopaths] Right to counsel.	5
617	22-3806		[Sexual Psychopaths] Examination by psychiatrists.	5
618	22-3807		[Sexual Psychopaths] When hearing is required.	5
619	22-3808		[Sexual Psychopaths] Hearing; commitment.	5
620	22-3809		[Sexual Psychopaths] Parole; discharge.	5
621	22-3810		[Sexual Psychopaths] Stay of criminal proceedings.	5
622	22-3811		[Sexual Psychopaths] Criminal law unchanged.	5
623	22-3531		[HIV Testing of Certain Criminal Offenders] Definitions.	5

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624	22-3531		[HIV Testing of Certain Criminal Offenders] Testing and counseling	5
625	22-3531		[HIV Testing of Certain Criminal Offenders] Rules.	5
626	22-4001		[Sex offender registration] Definitions.	5
627	22-4002		[Sex offender registration] Registration period.	5
628	22-4003		[Sex offender registration] Certification duties of the Superior Court.	5
629	22-4004		[Sex offender registration] Dispute resolution procedures in the Superior Court.	5
630	22-4005		[Sex offender registration] Duties of the Department of Corrections.	5
631	22-4006		[Sex offender registration] Duties of the Department of Mental Health.	5
632	22-4007		[Sex offender registration] Registration functions of the Court Services and Offender Supervision Agency.	5
633	22-4008		[Sex offender registration] Verification functions of the Court Services and Offender Supervision Agency.	5
634	22-4009		[Sex offender registration] Change of address or other information.	5
635	22-4010		[Sex offender registration] Maintenance and release of sex offender registration information by the Court Services and Offender Supervision Agency.	5
636	22-4011		[Sex offender registration] Community notification and education duties of the Metropolitan Police Department.	5
637	22-4012		[Sex offender registration] Interagency coordination.	5
638	22-4013		[Sex offender registration] Immunity.	5
639	22-4014		[Sex offender registration] Duties of sex offenders.	5
640	22-4015		Penalties; mandatory release condition	4
641	22-4016		not required for offenses between consenting adults.	5
642	22-4017		[Sex offender registration] Freedom of Information Act exception.	5
643	22-4131		[DNA Testing and Post-Conviction Relief for Innocent Persons] Definitions.	5
644	22-4132		[DNA Testing and Post-Conviction Relief for Innocent Persons] Pre-conviction DNA testing.	5
645	22-4133		[DNA Testing and Post-Conviction Relief for Innocent Persons] Post-conviction DNA testing.	5
646	22-4134		[DNA Testing and Post-Conviction Relief for Innocent Persons] Preservation of evidence	5

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647	22-4135		[DNA Testing and Post-Conviction Relief for Innocent Persons] Motion to vacate a conviction or grant a new trial on the ground of actual innocence.	5
648	22-4151		[DNA Sample Collection] Qualifying offenses.	5
649	22-4201		[National Insititute of Justice Appropriations] Technical assistance and research.	5
650	22-4231		[Criminal Justice Coordinating Council] Definitions.	5
651	22-4232		[Criminal Justice Coordinating Council] Establishment of the Criminal Justice Coordinating Council.	5
652	22-4233		[Criminal Justice Coordinating Council] Membership.	5
653	22-4234		[Criminal Justice Coordinating Council] Duties.	5
654	22-4235		[Criminal Justice Coordinating Council] Administrative support.	5
655	22-4241		[Criminal Justice Coordinating Council] Authorizing federal officials.	5
656	22-4242		[Criminal Justice Coordinating Council] Annual reporting requirement.	5
657	22-4243		[Criminal Justice Coordinating Council] Federal contribution to Criminal Justice Coordinating Council.	5
658	22-4244		[Criminal Justice Coordinating Council] District of Columbia Criminal Justice Coordinating Council defined.	5
659	22-4251		Comprehensive Homicide Elimination Strategy Task Force.	5
660	22-4331		Penalties; prosecutions.	4
661	22-4402		Throwing or depositing matter in Potomac River.	4
662	22-4403		Deposits of deleterious matter in Rock Creek or Potomac River.	4
663	22-4404		Penalties for violation of § 22-4403.	4
664	22-4501		Definitions.	2
665	22-4502		Additional penalty for committing crime when armed.	2
666	22-4502.01		Gun free zones; enhanced penalty.	2
667	22-4503		Unlawful possession of firearm.	2
668	22-4504	(c)	Unlawful possession of firearm.	2
669	22-4503.01		Unlawful discharge of a firearm.	2
670	22-4503.02		Prohibition of firearms from public or private property.	2
671	22-4504	(a)(1)	Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.	2

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672	22-4504	(a)(2)	Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.	2
673	22-4504	(b)	Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.	2
674	22-4504.01		Authority to carry firearm in certain places and for certain purposes.	2
675	22-4504.02		Lawful transportation of firearms.	2
676	22-4505		Exceptions to § 22-4504.	2
677	22-4506		Issue of a license to carry a pistol.	2
678	22-4507		Certain sales of pistols prohibited.	2
679	22-4508		Transfers of firearms regulated.	2
680	22-4509		Dealers of weapons to be licensed.	2
681	22-4510		Licenses of weapons dealers; records; by whom granted; conditions.	2
682	22-4510		Licenses of weapons dealers; records; by whom granted; conditions	2
683	22-4511		False information in purchase of weapons prohibited	2
684	22-4512		Alteration of identifying marks of weapons prohibited.	2
685	22-4513		Exceptions.	2
686	22-4514		Possession of certain dangerous weapons prohibited; exceptions	2
687	22-4514	(c)	Possession of certain dangerous weapons prohibited; exceptions	2
688	22-4515		Penalties	2
689	22-4515a	(d)	Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties.	2
690	22-4516		Severability.	2
691	22-4517		Dangerous articles; definition; taking and destruction; procedure.	2
692	23-0542		Interception, disclosure, and use of wire or oral communications prohibited.	5
693	23-0543		Possession, sale, distribution, manufacture, assembly, and advertising of wire or oral communication intercepting devices prohibited.	5
694	23-0585	(b)(1)	Violation of condition of release on citation; failure to appear.	3
695	23-0585	(b)(2)	Violation of condition of release on citation; failure to appear.	3
696	23-0703		Failure to appear	3
697	23-1103		Procuring business through official or attorney for a consideration prohibited.	5
698	23-1104		Attorneys procuring employment through official or bondsman for a consideration prohibited	5

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699	23-1105		Receiving other than regular fee for bonding prohibited; bondsmen prohibited from endeavoring to secure dismissal or settlement.	5
700	23-1107		Bondsmen prohibited from entering place of detention unless requested by prisoner; record of visit to be kept.	5
701	23-1108		Qualifications of bondsmen; rules to be prescribed by courts; list of agents to be furnished; renewal of authority to act; detailed records to be kept; penalties and disqualifications.	5
702	23-1109		Giving advance information of proposed raid prohibited.	5
703	23-1110		Designation of official to take bail or collateral when court is not in session; issuance of citations.	5
704	23-1327	(a)(1)	Penalties for failure to appear.	3
705	23-1327	(a)(2)	Penalties for failure to appear.	3
706	23-1327	(a)(3)	Penalties for failure to appear.	3
707	23-1328	(a)(1)	Offenses committed during release.	1
708	23-1328	(a)(2)	Offenses committed during release.	1
709	23-1329		Penalties for violation of conditions of release.	3
710	24-0241.05		Suspension of work release privilege; violations of work release plan.	5
711	24-0251.04	(b)	Procedures.	5
712	25-0434		Influencing the application process.	5
713	25-0772		Unlawful importation of beverages.	5
714	25-0781		Sale to minors or intoxicated persons prohibited.	5
715	25-0785	(c)(1)	Delivery, offer, or otherwise making available to persons under 21; penalties.	5
716	25-0831	(a)	Penalty for violation where no specific penalty provided; additional penalty for failure to perform certain required acts.	5
717	25-0831	(b)	Penalty for violation where no specific penalty provided; additional penalty for failure to perform certain required acts.	5
718	25-1001		Possession of Open Container	3
719	25-1002	(c)(1)(A	Purchase, possession or consumption by persons under 21; misrepresentation of age; penalties.	5
720	25-1002	(c)(4)(D	Purchase, possession or consumption by persons under 21; misrepresentation of age; penalties.	5
721	26-0103		Banking businesses to be organized under local or federal provisions; approval of Commissioner of the Department of Insurance, Securities, and Banking required; liquidation of solvent institutions; discontinuance of operation; violations; establishment of international banking facility.	5

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722	26-0107		Restriction on use of words "bank" and "trust company"; violations.	5
723	26-0204		Object; supervision by federal board; strict compliance with provisions required; exception; violations.	5
724	26-0323		Penalties.	5
725	26-0551.21		Penalty for violation of final order.	5
726	26-0634		Requirements for international banking corporation activities.	5
727	26-0907		Violations	5
728	26-1023	(a)	Criminal Penalties	5
729	26-1023	(b)	Criminal Penalties	5
730	26-1023	(c)	Criminal Penalties	5
731	26-1335		Compliance required of foreign corporations or companies.	5
732	28-2305		Contract to assign future salary or wages.	5
733	28-3313		Penalties	5
734	28-3817		Health spa sales.	5
735	28-4502		Contract, combination, or conspiracy to restrain traide	5
736	28-4503		Monopolization	5
737	28-4505	(h)	Civil investigative demand.	5
738	28-4505	(l)	Civil investigative demand.	5
739	28-4607		Penalties	5
740	31-0202		General duties of Commissioner; companies or associations to file certain information; service of legal process; rules and regulations.	5
741	31-0603		Statements to be filed by beneficial owners, directors, or officers; sales restrictions; exemptions; equity security defined; rules and regulations; violations; effective date.	5
742	31-0710	(d)(2)	Sanctions	5
743	31-0710	(d)(3)	Sanctions	5
744	31-0710	(e)	Sanctions	5
745	31-1305		Cooperation of officers, owners, and employees	5
746	31-2408.01		Uninsured Motorist Fund.	5
747	31-2413		Penalties; adjudications	5
748	31-2502.09		Making or publishing material false statements	5
749	31-2502.39		Persons not to act for unauthorized companies	5
750	31-2502.42		Violations of provisions	5
751	31-3431		Principal office, books, records, and files of the health maintenance organization to be in the District.	5
752	31-3521		Sanctions for violations.	5
753	31-4310		Representation of financial standing - Alien companies; violations.	5
754	31-4415		Capital stock records	5
755	31-4601		Violations	5

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756	31-5201		Maintenance of reinsurance reserve fund by life and fire insurance companies or associations; suspension or revocation of license for insolvency or impairment of capital; aiding unlicensed companies or associations; issuance of license.	5
757	31-5204		Principal office and books, records, and files of corporation to be in District; exception; reincorporation of certain corporations; violations; prosecutions.	5
758	31-5332	(a)	Penalties	5
759	31-5332	(b)	Penalties	5
760	31-5332	(c)	Penalties	5
761	31-5332	(d)	Penalties	5
762	31-5606.04	(a)	Criminal penalties	5
763	31-5606.04	(b)	Criminal penalties	5
764	31-5606.04	(c)	Criminal penalties	5
765	32-0213	(b)	Penalties	5
766	32-0220		Persons selling merchandise to minor for resale or distribution to ascertain that minor wears badge; penalties; exception	5
767	32-0221		Loitering around business establishments prohibited during school hours; penalty	5
768	32-0414		Penalties	5
769	32-0812		Penalties for violation of subchapter; jurisdiction; prosecution	5
770	32-0902		Use prohibited; exceptions.	5
771	32-1010		Penalties; prosecution	5
772	32-1121	(a)	Criminal penalties	5
773	32-1121	(b)	Criminal penalties	5
774	32-1121	(c)	Criminal penalties	5
775	32-1307		Penalties	5
776	32-1308.01	(l)(4)	Administrative actions on employee complaints.	5
777	32-1308.01	(l)(5)	Administrative actions on employee complaints.	5
778	32-1516		Invalid agreements	5
779	32-1530		Attorney fees	5
780	32-1533		Penalty for misrepresentation	5
781	32-1539		Failure to secure payment of compensation	5
782	32-213		Penalties.	5
783	34-0301		Public Service Commission; general powers	5
784	34-0701		False statements in securing approval for stock issue	5
785	34-0702		Demanding or receiving greater or less than established rates	5
786	34-0704		Rebates	5
787	34-0705		Failure or refusal to furnish information; furnishing false information; failure to keep proper accounts	5

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788	34-0707		Destruction of apparatus or appliance of Commission	5
789	34-0731		Prosecution for violation of rules	5
790	34-1264.02	(b)(1)	Cable theft	5
791	34-1264.02	(b)(2)	Cable theft	5
792	34-1264.02	(b)(3)	Cable theft	5
793	34-1264.02	(b)(4)	Cable theft	5
794	34-1264.02	(b)(5)	Cable theft	5
795	34-1264.02	(c)	Cable theft	5
796	34-2304	(e)	Appointment of receiver	5
797	34-2304	(e)	Appointment of receiver	5
798	34-2401.20		Unlawful tapping of water pipe; penalty	5
799	34-2401.22		Penalty for damaging or defacing water pipes	5
800	34-2502		Penalty for refusal to remove conduits	5
801	35-0211		Removal of disused tracks; penalty for noncompliance.	5
802	35-0216		Failure to pay established fare or to present valid transfer; entry by rear exit door prohibited	4
803	35-0251	(b)	Unlawful conduct on public passenger vehicles.	5
804	35-0251	(c)	Unlawful conduct on public passenger vehicles.	5
805	35-0251	(d)	Unlawful conduct on public passenger vehicles.	5
806	36-0102		Unauthorized use or sale of registered bottles.	5
807	36-0130		Prosecutions; penalties	5
808	36-0153		Unauthorized use, defacing, or sale of registered vessel	5
809	36-0202		Unauthorized use of registered label; injunctive relief.	5
810	36-0302.05		Violations; notice, order, injunction, and penalties.	5
811	36-0304.01		Prohibition on conversions.	5
812	37-201.16		Substitutes for dry measure prohibited.	5
813	37-201.32		Penalties; conduct of prosecutions.	5
814	38-0203		Enforcement; penalties.	5
815	38-0303		Regulations determining tuition requirement; penalties; prosecutions.	5
816	38-0303		Regulations determining tuition requirement; penalties; prosecutions.	5
817	38-0312		False information; penalty.	5
818	38-1312		Violations; penalties	5
819	38-1403		Penalty for failure to register	5
820	39-0108		Confidentiality of circulation records	5
821	41-0204		False statements; failure to render termination statement; "Attorney General" defined	5
822	42-1121		Illegal acts relating to stamps and other devices; penalties.	5
823	42-1708		Additional criminal penalties.	5

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824	42-1904.02		No offer or disposition of unit prior to registration; current public offering statement; right of cancellation by purchaser; form therefor prescribed by Mayor.	5
825	42-1904.17		Penalties; prosecution by Attorney General.	5
826	42-2435		Criminal penalties	5
827	42-3131.02		Inspection of buildings for violative conditions; interference with inspection	5
828	42-3131.10		Penalties for noncompliance	5
829	42-3304		Penalties	5
830	42-3405.10		Penalties	5
831	42-3509.08		Inspection of rental housing	5
832	43-0120		Keeping and exhibiting dead bodies.	5
833	44-0151.15	(a)	Criminal penalties	5
834	44-0151.15	(b)	Criminal penalties	5
835	44-0151.15	(b)	Criminal penalties	5
836	44-0212		Penalties and enforcement	5
837	44-0416		Violations and penalties for noncompliance.	5
838	44-0509	(a)	Penalties; enforcement.	5
839	44-0509	(d)(1)(A	Penalties; enforcement.	5
840	44-0509	(f)(2)	Penalties; enforcement.	5
841	44-0553		Penalties for unauthorized released of criminal information.	5
842	44-0609		Violations and penalties for noncompliance.	5
843	44-1712		Penalties; prosecutions; actions to enjoin.	5
844	46-0224.02		Parent locator service	5
845	46-0225.02		Criminal contempt remedy for failure to pay child support	5
846	46-0421		Violations; prosecutions.	5
847	47-0102		Total indebtedness not to be increased	5
848	47-0351.15		Penalties	5
849	47-0391.03		Powers of Authority	5
850	47-0813		Classes of property.	5
851	47-0821		Assessments--General duties of Mayor; appointment of assessors; submission of information by property owners.	5
852	47-0828		Violations of assessment provisions	5
853	47-0850.02		Residential property tax relief--One-time filing, notification of change in eligibility, liability for tax, audit.	5
854	47-0863		Reduced tax liability for property owners over age 65 and for property owners with disabilities; rules.	5
855	47-1805.02		Returns - Persons required to file	5
856	47-1805.04		Returns - Divulgence of information	5
857	47-2014		Assumption or refund of tax by vendor unlawful; penalties	5
858	47-2018		Secrecy of returns; reciprocity	5
859	47-2026		Certificate of registration	5

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860	47-2106		Penalty for conducting false "closing-out sales" and for violation of this chapter; prosecutions	5
861	47-2405		Transportation of cigarettes	5
862	47-2406		Offenses relating to stamps	5
863	47-2408	(c)	Records; reports; returns	5
864	47-2408	(d)	Records; reports; returns	5
865	47-2409		Seizure and forfeiture of property	5
866	47-2419		Documentation.	5
867	47-2421		Prohibitions on gray market cigarettes.	5
868	47-2604		Penalty for engaging in business without license or certificate of authority	5
869	47-2707		Prosecutions	5
870	47-2808		Auctioneers; temporary licenses; penalty for failure to account.	5
871	47-2809.01		Body art establishments.	5
872	47-2811		Massage establishments; Turkish, Russian, or medicated baths.	5
873	47-2828		Failure to Obtain Business License with Housing Residential Endorsement	5
874	47-2839.01		Security agencies.	5
875	47-2846		Penalties	5
876	47-2850		Rules governing the business of furnishing towing services for motor vehicles.	5
877	47-2853.26		False representation of authority to practice.	5
878	47-2853.27		Fines and penalties; criminal violations.	5
879	47-2853.73		Certain representations prohibited.	5
880	47-2853.76e		Prohibitions and penalties.	5
881	47-2853.83		Certain representations prohibited.	5
882	47-2883.02		Bond requirements.	5
883	47-2883.04		Penalty	5
884	47-2884.16		Penalties for violation of part; loan declared void; pledge returned.	5
885	47-2885.20		Penalties; prosecutions; injunction.	5
886	47-2886.14		Unlawful acts.	5
887	47-2887.13		Prohibited conduct.	5
888	47-2888.07	(a)	Penalties.	5
889	47-2888.07	(b)	Penalties.	5
890	47-2888.07	(c)	Penalties.	5
891	47-2907		Restaurants, hotels, barber shops, bathing houses, ice cream saloons, and soda fountains required to serve well-behaved persons.	5
892	47-3409		Divulging information obtained from Internal Revenue Service prohibited; penalties	5
893	47-3506		Administration and enforcement - Qualifying nonprofit housing organizations and cooperative housing associations	5
894	47-3719		Secrecy of returns.	5
895	47-4101	(a)	Attempt to evade or defeat tax	5
896	47-4101	(b)	Attempt to evade or defeat tax	5
897	47-4102	(a)	Failure to collect or pay over tax	5

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898	47-4102	(b)	Failure to collect or pay over tax	5
899	47-4103	(a)	Failure to pay tax, make return, keep records, or supply information	5
900	47-4103	(b)	Failure to pay tax, make return, keep records, or supply information	5
901	47-4104		Fraudulent statements or failure to make statements to employee	5
902	47-4105		Fraudulent withholding information or failure to supply information to employer	5
903	47-4106	(a)	Fraud and false statements	5
904	47-4106	(b)	Fraud and false statements	5
905	47-4106	(c)	Fraud and false statements	5
906	47-4106	(d)	Fraud and false statements	5
907	47-4107	(a)	Attempt to interfere with administration of District of Columbia revenue laws	5
908	47-4107	(b)	Attempt to interfere with administration of District of Columbia revenue laws	5
909	47-4405		Collections through third party contractors	5
910	47-4406		Secrecy of returns	5
911	48-0109		Prosecutions; violations	5
912	48-0702		Prohibitions.	5
913	48-0904.01	(d)(1)	Prohibited acts A; penalties	2
914	48-0904.01	(a)(2)(A	Prohibited acts A; penalties	2
915	48-0904.01	(a)(2)(B	Prohibited acts A; penalties	2
916	48-0904.01	(a)(2)(B	Prohibited acts A; penalties	2
917	48-0904.01	(a)(2)(C	Prohibited acts A; penalties	2
918	48-0904.01	(a)(2)(D	Prohibited acts A; penalties	2
919	48-0904.01	(b)(2)(A	Prohibited acts A; penalties	2
920	48-0904.01	(b)(2)(B	Prohibited acts A; penalties	2
921	48-0904.01	(b)(2)(C	Prohibited acts A; penalties	2
922	48-0904.01	(b)(2)(D	Prohibited acts A; penalties	2
923	48-0904.01	(d)(2)	Prohibited acts A; penalties	2
924	48-0904.02		Prohibited acts B; penalties	2
925	48-0904.03		Prohibited acts C; penalties	2
926	48-0904.03a		Prohibited acts D; penalties	2
927	48-0904.04		Penalties under other laws.	2
928	48-0904.05		Effect of acquittal or conviction under federal law.	2
929	48-0904.06	(a)	Distribution to minors	2
930	48-0904.06	(b)	Distribution to minors	2
931	48-0904.07	(b)(1)	Enlistment of minors to distribute	2
932	48-0904.07	(b)(2)	Enlistment of minors to distribute	2
933	48-0904.07a		Drug free zones.	2
934	48-0904.08		Second or subsequent offenses.	2
935	48-0904.09		Attempt; conspiracy.	2
936	48-0904.10		Possession of drug paraphernalia	2
937	48-0911.01		Consumption of marijuana in public space prohibited; impairment prohibited.	2
938	48-0921.02		Search warrants; issuance, execution and return; property inventory; filing of proceedings; interference with service	5

	A	B	C	D
939	48-1004		Prohibition. (Congregating in Drug Free Zone)	5
940	48-1103	(a)	Prohibited acts	3
941	48-1103	(b)	Prohibited acts	3
942	48-1103	(c)	Prohibited acts	3
943	48-1103	(e)(4)	Prohibited acts	3
944	49-0106		Rules for parades and encampments	5
945	49-0205		Penalty for selling, pawning, injuring, or retaining public property	5
946	49-0507		Witnesses; compulsory attendance	5
947	50-0326		Modernization of taxicabs.	5
948	50-0329.05	(a)(1)	Fleeing from a public vehicle inspection officer in a public vehicle-for-hire.	5
949	50-0329.05	(a)(2)	Fleeing from a public vehicle inspection officer in a public vehicle-for-hire.	5
950	50-0405	(b)(1)	Penalties	5
951	50-0505		Disclosure of damages or defects in used motor vehicles; violations; penalties	5
952	50-0607		Penalties	5
953	50-1215		False statements as to liens; violations of law chapter	5
954	50-1301.74		Failure to return license or registration; penalty	5
955	50-1301.75		Penalty for violations of chapter	5
956	50-1331.08		Penalties	5
957	50-1401.01	(d)	Fee; examination; age requirements; lost permits; provisions for armed forces personnel; contents; operation without permit prohibited; restrictions for minors	5
958	50-1401.02		Exemptions	5
959	50-1403.01		Revocation or suspension; new permit after revocation; nonresidents; penalty for operation with revoked or suspended license	5
960	50-1403.03		Suspension of minor's motor vehicle operator's permit for alcohol violation	5
961	50-1501.04		Unlawful acts; penalty	5
962	50-1507.03		Registration	5
963	50-1912		Penalty.	5
964	50-2201.03	(d)	Mayor to make rules; Department of Transportation; Director; Congressional and Council parking; title fees; common carriers; penalties; prosecutions; publication of regulations; excise tax; impoundment for outstanding violations.	5
965	50-2201.03	(f)	Mayor to make rules; Department of Transportation; Director; Congressional and Council parking; title fees; common carriers; penalties; prosecutions; publication of regulations; excise tax; impoundment for outstanding violations.	5
966	50-2201.04	(c)(1)	Speeding and reckless driving	4
967	50-2201.04	(c-1)(1)	Speeding and reckless driving	4

	A	B	C	D
968	50-2201.04b		Operation of all-terrain vehicles and dirt bikes	4
969	50-2201.05b		Fleeing from a law enforcement officer in a motor vehicle	4
970	50-2201.05c	(d)(1)(B	Leaving after colliding.	4
971	50-2201.05c	(d)(2)(A	Leaving after colliding.	4
972	50-2201.05d		Object falling or flying from vehicle.	4
973	50-2201.06		Garage keeper to report cars damaged in accidents	4
974	50-2201.28		Right-of-way at crosswalks.	4
975	50-2203.01		Negligent homicide	1
976	50-2206.11		Driving under the influence of alcohol or a drug.	4
977	50-2206.12		Driving under the influence of alcohol or a drug; commercial vehicle.	4
978	50-2206.14		Operating a vehicle while impaired.	4
979	50-2206.16		Operating under the influence of alcohol or a drug; horse-drawn vehicle.	4
980	50-2206.31		Operating under the influence of alcohol or a drug; watercraft.	4
981	50-2206.33		Operating a watercraft while impaired.	4
982	50-2206.36		Additional penalty for impaired operating with a minor in the watercraft.	4
983	50-2302.03		Exception for serious offenders.	4
984	50-2303.02		Exceptions for serious offenders.	4
985	50-2303.07		Identification of pedestrian offenders	5
986	50-2421.04		Removal of abandoned and dangerous vehicles from public space; penalties	5
987	50-2421.09		Procedures for reclaiming impounded vehicles; lien; penalties	5
988	50-2421.10		Disposal of unclaimed vehicles; penalties; auction admission fees	5
989	51-0113		Payment of employer contributions	5
990	51-0117		Records and reports; inspection; penalties for violation	5
991	51-0118		Protection of rights and benefits; child support obligations	5
992	51-0119	(a)	Penalties for false statements or representations	5
993	51-0119	(b)	Penalties for false statements or representations	5
994	51-0119	(c)	Penalties for false statements or representations	5
995				
996	18DCMR1101		Loaning Vehicle Registration and Misuse of Tags (Improper Tags)	4
997	18DCMR1101.1		Loaning Vehicle Registration and Misuse of Tags	4
998	18DCMR1101.1-X		Loaning Vehicle Registration and Misuse of Tags (Display of Tags)	4
999	18DCMR1104.2		Falsified Vehicle Registration or Tags (Registration or Tags)	4

	A	B	C	D
1000	18DCMR1104.3		Falsified Vehicle Registration or Tags (Title)	4
1001	18DCMR1104.4		Falsified Vehicle Registration or Tags (Counterfeit Tags)	4
1002	18DCMR1110.2		Improper Conduct with Vehicle License (Loaning Permit)	4
1003	18DCMR1200.8		Tampering with Secured Bike or Personal Mobility Device	4
1004	18DCMR2000.2		Failure to Obey Police Officer	4
1005	18DCMR2200.12		Motor Vehicle Speeding 30 MPH Over Limit	4
1006	19DCMR1309.1		Gambling On or Near Public Property	4
1007	24DCMR100.1		Unlawful Occupation of a Public Space at the Dock at Washington Harbour	4
1008	24DCMR121.1		Unauthorized Temporary Abode	4
1009	24DCMR2100.3		Crossing Police Line	4
1010	24DCMR2301.3		Possession of BB Gun	4
1011	24DCMR500.5		Soliciting Ticket Sales	4
1012	24DCMR502.1		Vending Without a License	4
1013	24DCMR502.2		Vending Without a License	4