First Draft of Report #60 – Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22E of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this– First Draft of Report #60 – Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses is July 20, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC Title 22E.

Chapter 4. Justification Defenses.

Chapter 5. Excuse Defenses.

Chapter 7. Generally Applicable Definitions.

RCC § 22E-401. Lesser Harm.

(a) *Defense*. A person does not commit an offense when, in fact:
  (1) The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm;
  (2) The specific, identifiable harm that the person seeks to avoid significantly exceeds the harm prohibited by the law the person is charged with violating.

(b) *Exceptions.* This defense is not available when:
  (1) Recklessness is the culpable mental state for an objective element of the offense and the person is reckless in bringing about the situation requiring a choice of harms;
  (2) Negligence is the culpable mental state for an objective element of the offense and the person is negligent in bringing about the situation requiring a choice of harms; or
  (3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability.

(c) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the terms "recklessly" and "negligently" have the meanings specified in RCC § 22E-206; and the term "in fact" has the meaning specified in RCC § 22E-207.

COMMENTARY

Explanatory Note. *This section establishes a lesser harm defense for the Revised Criminal Code (RCC). The defense applies where a person acts under a reasonable belief that they are acting to avert a greater harm.*[1] *The RCC lesser harm defense is the first codification of such a defense (also known as a necessity defense*[2] *or lesser evils defense) in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" specifies that the person is strictly liable as to whether the elements in paragraphs (a)(1) and (a)(2) are satisfied or not.[3]

[1] *See e.g.*, Model Penal Code § 3.02 cmt. at 9-10 (1985) ("Under this section, property may be destroyed to prevent the spread of a fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions. Cargo may be jettisoned or an embargo violated to preserve the vessel. An alien may violate a curfew in order to reach an air raid shelter. A druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency. A developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases of this kind.")

[2] A necessity defense excuses criminal actions taken in response to exigent circumstances. *See Reale v. United States*, 573 A.2d 13, 15 (D.C. 1990).

[3] RCC § 22E-207. Namely, under (a)(1), the person's belief must, in fact, be reasonable and, under (a)(2), the harm avoided must, in fact, be greater than the harm caused. However, there is no additional proof required as to the person's desire or awareness with respect to (a)(1) and (a)(2).

Paragraph (a)(1) specifies that the person must reasonably believe that the conduct constituting the offense is necessary to prevent a harm from occurring.[4] The term "harm" is not defined and is intended to be construed broadly per its ordinary meaning to encompass damage, injury, loss, or risk thereof. The harm must be specific and identifiable.[5] The person's belief that the harm will occur may be mistaken,[6] but it must be objectively reasonable.[7] Reasonableness is an objective standard that takes into account relevant characteristics of the actor.[8] The person must believe that the conduct is necessary in both its nature and degree.[9] The question of necessity is not committed to the private judgment of the person engaging in the conduct,[10] it is a mixed question of

[4] *See Griffin v. U. S.*, 447 A.2d 776, 778 (D.C. 1982) ("[A]ppellants had failed to proffer evidence sufficient to establish the elements of the defense because: (1) their proffer did not set forth any evidence concerning a specific, immediate, identifiable harm, *reasonably perceived* to be avoided by appellants' action…" (Emphasis added.)).

[5] The defense does not apply where a person takes proactive measures to avoid a risk of some indeterminate harm. Consider, for example, a person who believes that an elected official will reallocate funds from community health services funds to benefit a wealthy developer. That person is not justified in kidnapping the elected official to prevent such a generalized, ambiguous harm to others.

[6] Consider, for example, a person who believes that a child is at risk of imminently dying and speeds through a series of red lights to get the child to the emergency room. First, the person's conduct may be justified under the lesser harm defense even if it turns out that the child was experiencing a non-life threatening allergic reaction. Second, the person's conduct may be justified under the lesser harm defense even if it turns out that no amount of rushing would have been enough to save the child and that the attempt was futile. Third, the person's conduct may be justified under the lesser harm defense even if it turns out that taking the child to the emergency room actually made the illness or injury *worse*.

[7] Consider, for example, a person who believes in a superstition that a black cat crossing their path causes bad luck. That person is not justified in injuring black cats to prevent them from crossing anyone's path. Consider also, for example, a person who genuinely fears that every person of a particular race, religion, or sexual orientation is a violent predator. The lesser harm defense is unavailable if the factfinder determines the belief is objectively unreasonable.

[8] *See e.g.*, Model Penal Code § 3.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed…The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (Citations omitted).

[9] Consider, for example, a police agency that uses an algorithm to determine which citizens are most likely to commit a violent crime that has proven to be an accurate predictor of behavior. That agency is not justified in arresting and preventatively detaining someone based on their risk assessment alone when less severe alternatives (e.g., investigation or monitoring) are readily available because such conduct would not be necessary. Consider also, for example, a group of people who stranded together on a boat and learn that one passenger has a highly contagious, deadly virus. The group is not justified in throwing that passenger overboard when less severe alternatives (e.g., quarantine, vaccination, protective personal equipment) are readily available because such conduct would not be necessary.

[10] *See Swisher v. United States*, 572 A.2d 85 (D.C. App. 1990) (where a desire to attend a funeral did not constitute "necessity" as a defense to charge of contempt of court for failing to appear, although the defendant may have subjectively believed it was necessary to attend).

fact and law for determination at trial.[11] Conduct is not necessary if the greater harm can be avoided by a reasonable "legal alternative available to the defendants that does not involve violation of the law."[12]

Paragraph (a)(2) requires that the harm to be avoided is significantly greater than the harm prohibited by the law the person is charged with violating.[13] The term "harm" is not defined and is intended to be construed broadly per its ordinary meaning to encompass damage, injury, loss, or risk thereof. In most instances, the infliction of bodily injury to a person exceeds other harms.[14] However, there are exceptions to this general rule.[15] Causing the death of a person significantly exceeds every harm other than the death of one or more other persons.

Subsection (b) establishes three exceptions to the lesser harm defense.

Paragraph (b)(1) and (b)(2) preclude application of the defense if an objective element of the offense must be proven, the objective element requires either a reckless or negligent mental state, and the actor brought about the circumstances requiring the choice of harms, recklessly or negligently.[16] Recklessness and negligence are defined in in RCC § 22E-206.

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[11] *See e.g.*, Model Penal Code § 3.02 cmt. at 12 ("[I]t requires that the harm or evil sought to be avoided be greater than that which would be caused by the commission of the offense, not that the defendant believe it to be so.").

[12] *Griffin v. U.S.*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[13] *See Griffin v. U. S.*, 447 A.2d 776, 777 (D.C. 1982) ("[T]he necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law *would have significantly exceeded* the harm actually resulting from the defendants' breach of the law." (Emphasis added.)).

[14] For example, a person is not justified in beating up a habitual thief to teach him a lesson.

[15] For example, a person who recklessly shoves a bystander out of the way while running away from a purse snatcher may have a lesser harm defense. Consider also, for example, a person who is experiencing homelessness and takes shelter without permission in an empty building by breaking through a window. The factfinder must consider whether the risk of bodily harm (e.g., discomfort, possible hypothermia) significantly exceeds the degree of the trespassory intrusion and property damage (e.g., momentary shelter in an entryway, moving in and locking the owners out).

[16] For example, this limitation would preclude a necessity defense when an actor recklessly causes a fire, then recklessly damages property in an attempt to prevent the spread of the fire (e.g., throwing an expensive painting away from the fire but toward the vicinity of a puddle, which damages the painting). Even assuming the actor meets the other requirements of a necessity defense, the defense is not available for criminal destruction of property, RCC § 22E-2503(e).

See Model Penal Code § 3.02 cmt. at 14 (1985) ("When the actor has made a proper choice of values, his belief in the necessity of his conduct to serve the higher value will exculpate unless the crime involved can be committed recklessly or negligently. When the latter is the case, recklessness or negligence in bringing about the situation requiring the choice of evils or in appraising the necessity for his conduct may be the basis for conviction. This treatment of the matter thus precludes conviction of a purposeful offense when the actor's culpability inheres in recklessness or negligence, while sanctioning conviction for a crime for which that level of culpability is otherwise sufficient to convict.").

Paragraph (b)(3) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified defense or exclusion from liability.[17]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised lesser harm defense statute clearly changes current District law in one main way.*

The revised statute does not require that the harm to be avoided be an immediate harm. The current D.C. Code does not codify a lesser harm defense. However, District case law requires evidence of "a specific, *immediate*, identifiable harm."[18] In contrast, the RCC statute requires the conduct be necessary in its nature and degree, but does not limit the timing of harm to be avoided. In unusual circumstances, conduct may be necessary to avoid a much later but otherwise inevitable harm.[19] This change improves the proportionality of the revised offenses.

Beyond this one change to current District law, three other aspects of the revised statute may constitute substantive changes to District law.

First, the RCC lesser harm defense does not apply when recklessness or negligence is the culpable mental state for an objective element of an offense that must be proven, and the actor is reckless or negligent, as the case may be, in bringing about the situation requiring a choice of harms or in appraising the necessity for the actor's conduct. The current D.C. Code does not codify a lesser harm defense and current District case law on the lesser harm defense[20] does not address the actor's culpability where the actor is reckless or negligent in bringing about the circumstances requiring a choice of harms. Resolving this ambiguity, the RCC lesser harm defense expressly limits the defense when the actor recklessly or negligently created or appraised the underlying situation that appeared to require a choice of evils. This change improves the clarity and proportionality of the revised statutes.

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[17] For example, a teacher could not spank a child to prevent further misbehavior and justify their conduct under the lesser harm defense. The legislature has already considered such circumstances in the special responsibility defenses (RCC-22E-408) and determined that for a teacher, misbehavior does not outweigh the harm of spanking a child. *See* Model Penal Code § 3.02 cmt. at 13 (1985) ("...the general choice of evils defense cannot succeed if the issue of competing values has been previously foreclosed by a deliberate legislative choice, as when some provision of the law deals explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the claimed justification otherwise appears.").

[18] *Griffin v. U. S.*, 447 A.2d 776, 778 (D.C. 1982) (emphasis added); *see also Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988); *Fleet v. Fleet*, 137 A.3d 983, 988 (D.C. 2016) (explaining, "This defense of necessity does not require proof that harm is actually occurring, but only that the defendant have a reasonable belief that harm is imminent.").

[19] As the Model Penal Code commentary explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." The revised defense applies in this scenario. *See* Model Penal Code § 3.02 cmt. at 17 (1985).

[20] *Griffin v. United States*, 447 A.2d 776, (D.C.1982), *cert. den. sub nom. Snyder v. United States*, 461 U.S. 907 (1983).

Second, the revised defense does not apply where the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability. The current D.C. Code does not codify a lesser harm defense or other general defenses and current District case law on the lesser harm defense[21] does not address whether the defense is available when other general defenses are available. To resolve this ambiguity, the revised statute bars use of the lesser harm defense when the conduct is expressly addressed by another defense, affirmative defense, or exclusion from liability. The lesser harm defense is broadly worded given the wide range of circumstances in which it may be invoked, but it is not intended to replace or be an alternative to more specific requirements for defenses, affirmative defenses, or exclusions from liability that have been codified by the legislature.[22] This change eliminates a possible gap in liability in the revised statutes.

Third, the RCC lesser harm defense requires a person to reasonably believe the conduct constituting the offense is necessary but imposes no further culpable mental state requirement. The current D.C. Code does not codify a lesser harm defense and current District case law on the lesser harm defense[23] does not address what state of mind, if any, must be proven regarding the necessity for the otherwise criminal conduct or the fact that it is a significantly lesser harm. To resolve this ambiguity, the RCC lesser harm defense clarifies that there is no culpable mental state for the defense besides proof that the person "reasonably believes that the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm." A reasonable mistake as to the facts of the situation and available alternatives does not negate the defense. This change clarifies that the revised statutes.

Relation to National Legal Trends. *Codification of a lesser harm defense statute is broadly supported by national legal trends.*

A 2015 academic survey[24] reviewed 52 American jurisdictions[25] and found that 45[26] recognize a "lesser evils" defense. Of those 45 jurisdictions, 18 jurisdictions have codified such a defense in a statute.[27]

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[21] *Id*.

[22] For example, the special responsibility defenses in RCC § 22E-408 are carefully limited to persons who bear a special relationship to the complaining witness. It is drafted to allow a parent to physically discipline a child but to prohibit corporal punishment by schoolteachers. Subsection (b)(3) of the revised statute makes clear that a teacher could not use the lesser harm defense to justify corporal punishment because that situation is already accounted for by the special responsibility defense. *See* the Model Penal Code's necessity defense ("Justification Generally: Choice of Evils") in § 3.02(a)(2), which requires that "neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved."

[23] *Griffin v. United States*, 447 A.2d 776, (D.C.1982), *cert. den. sub nom. Snyder v. United States*, 461 U.S. 907 (1983).

[24] Paul H. Robinson, et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 127-140 (2015) (*available at* https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses).

[25] The research surveyed all 50 states, the federal criminal code, and the District of Columbia.

[26] *Id.* at 10. (Page numbers listed are for online version.)

[27] *See* Alaska Stat. Ann. § 11.81.320; Ariz. Rev. Stat. Ann. § 13- 417; Colo. Rev. Stat. Ann. § 18-1- 702; Del. Code Ann. tit. 11 § 463; Haw. Rev. Stat. § 703-302; 720 Ill. Comp. Stat. Ann. 5/7- 13; Ky. Rev. Stat. Ann. § 503.030; Me. Rev. Stat. Ann. tit. 17-A, § 103; Mo. Ann. Stat. § 563.026; Neb. Rev. Stat. Ann. § 28-

1407; N.H. Rev. Stat. Ann. § 627:3; N.J. Stat. Ann. § 2C:3-2; N.Y. Penal Law § 35.05; Or. Rev. Stat. Ann. § 161.200; 18 Pa. Cons. Stat. Ann. § 503; Tenn. Code Ann. § 39-11-609; Tex. Penal Code Ann. § 9.22; and Wis. Stat. Ann. § 939.47.

RCC § 22E-701. Definitions.

"Public official" means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47).

RCC § 22E-402. Execution of Public Duty.

(a) *Defense.* A person does not commit an offense when, in fact:
  (1) The conduct constituting the offense is required or authorized by law, including:
    (A) A court order;
    (B) A law governing the armed services or the lawful conduct of war;
    (C) A law defining the duties or functions of a public official;
    (D) A law defining the assistance to be rendered to a public official in the performance of their official duties;
    (E) A law governing the execution of legal process; or
    (F) Any other provision of law imposing a public duty;
  (2) The person reasonably believes the conduct constituting the offense is required or authorized by a court order or warrant; or
  (3) The person reasonably believes the conduct constituting the offense is required or authorized by law to assist a public official in the performance of their official duties.

(b) *Exceptions.*
  (1) This defense is not available in a situation that is expressly addressed by another available defense, affirmative defense, or exclusion from liability.
  (2) This defense is not available when the conduct constituting the offense is the use of deadly force, unless that use of deadly force:
    (A) Is expressly authorized by law; or
    (B) Occurs in the lawful conduct of war.[1]

(c) *Definitions*. The term "in fact" has the meaning specified in RCC § 22E-207; and the term "public official" has the meaning specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes an execution of public duty defense for the Revised Criminal Code (RCC). The defense applies when a court order or another law requires or authorizes a person to engaged in conduct that otherwise constitutes a criminal offense. The RCC execution of public duty defense is the first codification of such a defense in the District.*

[1] [CCRC recommendations for other justification defenses involving use of force are forthcoming. This language in paragraph (b)(2) may be reassessed at that time.]

Subsection (a) establishes the requirements for the defense. The term "in fact" specifies that the person is strictly liable as to whether the elements in paragraphs (a)(1) – (3) are satisfied or not.[2]

Paragraph (a)(1) applies where the conduct constituting the offense is required or authorized by one of six kinds of laws. Subparagraph (a)(1)(A) provides a defense where the person complies with a court order. The term "court order" includes any judicial directive, oral or written.[3] Subparagraph (a)(1)(B) provides a defense where a person complies with a law governing the armed services or the lawful conduct of war. Subparagraph (a)(1)(C) applies where a public official complies with a law defining their duties. This includes civil law.[4] The term "public official" is a defined term that means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47). The phrase "a law" is intended to make clear that the defense applies where there are two or more conflicting laws and at least one of them requires or authorizes the conduct. Subparagraph (a)(1)(D) applies where a person assists a public official in the performance of that official's duties. Subparagraph (a)(1)(E) applies where a person is serving process in accordance with the law. Subparagraph (a)(1)(F) applies when any other law imposes a public duty, whether on public officials or private citizens.[5] The word "law" should be construed broadly to include any statute or municipal regulation.[6]

Paragraphs (a)(2) and (a)(3) provide that there are two instances in which the defense applies to a person who mistakenly believes that their conduct is authorized by law. Per the rules of interpretation in RCC § 22E-207, a person is strictly liable as to whether their mistaken belief is reasonable.[7] Paragraph (a)(2) specifies that the defense applies where a person reasonably believes their conduct is authorized by a court order or warrant. The person must believe that the order or warrant authorizes the conduct and that they are personally authorized to perform it. Paragraph (a)(3) specifies that the defense applies to private citizens who reasonably believe that they are required or authorized to assist a public officer in the performance of their official duties. This defense is available even if the officer is exceeding their authority.[8]

Subsection (b) establishes two exceptions to the execution of public duty defense. Paragraph (b)(1) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified

[2] RCC § 22E-207.

[3] Consider, for example, a person who is ordered to remain in court for a hearing, after the time that they are due to return to a halfway house has passed. That person has an execution of public duty defense to violation of work release under RCC § 24-241.05A.

[4] *See* Model Penal Code § 3.03 cmt. at 26 (1985) (explaining the defense may include civil cases governing officers' immunity from tort liability).

[5] *See* Model Penal Code § 3.03 cmt. at 23 (1985) ("Because public duties of immense variety can be found in the statutory and common law of every state, in a section like this it would be unwieldy to attempt a complete catalogue giving attention to the precise contours of each public responsibility.").

[6] *See* Model Penal Code § 3.03 cmt. at 25 (1985) (explaining a "formal administrative regulation" is sufficient for the defense).

[7] *See id.* at 28 (explaining that criminal liability will attach where the mistaken belief was formed recklessly or negligently).

[8] However, this defense is not available where the conduct is the use of deadly force. *See* Model Penal Code § 3.03 cmt. at 28.

justification defense.[9] Paragraph (b)(2)[10] disallows the defense in cases involving use of force unless the law clearly authorizes the use of deadly force in that instance.[11]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *Execution of public duty is a new general defense and, in that sense, all aspects of the revised statute are substantive changes to District law.*

Relation to National Legal Trends. *Codifying an execution of public duty defense is generally supported by national legal trends. Out of 29 reform jurisdictions,[12] 18 have codified a similar defense.[13] The Model Penal Code also recognizes an execution of public duty defense that is similar to the RCC defense.[14]*

[9] *See* Model Penal Code § 3.03 cmt. at 26 (1985) (explaining that "explicit, carefully worked out provisions of the criminal law should control the general law of public duties in the cases to which they speak.").

[10] [CCRC recommendations for other justification defenses involving use of force are forthcoming. This language in paragraph (b)(2) may be reassessed at that time.]

[11] For example, the law expressly authorizes the use of deadly force by private corrections officers. *See* D.C. Code § 24-261.02.

[12] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[13] Ala. Code § 13A-3-22; Alaska Stat. Ann. § 11.81.420; Ariz. Rev. Stat. Ann. § 13-402; Ark. Code Ann. § 5-2-603; Colo. Rev. Stat. Ann. § 18-1-701; Conn. Gen. Stat. Ann. § 53a-17; Del. Code Ann. tit. 11; § 462; Haw. Rev. Stat. Ann. § 703-303; Ky. Rev. Stat. Ann. § 503.040; Me. Rev. Stat. tit. 17-A; § 102; Mo. Ann. Stat. § 563.021; N.H. Rev. Stat. Ann. § 627:2; N.J. Stat. Ann. § 2C:3-3; N.D. Cent. Code Ann. § 12.1-05-02; Or. Rev. Stat. Ann. § 161.195; 18; Pa. Stat. and Cons. Stat. Ann. § 504; Tenn. Code Ann. § 39-11-610; Tex. Penal Code Ann. § 9.21.

[14] *See* Model Penal Code § 3.03. As compared to the Model Penal Code, four aspects of the revised statute may constitute substantive changes. First, the revised defense does not apply when any other defense or exclusion from liability applies whereas the MPC statute specifies that is does not apply when another justification defense applies. Some affirmative defenses and exclusions in the revised code are in the nature of a justification defense. Second, the revised defense expressly requires that a person's belief in the legality of their conduct be reasonable. Third, the revised defense does not limit the reasonable belief provisions to instances in which there was a lack of jurisdiction or a defect in process. Fourth, the revised defense substitutes the more modern phrase "authorized by a court order or warrant" for the more antiquated phrase "authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process." These changes improve the clarity and consistency of the revised statute.

RCC § 22E-502. Temporary Possession.

(a) *Affirmative defense.* An actor does not commit an offense when:
  (1) In fact, the offense is a predicate possessory or distribution offense;
  (2) The actor possesses or distributes the item with intent, exclusively and in good faith, to do one or more of the following:
    (A) Permanently relinquish control over the item to a law enforcement officer or prosecutor for appropriate and lawful action;
    (B) Permanently relinquish control over the item to the actor's supervisor or a person in charge of the location where the item was found, for appropriate and lawful action;
    (C) Seek legal services from an attorney or provide legal services as an attorney;
    (D) Seek medical services from a licensed health professional or provide medical services as a licensed health professional;
    (E) Investigate the circumstances surrounding the item's possession, acquisition, or use by a specific person when the actor has a responsibility, under District civil law, for the health, welfare, or supervision of that person" or
    (F) Permanently dispose of the item; and
  (3) In fact, the actor does not possess the item longer than is reasonably necessary to engage in the conduct in paragraph (a)(2) of this section.

(b) *Definitions.*
  (1) The term "intent" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "health professional," "incapacitated individual," "law enforcement officer," and "possession" have the meanings specified in RCC § 22E-701.
  (2) In this section, the term "predicate possessory or distribution offense" means:
    (A) Possession of a Prohibited Weapon or Accessory under RCC § 22E-4101;
    (B) Carrying a Dangerous Weapon under RCC § 22E-4102;
    (C) Possession of a Firearm by an Unauthorized Person under RCC § 22E-4105;
    (D) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under D.C. Code § 7-2502.01;
    (E) Possession of a Stun Gun under D.C. Code § 7-2502.15;
    (F) Carrying an Air or Spring Gun under D.C. Code § 7-2502.17;
    (G) Carrying a Pistol in an Unlawful Manner under D.C. Code § 7-2509.06.
    (H) Possession of a Controlled Substance under D.C. Code § 48-904.01a;
    (I) Trafficking of a Controlled Substance under D.C. Code § 48-904.01b; and

(J) Trafficking of a Counterfeit Substance under D.C. Code § 48-904.01c.

COMMENTARY

Explanatory Note. *This section establishes a temporary possession affirmative defense for the Revised Criminal Code (RCC). The defense applies in several instances in which a person's possession or distribution of contraband is not blameworthy. The revised temporary possession defense is the first codification of a general defense for lawful possession in the District.*

Subsection (a) establishes the requirements for the affirmative defense. A defendant has the burden of proving an affirmative defense by a preponderance of the evidence per RCC § 22E-201(b)(3).

Paragraph (a)(1) specifies that the conduct constituting the offense[1] must be a "predicate possessory or distribution offense," as defined in paragraph (b)(2). The defense does not apply where a person is accused of taking,[2] using,[3] or destroying[4] an item. Nor does it apply to charges of tampering with evidence,[5] obstructing justice,[6] or serving as an accessory after the fact.[7] The term "in fact" specifies that the person is strictly liable as to whether the defense is available for a particular charge.[8]

Paragraph (a)(2) requires that the person possess or distribute the item, exclusively and in good faith, with one of several enumerated blameless intents. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that they would they would accomplish one of the goals specified in subparagraphs (a)(2)(A) – (F). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the intended outcome actually occurred, only that the defendant believed to a practical certainty that it would.[9]

Subparagraph (a)(2)(A) provides a defense where a person intends to surrender the item to a law enforcement officer or prosecutor to take appropriate action. The term "law enforcement officer" is defined in RCC § 22E-701. The person must be practically

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[1] *See* RCC § 22E-201 and the accompanying commentary for further explanation of objective elements, including conduct elements.

[2] The defense is not available to a person charged with theft under RCC § 22E-2101, which requires that the person "takes, obtains, transfers, or exercises control" over an item.

[3] The defense is not available to a person charged with unauthorized use of property under RCC § 22E-2102, which requires that the person "takes, obtains, transfers, or exercises control" over an item.

[4] The defense is not available to a person charged with criminal damage to property under RCC § 22E-2503, which requires that the person "damages or destroys" an item.

[5] D.C. Code § 22-723.

[6] D.C. Code § 22-722.

[7] D.C. Code § 22-1806.

[8] RCC § 22E-207.

[9] For example, a person may defend on the grounds that they intended to surrender the item to a prosecutor under subparagraph (a)(2)(A), even if it turns out that the defendant is mistaken and the intended recipient is actually not a prosecutor.

certain that the intended recipient is a law enforcement officer or prosecutor.[10] The defense does not apply where, for example, a person sells contraband to an officer who is working undercover. The person must also intend that the recipient take appropriate and lawful action. The defense does not apply where, for example, a person sells contraband to someone who happens to be an officer, for that officer's personal use and enjoyment.

Subparagraph (a)(2)(B) provides a defense where a person intends to surrender the item to their supervisor or to a person in charge of the location where the item was found. The term "supervisor" is undefined and should be construed broadly to include any supervisory context.[11] The phrase "person in charge of the location" is undefined and, per its ordinary meaning, should be construed broadly to include any person with authority over the location.[12] The person must intend that the recipient take appropriate and lawful action. The defense does not apply where, for example, a person sells contraband to someone who happens to be their supervisor, for that supervisor's personal use and enjoyment.

Subparagraph (a)(2)(C) provides a defense for any person seeking legal services from an attorney and for any attorney providing legal services. For example, a person who is uncertain of their legal rights and liabilities may be justified in bringing an item to an attorney to seek advice about its legality or about how to proceed. An attorney may be justified in possessing an item during a meeting with a client, while reviewing evidence at the Metropolitan Police Department's Evidence Control Branch, or when distributing contraband to the Office of Bar Counsel. However, the defense does not apply where a person sells contraband to someone who happens to be an attorney, for that attorney's personal use and enjoyment.

Subparagraph (a)(2)(D) provides a defense for any person seeking medical services from a licensed health professional and for any licensed health professional providing medical services. The term "health professional" is defined in RCC § 22E-701. For example, a person who takes someone to a hospital following an overdose may be justified in bringing a controlled substance to the doctor so the doctor can properly diagnose and treat the patient.[13] A doctor may be justified in possessing contraband that is removed from a patient's clothing to administer emergency treatment. The defense does not apply where, for example, a person sells contraband to someone who happens to be a health professional, for that health professional's personal use and enjoyment.

Subparagraph (a)(2)(E) provides a defense where a person has a special responsibility for someone's health, welfare, or supervision and possesses or distributes an item with intent to investigate the circumstances surrounding the item's possession, acquisition. For example, if a parent discovers a controlled substance in their home, they may be justified in temporarily holding on to the substance until their child returns home

[10] *See* rules of interpretation in RCC § 22E-207.

[11] For example, the defense may be available to a student who finds illegal drugs and gives them to a teacher, a restaurant employee who finds a prohibited weapon and gives it to a manager on duty, and a child who finds contraband and gives it to a babysitter.

[12] For example, a customer in a retail store who discovers a prohibited weapon may be justified in giving that weapon to a manager, security guard, or cashier.

[13] *See also* D.C. Code § 7-403 (Seeking health care for an overdose victim).

from school, so that their can confront the child[14] before disposing of the item. However, the parent would not be justified in using any portion of the controlled substance in the meantime.[15]

Subparagraph (a)(2)(F) provides a defense where a person possesses or distributes contraband with intent to permanently dispose of it.[16] The term "dispose" is undefined and should be construed broadly to include practical efforts to make the item unavailable to anyone.

Paragraph (a)(3) requires that the person not possess the item longer than is reasonably necessary to accomplish the intended outcome. Determining the time reasonably necessary is fact-sensitive inquiry.[17] The term "in fact" specifies that the person is strictly liable as to whether the duration of the possession is reasonable.[18]

Subsection (b) cross-references applicable definitions in the RCC and defines the term "surrender." In this section, the term "surrender" means to permanently relinquish the ability to exercise control over an item. A person does not surrender an item by giving it to another person or agency for temporary safekeeping.[19]

Relation to Current District Law. *Temporary possession is a new general defense and, in that sense, all aspects of the revised statute are substantive changes to District law. However, as compared to the closely related immunity provisions for voluntary surrender for certain crimes[20] and defenses of innocent[21] or momentary possession[22] recognized in case law for certain crimes, the RCC temporary possession defense statute clearly changes current District law in two main ways.*

First, the RCC defense is an affirmative defense, which the defendant must prove by a preponderance of the evidence. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The current voluntary surrender provisions in the D.C. Code require a defendant to prove their intent to deliver

[14] Confronting kids with evidence of their drug use is specifically endorsed as a strategy to combat youth drug abuse by the Partnership for Drug-Free Kids and other national advocacy groups. *See* Partnership for Drug-Free Kids, *Prepare to Take Action if You Suspect Teen or Young Adult Drug Use* (available at https://drugfree.org/article/prepare-to-take-action/) (last visited April 15, 2020).

[15] Paragraph (a)(2) requires that the person act "exclusively and in good faith."

[16] For example, a person who discovers a controlled substance or weapon on the sidewalk may be justified in carrying it to a garbage can.

[17] For example, a parent who discovers a controlled substance may be justified in retaining it only until the child is confronted and disciplined, whereas a school security guard may be justified in retaining it only until a law enforcement officer arrives.

[18] RCC § 22E-207.

[19] *See e.g., Stein v. United States*, 532 A.2d 641, 646 (D.C. App. 1987) (explaining, "'Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his [or her] ownership, but without vesting it in any other person, and with the intention of not reclaiming future possession or resuming its ownership, possession, or enjoyment.'").

[20] *See* D.C. Code §§ 7-2507.05; 7-2510.07(f)

[21] Possession offenses "should not be construed to mean a possession…which might result temporarily and incidentally from the performance of some lawful act', particularly when, as is here claimed, the act was designed to meet the social policy of the law." *People v. La Pella*, 272 N.Y. 81, 83 (1936) (internal citations omitted); *accord Hines v. U. S.*, 326 A.2d 247, 249 (D.C. App. 1974).

[22] *See Hines v. United States*, 326 A.2d 247 (D.C. 1974); *Stewart v. U. S.*, 439 A.2d 461 (D.C. App. 1981); *see also* Crim. Jury Inst. for DC Instruction 6.501(c) (2019).

and abandon a weapon to the police by "clear and unequivocal" evidence.[23] A trial court's decision to grant or deny immunity under D.C. Code § 7-2507.05 is a question of law.[24] The D.C. Court of Appeals (DCCA) case law recognizing an innocent or momentary possession defense[25] impose no burden of proof on the defendant insofar as the defense has been construed to negate the intent element of the possessory offense. In contrast, the RCC defense is an affirmative defense with a burden of proof consistent with all other affirmative defenses in the RCC. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute does not require that the contraband or item be made safe prior to distribution. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. However, D.C. Code § 7-2507.05(a)(3) requires that every firearm to be delivered and abandoned to the Chief under the section shall be transported in accordance with § 22-4504.02, which specifies that the weapon must be unloaded and transported safely. In contrast, the revised statute does not require proof that a firearm, ammunition, or any other object is made safe for the defense to apply. With respect to firearms, a person should not be subject to liability for surrendering a loaded firearm to law enforcement, as some individuals may not know how to safely check or unload a firearm. This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these two changes to current District law, three other aspects of the RCC statute may constitute substantive changes to District law.

First, the RCC defense applies to a wide array of specified predicate offenses where the primary element that must be proven is possession or distribution of an item. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The current voluntary surrender provisions in the D.C. Code apply only to selected firearm, ammunition, and destructive device charges.[26] Under DCCA case law, an innocent or momentary possession defense has been recognized as applicable to the offense of carrying a pistol without a license[27] and possession of a controlled substance,[28] but District courts have not yet clarified whether it is available as a defense to other offenses. District case law does not address whether these immunity provisions and defenses are more broadly available in a prosecution for possession of other contraband[29] or for distribution offenses.[30] To resolve these

[23] *Lewis v. United States*, 871 A.2d 470, 474-745 (D.C. App. 2005).
[24] *Lewis v. United States*, 871 A.2d 470, 473 (D.C. App. 2005).
[25] Crim. Jury Inst. for DC Instruction 6.501(c) (2019).
[26] D.C. Code § 7-2507.05 applies only to provisions "in [that] unit," which appears to apply only to Title 7, Chapter 25, although closely related offenses also appear in Title 22, Chapter 45 of the D.C. Code and Title 24, Chapter 23 of the DCMR. *See Stein v. United States*, 532 A.2d 641, 647 (D.C. App. 1987) (interpreting the phrase "in this chapter" in an earlier version of the statute to apply only to offenses that were enacted as part of the same act and declining to extend immunity to include other firearms offenses). D.C. Code § 7-2510.07(f), the immunity provision in the District's recent extreme risk protection order statutes, precludes arrest and prosecution under D.C. Code §§ 7-2506.01, 22-4503 and 22-4504(a) and (a-1) only.
[27] *See Hines v. U. S.*, 326 A.2d 247, 249 (D.C. App. 1974).
[28] *Stewart v. U. S.*, 439 A.2d 461 (D.C. App. 1981).
[29] E.g., drug paraphernalia (D.C. Code § 48-1103), bump stocks (D.C. Code § 22-4514(a)), knuckles (D.C. Code § 22-4514(a)), blackjacks (D.C. Code § 22-4514(a)), slungshots (D.C. Code § 22-4514(a)), sand

ambiguities, the RCC statute creates consistent defenses across RCC possession and distribution offenses for possession and distribution that is not blameworthy and may serve socially beneficial interests. There is a strong public safety interest in encouraging all District residents to safely dispose of contraband or turn contraband over to relevant authorities. The defense does not extend to offenses that are not predicate crimes, maintaining liability for blameworthy conduct.[31] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC statute specifies culpable mental state requirements that must be proven for the defense. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The current voluntary surrender provisions in the D.C. Code do not appear to specify an intent requirement for immunity.[32] The innocent or momentary possession defense recognized in DCCA case law requires a showing of "an absence of criminal purpose" and "an affirmative effort to aid and enhance social policy underlying law enforcement."[33] Dicta suggests that this includes, at minimum, any motive "to protect the finder or others from harm, to turn it over to the police, or to otherwise secure [the contraband]."[34] To resolve these ambiguities, the revised statute specifies six different scenarios in which acting with a specified intent renders a person's temporary possession justified. The RCC statute also specifies that no culpable mental state is necessary as to whether the duration of the possession or distribution is no longer than reasonably necessary, making the matter an objective question of fact. This change improves the clarity, consistency, and proportionality of the revised statutes.

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clubs (D.C. Code § 22-4514(a)), sandbags (D.C. Code § 22-4514(a)), switchblade knives (D.C. Code § 22-4514(a)), silencers (D.C. Code § 22-4514(a)), weapons of mass destruction (D.C. Code § 22-3154).

[30] For example, a person who discovers a drug stash and gives it to the police distributes a controlled substance in violation of D.C. Code § 48-904.01(a)(1). *See* D.C. Code § 48-901.02 ("'Distribute' means the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship.")

[31] Notably, the temporary possession defense does not apply to charges of tampering with physical evidence, obstruction of justice, or serving as an accessory after the fact. *See* D.C. Code §§ 22-722 and 723. The following examples are illustrative. During the execution of a search warrant, Roommate A flushes Roommate B's drug stash down the toilet. A is not guilty of possession of a controlled substance as a principal, but may be guilty as an accessory after the fact. A is also guilty of tampering with physical evidence and obstruction of justice. Consider also a pedestrian who discovers an extended magazine on the side of the road, picks it up, and throws it in the garbage. The pedestrian may be justified in committing second degree possession of a dangerous weapon but may still be guilty of tampering with physical evidence upon proof that their intent was "to impair its integrity or its availability for use in the official proceeding."

[32] D.C. Code § 7-2507.05 requires that the surrender be voluntary and peaceable, undefined. D.C. Code § 7-2510.07(f) requires that the surrender be peaceable, undefined.

[33] *Hines v. U. S.*, 326 A.2d 247, 248 (D.C. App. 1974) (further stating that the court agrees with a New York opinion which characterized the defense more broadly, explaining that possession "should not be construed to mean a possession…which might result temporarily and incidentally from the performance of some lawful act', particularly when, as is here claimed, the act was designed to meet the social policy of the law." *People v. La Pella*, 272 N.Y. 81, 83 (1936) (internal citations omitted)).

[34] *See also Logan v. U.S.*, 402 A.2d 822, 826 (D.C. App. 1979) (explaining, "intent may be demonstrable, in part, by a defendant's actions when he picks up a pistol (1) to protect himself or others from harm, or (2) to otherwise secure it.").

Third, the RCC statute specifies that the defendant may not possess an item longer than is reasonably necessary to accomplish the intended goal. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The DCCA-recognized innocent or momentary possession defense[35] requires remedial action be undertaken with reasonable immediacy. To resolve this ambiguity, the RCC statute includes a standard requirement that the item is possessed no longer than is reasonably necessary effectuate one of the specified goals. This change improves the clarity and proportionality of the revised statutes.

Relation to National Legal Trends. *The RCC temporary possession statute appears to be novel in its generality, based on preliminary research. However, this general defense is consistent with principles of liability that appear in codified defenses, case law, and jury instructions for specific offenses.*

Much like the District, other jurisdictions have codified offense-specific defenses for possession of contraband where an actor's purpose is to aid law enforcement.[36] Additionally, case law in other jurisdictions has recognized that temporary lawful possession is insufficient to support a conviction for possession of contraband.[37]

[35] *Logan v. U. S.*, 402 A.2d 822, 827 (D.C. App. 1979) ("[T]o warrant an instruction a defendant's actions must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct."); *Worthy v. U. S.*, 420 A.2d 1216, 1218 (D.C. App. 1980) (rejecting a claim of innocent possession where there was no evidence that the defendant "found the prohibited weapon recently"); *Hines v. U. S.*, 326 A.2d 247, 249 (D.C. App. 1974).

[36] *See e.g.*, N.Y. Pub. Health Law § 3305 ("The provisions of this article restricting the possession and control of controlled substances and official New York state prescription forms shall not apply… (c) to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties.").

[37] *See e.g., Stanton v. State*, 746 So. 2d 1229, (Fla. Dist. Ct. App. 1999) ("We do not think that a person who takes temporary possession of contraband for the sole purpose of turning it into the authorities, and promptly does so, is guilty of a crime. If a person finds contraband washed up on the beach, or floating in the sea, and takes the contraband forthwith to the authorities, we do not think that the law does, or is intended to, criminalize temporary possession for that purpose. Likewise if a parent discovers contraband in possession of his or her child, and disposes of it, we do not think the law criminalizes the parent's temporary possession."); *Adams v. State*, 706 P.2d 1183, 1185 (Alaska Ct.App.1985) (finding a temporary lawful possession defense available where defendant turns controlled substance over to police, destroys it, or promptly return it to its source); *People v. Mijares*, 491 P.2d 1115, 1119 (1971) ("It would be incongruous to adhere to cases declaring that abandonment concludes an existing narcotic possession and then hold that during the brief moment involved in abandoning the narcotic, a sufficient possession which did not previously exist somehow comes into being to support a conviction for possession of contraband.").