First Draft of Report #37 - Controlled Substance and Related Offenses

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This Draft Report contains possible reforms to District of Columbia criminal statutes for review and general discussion by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. The Commission may provide general reform recommendations on this topic to the D.C. Council and Mayor at a future date, but, should it do so, does not intend to recommend a specific bill or legislation related to controlled substance offenses while there are federal appropriations prohibitions limiting the District's ability to freely engage in the process of enacting legislation regarding these offenses.[1] 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.

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 #37 – Controlled Substance and Related Offenses is Monday, September 16, 2019. 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.

[1] See February 4, 2015 Memorandum of Attorney General Karl Racine re Legality of Hearings on Bill 21-23, the Marijuana Legalization and Regulation Act of 2015, available online at: https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/AG%27s%20Memo%20February%204%202015.pdf (last visited July 12, 2019).

RCC § 48-904.01a. Possession of a Controlled Substance.
RCC § 48-904.01b. Trafficking of a Controlled Substance.
RCC § 48-904.01c. Trafficking of a Counterfeit Substance.
RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.
RCC § 48-904.11. Trafficking of Drug Paraphernalia.

RCC § 48-904.01a. Possession of a Controlled Substance.

(a) *First Degree*. A person commits first degree possession of a controlled substance when that person:
  (1) Knowingly possesses a measurable amount of a controlled substance; and
  (2) The controlled substance is, in fact:
    (A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
    (B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
    (C) Opium poppy or poppy straw;
    (D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
    (E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
    (F) Methamphetamine, its salts, isomers, or salts of its isomers;
    (G) Phenmetrazine, or its salts; or
    (H) Phencyclidine or a phencyclidine immediate precursor.

(b) *Second Degree*. A person commits second degree possession of a controlled substance when that person knowing possesses a measurable amount of any controlled substance.

(c) *Exclusion from Liability.* Notwithstanding subsections (a) and (b), a person shall not be subject to prosecution under this section if a person possesses a controlled substance that was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of his or her professional practice, or as authorized by this chapter or Chapter 16B of Title 7.

(d) *Penalties.*
  (1) First degree possession of a controlled substance is a Class [X] offense subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree possession of a controlled substance is a Class [X] offense subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "possesses" has the meaning specified in RCC § 22E-701; and the terms "controlled substance," "distribute," "immediate precursor," "manufacture," "opium poppy," and "person," and "poppy straw" have the meanings specified in RCC § 48-901.02.

(f) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Commentary

Explanatory Note. *This section establishes the possession of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing a controlled substance. The offense is divided into two penalty gradations which are based on the type of controlled substance possessed by the actor. The revised possession of a controlled substance statute replaces D.C. Code § 48-904.01(d), the applicable language of the attempt and conspiracy penalty provision,*[2] *and the applicable language of the repeat offender penalty enhancement statute.*[3]

Subsection (a) specifies the elements of first degree possession of a controlled substance. Paragraph (a)(1) specifies that the person must knowingly possess a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[4] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed a controlled substance. It is not required that the accused knew which specific controlled substance he or she possessed. This element may be satisfied by showing that the accused was practically certain that he or she possessed any controlled substance.

Paragraph (a)(2) requires that the controlled substance that the accused possessed was, in fact, one of the eight substances referenced in subparagraphs (a)(2)(A)-(H). Subparagraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state as to whether the substance was one of the substances referenced in (a)(2)(A)-(H).

Subsection (b) specifies the elements of second degree possession of a controlled substance. The elements of second degree possession of a controlled substance are identical to those for first degree possession of a controlled substance, except that it is not required that the person possessed one of the eight substances listed in subparagraphs (a)(2)(A)-(H). Second degree possession of a controlled substance only requires that the person knowingly possessed any controlled substance.

Subsection (c) provides an exclusion from liability under subsections (a) and (b) if a person possesses a controlled substance that was obtained directly from, or pursuant to, a valid prescription or order of a practitioner, or if the possession is otherwise authorized by Chapter 9 of Title 48 or Chapter 16B of Title 7.

Subsection (d) specifies relevant penalties for the offense.

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[2] D.C. Code § 48-904.09.
[3] D.C. Code § 48-904.08.
[4] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

Subsection (e) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (f) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised possession of a controlled substance offense changes current District law in three main ways.*

First, the revised possession of a controlled substance offense changes current District law by dividing the offense into two penalty grades based on whether the controlled substance is an abusive or narcotic drug. The current D.C. Code possession of controlled substance offense is divided into two penalty grades based on whether the controlled substance is phencyclidine (commonly known as "PCP") in liquid form[5] as compared to any other drug. In contrast, in the revised offense, first degree possession of a controlled substance requires possession of one of the substances enumerated in subparagraphs (a)(2)(A)-(H), and second degree possession of a controlled substance requires possession of any controlled substance. In the revised offense first degree possession of a controlled substance includes possession of phencyclidine, but does not provide any heightened penalty for possession of phencyclidine in liquid form. Grading possession based on whether the controlled substance is an abusive or narcotic drug uses the same standards (based on the potential harm of the drug) as in the current and RCC offenses of distribution and possession with intent to distribute. There is no clear rationale for why, at present, the *possession* of any quantity of liquid phencyclidine, alone, merits categorically more severe penalties[6] than all other controlled substances.[7] This change improves the proportionality and consistency of revised statutes.

Second, the RCC possession of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[8] In contrast, under the RCC attempt or conspiracy to commit a controlled substance offense will be determined by

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[5] D.C. Code § 48-904.01(d)(2).

[6] Under current District law, possession of any quantity of liquid phencyclidine is subject to a 3 year imprisonment penalty as compared to a maximum of 180 days for all other controlled substances—a penalty six times as severe. D.C. Code § 48-904.01(d).

[7] The legislative history to the "Liquid PCP Possession Amendment Act" provides two rationales for the increased penalty for possession of phencyclidine in liquid form: 1) the Committee report says that PCP "more frequently engenders violent and bizarre behavior, combined with a sense of invulnerability, than happens with other drugs"; and 2) PCP in liquid form is the typical medium for distribution, even in small quantities. The report says that illegal drugs are usually distributed and consumed in similar form, but that is not the case with PCP which typically is distributed is a liquid but is not consumed in that form. The legislative history makes clear that the bill "should not be viewed as a bill to punish *users*" and that the enhanced penalty is that the enhanced penalty is intended to "address the fight against PCP . . . *by going after distributors.*" Committee on Public Safety and the Judiciary Report on the Liquid PCP Possession Amendment Act, April 13, 2010, at 5-6. However, to the extent that the intent of the bill was to punish distributors, and PCP is typically distributed, but not consumed, in liquid form, it is unclear why penalties for *possession* of liquid PCP should be increased. If PCP in liquid form is highly probative of intent to distribute, then the RCC trafficking of a controlled substance should adequately provide for heightened penalties above those applicable for simple possession.

[8] D.C. Code § 48-904.09.

the general provisions relating to attempt[9] and conspiracy[10] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statutes.

Third, the RCC possession of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[11] In contrast, the revised code omits a drug offense-specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 to address any increase in penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised criminal code.

Beyond these three substantive changes to current District law, one other aspect of the revised possession of a controlled substance statute may be viewed as a substantive change of law.

The revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Three other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute requires that the accused possess a "measurable amount" of a controlled substance. Although the current statute does not specify that the accused must possess a measurable amount, the D.C. Court of Appeals (DCCA) has held that the offense requires possession of a "measurable amount" of a controlled substance.[12] This language is intended to codify current DCCA case law which requires that the accused possesses a measurable amount of a controlled substance.

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[9] RCC § 22E-301.
[10] RCC 22E-303.
[11] D.C. Code § 48-904.08.
[12] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

Second, the exclusion to liability under subsection (c) does not reference D.C. Code § 48-1201. The current statutory provision criminalizing possession of a controlled substance refers to § 48-1201. However, omitting this reference is not intended to change current District law, or in any way change the applicability of § 48-1201.

Relation to National Legal Trends. *The revised possession of a controlled substance statute's above-mentioned substantive changes have mixed support from national legal trends.*

First, grading possession of a controlled substance based on the type of substance is not supported by national legal trends. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions")[13], a slight minority divide their possession of a controlled substance into more than one penalty grade based on the type of substance.[14]

Second, eliminating the separate penalty for liquid PCP is supported by national legal trends. Of the twenty-nine reformed code jurisdictions, none have a separate penalty provision for possession of liquid PCP.

[13] 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). In addition, Tennessee reformed its criminal code after the publication of this article.

[14] Alaska Stat. Ann. § 11.71.030, Alaska Stat. Ann. § 11.71.040; Ark. Code Ann. § 5-64-419; Del. Code Ann. tit. 16, § 4756, Del. Code Ann. tit. 16, § 4763; Haw. Rev. Stat. Ann. § 712-1241, Haw. Rev. Stat. Ann. § 712-1242, Haw. Rev. Stat. Ann. § 712-1243; 720 Ill. Comp. Stat. Ann. 570/402; Ind. Code Ann. § 35-48-4-6, Ind. Code Ann. § 35-48-4-6.1, Ind. Code Ann. § 35-48-4-7; Ky. Rev. Stat. Ann. § 218A.1415, Ky. Rev. Stat. Ann. § 218A.1416; Minn. Stat. Ann. § 152.021, Minn. Stat. Ann. § 152.022, Minn. Stat. Ann. § 152.023, Minn. Stat. Ann. § 152.024, Minn. Stat. Ann. § 152.025; N.H. Rev. Stat. Ann. § 318-B:2; N.Y. Penal Law § 220.21, N.Y. Penal Law § 220.18, N.Y. Penal Law § 220.16, N.Y. Penal Law § 220.09, N.Y. Penal Law § 220.06, N.Y. Penal Law § 220.03; Ohio Rev. Code Ann. § 2925.11; S.D. Codified Laws § 22-42-5; Tex. Health & Safety Code Ann. § 481.115.

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

(a) *First Degree*. A person commits first degree trafficking of a controlled substance when that person:
   (1) Knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance; and
   (2) The controlled substance is, in fact:
      (A) More than 200 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
      (B) More than 200 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
      (C) More than 200 grams of a compound or mixture containing opium poppy or poppy straw;
      (D) More than 400 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;
      (E) More than 400 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;
      (F) More than 200 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;
      (G) More than 200 grams of a compound or mixture containing phenmetrazine, or its salts; or
      (H) More than 100 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor;

(b) *Second Degree*. A person commits second degree trafficking of a controlled substance when that person:
   (1) Knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance; and
   (2) The controlled substance is, in fact:
      (A) More than 20 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
      (B) More than 20 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
      (C) More than 20 grams of a compound or mixture containing opium poppy or poppy straw;
      (D) More than 50 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;
      (E) More than 50 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;
      (F) More than 20 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;

(G) More than 20 grams of a compound or mixture containing phenmetrazine, or its salts; or
(H) More than 10 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor;

(c) *Third Degree*. A person commits third degree trafficking of a controlled substance when that person:
(1) Knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance; and
(2) The controlled substance is, in fact:
(A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor;

(d) *Fourth Degree*. A person commits fourth degree trafficking of a controlled substance when that person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of any controlled substance that is, in fact, listed in Schedule I, II, or III as defined in Subchapter II of this Chapter.

(e) *Fifth Degree*. A person commits fifth degree trafficking of a controlled substance when that person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of any controlled substance.

(f) *Aggregation of Quantities.* When a single scheme or systematic course of conduct could give rise to multiple charges under this section, the government instead may bring one charge and aggregate the quantities of a controlled substance involved in the scheme or systematic course of conduct to determine the grade of the offense.

(g) *Penalties*.
(1) First degree trafficking of a controlled substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree trafficking of a controlled substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree trafficking of a controlled substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree trafficking of a controlled substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree trafficking of a controlled substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(6) *Enhanced Penalties.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven:

(A) The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age;

(B) The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a controlled substance; or

(C) The actor commits an offense under this section when in a location that, in fact:

(i) Is within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center; and

(ii) Displays clear and conspicuous signage that indicates controlled substances are prohibited in the location or that the location is a drug free zone.

(h) *Defenses.*

(1) It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance.

(2) It is a defense to prosecution under this section for manufacturing or possession with intent to manufacture that the actor packaged, repackaged, labeled, or relabeled a controlled substance for his or her own personal use, or possessed a controlled substance with intent to do so.

(3) *Burden of Proof for Defenses.* If any evidence of either defense under this subsection is present at trial, the government must prove the absence of all requirements of the defense beyond a reasonable doubt.

(i) *Definitions*. The terms "intent" and "knowledge" have the meanings specified in RCC § 22E-206; the terms "actor," "dangerous weapon," "firearm," "imitation firearm," and "possesses" have the meaning specified in RCC § 22E-701; and the terms and the terms "controlled substance," "distribute," "immediate precursor," "manufacture," "opium poppy," and "person," and "poppy straw" have the meanings specified in RCC § 48-901.02.

(j) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Commentary

Explanatory Note. *This section establishes the trafficking of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, manufacturing, or possessing with intent to distribute or manufacture a controlled substance. The offense is divided into five penalty gradations based on the type and quantity of controlled substance involved in the offense. The revised trafficking of a controlled substance statute replaces portions of the District's current controlled substance prohibited acts*

statute,[15] *the distribution to minors statute,*[16] *the drug free zones statute,*[17] *the attempt and conspiracy penalty provision,*[18] *the repeat offender penalty enhancement statute,*[19] *part of the statute criminalizing possession of a firearm or imitation firearm during a dangerous crime,*[20] *and the additional penalty for committing crime when armed statute.*[21]

Subsection (a) specifies the elements of first degree trafficking of a controlled substance. Paragraph (a)(1) requires that the person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[22] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.01, and 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."[23] The term "manufacture" is defined in D.C. Code § 48-901.01, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.01, and includes a broad array of substances organized into five different schedules.

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 to mean that the accused was practically certain that he or she would distribute or manufacture a controlled substance. It is not required that the accused knew which specific controlled substance he or she would distribute or manufacture. This element may be satisfied by showing that the accused was practically certain that he or she distributed or manufactured any controlled substance. Alternatively, a person commits trafficking in a controlled substance if he or she knowingly possesses a controlled substance with intent to distribute or manufacture a controlled substance. Again, it is not required that the accused knew which specific controlled substance he or she possessed with intent to distribute or manufacture. The term "intent" is defined in RCC § 22E-206, which here requires that the person was practically certain that he or she would distribute or manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually distributed or manufactured a controlled substance, only that the actor believed to a practical certainty that he or she would distribute or manufacture a controlled substance.

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[15] D.C. Code § 48-904.01(d).
[16] D.C. Code § 48-904.06.
[17] D.C. Code § 48-904.07a.
[18] D.C. Code § 48-904.09.
[19] D.C. Code § 48-904.08.
[20] D.C. Code § 22-4504 (b).
[21] D.C. Code § 22-4502.
[22] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).
[23] The terms "administering" and "dispensing" are also defined in D.C. Code § 48-901.02.

Paragraph (a)(2) requires that the controlled substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[24] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

Subsection (b) specifies the elements of second degree trafficking in a controlled substance. The elements of second degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the minimum required quantity for each specified controlled substance in subparagraphs (b)(2)(A)-(H) are lower than those required for first degree trafficking.

Subsection (c) specifies the elements of third degree trafficking in a controlled substance. The elements of third degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that there is no minimum quantity required for each specified controlled substance in subparagraphs (c)(2)(A)-(H). Third degree trafficking only requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of one of the substances listed in subparagraphs (c)(2)(A)-(H).

Subsection (d) specifies the elements of fourth degree trafficking in a controlled substance. The elements of fourth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture any controlled substance that is, in fact, under schedule I, II, or III, as defined in Subchapter II of this Chapter 9 of Title 48. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the controlled substance is included in schedules I, II, or III.

Subsection (e) specifies the elements of fifth degree trafficking in a controlled substance. The elements of fifth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture any controlled substance.

Subsection (f) allows for the aggregation of quantities for the purposes of offense grading when a single scheme or systematic course of conduct could give rise to multiple trafficking of a controlled substance charges. The aggregation provision only applies when the multiple charges could arise from trafficking the same type of controlled substance. The government may not aggregate quantities of two different controlled substances to determine the grade of the offense.

Subsection (g) specifies relevant penalties for the offense. Paragraph (g)(6) provides for enhanced penalties for each grade of the offense. If the government proves at least one of the elements listed under subparagraphs (g)(6)(A)-(C), the penalty classification for each offense may be increased in severity by one penalty class. This penalty enhancement may be applied in addition to any penalty enhancements authorized by RCC Chapter 8.

[24] For example, under subparagraph (a)(2)(D), it is not required that the person distribute, manufacture, or possess X grams of pure cocaine. This element is satisfied if the defendant distributed cocaine mixed with an adulterant, if the entire mixture weighs more than X grams.

Subparagraph (g)(6)(A) codifies a penalty enhancement if the actor was, in fact, over the age of 21, and distributed a controlled substance to a person who was, in fact, under the age of 18. The term "in fact" specifies that there is no culpable mental state as to the age of the actor or the person to whom the controlled substance was distributed.

Subparagraph (g)(6)(B) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a controlled substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is in "close proximity or easily accessible during the commission of the offense."[25] The term "firearm" is defined in RCC § 22E-701 as [forthcoming]."[26] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny 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 to a person." Subparagraph (g)(6)(B) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[27] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must at least facilitate commission of the offense in some manner.[28]

Subparagraph (g)(6)(C) codifies a penalty enhancement if the person commits the offense in a location that is, in fact, within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center, that displays clear and conspicuous signage which indicates controlled substances are prohibited or the location is a drug free zone. This enhancement applies if the offense occurs within 100 feet of the building or grounds, or within the building or grounds. The term "in fact" specifies that

[25] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).
[26] Statutory language and commentary regarding this definition will be issued shortly, in connection with draft recommendations for firearm offenses.
[27] 18 U.S.C. § 924 (c)(1)(A). *See,* Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018, at 8 (discussing the "in furtherance" requirement under 18 U.S.C. § 94, and federal courts' holdings regarding factors that are relevant in determining whether possession of firearm was in furtherance of predicate drug offense).
[28] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.

there is no culpable mental state as to whether the person committed the offense while in the specified location.

Subsection (h) specifies two defenses to prosecution under this section. Under paragraph (h)(1), it is a defense that the person distributes or possesses with intent to distribute a controlled substance, but such distribution or possession with intent to distribute is not in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. This defense generally applies to sharing or giving away controlled substances for free,[29] rather than substances distributed in exchange for anything of value, which includes services, satisfaction of debt, or promises of future payment or services. However, even when sharing or giving away controlled substances for free, the defense is not available if such action was taken with future expectation of financial gain from distribution of a controlled substance.[30]

Under paragraph (h)(2), it is a defense to that the person manufactured, or possessed with intent to manufacture, a controlled substance by packaging, repackaging, labeling, or relabeling a controlled substance for his or her own personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or re-label the substance for one of the purposes specified in paragraph (h)(2). Under this defense, packaging, repackaging, labeling, or relabeling a controlled substance for personal use, or possessing a controlled substance with intent to package, repackage, label, or relabel it for personal use does not constitute a violation of this section.[31]

Paragraph (h)(3) establishes the burden of proof for the defenses under subsection (h). If any evidence of the defenses is presented at trial by either the government or the accused, the government bears the burden of proving the absence of all elements of the defense beyond a reasonable doubt.

Subsection (i) cross-references applicable definitions located elsewhere in the RCC.

Subsection (j) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking of a controlled substance statute changes current law in nine main ways.*

First, the revised offense grades, in part, based on the weight of the controlled substance involved in the offense. The current D.C. Code statute only provides for different penalties based on the *type* of controlled substance, but not the weight. The current statute provides for a maximum 30-year sentence if the offense involves a schedule I or II drug that is an "abusive" or

[29] For example, an actor who shares a controlled substance with his or her spouse or a friend, without receiving anything of value in return and having no future expectation of receiving something of value in return, may claim this defense. However, a person successfully raising this defense likely would still be liable for committing a lesser crime—possession of a controlled substance.

[30] For example, an actor would not be able to claim this defense who distributes free "samples" of a controlled substance for marketing purposes or to create addiction in a population, which is expected to end up yielding the actor some sort of financial gain from drug distribution.

[31] For example, a person who packages cocaine in a bag for his own use later in time has technically "manufactured" a controlled substance as the term is defined. Under this defense, this conduct would not constitute a violation of this section. However, a person successfully raising this defense likely would still be liable for committing a lesser crime—possession of a controlled substance.

"narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, under subsection (f), when a single scheme or course of conduct could give rise to multiple charges of trafficking of a controlled substance, the government may bring one charge and aggregate the quantity of the controlled substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves controlled substances under Schedules IV or V. The current D.C. Code statute provides for different maximum penalties based on whether the actor committed the offense with respect to a controlled substance under Schedule IV or V.[32] In contrast, under the revised statute, fifth degree trafficking of a controlled substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor. This change improves the proportionality of the revised statute.

Third, the revised statute includes a defense if the person distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. Under the current D.C. Code, a person commits distribution of a controlled substance regardless of whether the controlled substance was distributed in exchange for anything of value.[33] Consequently, non-commercial transfers of a controlled substance between two people such as gifting and sharing are subject to liability.[34] In contrast, the revised statute provides a defense if the actor distributed or possessed with intent to distribute a controlled substance, but did not do so in exchange for anything of value or future expectation of receiving something of value. However, both the person distributing and the recipient of such a transaction likely would still be liable for a lesser possessory offense.[35] This change improves the proportionality of the revised statute.

Fourth, the revised statute includes a defense if the person packages, repackages, labels or relabels a controlled substance for his or her own personal use, or possesses a controlled substance with intent to do so. Under the current D.C. Code, a person commits manufacturing of a controlled substance regardless of the purpose for packaging, repackaging, labeling, or relabeling of a controlled substance. Consequently, a person who packages a controlled substance for his or her own use is subject to liability. In contrast, the revised statute provides a defense if the actor packaged, repackaged, labeled, or relabeled a controlled substance for his or her personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or relabel a substance for one the purposes specified in paragraph (h)(2). However, the person would still be liable for a lesser possessory offense.[36] This change improves the proportionality of the revised statute.

Fifth, the RCC trafficking of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be

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[32] D.C. Code § 48-904.01 (a)(2)(C), (D).

[33] *Durham v. United States*, 743 A.2d 196, 201 (D.C. 1999) ("The prosecutor need not prove that a sale took place").

[34] See *Wright v. United States*, 588 A.2d 260, 262 (D.C. 1991) ("Appellant testified that he possessed drugs when arrested which he intended to share with his companion. Such evidence proves possession with intent to distribute.").

[35] RCC § 48-904.01a.

[36] RCC § 48-904.01a.

proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[37] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[38] and conspiracy[39] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Sixth, the RCC trafficking of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[40] In contrast, the revised code omits a drug-offense specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 address any increased penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised statute.

Seventh, the RCC limits the area around schools and other specified locations that are subject to a penalty enhancement, and eliminates public housing and "video arcade[s]" altogether as specified locations. Under the current D.C. Code, drug free zones extend to all areas within 1,000 feet of any designated location, including all day care centers (public or private), schools, playgrounds, libraries, public housing, and video arcades.[41] In contrast, the revised statute applies a penalty enhancement only if the offense occurs within 100 feet of a designated location, which does not categorically include public housing or video arcades. While heightened penalties are warranted for committing trafficking of a controlled substance on or near locations where youth gather, 1,000 feet appears to be an excessive distance. In an urban jurisdiction like the District, a 1,000 foot radius around every playground, school, etc. listed in the current drug free zone statute leaves almost no location in the District in an *unenhanced* location.[42] In

[37] D.C. Code § 48-904.09.
[38] RCC § 22E-301.
[39] RCC 22E-303.
[40] D.C. Code § 48-904.08.
[41] Drug free zones include "[a]ll areas within 1000 feet of an appropriately identified public or private day care center, elementary school, vocational school, secondary school, junior college, college, or university, or any public swimming pool, playground, video arcade, youth center, or public library, or in and around public housing, as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority, or an event sponsored by any of the above entities shall be declared a drug free zone." D.C. Code § 48-904.07a.
[42] See, Judith Greene, Kevin Prains, Jason Ziedenberg, Justice Policy Institute. *Disparity by Design: How drug-free zone laws impact racial disparity – and fail to protect youth.* March, 2006. This report notes that the New Jersey Sentencing Commission concluded that under New Jersey's drug free zone laws, "urban areas where schools, parks, and public housing developments are numerous and closely spaced, overlapping zones turn entire communities into

addition to considerably expanding the zones where there are enhanced penalties, categorically raising penalties in areas of public housing (as opposed to private housing) raises concerns about equitable treatment under the law. This change improves the proportionality of the revised statute.

Eighth, the RCC includes a penalty enhancement only if the person commits an offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of the offense. The current D.C. Code "while armed" enhancement in § 22-4502[43] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[44] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a controlled substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with intent to distribute a controlled substance[45] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[46] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or

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prohibited zones – erasing the very distinction between school and non-school areas that the law was intended to create." *Id*. at 4. For example, drug free zones covered 76 percent of Newark, and over half of Camden and Jersey City. *Id*. at 26. A partial map of District schools and other locations which comprise the District's gun-free zone (locations nearly identical to those listed in the drug-free zone) was compiled by the Crime Prevention Research Institute. *See* https://crimeresearch.org/2017/10/dcs-gun-free-zone-problem-regulations-effectively-ban-anyone-legally-carrying-gun/ (last visited June 25, 2019).

[43] D.C. Code § 22-4502 authorizes additional penalty for "Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)[.]" The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress."

[44] D.C. Code § 22-4504 (b) states "No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence." The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress."

[45] The penalty enhancement under D.C. Code § 22-4502 applies to "crimes of violence" and "dangerous crimes." D.C. Code § 22-4501 defines "dangerous crime" as "distribution of or possession with intent to distribute a controlled substance."

[46] D.C. Code § 22-4504 could apply if a person distributes a controlled substance while constructively possessing a firearm or switchblade knife in his home located miles away, even if the weapon was inaccessible and played no role in commission of the offense

22-4504.[47] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[48]

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the controlled substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[49] Second, the revised enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[50] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the controlled substance offense, which excludes coincidental possession.[51] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[52] These latter two changes eliminate an enhancement

[47] *But see*, *Easley v. United States*, 482 A.2d 779 (D.C. 1984) (holding that when determining whether an actor was aware of a firearm, as required for constructive possession, a criminal venture is only relevant if there was a connection between the firearm and the criminal venture).

[48] *Hawkins v. United States*, 119 A.3d 687, 702 (D.C. 2015) (citing *Thomas v. United States,* 602 A.2d 647 (D.C.1992)). The penalty for distribution of, or possession with intent, to distribute a controlled substance that is an abusive or narcotic drug is 30 years. D.C. Code § 48-904.01. If the person commits this offense while possessing a firearm, the person may be subject to an additional 30 years, with a 5 year mandatory minimum, under the while armed enhancement in § 22-4502, and an additional 15 years, with a 5 year mandatory minimum under § 22-4504. In total, a person who distributes, or possesses with intent to distribute an abusive or narcotic drug while possessing a firearm is subject to a maximum of 75 years imprisonment, including two separate 5 year mandatory minimums. The 75 year maximum sentence exceeds the maximum sentence for first degree murder, absent aggravating circumstances. D.C. Code § 22-2104.

[49] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504 provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15 year sentence.

[50] *See generally*, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018.

[51] For example, if a person distributes a controlled substance while possessing a 7 inch chef's knife with intent to use the knife as a weapon if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply. However, a person who distributes a controlled substance in a kitchen while incidentally in close proximity to a 7 inch chef's knife would not be subject to this penalty enhancement.

[52] The scope of the revised enhancement—"readily available"—matches the breadth of current D.C. Code § 22-4502, but is narrower than D.C. Code § 22-4504(b), which applies to any constructive possession. *Compare, Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (firearm in dresser in the same room as defendant was "readily accessible"), *with Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007) (holding that evidence of constructively possession was sufficient when firearm found in defendant's apartment, while defendant was outside the apartment sitting in a car).

for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[53] These changes improve the clarity, consistency, and proportionality of the revised statute.

Ninth, the trafficking of a controlled substance statute does not include a separate penalty for first time offenders who distribute or possess with intent to distribute ½ pound or less of marijuana. Under the current statute, distributing or possessing with intent to distribute marijuana is subject to a 5 year maximum sentence. However, if the offense involved ½ pound or less of marijuana, and the person had not been previously convicted of the offense, the maximum sentence is 180 days. In contrast, the revised trafficking of a controlled substance statute does not provide a separate penalty for first time offenders trafficking ½ pound or less of marijuana. Violations of this statute involving marijuana constitutes fourth degree trafficking of a controlled substance, and is subject to the penalty specified in paragraph (g)(4).[54] This change improves the consistency and proportionality of the revised statutes.

Beyond these nine substantive changes to current District law, two other aspects of the revised trafficking of controlled substances statute may be viewed as substantive changes of law.

First, the revised statute caps the increased penalties an actor may be subject to for different types of penalty enhancements. The current D.C. Code provides separate penalty enhancements in the current distribution to minors statute[55], the drug free zone statute[56], and portions of the while armed enhancement statute.[57] However, the D.C. Code is silent as to whether or how these different penalty enhancements may be stacked, and there is no relevant D.C. Court of Appeals (DCCA) case law. The revised statute resolves this ambiguity by specifying that only one of the enhancements may apply.[58] This change improves the clarity and proportionality of the revised statutes.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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[53] An actor who constructively possesses a dangerous weapon in furtherance of a drug crime may still be liable for one or more separate weapon offenses under the RCC. See RCC § 22E-XXXX [Weapon crimes] and accompanying commentary for more details.

[54] The exact effect of this change is unclear at this time, as penalties have not been determined for the trafficking offense.

[55] D.C. Code 48-904.06.

[56] D.C. Code § 48-904.07a.

[57] D.C. Code § 22-4502.

[58] For example, a person who sells a controlled substance to a minor while in a drug free zone would only be subject to an increase in penalty severity of one class.

The remaining changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute specifies particular controlled substances rather than rely on the defined terms "abusive" or "narcotic" drugs to list those controlled substances. The current statute provides different maximum penalties based on the type of controlled substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[59] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[60] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the person distributes, manufactures, or possesses a "measurable quantity" of a controlled substance. Although the current statute does not require any minimum quantity of controlled substance, the DCCA has clearly held that the current statute requires distribution, manufacture, or possession of a measurable quantity of a controlled substance.[61]

Third, the revised trafficking in controlled substance statute does not include exceptions for offenses committed with respect to marijuana. This is not intended to change current District law. The revised definition of the term "controlled substance" includes all of the exceptions that are recognized under current law with respect to possession, distribution, and manufacturing of marijuana.

Relation to National Legal Trends. *The revised trafficking of a controlled substance statute's above-mentioned substantive changes have mixed support from national legal trends.*

First, using quantities to grade the trafficking of a controlled substance offense is well supported by other states' statutes. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions")[62], 24 states grade their analogous trafficking offense based on the quantity of the controlled substance involved in the offense.[63]

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[59] D.C. Code § 48-904.01 (a)(2)(A).

[60] D.C. Code § 48-901.02.

[61] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994).

[62] 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). In addition, Tennessee reformed its criminal code after the publication of this article.

[63] Ala. Code § 13A-12-231; Alaska Stat. Ann. § 11.71.030, Alaska Stat. Ann. § 11.71.040, Alaska Stat. Ann. § 11.71.050; Ark. Code Ann. § 5-64-422, Ark. Code Ann. § 5-64-426; Ariz. Rev. Stat. Ann. § 13-3407; Colo. Rev. Stat. Ann. § 18-18-405; Conn. Gen. Stat. Ann. § 21a-278; Del. Code Ann. tit. 16, § 4751C; Haw. Rev. Stat. Ann. § 712-1241, Haw. Rev. Stat. Ann. § 712-1242, Haw. Rev. Stat. Ann. § 712-1243; 720 Ill. Comp. Stat. Ann. 570/401; Ind. Code Ann. § 35-48-4-1; Ind. Code Ann. § 35-48-4-1.1; Ind. Code Ann. § 35-48-4-2; Kan. Stat. Ann. § 21-5705; Ky. Rev. Stat. Ann. § 218A.1412, Ky. Rev. Stat. Ann. § 218A.1413; Me. Rev. Stat. tit. 17-A, § 1103; Mo. Ann. Stat. § 579.065; Minn. Stat. Ann. § 152.021, Minn. Stat. Ann. § 152.022, Minn. Stat. Ann. § 152.023; N.H. Rev. Stat. Ann. § 318-B:26; N.J. Stat. Ann. § 2C:35-5; N.Y. Penal Law § 220.43, N.Y. Penal Law § 220.41, N.Y. Penal Law § 220.39, N.Y. Penal Law § 220.34, N.Y. Penal Law § 220.31; N.D. Cent. Code Ann. § 19-03.1-23.1; Ohio Rev. Code Ann. § 2925.03; Tenn. Code Ann. § 39-17-417; Tex. Health & Safety Code Ann. § 481.112; Tex. Health & Safety Code Ann. § 481.1121; Wash. Rev. Code Ann. § 69.50.401; Wis. Stat. Ann. § 961.41.

Second, the drug quantity thresholds for first and second degree trafficking of a controlled substance have mixed support in other states' statutes. For opium, six states[64] use 200 grams or more as the threshold quantity for their highest penalty grade, and seven states[65] use 20 grams or more as the threshold quantity for the second highest penalty grade. For cocaine, six states[66] use 400 grams or more as the threshold quantity for their highest penalty grade, and five states[67] use 50 grams or more as the threshold quantity for the second highest penalty grade. For methamphetamine, six states[68] use 200 grams or more as the threshold quantity for their highest penalty grade, and nine states[69] use 20 grams or more as the threshold quantity for the second highest penalty grade. For phencyclidine, seven states[70] use 100 grams or more as the threshold quantity for their highest penalty grade, and 11 states[71] use 10 grams or more as the threshold quantity for the second highest penalty grade. There were no clear legal trends as to quantity thresholds for opium poppy or poppy straw, ecgonine, or phenmatrazine. Different states use an array of penalties for various grades of their analogous trafficking offenses, and it is difficult to draw direct comparisons between different states' quantity thresholds.

Codifying defenses to trafficking of a controlled substance if the person distributed or possessed with intent to distribute a controlled substance when not in exchange for anything of value, or if the person labeled or relabeled a controlled substance for personal use is not supported by national legal trends. One of the 29 reformed code jurisdictions, Arkansas, clearly bars liability for distribution of controlled substances not in exchange for something of value.[72] Due to time and staffing constraints the CCRC did not review statutes in the non-reformed states, and did not review case law to determine if any states' courts have limited application of analogous trafficking offenses under these circumstances.

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[64] Arkansas, Colorado, Illinois, Kansas, Texas, and Washington.
[65] Alabama, Arkansas, Illinois, Kansas, Minnesota, Ohio, and Texas.
[66] Alabama, Illinois, Kansas, Tennessee, Texas, and Washington.
[67] Alabama, Illinois, Kansas, Missouri, Texas.
[68] Alabama, Arkansas, Illinois, Tennessee, Texas, and Washington.
[69] Alabama, Delaware, Illinois, Kansas, Missouri, New Hampshire, Ohio, Tennessee, and Texas.
[70] Arkansas, Colorado, Kansas, Minnesota, Tennessee, Texas, and Washington.
[71] Alabama, Colorado, Delaware, Illinois, Indiana, Kansas, Minnesota, Ohio, Tennessee, Texas, and Wisconsin.
[72] Ark. Code. Ann. § 5-64-101 (defining the term "deliver" as "the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance *in exchange for money or anything of value*, whether or not there is an agency relationship").

RCC § 48-904.01c. Trafficking of a Counterfeit Substance

(a) *First Degree*. A person commits first degree trafficking of a counterfeit substance when that person
  (1) Knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of a counterfeit substance; and
  (2) The counterfeit substance is, in fact:
    (A) More than 200 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives (except isoquinoline alkaloids of opium);
    (B) More than 200 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
    (C) More than 200 grams of a compound or mixture containing opium poppy or poppy straw;
    (D) More than 400 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;
    (E) More than 400 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;
    (F) More than 200 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;
    (G) More than 200 grams of a compound or mixture containing phenmetrazine, or its salts; or
    (H) More than 100 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor;

(b) *Second Degree*. A person commits second degree trafficking of a counterfeit substance when that person
  (1) Knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of a counterfeit substance; and
  (2) The counterfeit substance is, in fact:
    (A) More than 20 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives (except isoquinoline alkaloids of opium);
    (B) More than 20 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
    (C) More than 20 grams of a compound or mixture containing opium poppy or poppy straw;
    (D) More than 20 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;
    (E) More than 20 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;
    (F) More than 20 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;

(G) More than 20 grams of a compound or mixture containing phenmetrazine, or its salts; or
(H) More than 10 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor;

(c) *Third Degree*. A person commits third degree trafficking of a counterfeit substance when that person:
(1) Knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of a counterfeit substance; and
(2) The counterfeit substance is, in fact:
(A) Opium, its phenanthrene alkaloids, or their derivatives (except isoquinoline alkaloids of opium);
(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor;

(d) *Fourth Degree*. A person commits fourth degree trafficking of a counterfeit substance when that person knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of any counterfeit substance that is, in fact, a controlled substance under Schedule I, II, or III, as defined in Subchapter II of this Chapter.

(e) *Fifth Degree*. A person commits fifth degree trafficking of a counterfeit substance when that person knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of any counterfeit substance.

(f) *Aggregation of Quantities.* When a single scheme or systematic course of conduct could give rise to multiple charges under this section, the government instead may bring one charge and aggregate the quantities of a counterfeit substance involved in the scheme or systematic course of conduct to determine the grade of the offense.

(g) *Penalties*.
(1) First degree trafficking of a counterfeit substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree trafficking of a counterfeit substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree trafficking of a counterfeit substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree trafficking of a counterfeit substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree trafficking of a counterfeit substance is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(6) *Enhanced Penalties.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, if the actor knowingly possesses, either on the actor's person or

in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a counterfeit substance.

(h) *Definitions*. The terms "intent" and "knowledge" have the meanings specified in RCC § 22E-206; the terms "actor," "dangerous weapon," "firearm" "imitation firearm," and "possesses" have the meaning specified in RCC § 22E-701; and the terms "controlled substance," "distribute," "immediate precursor," "manufacture," "opium poppy," and "person," and "poppy straw" have the meanings specified in RCC § 48-901.02.

(i) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Commentary

Explanatory Note. *This section establishes the trafficking a counterfeit substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, creating, or possessing with intent to distribute a counterfeit substance. The offense is divided into five penalty gradations which are based on the type and quantity of counterfeit substance. The revised trafficking a counterfeit substance statute replaces portions of the District's current controlled substance prohibited acts statute,*[73] *the attempt and conspiracy penalty provision,*[74] *and the repeat offender penalty enhancement statute.*[75]

Subsection (a) specifies the elements of first degree trafficking of a counterfeit substance. Paragraph (a)(1) requires that the accused knowingly distributes, creates, or possesses with intent to distribute, a measurable quantity of a counterfeit substance. A measurable quantity means a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[76] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.02, and 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." The term "creates" is intended to have the same meaning as under current law. The term "counterfeit substance" is defined under D.C. Code § 48-901.02, and means "a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance."

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means that the accused was practically certain that he or she would distribute or create a counterfeit substance. It is not required that the accused knew which specific counterfeit substance he or she would distribute or create. This element may be satisfied by showing that the accused was practically certain that he or she distributed or

[73] D.C. Code § 48-904.01(d).
[74] D.C. Code § 48-904.09.
[75] D.C. Code § 48-904.08.
[76] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

created any counterfeit substance. Alternatively, a person commits trafficking in a counterfeit substance if he or she knowingly possesses a counterfeit substance with intent to distribute the counterfeit substance. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would distribute a counterfeit substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually distributed a counterfeit substance, only that the actor believed to a practical certainty that he or she would distribute a counterfeit substance.

Paragraph (a)(2) requires that the counterfeit substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[77] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

Subsection (b) specifies the elements of second degree trafficking in a counterfeit substance. The elements of second degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that the minimum required quantity for each specified controlled substance in subparagraphs (b)(2)(A)-(H) are lower than those required for first degree trafficking.

Subsection (c) specifies the elements of third degree trafficking in a counterfeit substance. The elements of third degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that there is no minimum quantity required for each specified counterfeit substance in subparagraphs (c)(2)(A)-(H). Third degree trafficking only requires that the actor distributes, creates, or possesses with intent to distribute, a measurable quantity of one of the substances listed in subparagraphs (c)(2)(A)-(H).

Subsection (d) specifies the elements of fourth degree trafficking in a counterfeit substance. The elements of fourth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, creates, or possesses with intent to a distribute any counterfeit substance that is, in fact, a controlled substance under schedule I, II, or III, as defined in Subchapter II of Chapter 9 of Title 48. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the substance is included in schedules I, II, or III.

Subsection (e) specifies the elements of fifth degree trafficking in a counterfeit substance. The elements of fifth degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that the offense requires that the actor distributes, creates, or possesses with intent to a distribute any counterfeit substance.

Subsection (f) allows for the aggregation of quantities for the purposes of offense grading when a single scheme or systematic course of conduct could give rise to multiple trafficking of a counterfeit substance charges. The aggregation provision only applies when the multiple charges

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[77] For example, under subparagraph (a)(2)(D), it is not required that the person distribute, manufacture, or possess X grams of pure cocaine. This element is satisfied if the defendant distributed cocaine mixed with an adulterant, if there were more than X grams of the entire mixture.

could arise from trafficking the same type of counterfeit substance. The government may not aggregate quantities of two different counterfeit substances to determine the grade of the offense.

Subsection (g) specifies relevant penalties for the offense.

Paragraph (g)(6) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a counterfeit substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is in "close proximity or easily accessible during the commission of the offense."[78] The term "firearm" is defined in RCC § 22E-701 as [forthcoming]."[79] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny 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 to a person." Paragraph (g)(6) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[80] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must facilitate commission of the offense in some manner.[81]

Subsection (h) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (i) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking in counterfeit substances statute changes current law in four main ways.*

First, the first three grades of the revised offense are based on the quantity of the counterfeit substance. The current statute only provides for different penalties based on the *type* of substance, but not the quantity. The current statute provides for a maximum 30 year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless

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[78] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).

[79] Statutory language and commentary regarding this definition will be issued shortly, in connection with draft recommendations for firearm offenses.

[80] 18 U.S.C. § 924 (c)(1)(A).

[81] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.

of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, when a single scheme or course of conduct could give rise to multiple trafficking of a counterfeit substance charges, the government may bring one charge and aggregate the quantity of the counterfeit substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves counterfeit substances under Schedules IV or V. The current statute provides for different maximum penalties based on whether the actor committed the offense with respect to substances under Schedule IV or V.[82] In contrast, under the revised statute, fifth degree trafficking of a counterfeit substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor.[83] This change improves the proportionality of the revised statute.

Third, the RCC trafficking of a counterfeit substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[84] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[85] and conspiracy[86] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Fourth, the RCC trafficking of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under current law, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[87] In contrast, the revised code omits a drug-offense specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 address any increased penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised statute.

Fifth, the RCC includes a penalty enhancement only if the person commits the offense while possessing on one's person or having readily available, a firearm, imitation firearm, or

[82] D.C. Code § 48-904.01 (a)(2)(C), (D).
[83] The current D.C. Code provides tests for determining which substances should be categorized into each schedule. The tests for schedules IV and V are require a "low potential for abuse," and "limited physical dependence or psychological dependence" if the substance is abused. D.C. Code §§ 48-902.03, 48-902.05, 48-902.07, 48-902.09, 48-902.11.
[84] D.C. Code § 48-904.09.
[85] RCC § 22E-301.
[86] RCC 22E-303.
[87] D.C. Code § 48-904.08.

other dangerous weapon, and such possession is in furtherance of and while committing the offense. The current D.C. Code "while armed" enhancement in § 22-4502[88] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[89] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a counterfeit substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with intent to distribute a counterfeit substance[90] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[91] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[92] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[93]

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[88] D.C. Code § 22-4502 authorizes additional penalty for "Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)[.]" The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress." As defined in D.C. Code § 48-901.02 (5), "counterfeit substances" are controlled substances.

[89] D.C. Code § 22-4504 (b) states "No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence." The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress." As defined in D.C. Code § 48-901.02 (5), "counterfeit substances" are controlled substances.

[90] The penalty enhancement under D.C. Code § 22-4502 applies to "crimes of violence" and "dangerous crimes." D.C. Code § 22-4501 defines "dangerous crime" as "distribution of or possession with intent to distribute a controlled substance."

[91] D.C. Code § 22-4504 could apply if a person distributes a controlled substance while constructively possessing a firearm or switchblade knife in his home located miles away, even if the weapon was inaccessible and played no role in commission of the offense

[92] *But see*, Easley v. United States, 482 A.2d 779 (D.C. 1984) (holding that when determining whether an actor was aware of a firearm, as required for constructive possession, a criminal venture is only relevant if there was a connection between the firearm and the criminal venture).

[93] *Hawkins v. United States*, 119 A.3d 687, 702 (D.C. 2015) (citing *Thomas v. United States,* 602 A.2d 647 (D.C.1992)). The penalty for distribution of, or possession with intent, to distribute a counterfeit substance that is an abusive or narcotic drug is 30 years. D.C. Code § 48-904.01. If the person commits this offense while possessing a firearm, the person may be subject to an additional 30 years, with a 5 year mandatory minimum, under the while armed enhancement in § 22-4502, and an additional 15 years, with a 5 year mandatory minimum under § 22-4504. In total, a person who distributes, or possesses with intent to distribute a counterfeit substance that is an abusive or

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the counterfeit substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[94] Second, the revised enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[95] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the counterfeit substance offense, which excludes coincidental possession.[96] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[97] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[98] These changes improve the clarity, consistency, and proportionality of the revised statute.

Beyond these five substantive changes to current District law, two other aspects of the revised trafficking of counterfeit substances statute may be viewed as substantive changes of law.

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narcotic drug while possessing a firearm is subject to a maximum of 75 years imprisonment, including two separate 5 year mandatory minimums. The 75 year maximum sentence exceeds the maximum sentence for first degree murder, absent aggravating circumstances. D.C. Code § 22-2104.

[94] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504 provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15 year sentence.

[95] See generally, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018.

[96] For example, if a person distributes a controlled substance while possessing a 7 inch chef's knife with intent to use the knife as a weapon if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply. However, a person who distributes a controlled substance in a kitchen while incidentally in close proximity to a 7 inch chef's knife would not be subject to this penalty enhancement.

[97] The scope of the revised enhancement—"readily available"—matches the breadth of current D.C. Code § 22-4502, but is narrower than D.C. Code § 22-4504(b), which applies to any constructive possession. *Compare, Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (firearm in dresser in the same room as defendant was "readily accessible"), *with Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007) (holding that evidence of constructively possession was sufficient when firearm found in defendant's apartment, while defendant was outside the apartment sitting in a car).

[98] An actor who constructively possesses a dangerous weapon in furtherance of a drug crime may still be liable for one or more separate weapon offenses under the RCC. See RCC § 22E-XXXX [Weapon crimes] and accompanying commentary for more details.

First, the revised statute specifies that the actor must knowingly distribute, create, or possesses a counterfeit substance. The current statute does not specify any culpable mental state, there is no relevant DCCA case law, and there is no Redbook Jury Instruction that specifically applies to the counterfeit substance offense. One means of committing the current offense is to "possess with intent to distribute a counterfeit substance,"[99] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[100] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

The remaining changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not refer to the terms "abusive" or "narcotic" drugs. The current statute provides different maximum penalties based on the type of substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A counterfeit substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[101] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[102] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the actor distributes, creates, or possesses a "measurable quantity" of a counterfeit substance. Although the current statute does not require any minimum quantity of counterfeit substance, the DCCA has clearly held that the current statute requires distribution, creation, or possession of a measurable quantity of a controlled substance.[103]

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[99] D.C. Code § 48-904.01 (b)(1).

[100] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[101] D.C. Code § 48-904.01 (a)(2)(A).

[102] D.C. Code § 48-901.02.

[103] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994). Although the *Thomas* case did not involve the counterfeit substance offense, the DCCA held that "in order to secure a conviction for controlled substance violations, the government need only prove there was a measurable amount of the controlled substance in question."

Relation to National Legal Trends. *It is unclear whether the revised trafficking of a counterfeit substance statute's above-mentioned substantive changes have support from national legal trends.*

As discussed in commentary to RCC § 48-904.01b, grading controlled substance offenses based on the quantity of substance involved in the offense is supported by national legal trends. However, the CCRC did not comprehensively review analogous trafficking of counterfeit substance offenses in other jurisdictions due to time and staffing constraints.

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

(a) *Offense.* A person commits possession of drug manufacturing paraphernalia when that person knowingly possesses an object:
 (1) That has been used to manufacture a controlled substance; or
 (2) With intent to use the object to manufacture a controlled substance.
(b) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation:
 (1) If the object possessed is 50 years of age or older; or
 (2) If a person possesses an object:
  (A) That has been used to package or repackage a controlled substance for that person's own use; or
  (B) With intent to use the object to package or repackage a controlled substance for that person's own use.
(c) *Penalty*. Possession of drug manufacturing paraphernalia is a Class [X] offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "possesses" has the meaning specified in RCC § 22E-701; and the term "controlled substance" has the meaning specified in D.C. Code § 48-901.02.
(e) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Commentary

Explanatory Note. *This section establishes the possession of drug manufacturing paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing an object with intent to use the object to manufacture a controlled substance. The revised possession of drug manufacturing paraphernalia offense does not cover possession of objects with intent to use them for any other purpose related to controlled substances. The revised possession of drug paraphernalia statute replaces the current possession of drug paraphernalia statute that applies specifically to hypodermic needles and syringes*[104]*, portions of the general drug paraphernalia statute criminalizing possession of drug paraphernalia,*[105] *the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11*[106]*, and the statute specifying factors to be considered in determining whether object is paraphernalia.*[107]

Subsection (a) specifies the elements of possession of drug paraphernalia. Subsection (a) specifies that the accused must knowingly possess an object. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Subsection (a) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed an object.

[104] D.C. Code § 48-904.10.
[105] D.C. Code § 48-1103 (a)(1).
[106] D.C. Code §48-1101 (3).
[107] D.C. Code § 48-1102.

Subsection (a) further specifies two additional elements, at least one of which must be proven. Paragraph (a)(1) requires that the object was used to manufacture a controlled substance. Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the object was used to manufacture a controlled substance. The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. Paragraph (a)(2) requires that the actor had intent to use the object to manufacture a controlled substance. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would use the object to manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" 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 person actually used the object to manufacture a controlled substance, only that the person believed to a practical certainty that he or she would use the object to manufacture a controlled substance.

Subsection (b) provides two exclusions to liability. Paragraph (b)(1) provides an exception to liability if the object is 50 year of age or older. This exclusion applies regardless of the intended use of the object. Paragraph (b)(2) provides an exclusion to liability if the person possesses an object that has been used to package or repackage a controlled substance for that person's own use, or with intent to use the object to package or repackage a controlled substance for that person's own use.

Subsection (c) specifies penalties for the offense.

Subsection (d) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (e) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised possession of drug manufacturing paraphernalia statute changes current District law in three main ways.*

First, the revised statute limits liability to possession of objects related to the manufacture of a controlled substance. The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use "drug paraphernalia," a defined term,[108] to "plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]"[109] In addition, current D.C. Code § 48-904.01 specifically criminalizes possession of a "hypodermic needle, hypodermic syringe . . . with intent

[108] D.C. Code § 48-1101 (3). This definition of "drug paraphernalia" includes a list of items that largely, though not entirely, replicates the functions of the object described in the general paraphernalia statute, for example: "planting," "propagating," "cultivating," "growing."

[109] D.C. Code § 48-1103.

to use it for administration of a controlled substance by subcutaneous injection"[110] In contrast, the revised statute does not use a defined term of "drug paraphernalia" and more simply requires that the person possessed an object that was actually used to manufacture a controlled substance, or with intent to use it to manufacture a controlled substance. Objects that are used or intended for use for any other purpose, most notably personal consumption, are not covered by the revised statute.[111] This change improves the clarity and proportionality of the revised criminal code.

Second, the revised statute does not provide as a basis for liability that a person possesses an object that has been "designed for use" in manufacturing a controlled substance. The current D.C. Code paraphernalia statute includes liability for "objects used, intended for use, or designed for use in manufacturing…a controlled substance." [112] In contrast, the revised statute provides liability only for possession of an object that "has been used" or "[w]ith intent to use" to manufacture a controlled substance. Determining whether an item is specially "designed for" a particular purpose based on its objective features is a potentially difficult task, subject to arguments over whether a possessor is sufficiently on notice as to the item being contraband.[113] Moreover, in practice, the revised statute's elimination of separate liability for possession of items "designed for use in manufacturing…a controlled substance" may be quite narrow. Most objects involved in the planned[114] manufacture of a controlled substance are either general purpose items not specially designed[115] for manufacturing a controlled substance, or, if they are so specially designed,[116] would need few additional facts to allow inference of an intent to use to manufacture a controlled substance under the revised statute. This change clarifies and improves the proportionality of the revised statute.

Third, the revised statute includes an exclusion to liability if a person possesses an object that has been used to package or repackage a controlled for the person's own use, or with intent to use the object to package or repackage a controlled substance for the person's own use. Under current law, the term "manufacturing" includes "any packaging or repackaging of the [controlled] substance" with no exception for personal use.[117] In contrast, the revised statute provides an exclusion to liability for possessing an object used, or with intent to use, to package or repackage a controlled substance for the actor's own use. This change improves the proportionality of the revised statute.

Beyond these three substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may be viewed as substantive changes of law.

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[110] This statute also requires that the needle or syringe "has on it or in it any quantity (including a trace) of a controlled substance [.]"

[111] For example, possession of an instrument with intent to use it to ingest a controlled substance is not covered by the revised statute. This decriminalizes conduct currently covered by both D.C. Code § 48-904.10, and § 48-1103.

[112] D.C. Code § 48-1101 (3)(B).

[113] *See, generally, Fatumabahirtu v. United States*, 26 A.3d 322, 333 (D.C. 2011)(discussing constitutional litigation of paraphernalia statutes regarding "notice as to when otherwise innocuous household items qualified as drug paraphernalia.").

[114] The revised statute continues liability for knowing possession of an object that has been used to manufacture a controlled substance.

[115] For example, scales, packaging equipment, adulterants, and other items listed in D.C. Code § 48-1101 (3)(B).

[116] For example, a chemical preparation apparatus configured in a unique way to produce a controlled substance.

[117] The current definition of the term "manufacture" includes exceptions for "preparation or compounding of a controlled substance by an individual for his or her own use," but not for packaging or repackaging of a controlled substance for his or her own use. D.C. Code § 48-901.01 (13).

First, the revised statute specifies that the actor must knowingly possess an object. The current D.C. Code statute does not specify any culpable mental state as to the possession of the object, and there is no DCCA case law on point. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[118] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Four other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not include an exception to liability for possession of testing equipment for the purpose of testing personal use quantities of a controlled substance. The current statute provides that "it shall not be unlawful for a person to use, or possess with the intent to use, [paraphernalia] for the purpose of testing personal use quantities of a controlled substance ."[119] However, omitting this language is not intended to change District law. Under the revised possession of drug paraphernalia statute, possession of testing equipment with intent to test personal quantities of a controlled substance is not criminalized, as the revised statute requires that the actor possesses an object that has been used, or with intent to use, it to manufacture a controlled substance.

Second, the revised statute does not include an exception for possession of objects with intent to ingest or manufacture cannabis. The current statute provides an exception for persons 21 years of age or older who use, or possess with intent to use, paraphernalia to use or possess cannabis, or to grow, possess, harvest, or process cannabis plants in a manner lawful under D.C. Code § 48-904.01(a). However, omitting this exception is not intended to change current District law. A person who possesses an object with intent to use or possess would not be liable under the revised statute, which requires intent to manufacture. The term "controlled substance" as defined excludes cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who possesses an object with intent to use it to grow, possess, harvest, or process cannabis plants in the manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent to manufacture a "controlled substance," and would not liable under the revised offense.

[118] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[119] D.C. Code § 48-1103.

Third, the revised statute includes an exclusion to liability if the object is 50 years of age or older. The current D.C. Code paraphernalia offenses do not include this exclusion. However, in the current D.C. Code § 48-1101 definition of "drug paraphernalia" it states that "[t]he term 'drug paraphernalia' shall not include any article that is 50 years of age or older." Although the revised statute does not use a defined term of "drug paraphernalia," this exclusion is intended to maintain current law by excluding cases involving objects that are 50 years of age or older.

Fourth, the forfeiture under D.C. Code § 48-1104 includes two technical amendments. First, the statute refers to the revised paraphernalia offenses under D.C. Code § 48-904.10 and § 48-904.11, instead of current D.C. Code § 48-1103. Second, the forfeiture statute also omits the reference to use or possession of drug paraphernalia for "personal use." Under the current forfeiture statute, money or currency that has been used or intended for use in conjunction with the use or possession of paraphernalia, other than for personal use, is subject to forfeiture. This limitation on the forfeiture statute is unnecessary under the revised statutes, as use or possession of an object that is used for personal use of a controlled substance is not a criminal offense.

Relation to National Legal Trends. *The revised possession of drug manufacturing paraphernalia statute's above-mentioned substantive changes have limited support from national legal trends.*

Limiting the scope of the possession of drug paraphernalia offense to objects that have been used or are intended for use in manufacturing of a controlled substance is not supported by national legal trends. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[120] none limit the scope of their analogous possession of paraphernalia statutes to objects used for manufacturing controlled substances. However, Alaska does not have an analogous possession of drug paraphernalia offense, and New Mexico recently decriminalized possession of *all* drug paraphernalia, regardless of its actual or intended use.[121]

[120] 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). In addition, Tennessee reformed its criminal code after the publication of this article.

[121] N.M. Stat. Ann. § 30-31-25.1 (possession of drug paraphernalia is only punishable by a fine).

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

(a) *Offense.* A person commits trafficking of drug paraphernalia when that person:
  (1) Knowingly sells or delivers, or possesses with intent to sell or deliver, an object;
  (2) With intent that another person will use the object to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance.

(b) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation of this section:
  (1) For a community-based organization to sell or deliver, or possess with intent to sell or deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance; or
  (2) For person authorized by subsection (b) of 48-1103.01 to deliver any hypodermic syringe or needle distributed as part of the Needle Exchange Program authorized under D.C. Code § 48-1103.01; or
  (3) For a person to sell or deliver or possess with intent to sell or deliver an object that is 50 years of age or older.

(c) *Penalties.* Distribution of drug paraphernalia is a Class [X] offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The term "community based organization" has the meaning specified in D.C. Code § 7-404; the terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "possesses" has the meaning specified in RCC § 22E-701; and the terms "controlled substance" and "distributes" have the meaning specified in § 48-901.02.

(e) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Commentary

Explanatory Note. *This section establishes the trafficking of drug paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly selling or delivering, or possessing with intent to sell or deliver, an object with intent that another person will use the object for one of several specified purposes in conjunction with a controlled substance. The revised distribution of drug paraphernalia statute replaces portions of the general drug paraphernalia statute that criminalize sale, delivery, or possession with intent to sell or deliver drug paraphernalia,*[122] *the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11,*[123] *and the statute providing factors to be considered in determining whether an object is paraphernalia.*[124]

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[122] D.C. Code § 48-1103 (b), (c), and (e).
[123] D.C. Code §48-1101 (3).
[124] D.C. Code § 48-1102.

Subsection (a) specifies the elements of trafficking of drug paraphernalia. Paragraph (a)(1) specifies that the accused must knowingly deliver or sell, or possess with intent to deliver or sell, an object. The terms "deliver" and "sell" are intended to have the same meaning as under current District law. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, and applied here requires that the accused was practically certain that he or she delivered, sold, or possessed an object. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that he or she would deliver or sell an object. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually delivered or sold the object, only that the actor possessed the object while believing to a practical certainty that he or she would deliver or sell the object.

Paragraph (a)(2) requires that the person had intent that another person will use the object to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that another person would use the object for one of the specified purposes. Per RCC § 22E-205, the object of the phrase "with intent that" 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 another person actually used the object, only that the person believed to a practical certainty that another person would use the object for one of the specified purposes.

Subsection (b) provides three exceptions to liability. Paragraph (b)(1) specifies that it is not a violation of this section for a community-based organization to deliver, or possess with intent to deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance. The term "community based organization" is defined in D.C. Code § 7-404, and means "an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use . . . [and] includes all organizations currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01."

Paragraph (b)(2) specifies that it is not a violation of this section for a person authorized by subsection (b) of 48-1103.01 to deliver any hypodermic syringe or needle distributed as part of the Needle Exchange Program authorized under D.C. Code § 48-1103.01.

Paragraph (b)(3) specifies that it is not a violation of this section for a person to deliver or sell, or possess with intent to deliver or sell, any object that is 50 years of age or older. This exception applies regardless of the intended use of the object.

Subsection (c) specifies relevant penalties for the offense.

Subsection (d) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (e) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking of drug paraphernalia statute changes current law in five main ways.*

First, the revised distribution of drug paraphernalia statute does not require that the actor distributed or possessed "drug paraphernalia," a defined term that includes objects designed in a particular way. The current D.C. Code statute requires delivery or sale, or possession with intent to deliver or sell of "drug paraphernalia," a defined term which includes a broad array of specified objects used to produce, package, test, measure, or ingest a controlled substance, as well as any object "used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing . . . [a] controlled substance into the human body[.]"[125] In contrast, the revised statute covers any object provided that the accused intended that another person would use it for one of the specified purposes.[126] This change improves the clarity of the revised criminal code.

Second, the revised statute requires that the actor's sale, delivery, or possession with intent to sell or deliver the object be with intent that another person would use the object for one of the specified purposes. The current D.C. Code statute requires that the defendant sells or delivers paraphernalia "knowingly, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance[.]" The D.C. Court of Appeals has applied this culpable mental state language without discussion as to the meaning of such terms or whether or how such language equates to a negligence standard under the Model Penal Code or other jurisdictions."[127] Coupled with the current D.C. Code definition of "drug paraphernalia" as including, in part, items that are "designed for" use with controlled substances, the current statute provides liability for selling or delivering an item, without any awareness of that the other person may or will use that item in relation with a controlled substance. In contrast, the revised statute requires that the person's sale, delivery, or possession be with intent to sell or deliver an object be done "with intent" that the object be used for one of the specified purposes. While it need not be proven that an actor consciously desired for the recipient of the object to use it with respect to a controlled substance, the actor must be at least practically certain that the object would be used for such purposes. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[128] while basing criminal liability on negligence[129] is generally disfavored.[130]. This change improves the clarity and proportionality of the revised criminal code.

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[125] D.C. Code § 48-1101 (3).

[126] This change may have no practical effect on current District law. As currently defined, any object can constitute "drug paraphernalia" if it is used or intended to be used to manufacture or ingest a controlled substance. Any time a person satisfies the elements under the revised statute, the object in question would have constituted "drug paraphernalia" as currently defined.

[127] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). This case involved a glass ink pen, which could be used to inhale or ingest a controlled substance. However, the holding in *Fatumabahirtu* may presumably be applied to all other prohibited uses of drug paraphernalia.

[128] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[129] The DCCA's opinion in *Fatumabahirtu* strongly suggests that, per the current statute's reference to "under circumstances where one reasonably should know…," something akin to mere *negligence* as to whether the buyer would use the paraphernalia to ingest a controlled substance would suffice for criminal liability. The DCCA's opinion referenced the Model Drug Paraphernalia Act, which served as a model for the District's current paraphernalia statute and stated: "The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be

Third, the revised statute does not specifically criminalize sale of items currently enumerated in D.C. Code § 48-1103 (e)(1). Under the current D.C. Code statute, sale of cocaine free base kits, glass or ceramic tubes,[131] cigarette rolling papers, and cigar wrappers is criminalized for most[132] vendors, regardless of their actual or intended use. In contrast, under the revised statute sale of these objects is not criminalized, unless the person selling the objects intends that another person will use them in a manner specified in paragraph (a)(2) in relation to a controlled substance. Most of these items are objects with legitimate uses[133] and are currently available for purchase by District residents on the websites of major online retail sellers—any sale of which may constitute a crime under current law.[134] This change improves the proportionality of the revised criminal code.

Fourth, the revised statute penalizes repeat offenders consistent with other offenses in the RCC. Under the current D.C. Code statute, a person convicted of delivering or selling drug paraphernalia who has previously been convicted in the District of Columbia of a violation under subchapter I of Chapter 11, may be sentenced up to 2 years, four times the 6 month penalty for first time offenders. In contrast, the revised code omits any special repeat offender provision for trafficking of drug paraphernalia, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 to address any increased penalties. There is no clear rationale for why, at present, repeat paraphernalia offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised criminal code.

Fifth, the revised statute eliminates penalty enhancements for delivering or selling paraphernalia to a person under the age of 18. Under the current D.C. Code statute, any person who is 18 year of age or older who delivers or sells paraphernalia to a person who is under the age of 18 and who is at least 3 years younger may be sentenced to a term of imprisonment of up to 8 years, sixteen times the penalty for delivery or sale to an adult.[135] In contrast, the revised

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used as drug paraphernalia; or (iii) is aware of facts and circumstances from *which he should reasonably conclude there is a high probability* an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care." *Fatumabahirtu*, 26 A.3d at 334 (emphasis added). To the extent that the DCCA ruling in *Fatumabahirtu* establishes or requires a lower culpable mental state as to whether the person to whom an object is delivered or sold will use the object in a proscribed manner with respect to a controlled substance, that case would no longer be valid law upon adoption of the revised statute.

[130] The Supreme Court has stated that the principle that "the understanding that an injury is criminal only if inflicted knowingly is 'as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Rehaif v. United States*, No. 17-9560, 2019 WL 2552487, at *4 (U.S. June 21, 2019) (quoting *Morisette v. United States*, 342 U.S. 246, 250 (1952)).

[131] The tubes must be 6 inches in length and 1 inch in diameter.

[132] The statute excepts from this blanket prohibition on sale certain businesses. Commercial retail or wholesaler establishments may sell cigarette rolling papers if the establishment: derives at least 25% of its total annual revenue from the sale of tobacco products; and sells loose tobacco intended to be rolled into cigarettes or cigars.

[133] *See, e.g.,* Toff, Nancy, *The Flute Book: A Complete Guide for Students and Performers* (2012) at 36.

[134] *See,* D.C. Code § 45–604 ("The word "person" shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").

[135] D.C. Code § 48-1103 (c). Notably, an 8 year maximum sentence is longer than the maximum sentence authorized for felony assault, D.C. Code § 22-404, fourth degree sexual abuse, D.C. Code §22-3005, or second degree sexual abuse of a minor, D.C. Code § 22-3009.02.

statute does not include an age-based penalty enhancement. Delivering or selling drug paraphernalia to a minor would likely give rise to liability for contributing to the delinquency of a minor[136] that effectively raises the penalty for such behavior in a more proportionate manner. This change improves the proportionality of the revised criminal code.

Beyond these five substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may be viewed as substantive changes of law.

First, the revised statute specifies that the actor must knowingly distribute or sell the object that is to be used in connection with a controlled substance. The current D.C. Code statute does not specify any culpable mental state for "deliver or sell," however the DCCA has stated that the current statute requires "specific intent" to deliver or sell the paraphernalia.[137] The revised statute specifies that a "knowingly" culpable mental state is required. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[138] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Six other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not specifically criminalize manufacturing drug paraphernalia. The current D.C. Code statute specifically includes "manufacture with intent to deliver or sell drug paraphernalia" as a distinct form of a paraphernalia offense.[139] The revised statute, however, does not explicitly refer to manufacturing objects that are intended for use with controlled substances because such language is surplusage and potentially confusing. A person

[136] D.C. Code § 22–811(a)(5)(carrying a six-month maximum penalty for a first-time offense).
[137] *Fatumabahirtu*, 26 A.3d at 325 ("We hold that D.C.Code § 48–1103(b) requires the government to prove that an owner or a clerk of a commercial retail store had (1) the specific intent to deliver or sell drug paraphernalia (as defined in D.C.Code § 48–1101(3))…."). The DCCA discussion of "specific intent" in *Fatumabahirtu* does not appear to distinguish between conduct to "deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell."
[138] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[139] D.C. Code § 48-1103 (b)(1). Notably, unlike Chapter 9 of Title 48, which contains most controlled substance offenses and penalties, the term "manufacture" is not defined for Chapter 11.

who manufactures an object would also necessarily possess the object, and fall within the scope of the revised statute.

Second, the exclusion to liability under paragraph (b)(1) specifically lists testing equipment and other objects rather than rely on a cross reference. The current D.C. Code statute states that "it shall not be unlawful for a community based organization to as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[140] In the revised statute the term "community based organization" is cross-referenced in the subsection (e), and retains the same meaning as under current law. However, instead of referring to D.C. Code § 48-1101(3), paragraph (b)(1) specifies the testing equipment and objects that are excluded from the offense, using language copied verbatim from current D.C. Code § 48-1103(3)(D).

Third, paragraph (b)(2) includes the exclusion to liability currently located in D.C. Code § 48-1103.01(d). The exclusion in (b)(2) is copied nearly verbatim from D.C. Code § 48-1103.01(d). Including the exclusion within the revised statute is an organizational revision, and is not intended to substantively change current District law.

Fourth, the revised statute includes an exclusion to liability if the object is 50 years of age or older. The current D.C. Code paraphernalia offense does not include this exclusion, however, current D.C. Code § 48-1101 states that "[t]he term 'drug paraphernalia' shall not include any article that is 50 years of age or older." Although the revised statute does not use the term "drug paraphernalia," this exclusion is intended to maintain current law in excluding cases involving objects that are 50 years of age or older.

Fifth, the revised statute does not include an exception for selling, delivering, or possessing with intent to sell or deliver objects with intent that another person will use the object to possess, use, grow, harvest, or process cannabis. The current statute provides an exception for selling, delivering, or possessing with intent to sell or deliver drug paraphernalia "under circumstances in which one knows or has reason to know that such drug paraphernalia will be used solely for use of marijuana that is lawful under § 48-904.01(a), or that such drug paraphernalia will be used solely for growing, possession, harvesting, or processing of cannabis plants that is lawful under § 48-904.01(a)."[141] However, omitting this exception is not intended to change current District law. A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that a person will use the object to use, possess, grow, harvest, or process cannabis plants in a manner that is lawful under § 48-901.01(a) will not be liable under the revised offense. Under both current law and the RCC, the term "controlled substance" does not include marijuana used or possessed in manner defined in §48-904.01 (a), or cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that another person will use the object with marijuana or cannabis plants in a manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent that another person will use the object to produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a "controlled substance," and would not liable under the revised offense.

Sixth, the forfeiture under D.C. Code § 48-1104 includes two technical amendments. First, the statute refers to the revised paraphernalia offenses under D.C. Code § 48-904.10 and § 48-904.11, instead of current D.C. Code § 48-1103. Second, the forfeiture statute also omits the

[140] D.C. Code § 48-1103(b)(1)(A).
[141] D.C. Code § 48-1103 (b)(1).

reference to use or possession of drug paraphernalia for "personal use." Under the current forfeiture statute, money or currency that has been used or intended for use in conjunction with the use or possession of paraphernalia, other than for personal use, is subject to forfeiture. This limitation on the forfeiture statute is unnecessary under the revised statutes, as use or possession of an object that is used for personal use of a controlled substance is not a criminal offense.

Relation to National Legal Trends. *The revised trafficking of drug paraphernalia statute's above-mentioned substantive changes are unsupported or have limited support in other states' statutes.*

First, criminalizing trafficking of any object with intent that the object will be used in conjunction with a controlled substance rather than criminalizing a defined term "paraphernalia" that includes a detailed list of items is not supported by national legal trends. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[142] only one, Indiana, does not use the term "drug paraphernalia."

Second, it is unclear whether requiring that the actor has intent that the object will be used in conjunction with a controlled substance is supported by national legal trends. Due to time and staffing constraints, the CCRC staff did not review case law interpreting the analogous trafficking of drug paraphernalia statutes to determine the requisite mental state in the 29 reformed code jurisdictions.

[142] *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). In addition, Tennessee reformed its criminal code after the publication of this article.