



# First Draft of Report #33 - Correctional Facility Contraband

SUBMITTED FOR ADVISORY GROUP REVIEW  
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at [www.ccrcc.dc.gov](http://www.ccrcc.dc.gov).

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report #33 - *Correctional Facility Contraband*, is March 1, 2019 (nine weeks from the date of issue, which includes a two-week extension from the initial deadline due to the federal shutdown). Oral comments and written comments received after March 1, 2019 may not be reflected in the next draft or final recommendation. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

**RCC § 22E-3403. Correctional Facility Contraband.**

- (a) Except as provided in subsection (d), a person commits correctional facility contraband when that person:
- (1) With intent that an item be received by someone confined to a correctional facility:
    - (A) Knowingly brings the item to a correctional facility;
    - (B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
    - (C) The item, in fact, is Class A contraband or Class B contraband;or
  - (2) In fact, is someone confined to a correctional facility and:
    - (A) Knowingly possesses an item in a correctional facility;
    - (B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
    - (C) The item, in fact, is Class A contraband or Class B contraband.
- (b) *Gradations and Penalties.*
- (1) *First Degree.* A person commits first degree correctional facility contraband when the item is Class A contraband. First degree correctional facility contraband is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Second Degree.* A person commits second degree correctional facility contraband when the item is Class B contraband. Second degree correctional facility contraband is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* In this section:
- (1) The terms “knowingly” and “intent” have the meanings specified in § 22E-206; “in fact” has the meaning specified in § 22E-207;
  - (2) The terms “effective consent,” “dangerous weapon,” and “imitation dangerous weapon” have the meanings specified in § 22E-1001;
  - (3) The term “building” has the meaning specified in § 22E-2001;
  - (4) The term “possession” has the meaning specified in § 22E-202; and
  - (5) The term “correctional facility” means:
    - (A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
    - (B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
    - (C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

- (6) The term “Class A contraband” means:
- (A) A dangerous weapon or imitation dangerous weapon;
  - (B) Ammunition or an ammunition clip;
  - (C) Flammable liquid or explosive powder;
  - (D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
  - (E) A shank or homemade knife;
  - (F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;
  - (G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
  - (H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;
  - (I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;
  - (J) Rope; or
  - (K) A correctional officer’s uniform, law enforcement officer’s uniform, medical staff clothing, or any other uniform.

- (7) The term “Class B contraband” means:
- (A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];
  - (B) Any alcoholic liquor or beverage;
  - (C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or
  - (D) A portable electronic communication device or accessories thereto.

(d) *Exclusions from Liability.*

- (1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution.
- (2) A person does not commit correctional facility contraband when the item:
  - (A) Is a portable electronic communication device used by an attorney during the course of a legal visit; or
  - (B) Is a controlled substance prescribed to the person.

(e) *Detainment Authority.* If there is probable cause to suspect a person of possession of contraband, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

## COMMENTARY

***Explanatory Note.*** *This section establishes the correctional facility contraband offense for the Revised Criminal Code (RCC). The offense punishes knowingly bringing certain prohibited items to a person confined in jail, halfway house, or juvenile detention center. It also punishes a person confined to a jail, halfway house, or juvenile detention center who knowingly possessing certain prohibited items. The revised statute replaces D.C. Code § 22-2603.02, Unlawful possession of contraband; D.C. Code § 22-2603.03, Penalties; D.C. Code § 22-2603.01, Definitions; and D.C. Code § 22-2603.04, Detainment Power.*

Subsection (a)(1) specifies that one way of committing correctional facility contraband is by bringing a prohibited item to a correctional facility with intent that it reach someone who is confined there. It is not an element that the prohibited item actually was received by someone confined. “With intent” is a defined culpable mental state<sup>1</sup> that here requires the person believe their conduct is practically certain to cause the prohibited item to be received by someone who is confined to the correctional facility.<sup>2</sup> It is not necessary that the person intend that the item reach a particular resident of the facility.<sup>3</sup>

Subsection (a)(1)(A) specifies that the person must act knowingly, a culpable mental state that is defined in the general part of the revised code.<sup>4</sup> Applied here, it means the person must be practically certain that they have the item<sup>5</sup> and be practically certain that they brought the item to correctional facility grounds.<sup>6</sup> However, causing an innocent third party, such as a mail delivery person, to bring a prohibited item to a correctional facility may be sufficient for liability if the other elements of the offense are satisfied.<sup>7</sup>

Subsection (a)(1)(B) requires that the person bring the item to the correctional facility without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services. Effective consent is a defined term and means consent that was not obtained by coercion or deception.<sup>8</sup> Where a person has the effective consent of the correctional facility to bring the otherwise-prohibited item to the jail, that item does not subject the person to

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<sup>1</sup> RCC § 22E-206.

<sup>2</sup> For example, an attorney who brings a cellular phone into D.C. Jail to take personal phone calls in the waiting room does not commit a contraband offense because she did not intent to give it to a resident.

<sup>3</sup> Consider, for example, a person who places a weapon on the outer wall of a correctional facility’s recreation yard, hopeful that any resident might retrieve it. The government is not required to prove which resident was the intended recipient.

<sup>4</sup> RCC § 22E-206.

<sup>5</sup> Consider, for example, an attorney who brings his college backpack to D.C. Jail, without realizing there is a decades-old marijuana cigarette in the bottom of the bag. That attorney has not committed a correctional facility contraband offense.

<sup>6</sup> Consider, for example, a person who attempts to bring contraband into a halfway house, believing it is a temporary housing shelter or a rehabilitation center. That visitor has not committed a correctional facility contraband offense.

<sup>7</sup> See RCC § 22A-211, Liability for causing crime by an innocent or irresponsible person.

<sup>8</sup> RCC § 22E-1001.

correctional facility contraband liability.<sup>9</sup> Per the rule of interpretation in RCC § 22E-207(a), the culpable mental state of knowingly specified in subsection (a)(1)(A) applies to this element of the offense. The person must be practically certain that they lack effective consent to bring the item to the correctional facility.<sup>10</sup>

Subsection (a)(1)(C) requires that the item constitute Class A or Class B contraband. The term “in fact” is defined in the revised code to indicate that the actor is strictly liable with respect to this element of the revised offense.<sup>11</sup> Accordingly, it is of no consequence that the person does not know that the item is Class A or Class B contraband.

Subsection (a)(2) states that the second type of person subject to liability for correctional facility contraband is someone who is confined to a correctional facility. The word “confined” refers to the person’s legal custodial status and not to the physical strictures of the building. For instance, a corrections officer may be securely confined inside D.C. Jail during a shift in a physical sense, but the officer not legally “confined” to the custody of the correctional facility. Conversely, a halfway house resident may be physically permitted to leave at will, but nevertheless legally “confined” to the facility during designated hours.

Subsection (a)(2)(A) specifies that the person must act knowingly.<sup>12</sup> That is, the person must be practically certain that they possess the item on correctional facility grounds. “Possession” is a defined term and includes both actual and constructive possession.<sup>13</sup>

Subsection (a)(2)(B) requires that the person possess the item without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services. Effective consent is a defined term and means consent that was not obtained by coercion or deception.<sup>14</sup> Where a person has the permission of the correctional facility to have the otherwise-prohibited item inside the facility, the item does not subject the person to correctional facility contraband liability.<sup>15</sup> Per the rule of interpretation in RCC § 22E-207(a), the culpable mental state of knowingly specified in subsection (a)(2)(A) applies to this element of the offense. That is, the person must be practically certain that they lack effective consent to possess the item in the correctional facility.<sup>16</sup>

Subsection (a)(2)(C) requires that the item constitute Class A or Class B contraband. The term “in fact” is defined in the revised code to indicate that the actor is strictly liable with respect to this element of the revised offense.<sup>17</sup> Accordingly, it is of

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<sup>9</sup> For example, the department may allow a barber to bring a razor blade to use for cutting and shaving hair.

<sup>10</sup> Consider, for example, a person who gives papers fastened with a binder clip to a resident at D.C. Jail, without knowing that binder clips are disallowed. That person has not committed a contraband offense.

<sup>11</sup> RCC § 22E-207.

<sup>12</sup> RCC § 22E-206.

<sup>13</sup> RCC § 22E-202.

<sup>14</sup> RCC § 22E-1001. Accordingly, a person who obtains the Department’s consent by bribery, nevertheless commits a contraband offense.

<sup>15</sup> For example, the department may allow a confined person to use a phone for the limited purpose of an art or journalism project.

<sup>16</sup> Consider, for example, a confined person who accepts papers fastened with a binder clip, without knowing that binder clips are disallowed. That person has not committed a contraband offense.

<sup>17</sup> RCC § 22E-207.

no consequence that the person does not know that the item is Class A or Class B contraband.<sup>18</sup>

Subsection (b) states the gradations for the revised offense. The revised statute punishes contraband that may be used to cause an injury or facilitate an escape more severely than other contraband. Subsection (b) specifies the penalties for each grade of the revised offense.<sup>19</sup> [RESERVED.]

Subsections (c)(1) - (4) cross-reference applicable definitions located elsewhere in the RCC.

Subsection (c)(5) provides a definition for “correctional facility.” The term “correctional facility” refers to buildings and their grounds that are used by the Department of Corrections to confine people securely. It does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. It does not include buildings used by private businesses to detain suspected criminals.<sup>20</sup> With the exception of halfway houses, the definition excludes unsecured facilities such as inpatient drug treatment programs and independent living programs. The term “building” is defined in § 22E-2001 and means “a structure affixed to land that is designed to contain one or more human beings.” Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter.<sup>21</sup> Building grounds do not include adjacent or adjoining buildings that do not otherwise meet the definition of a building in the “correctional facility” definition. Subsections (c)(5)(A) and (B) require that adult detention centers and halfway houses be located in the District of Columbia,<sup>22</sup> but subsection (c)(5)(C) provides that youth detention centers may be located outside the city limits.<sup>23</sup>

Subsection (c)(6) defines Class A contraband as a list of items that may injure a person or facilitate an escape from the facility. Subsection (c)(6)(F) prohibits any substance capable of causing temporary blindness or incapacitation. The words “substance” and “incapacitation” distinguish materials that could be ingested and disorienting from objects that could be used to physically restrain a person such as handcuffs<sup>24</sup> or rope.<sup>25</sup>

Subsection (c)(7) defines Class B contraband to include controlled substances,<sup>26</sup> alcohol, drug paraphernalia, and cellular phones. In subsection (c)(7)(C), the phrase “item that can be used for the administration of a controlled substance” means an object that could be used to assist a user to introduce the drug into the body.<sup>27</sup> In subsection

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<sup>18</sup> Consider, for example, a confined person who accepts papers fastened with a binder clip. If the person knows that binder clips are prohibited by D.C. Jail, it is of no consequence that the person does not know that a binder clip can be disassembled into a sharp object capable of puncturing a person. See RCC § 22E-3403(c)(6)(D).

<sup>19</sup> [The Commission will assess specific merger issues for this offense after developing recommendations for RCC drug and weapons offenses.]

<sup>20</sup> For example, the booking room of a retail store does not qualify as a correctional facility.

<sup>21</sup> D.C. Code § 22-2603.01.

<sup>22</sup> See *Rivers v. United States*, 1975, 334 A.2d 179.

<sup>23</sup> For example, New Beginnings Youth Development Center is located on federal land outside of the city’s boundaries. See § 10-509.01.

<sup>24</sup> See RCC § 22E-3403(c)(6)(H).

<sup>25</sup> See RCC § 22E-3403(c)(6)(J).

<sup>26</sup> [The Commission has not yet issued recommendations for reformed drug offenses.]

<sup>27</sup> For example, a pipe may be included, whereas aluminum foil is not.

(c)(7)(D), “accessories” refers to devices that “enable or facilitate the use of a mobile telephone or other portable communication device. It is difficult to be exhaustive in light of changing technology, but accessories include chargers and batteries.”<sup>28</sup>

Subsection (d) clarifies that the statute excludes all constitutionally protected activity from its reach.<sup>29</sup> Two potential conflict-of-law scenarios are specifically addressed. Subsection (d)(2)(A) excludes from liability the use of a portable electronic device by an attorney during a legal visit.<sup>30</sup> Subsection (d)(2)(B) excludes from liability possession of prescription medication by a person who needs it for their health and wellness.<sup>31</sup>

Subsection (e) limits the correctional facility’s authority to detain a person on suspicion of bringing contraband to a period of two hours. Probable cause is both sufficient and required.<sup>32</sup>

***Relation to Current District Law.*** *The revised correctional facility contraband statute changes current law in seven ways to improve the consistency of the code, ensure the constitutionality of the statute, and improve the proportionality of penalties.*

First, the revised statute criminalizes conduct concerning contraband in halfway houses and in juvenile detention centers outside of city limits. The D.C. Code currently prohibits contraband on the “grounds of a penal institution or a secure juvenile residential facility.” These terms are not defined in the statute or in case law interpreting the statute. However, the DCCA has held that a related phrase, “penal or correctional facility,” which appears in the District’s escape statute,<sup>33</sup> includes the District’s halfway houses.<sup>34</sup> Recently, the D.C. Council explicitly rejected a proposed amendment to expand the reach of the correctional facility contraband offense to halfway houses and other unsecured facilities.<sup>35</sup> In contrast, the definition of “correctional facility” in the revised correctional facility contraband offense is consistent with the definition of “correctional facility” in the revised escape statute and includes halfway houses and juvenile detention centers outside of the District.<sup>36</sup> This change improves the consistency of the revised statutes.

Second, the revised statute specifies that a knowing culpable mental state is required for persons who possess contraband, just as it is for persons who deliver it. Current D.C. Code § 22-2603.02(b) merely states, “It is unlawful for an inmate, or securely detained juvenile, to possess Class A, Class B, or Class C contraband, regardless of the intent with which he or she possesses it.” This language is ambiguous as to whether a person is strictly liable as to whether the item possessed is contraband, or

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<sup>28</sup> Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-151, “Omnibus Public Safety and Justice Amendment Act of 2009,” (June 26, 2009) at page 16.

<sup>29</sup> RCC § 22E-3403(d)(1).

<sup>30</sup> Prohibiting contraband in this context may offend the right to effective assistance of counsel under the Sixth Amendment.

<sup>31</sup> Prohibiting contraband in this context may offend the prohibition of cruel and unusual punishment in the Eighth Amendment.

<sup>32</sup> See D.C. Code § 23-582.

<sup>33</sup> D.C. Code § 22-2601.

<sup>34</sup> See *Demus v. United States*, 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States*, 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

<sup>35</sup> Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-963, “Criminal Code Amendment Act of 2010,” (December 6, 2010) at page 4.

<sup>36</sup> RCC § 22E-2601.



whether a person’s intent to use contraband for a non-harmful purpose is irrelevant to liability but they must be aware that they possess contraband.<sup>37</sup> There is no case law on point. District practice appears to treat as a matter of strict liability the fact that an item possessed by a confined person is contraband, while the possession itself must be purposeful.<sup>38</sup> In contrast, the revised statute requires a confined person to both knowingly possess an item and know that he lacks effective consent to do so, similar to the requirements for someone bringing contraband into a correctional facility. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.<sup>39</sup> This change improves the proportionality of the revised statutes.

Third, the revised offense reclassifies contraband according to the danger presented. Current statutory law roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs;<sup>40</sup> (B) alcohol, drug paraphernalia, and cellular phones;<sup>41</sup> and (C) any item prohibited by rule.<sup>42</sup> The current statute also penalizes possession of class C contraband as a criminal offense, even though only administrative sanctions are authorized,<sup>43</sup> and a person who violates the rules of a halfway house is subject to being remanded to D.C. Jail.<sup>44</sup> By contrast, the revised statute classifies contraband into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. The revised statute does not otherwise criminalize violations of other correction facility rules, including rules of half-way houses, regarding what items that can be possessed. In the RCC, such matters are subject to only administrative processing and sanctions. This reclassification of what constitutes contraband reorders and limits criminal sanctions to items posing significant dangers. This change improves the proportionality of the revised statutes.

Fourth, the revised statute narrows the list of Class A contraband in two ways. First, the current statute includes as Class A contraband the possession of any civilian clothing<sup>45</sup> and “Any item, the mere possession of which is unlawful under District of Columbia or federal law.”<sup>46</sup> There is no District case law interpreting this phrase, but the language would seem to include not only weapons and controlled substances listed

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<sup>37</sup> The current statutory definition of Class C contraband also states: “The rules shall be posted in the facility to give notice of the prohibited articles or things,” but does not provide any relief to the accused if the notice is not posted.” D.C. Code § 22-2603.01(4)(a).

<sup>38</sup> Criminal Jury Instructions for the District of Columbia Instruction 6.603 (2018) (“The elements of possessing contraband in [a penal institution] [a secure juvenile residential facility], each of which the government must prove beyond a reasonable doubt, are that: 1. [Name of defendant] was [an inmate] [a securely detained juvenile] in [name of penal institution or secure juvenile residential facility]; 2. S/he possessed [name of object]; [and] 3. S/he did so voluntarily and on purpose, and not by mistake or accident[.] [; and] [4. The [name of object] was [insert applicable definition of contraband from statute].] “voluntarily and on purpose, and not by mistake or accident.”).

<sup>39</sup> 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)”).

<sup>40</sup> D.C. Code § 22-2603.01(2)(A).

<sup>41</sup> D.C. Code § 22-2603.01(3)(A).

<sup>42</sup> D.C. Code § 22-2603.01(4)(A).

<sup>43</sup> D.C. Code § 22-2603.03(e).

<sup>44</sup> D.C. Code § 24-241.05(a).

<sup>45</sup> D.C. Code § 22-2603.01(2)(A)(viii).

<sup>46</sup> D.C. Code § 22-2603.01(2)(A)(i).

separately as Class A contraband, but items that pose no apparent threat to the safety or order of a correctional facility.<sup>47</sup> In contrast, the revised statute criminalizes as Class A contraband only the possession of a uniform, and punishes possession of any weapon or drug that is prohibited by the District's criminal code, without including any (unspecified) item prohibited by federal or District law. Second, the current statute includes as Class A contraband, "Any object designed or intended to facilitate an escape."<sup>48</sup> In contrast, the revised statute refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door."<sup>49</sup> The revised language creates a more objective basis for identifying contraband—rather than intent to facilitate escape—and is consistent with language in the revised possession of burglary and theft tools offense.<sup>50</sup> These changes improve the clarity and consistency of the revised offense and improve the proportionality of penalties.

Fifth, the revised statute punishes accomplice liability consistently with other revised offenses. The current contraband statute compels District employees to report contraband and criminally punishes a failure to do so.<sup>51</sup> In contrast, the revised contraband statute relies on the definition of accomplice liability in the revised code's general part,<sup>52</sup> as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,<sup>53</sup> and carves out exceptions to accomplice liability.<sup>54</sup> Offenses relating to public corruption and obstructing justice may also punish employee accomplices in this context.<sup>55</sup> This approach avoids potential First Amendment challenges regarding compelled speech, and may improve the constitutionality of the revised offense.<sup>56</sup> This change also improves the consistency and the proportionality of the revised offenses.

Sixth, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the sentencing court. The current contraband statute requires that a sentence for unlawful possession of contraband run consecutive to any term of imprisonment imposed in the case in which the person was being detained at the time this offense was committed.<sup>57</sup> This provision has two notable features that distinguish it from any other sentencing provision in the D.C. Code. First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.<sup>58</sup> Second, it applies to persons who are pre-trial in any jurisdiction at the time of the

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<sup>47</sup> See, e.g. 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).

<sup>48</sup> D.C. Code § 22-2603.01(2)(A)(iv).

<sup>49</sup> RCC § 22E-3403(c)(6)(G).

<sup>50</sup> RCC § 22E-2702(a)(2)(G).

<sup>51</sup> D.C. Code § 22-2603.02(c).

<sup>52</sup> RCC § 22E-210.

<sup>53</sup> RCC § 22E-211.

<sup>54</sup> RCC § 22E-212.

<sup>55</sup> [The Commission has not yet issued recommendations for reformed public corruption and obstructing justice offenses.]

<sup>56</sup> See Eugene Volokh, *Do Laws Requiring People to Report Crimes Violate the First Amendment? The logic of a recent Second Circuit decision suggests that they do*, REASON (Sep. 26, 2018) (citing *Burns v. Martuscello*, 890 F.3d 77 (2d Cir. 2018)).

<sup>57</sup> D.C. Code § 22-2603.03(d).

<sup>58</sup> By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the. D.C. Code § 22-2601(b).

contraband offense.<sup>59</sup> Legislative history does not clarify why such an infringement on the sentencing court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape. In contrast, the revised statute does not require consecutive sentencing, leaving such a decision to the sentencing court. This change improves the consistency and the proportionality of revised offenses.

Seventh, the RCC contains merger provisions that describe when a conviction for correctional facility contraband and another conviction arising from the same course of conduct merges. The current statute and District case law are silent as to whether a conviction for unlawful possession of contraband merges with other offenses. However, the current contraband offense and offenses for possession of controlled substances and weapons do not appear to satisfy an elements test<sup>60</sup> as required for the DCCA to require merger. In contrast, the RCCs general provisions describe when a conviction for correctional facility contraband and offenses arising from the same course of conduct may merge, including charges for possession of controlled substances and prohibited weapons.<sup>61</sup> This change avoids unnecessary overlap between offenses and improves the proportionality of the revised offenses.

*Beyond these changes to current District law, three other aspects of the revised correctional facility contraband statute may constitute substantive changes of law.*

First, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 22-2603.02(a)(2) makes it unlawful to “cause another” to bring contraband to a secured facility. By contrast, the revised statute relies on the definitions of accomplice liability,<sup>62</sup> solicitation,<sup>63</sup> and criminal conspiracy<sup>64</sup> in the revised code's general part. This change improves the consistency and the proportionality of revised offenses.

Second, the revised statute modifies the exclusions from liability enumerated in D.C. Code §§ 22-2603.02(d), (e), and (f). The first exception in current law is for any item issued to a facility employee or a law enforcement officer that is being used in the performance of her official duties.<sup>65</sup> In the RCC this exception is rendered unnecessary by the revised offenses requirement that the person knowingly act without the correctional facility's effective consent.<sup>66</sup> This change to the RCC authorizes the facility to allow employees to carry contraband that was not “issued,” such as personal medication, a possible change in law. The second exception in current law is for attorneys who share portable electronic devices or recorded materials with detained

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<sup>59</sup> The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).

<sup>60</sup> *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*).

<sup>61</sup> [The Commission may update future commentary to RCC § 22E-214 to note the intended merger relationship between correctional facility contraband and other offenses. The Commission will assess specific merger issues for this offense after developing recommendations for RCC drug and weapons offenses.]

<sup>62</sup> RCC § 22E-210.

<sup>63</sup> RCC § 22E-302.

<sup>64</sup> RCC § 22E-303.

<sup>65</sup> D.C. Code § 22-2603.02(d).

<sup>66</sup> Where, for example, a facility has permitted an employee to carry a billy or a law enforcement officer to use tear gas, correctional facility contraband liability does not attach.

clients.<sup>67</sup> Because the revised offense does not criminalize conveying or possessing written or recorded materials, the revised exception for attorneys refers only to portable electronic communication devices. The third exclusion from liability in current law is possession of a “controlled substance that is prescribed to that person and that is medically necessary for that person to carry.”<sup>68</sup> The term “carry” is not defined and has not been interpreted in District case law. To clarify that a person will not be subject to prosecution for medicine she needs to constructively possess, RCC § 22E-3403(d)(2)(B) categorically excepts all prescribed medication.<sup>69</sup>

*Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.*

First, the phrase “brings...to a correctional facility” replaces the phrases “bring...into or upon the grounds of”<sup>70</sup> and “place in such proximity to.”<sup>71</sup> Current D.C. Code § 22-2603.02(a) is grammatically difficult to understand. Presumably, subsection (a)(3) intends to say either, “place in close proximity with intent to give access” or “place in such proximity as to give access.” Because the revised statute defines the term “correctional facility” to include the building grounds, the word “to” adequately captures all trafficking scenarios targeted by the current law.<sup>72</sup>

Second, the revised code defines “possession” in its general part.<sup>73</sup> The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.<sup>74</sup> In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Third, the revised offense simplifies the defined term “Cellular telephone or other portable communication device and accessories thereto.”<sup>75</sup> Current law defines this term with references to specific technology, several of which are already rare or obsolete.<sup>76</sup>

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<sup>67</sup> D.C. Code § 22-2603.02(e).

<sup>68</sup> D.C. Code § 22-2603.02(f).

<sup>69</sup> A person may still be subject to administrative discipline for possession of prescribed medication, if it violates a reasonable institutional rule.

<sup>70</sup> D.C. Code § 22-2603.02(a)(1).

<sup>71</sup> D.C. Code § 22-2603.02(a)(3).

<sup>72</sup> For example, if a person places contraband on the outer wall of the correctional facility’s secured yard, that person has brought contraband to the correctional facility.

<sup>73</sup> RCC § 22E-202.

<sup>74</sup> See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

<sup>75</sup> D.C. Code § 22-2603.01(a)(3)(c).

<sup>76</sup> “Cellular telephone or other portable communication device and accessories thereto” means any device carried, worn, or stored that is designed, intended, or readily converted to create, receive or transmit oral or written messages or visual images, access or store data, or connect electronically to the Internet, or any other electronic device that enables communication in any form. The term “cellular telephone or other portable communication device and accessories thereto” includes portable 2-way pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, and any components of these devices. The term “cellular telephone or other portable communication device and accessories thereto” also includes any new technology that is developed for communication purposes and includes accessories that enable or facilitate the use of the cellular telephone or other portable communication device.

The revised statute uses a simpler reference to portable electronic communication devices and accessories thereto.<sup>77</sup>

Fourth, the revised statute clarifies the correctional facilities' detention authority. D.C. Code § 22-2603.04 states that a person who brings contraband to a facility may be detained for no more than two hours until police arrive. The statute does not include a standard of proof and the District of Columbia Court of Appeals has not interpreted the statute. The revised statute clarifies that probable cause is required, just as it is for any other warrantless detention.<sup>78</sup>

***Relation to National Legal Trends.*** *The revised correctional facility contraband statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.<sup>79</sup> Twenty-six reform states criminalize trafficking contraband to a correctional facility.<sup>80</sup> Twenty-five reform states criminalize possession of contraband by a person who is incarcerated.<sup>81</sup>

First, the revised statute prohibits contraband in halfway houses, in addition to secure detention facilities. This change is broadly supported by national trends. Eighteen reform states explicitly define terms such as "detention facility," "correctional facility,"

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<sup>77</sup> RCC § 22-3403(c)(7)(D).

<sup>78</sup> See D.C. Code § 23-582.

<sup>79</sup> The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

<sup>80</sup> Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; Colo. Rev. Stat. Ann. § 18-8-203; Colo. Rev. Stat. Ann. § 18-8-204; Conn. Gen. Stat. Ann. § 53a-174; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1023; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; 720 Ill. Comp. Stat. Ann. 5/31A-1.2; Ind. Code Ann. § 35-44.1-3-5; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-7-307; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09; Ohio Rev. Code Ann. § 2921.36; Or. Rev. Stat. Ann. § 162.185; 18 Pa. Stat. and Cons. Stat. Ann. § 5122; Tenn. Code Ann. § 39-16-201; Tex. Penal Code Ann. § 38.114; Tex. Penal Code Ann. § 38.09; Utah Code Ann. § 76-8-311.3; Utah Code Ann. § 76-8-311.1; Wash. Rev. Code Ann. § 9A.76.140; Wash. Rev. Code Ann. § 9A.76.150; Wash. Rev. Code Ann. § 9A.76.160.

<sup>81</sup> Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; Colo. Rev. Stat. Ann. § 18-8-204.1; Colo. Rev. Stat. Ann. § 18-8-204.2; Conn. Gen. Stat. Ann. § 53a-174a; Conn. Gen. Stat. Ann. § 53a-174b; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1023; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; 720 Ill. Comp. Stat. Ann. 5/31A-1.2; Ind. Code Ann. § 35-44.1-3-7; Ind. Code Ann. § 35-44.1-3-8; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-8-318; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09; Ohio Rev. Code Ann. § 2921.36; Or. Rev. Stat. Ann. § 162.185; 18 Pa. Stat. and Cons. Stat. Ann. § 5122; Tenn. Code Ann. § 39-16-201; Tex. Penal Code Ann. § 38.114; Utah Code Ann. § 76-8-311.3; Utah Code Ann. § 76-8-311.1.

“penal institution” and “official custody” to include any place used for the confinement of accused or convicted persons.<sup>82</sup>

Second, the revised statute requires that an incarcerated person know that she possesses the prohibited item and know she does not have the effective consent of the facility to possess it. No reform state punishes an incarcerated person for possession of contraband “regardless of the intent with which he or she possesses it,” as the District’s current law does.<sup>83</sup> Nineteen reform states statutorily require knowledge or intent.<sup>84</sup>

Third, the revised statute follows the gradation approach in the Model Penal Code, by distinguishing between items that may be useful for an escape and other contraband.<sup>85</sup> Seven reform states have a gradation structure similar to the revised statute and the model penal code.<sup>86</sup>

Fourth, the revised statute decriminalizes possession of civilian clothing and “anything prohibited by rule.” No reform states expressly punish possession of civilian clothing.<sup>87</sup> A minority of reform states (ten) define contraband to include any unauthorized item.<sup>88</sup> However, at least one of these statutes was held to violate due process as applied.<sup>89</sup>

Fifth, the revised code punishes “causing another to bring contraband” in its general accomplice liability provision instead of in the offense definition. Only four

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<sup>82</sup> Ala. Code § 13A-10-30; Ariz. Rev. Stat. Ann. § 13-2501; Ark. Code Ann. § 5-54-101(2)(A); Colo. Rev. Stat. Ann. § 18-8-204; Conn. Gen. Stat. Ann. § 1-1(w); Del. Code Ann. tit. 11, § 1258(3); 720 Ill. Comp. Stat. Ann. 5/31A-0.1; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.010; Me. Rev. Stat. tit. 17-A, § 755(3); Mo. Ann. Stat. § 217.010; N.H. Rev. Stat. Ann. § 642:6(II); N.Y. Penal Law § 205.00 (1); N.D. Cent. Code Ann. § 12.1-08-06(3)(b); Or. Rev. Stat. Ann. § 162.135(2); Tex. Penal Code Ann. § 1.07 (14); Utah Code Ann. § 76-8-311.3(1)(c); Wash. Rev. Code Ann. § 9A.76.010(3)(e). Staff did not research case law for jurisdictions that do not define these terms or that define them using unclear language such as “any prison or any building appurtenant thereto.”

<sup>83</sup> D.C. Code § 22-2603.02(b).

<sup>84</sup> Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Colo. Rev. Stat. Ann. § 18-8-204.1; Colo. Rev. Stat. Ann. § 18-8-204.2; Conn. Gen. Stat. Ann. § 53a-174a; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1022; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; Ind. Code Ann. § 35-44.1-3-7; Ind. Code Ann. § 35-44.1-3-8; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-8-318; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; Or. Rev. Stat. Ann. § 162.185; Tenn. Code Ann. § 39-16-201; Utah Code Ann. § 76-8-311.3.

<sup>85</sup> Model Penal Code § 242.7.

<sup>86</sup> Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09.

<sup>87</sup> Staff did not perform case law research to determine phrases such as “any item or article that could be used to facilitate an escape” have been interpreted by any state court to include all civilian clothing.

<sup>88</sup> Ala. Code § 13A-10-30(b)(4); Alaska Stat. Ann. § 11.56.390; Ark. Code Ann. § 5-54-119; Ind. Code Ann. § 35-44.1-3-5 (for trafficking, but not for possession); Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.010; Mo. Ann. Stat. § 221.111(4) (infraction only); N.H. Rev. Stat. Ann. § 642:7; (“anything contrary to law or regulation”); N.Y. Penal Law § 205.00 (3); Or. Rev. Stat. Ann. § 162.135(1)(a)(D); *see also* Mont. Code Ann. § 45-7-307 (barring “illegal articles”); N.J. Stat. Ann. § 2C:29-6 (barring “unlawful” articles).

<sup>89</sup> *See State v. Taylor*, 54 Kan. App. 2d 394 (2017) (holding a contraband statute violated due process as applied to a defendant was not provided individualized notice by correctional institution administrators of what items were prohibited).

reform states specifically punish “causing another” to bring contraband in the contraband offense definition.<sup>90</sup>

Sixth, the revised offense does not criminalize an employee’s failure to report the presence of contraband. No reform states punish a failure to report.<sup>91</sup>

Seventh, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the trial court. Only one reform state requires consecutive sentencing for promoting contraband.<sup>92</sup>

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<sup>90</sup> Conn. Gen. Stat. Ann. § 53a-174; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; Ind. Code Ann. § 35-44.1-3-5; Utah Code Ann. § 76-8-311.3.

<sup>91</sup> *But see* Ariz. Rev. Stat. Ann. §§ 13-2505(B) and 13-2514(B) (requiring reporting without punishing a failure to report). Staff did not perform research to determine whether this conduct would violate other public corruption statutes in each state.

<sup>92</sup> Colo. Rev. Stat. Ann. § 18-8-209.