



First Draft of Report #39 - Weapon Offenses and Related Provisions

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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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.ccrdc.dc.gov.

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report No. 39, *Weapon Offenses and Related Provisions*, is Monday, September 30, 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.

RCC Title 7.

Chapter 25.

- RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition. {D.C. Code §§ 7-2502.01; 7-2506.01(a); 7-2507.06; 24 DCMR § 2343.2}
- RCC § 7-2502.15. Possession of a Stun Gun. {D.C. Code § 7-2502.15}
- RCC § 7-2502.17. Carrying an Air or Spring Gun. {24 DCMR § 2301}
- RCC § 7-2507.02. Unlawful Storage of a Firearm. {D.C. Code § 7-2507.02; 24 DCMR § 2348}
- RCC § 7-2509.06. Carrying a Pistol in an Unlawful Manner. {24 DCMR §§ 2343.1; 2344}

RCC Title 22E.

Chapter 7. Definitions

- RCC § 22E-701. Definitions. {D.C. Code §§ 7-2502.12; 22-4501; 22-4513; 24 DCMR § 2325}

Chapter 41. Weapons

- RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory. {D.C. Code §§ 7-2502.13; 7-2506.01(a)(3); 7-2506.01(b); 22-4514(a); 22-4515a(a) and (c)}
- RCC § 22E-4102. Carrying a Dangerous Weapon. {D.C. Code §§ 7-2509.07; 22-4502.01; 22-4504(a) – (a-1); 22-4504.01; 22-4505; 24 DCMR § 2346}
- RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime. {D.C. Code §§ 22-4514(b); 22-4515a(b)}
- RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime. {D.C. Code §§ 22-4502 and 22-4504(b)}
- RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person. {D.C. Code § 22-4503}
- RCC § 22E-4106. Negligent Discharge of Firearm. {D.C. Code §§ 22-4503.01; 24 DCMR § 2300}
- RCC § 22E-4107. Alteration of a Firearm Identification Mark. {D.C. Code §§ 7-2505.03(d); 22-4512}
- RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property. {D.C. Code § 22-4503.02}
- RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition. {D.C. Code § 22-4504.02}
- RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol. {D.C. Code § 22-4506}
- RCC § 22E-4111. Unlawful Sale of a Pistol. {D.C. Code § 22-4507}

RCC § 22E-4112.	Unlawful Transfer of a Firearm. {D.C. Code § 22-4508}
RCC § 22E-4113.	Sale of Firearm Without a License. {D.C. Code § 22-4509}
RCC § 22E-4114.	Civil Provisions for Licenses of Firearms Dealers. {D.C. Code § 22-4510}
RCC § 22E-4115.	Unlawful Sale of a Firearm by a Licensed Dealer. {D.C. Code § 22-4510}
RCC § 22E-4116.	Use of False Information for Purchase or Licensure of a Firearm. {D.C. Code § 22-4511}
RCC § 22E-4117.	Civil Provisions for Taking and Destruction of Dangerous Articles. {D.C. Code § 22-4517}
RCC § 22E-4118.	Exclusions from Liability for Weapon Offenses. {D.C. Code §§ 22-4504.01; 22-4505}
RCC § 22E-4119.	Limitation on Convictions for Multiple Related Weapons Offenses.*
RCC § 22E-4120.	Severability. {D.C. Code § 22-4516}

* No corresponding statute in current D.C. Code. {...} Corresponding statute(s) in D.C. Code.

RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

- (a) *First Degree.* A person commits first degree possession of an unregistered firearm, destructive device, or ammunition when that person knowingly possesses:
 - (1) A firearm without, in fact, being the holder of a registration certificate issued under D.C. Code § 7-2502.07 for that firearm; or
 - (2) A destructive device.
- (b) *Second Degree.* A person commits second degree possession of an unregistered firearm, destructive device, or ammunition when that person knowingly possesses:
 - (1) Ammunition without, in fact, being the holder of a registration certificate issued under D.C. Code § 7-2502.07 for a firearm of the same caliber; or
 - (2) One or more restricted pistol bullets.
- (c) *Exclusions from Liability.* Notwithstanding subsections (a) and (b):
 - (1) A person shall not be subject to prosecution under subsection (a) of this section for possession of a firearm frame, receiver, muffler, or silencer.
 - (2) A person shall not be subject to prosecution under subsection (a) of this section if the person is a nonresident of the District of Columbia who is:
 - (A) Participating in a lawful recreational firearm-related activity inside the District; or
 - (B) Traveling to or from a lawful recreational firearm-related activity outside the District; and
 - (i) Upon demand of a law enforcement officer exhibits proof that:
 - (I) The person is traveling to or from a lawful recreational firearm-related activity outside the District; and
 - (II) The person's possession or control of the firearm is lawful in the person's jurisdiction of residence; and
 - (ii) The firearm is transported in accordance with the requirements specified in RCC § 22E-4109.
 - (3) A person shall not be subject to prosecution under subsection (b) of this section if the person is the holder of an ammunition collector's certificate effective on or before September 24, 1976.
 - (4) A person shall not be subject to prosecution under subsection (b) of this section for possession of one or more empty cartridge cases or shells.
 - (5) A person shall not be subject to prosecution under this section for possession of an unregistered firearm, destructive device, or ammunition when voluntarily surrendering the object.
 - (6) A person shall not be subject to prosecution under this section if the person meets any of the exception criteria in RCC § 22E-4118.
- (d) *Prosecutorial Authority.* The Attorney General shall prosecute violations of this section.

- (e) *Jury Trial.* A defendant charged with a violation of this section or an inchoate violation of this section may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.
- (f) *Penalties.*
 - (1) First degree possession of an unregistered firearm, destructive device, or ammunition is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree possession of an unregistered firearm, destructive device, or ammunition is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (3) *Administrative Disposition.* The Attorney General may, in the operation of its discretion, offer an administrative disposition under D.C. Code § 5-335.01 et seq. for a violation of this section.
- (g) *Definitions.* The term “knowingly” has the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “ammunition,” “Attorney General,” “court,” “law enforcement officer,” “possesses,” and “restricted pistol bullet” have the meanings specified in RCC § 22E-701; the terms “destructive device” and “firearm” have the meanings specified in D.C. Code § 7-2501.01.
- (h) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense.

COMMENTARY

***Explanatory Note.** This section establishes the possession of an unregistered firearm, destructive device, or ammunition offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing a firearm or ammunition without having registered a firearm under D.C. Code § 7-2502.07. The revised statute replaces the first sentence of D.C. Code § 7-2502.01(a) (concerning possession of an unregistered firearm or destructive device); 7-2506.01(a) (Persons permitted to possess ammunition); and 7-2507.06 (Penalties); and 24 DCMR § 2343.2 (Ammunition carried by licensee). This section is added to the list of excepted code provisions in D.C. Code § 7-2507.06(a).*

Subsection (a) specifies the elements of first degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (a) specifies that a person must knowingly possess an unregistered firearm¹ or destructive device. “Knowingly” is a defined term² and applied here means that the person must be practically certain that they possess the firearm or destructive device. “Possesses” is a defined term and includes

¹ Knowledge of a gun’s presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); see also *Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer’s knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

² “Knowingly” is defined in RCC § 22E-206.

both actual and constructive possession.³ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.⁴ Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.⁵

Paragraph (a)(1) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing an unregistered firearm. "Firearm" is a defined term,⁶ which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability⁷ but excludes antiques.⁸ Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess a firearm⁹ or that they possess component parts that could be arranged to make a whole firearm.¹⁰ Paragraph (a)(1) requires proof that the accused lacked a firearm registration certificate on the day in question.¹¹ Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a registration certificate.¹² It is not a defense that the person was unaware of the duty to register the firearm.¹³ It is not a defense that the firearm cannot be registered lawfully in the District.¹⁴

³ RCC § 22E-701.

⁴ See, e.g., *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

⁵ See, e.g., *Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

⁶ D.C. Code § 7-2501.01.

⁷ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

⁸ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

⁹ See *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

¹⁰ *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

¹¹ See *Herrington v. United States*, 6 A.3d 1237, 1244-45 (D.C. 2010) (stating a legislature may not presume criminality from Second Amendment-protected conduct and put the burden of persuasion on the accused to prove facts necessary to establish innocence); see also *Walker v. United States*, 982 A.2d 723, 738 (D.C. 2009) (explaining to convict a defendant on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed) (citing *Halicki v. United States*, 614 A.2d 499, 503-04 (D.C.1992)); *Tabaka v. Dist. of Columbia*, 976 A.2d 173, 175 (D.C. 2009) (explaining that a record of no permit is testimonial, triggering the Confrontation Clause of the Sixth Amendment to the United States Constitution).

¹² RCC § 22E-207.

¹³ *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978); *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987); *District of Columbia v. Lewis*, 136 WLR 2609 (Super. Ct. 2008).

¹⁴ See *United States v. Carmel*, 548 F.3d 571, 579 (7th Cir.2008) (holding that defendant could have complied with statute prohibiting possession of unregistered firearms "simply by declining to possess...illegal machine guns," which could not be registered because they could not legally be possessed); *United States v. Grier*, 354 F.3d 210, 214-15 (3d Cir.2003) (same); *United States v. Bournes*, 339 F.3d 396, 399 (6th Cir.2003) (same); *United States v. Elliott*, 128 F.3d 671, 672 (8th Cir.1997) (same); *Hunter v. United States*, 73 F.3d 260, 261-62 (9th Cir.1996) (same); *United States v. Ardoin*, 19 F.3d 177, 179-80 (5th Cir.1994) (same); *United States v. Jones*, 976 F.2d 176, 183 (4th Cir.1992) (same); but see *United States v. Dalton*, 960 F.2d 121, 124 (10th Cir.1992) (reversing conviction

Paragraph (a)(2) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing a destructive device. The term “destructive device” is a defined¹⁵ term that includes certain explosives and lacrimators but excludes B-B guns and flare guns. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of “destructive device.”

Subsection (b) specifies the elements of second degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (b) specifies that a person must knowingly possess a specified object.¹⁶ “Knowingly” is a defined term¹⁷ and applied here means that the person must be practically certain that they possess the object. “Possesses” is a defined term and includes both actual and constructive possession.¹⁸ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.¹⁹ Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate constructive possession.²⁰

Paragraph (b)(1) provides that a person commits second degree possession of an unregistered firearm, destructive device, or ammunition by possessing ammunition without having a registered firearm of the same caliber. “Ammunition” is a defined term,²¹ which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of “ammunition.” Paragraph (b)(1) uses the term “in fact” to specify that there is no culpable mental state required as to whether the person lacked a firearm registration certificate on the day in question.²² It is not a defense that the person was unaware of the duty to have a registered firearm. It is not a defense that a firearm of the same caliber cannot be registered lawfully in the District.

Paragraph (b)(2) provides that a person commits second degree possession of an unregistered firearm, destructive device, or ammunition by possessing one or more

for possession of unregistered machine gun, holding that a conviction for a crime that “ha[s] as an essential element [the defendant’s] failure to do an act that he is incapable of performing” violates due process).

¹⁵ D.C. Code § 7-2501.01.

¹⁶ Knowledge of ammunition’s presence may be inferred from surrounding circumstances; direct evidence is not required. *See Ko v. United States*, 722 A.2d 830 (D.C. 1998) (upholding conviction of unlawful possession of ammunition on evidence that defendant, who had purchased a restaurant, found ammunition owned by seller in office, put that ammunition in his desk drawer, and made no attempt for several months to return ammunition to the seller).

¹⁷ “Knowingly” is defined in RCC § 22E-206.

¹⁸ RCC § 22E-701.

¹⁹ *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

²⁰ *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

²¹ RCC § 22E-701.

²² *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017); *Herrington v. United States*, 6 A.3d 1237 (D.C. 2010).

restricted pistol bullets. The term “restricted pistol bullet” is defined²³ to include several categories of pistol and rifle ammunition that are likely to pierce through bullet-resistant tactical vests. The term does not include hollow-point bullets. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of “restricted pistol bullet.”

Paragraph (c)(1) excludes from liability possession of a firearm frame, receiver, muffler, or silencer. Possession of a silencer is punished as possession of a prohibited weapon or accessory.²⁴

Paragraph (c)(2) excludes from liability possession of a firearm by a nonresident who is traveling through the District with the firearm that they have registered in another state. Subparagraph (c)(2)(A) excludes nonresidents who are participating in a lawful recreational firearm-related activity²⁵ inside the District. Subparagraph (c)(2)(B) excludes non-residents who are traveling to or from a lawful recreational firearm-related activity outside the District. Subparagraph (c)(2)(B) requires that the person comply with any law enforcement officer’s demand for proof that they meet the exclusion criteria. “Law enforcement officer” is defined in RCC § 22E-701. Subparagraph (c)(2)(B) also requires that the firearm be safely transported consistent with RCC § 22E-4109.

Paragraph (c)(3) excludes from liability possession of ammunition by any person who holds an ammunition collector’s certificate issued before the Firearms Control Regulation Act of 1975 became effective. Where the government presents a *prima facie* case of possession of ammunition without the necessary firearm registration, the defendant has the burden of proving this exclusion from liability by a preponderance of the evidence.²⁶

Paragraph (c)(4) excludes empty cartridge casings and shells from the reach of the second degree possession of an unregistered firearm, destructive device, or ammunition offense.²⁷

Paragraph (c)(5) excludes from liability a person who is voluntarily surrendering a weapon from criminal prosecution. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.²⁸ Under D.C. Code § 7-2507.05, for example, the accused must show not only an absence of criminal purpose but also that the possession was excused and justified as stemming from effort to aid and enhance social policy underlying law enforcement.²⁹ The accused must also show an intent to abandon and an act or omission by which such intention is put into effect.³⁰ Proof of that

²³ RCC § 22E-701.

²⁴ RCC § 22E-4101.

²⁵ E.g., safety training course, firing range practice, gun show, shooting competition.

²⁶ See *Herrington v. United States*, 6 A.3d 1237, n. 31 (D.C. 2010).

²⁷ For example, a person who keeps a shotgun shell as a souvenir, after a day of recreational skeet shooting, does not commit a second degree possession of unregistered firearm, destructive device, or ammunition offense.

²⁸ See, e.g., D.C. Code §§ 7-2507.05; 7-2510.07(f)(1). [The Commission’s recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

²⁹ *Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)).

³⁰ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987).

intent, must be clear and unequivocal.³¹ A firearm must be unloaded and securely wrapped in package at time of surrender.³²

Paragraph (c)(6) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.³³

Subsection (e) provides a jury trial for defendants charged with possession of an unregistered firearm, destructive device, or ammunition,³⁴ or an inchoate version of the offense. Inclusion of a jury trial right is intended to ensure that the Second Amendment rights of the accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.³⁵

Subsection (f) provides the penalty for each gradation of the revised offense. [RESERVED.] Paragraph (f)(3) provides that the Attorney General may allow a person charged with possession of an unregistered firearm, destructive device, or ammunition to resolve the charge using the District's post-and-forfeit procedure.³⁶

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

Subsection (h) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised possession of an unregistered firearm, destructive device, or ammunition offense changes current District law in eight main ways.*

First, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 7-2507.06 provides two different penalties for an unregistered firearm. Subsection (a) specifies a maximum penalty of one year of incarceration, a fine of \$2,500, or both.³⁷ Paragraph (a)(2) of D.C. Code § 7-2507.06 specifies that a second offense is punishable by a maximum penalty of five years of incarceration, a fine of \$12,500, or both, unless the person is in their dwelling place, place of business, or on their land and possesses a firearm that could otherwise be

³¹ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *see also*; *Lewis v. United States*, 871 A.2d 470, 474 (D.C. 2005).

³² *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

³³ Because provisions of statutes governing offenses of possession of an unregistered firearm (UF) and unlawful possession of ammunition (UA) are “police or municipal ordinances or regulations,” prosecutorial authority lies with the Office of the Attorney General of the District of Columbia (OAG), rather than Office of the United States Attorney (USAO), irrespective of the fact that a violation of these provisions carries a maximum penalty of both a fine and imprisonment. *In re Hall*, 31 A.3d 453 (D.C. 2011).

³⁴ Possession of an unregistered firearm, destructive device, or ammunition is jury-demandable under current law. *See Henry v. United States*, 754 A.2d 926 (D.C. 2000).

³⁵ *See* Report on Bill 16-247, the “Omnibus Public Safety Amendment Act of 2006,” Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 (“Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.”).

³⁶ Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors.

³⁷ D.C. Code § 22-3571.01.

registered.³⁸ (Subparagraph (b)(1)(A) of D.C. Code § 7-2507.06 specifically authorizes the Attorney General to offer an alternative administrative disposition without conviction, but this provision is superfluous because general authority to offer such a disposition exists in D.C. Code § 5-335.01.) In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of an unregistered firearm, destructive device, or ammunition offense may be subject to a general repeat offender penalty enhancement just as other offenses.³⁹ This change improves the consistency and proportionality of the revised statute.

Second, the revised statute provides a jury trial for defendants charged with attempted possession of an unregistered firearm, destructive device, or ammunition. Under current D.C. law, attempted possession of an unregistered firearm (first offense) and attempted unlawful possession of ammunition are not jury demandable offenses.⁴⁰ In contrast, the RCC's provision of a right to a jury for attempted is consistent with the District having recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.⁴¹ Firearms are bearable arms protected by the Second Amendment to the United States Constitution.⁴² This change improves the consistency and proportionality of the revised code.

Third, the revised offense does not include liability for possession of a frame, receiver, muffler, or silencer. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers. Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are "bearable arms" protected by the Second Amendment.⁴³ With limited exceptions for military and law enforcement,⁴⁴ the RCC criminalizes mere possession of a silencer as contraband *per se*⁴⁵ and, because any possession is illegal, does not regulate their registration, storage, or carrying. This change improves the proportionality and logically reorganizes the revised offenses.

Fourth, the revised statute punishes possession of a restricted pistol bullet as possession of an unregistered firearm, destructive device, or ammunition⁴⁶ only. Current 24 DCMR § 2343.2 states, "A person issued a concealed carry license by the Chief may not carry any restricted pistol bullet as that term is defined in the Act." However, mere possession—much less actual possession or carrying—of a restricted pistol bullet by any person, including the holder of a carry license, is prohibited under other provisions in

³⁸ D.C. Code § 22-3571.01.

³⁹ RCC §§ 22E-606(a) and (b).

⁴⁰ D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both."); D.C. Code § 16-705.

⁴¹ See Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

⁴² See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴³ See *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).

⁴⁴ RCC § 22E-4118.

⁴⁵ RCC § 22E-4101, possession of a prohibited weapon or accessory.

⁴⁶ RCC § 7-2502.01(b)(2).

current law.⁴⁷ In contrast, the revised code effectively repeals 23 DCMR § 2343.2 as duplicative of the prohibition on restricted pistol bullets in the revised possession of a prohibited weapon or accessory offense.⁴⁸ This change improves the logical organization of the revised code and reduces unnecessary overlap between District offenses.

Fifth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E 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 an unregistered firearm, destructive device, or ammunition 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.

Sixth, the revised statute's Administrative Disposition⁴⁹ provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor...may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging⁵⁰ any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.⁵¹ This change improves the clarity and consistency of the revised offenses.

⁴⁷ With limited exceptions, a person who has any ammunition (defined in D.C. Code § 7-2501.01 to include restricted pistol bullets) without having a registered firearm of the same caliber, may be prosecuted under D.C. Code § 7-2506.01. A person who has a registered firearm is nevertheless prohibited from having one or more restricted pistol bullets under D.C. Code § 7-2506.01(a)(3).

⁴⁸ RCC § 22E-4101(a)(2)(F).

⁴⁹ The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.

⁵⁰ [The Commission's recommendations for penalties are forthcoming and may include eligibility criteria for certain diversion programs.]

⁵¹ See American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

Seventh, the revised offense punishes possession of one restricted bullet as severely as possession of two or more. Current D.C. Code § 7-2507.06(a) provides a maximum penalty of one year in jail for possession of a single restricted pistol bullet and a maximum of 10 years in prison for possession of two or more. D.C. Code § 7-2507.06(b)(1)(B) authorizes the Attorney General to offer an alternative administrative disposition without conviction for possession a single restricted pistol bullet but not for possession of two or more.⁵² In contrast, the revised offense provides a single penalty gradation for possession of restricted ammunition. It is unclear why such a sharp difference in penalty is supported by possessing one bullet versus possessing two or more bullets.⁵³ This change improves the proportionality of the revised offense.

Eighth, the RCC codifies a single list of exclusions from liability for possessory weapons offenses that are incorporated into the revised possession of an unregistered firearm, destructive device, or ammunition offense by reference.⁵⁴ The current D.C. Code provisions list incongruent exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who possess an unregistered firearm, destructive device, or ammunition.⁵⁵ In contrast, RCC § 22E-4118 provides a single, comprehensive list of exclusions from liability, reconciling the exclusion circumstances described in current law. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.⁵⁶ This change improves the clarity, consistency, and completeness of the revised code.

Beyond these changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute holds an actor strictly liable as to the existence of a firearm registration certificate. Current D.C. Code §§ 22-4502.01; 22-4506.01; and 22-4507.06 do not specify a culpable mental state for any element of the unregistered firearm, destructive device, or ammunition offenses.⁵⁷ District case law has not

⁵² This provision is technically superfluous since general authority to offer such a disposition exists in D.C. Code § 5-335.01.

⁵³ Firearms frequently hold six rounds of ammunition or more. Ammunition is often sold in boxes of 50 rounds or more.

⁵⁴ RCC § 22E-4118.

⁵⁵ The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or from the class and is not liable for possessing ammunition during the class, however, there is no exception in current law for possessing a firearm during a firearm training and safety class. *See, e.g.*, D.C. Code § 22-4504.02(a); 22-4505(c); 7-2506.01(a)(5). Second, a member of the military avoids prosecution for possession of an assault weapon, machine gun, or sawed-off shotgun, however, there is no military exception for possession of a large-capacity ammunition feeding device. D.C. Code § 22-4514(a); 7-2506.01(b). Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon.

⁵⁶ [The Commission's recommendations for general defenses are forthcoming.]

⁵⁷ District case law requires knowledge for actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir.

addressed whether a reasonable or unreasonable mistake of fact as to having validly registered a firearm is a defense.⁵⁸ The revised offense makes no allowance for such a defense. A firearm owner is required to comply with all District regulations, including receiving training on the responsibilities of ownership.⁵⁹ This change clarifies the revised offense.

Second, the RCC's exclusion for nonresidents traveling through the District, in subsection (c)(1) of the revised offense, requires that the person exhibit proof that they meet the exclusion criteria to any "law enforcement officer" who demands it. D.C. Code § 7-2502.01(b)(3) requires that a nonresident in these circumstances comply with such a request made by a Metropolitan Police Officer "or other bona fide law enforcement officer." The term "bona fide law enforcement officer" is not defined in the statute and District case law has not interpreted its meaning. In contrast, the revised offense uses the standardized definition of "law enforcement officer" that is employed throughout the RCC.⁶⁰ The RCC definition of "law enforcement officer" includes special police officers, corrections officers, and other government actors who do not have arrest powers, which may be broader than the phrase "bona fide law enforcement officer" in current law. This change improves the clarity and consistency of the revised offense and may eliminate an unnecessary gap in liability.

Third, the revised statute refers to "possession" and does not include explicit references to transferring, offering for sale, selling, giving, or delivering a destructive device. D.C. Code § 7-2502.01(a) makes it unlawful to receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device. Such conduct is also prohibited by D.C. Code §§ 7-2504.01(b) and 7-2505.01. In contrast, the RCC's definition of possess⁶¹ includes both actual possession and constructive possession. A person who knowingly transfers, offers, sells, gives, or delivers a destructive device appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.⁶² This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

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

First, the revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an unregistered firearm, destructive device, or ammunition liability. The current statutes do not specify a requisite mental state,⁶³ however, District case law requires knowledge for actual or constructive

1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

⁵⁸ Consider, for example, a person who mistakenly believes their registration expires in July instead of June. Consider also a person who inherits a firearm believing the registration certificate was transferred to them in probate.

⁵⁹ See D.C. Code § 7-2502.03(a)(10).

⁶⁰ RCC § 22E-701.

⁶¹ RCC § 22E-701.

⁶² See D.C. Code § 22-1511 (Fraudulent advertising).

⁶³ D.C. Code §§ 7-2502.01; 7-2506.01.

possession of any item.⁶⁴ The revised statute uses the RCC’s general provisions that define “knowingly” and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.⁶⁵ These changes clarify and improve the consistency of District statutes.

Second, the revised code defines “possession” in its general part.⁶⁶ 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.⁶⁷ The RCC definition of “possession,”⁶⁸ with the requirement in the offense that the possession be “knowing,”⁶⁹ matches the meaning of possession in current DCCA case law.⁷⁰ The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Third, the revised offense does not specifically include a self-defense provision. Current D.C. Code § 7-2502.01(b)(4) specifies that a person will not be subject to prosecution “who temporarily possesses a firearm...while in the home or place of business of the registrant...[if] the person reasonably believes that possession of the firearm is necessary to prevent imminent death or great bodily harm to himself or herself.” An offense-specific self-defense provision is duplicative in the RCC. Per subsection (h) of the revised statute, the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense, including general provisions that preclude liability where a person acts in defense of one’s self, a third person, or property.⁷¹ This change improves the consistency of the revised offenses.

Fourth, the revised statute requires the government prove that a person who possesses ammunition does not have a registered firearm of the same caliber. Current D.C. Code § 7-2506.01(a) states that no person shall possess ammunition unless one of

⁶⁴ See, e.g., *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

⁶⁵ RCC § 22E-207.

⁶⁶ RCC § 22E-202.

⁶⁷ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

⁶⁸ RCC § 22E-701.

⁶⁹ RCC § 22E-206.

⁷⁰ See *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. See *United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); see also *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”).

⁷¹ [The Commission’s recommendations for general defenses are forthcoming.]

five circumstances is present. The statute does not specify whether the government has the burden of proving the absence of these circumstances or whether the defense must affirmatively raise any the circumstances as a defense. However, the District of Columbia Court of Appeals (“DCCA”) has required the government to prove the circumstance described in D.C. Code § 7-2506.01(a)(3): the absence of a firearm registration certificate.⁷² The revised offense clarifies that the absence of a firearm registration certificate is an element that must be proven beyond a reasonable doubt, whereas the other exceptions⁷³ must be proven by the defense by a preponderance of the evidence.⁷⁴ This change improves the clarity and consistency of the revised offense.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

⁷² In *Logan v. United States*, the District of Columbia Court of Appeals (“DCCA”) construed the statute to mean that possession of ammunition is presumptively unlawful and, thus, the government does not have the burden of proving that a defendant is not a licensee, an authorized government officer, agent or employee, a registrant of firearms of the same caliber as the ammunition possessed, or a certified dealer. 489 A.2d 485, 492-93 (D.C. 1985). However, in *Herrington v. United States*, the DCCA held that *Logan* was unconstitutional as applied to a person who possesses ammunition in their own home. 6 A.3d 1237, 1241-45 (D.C. 2010). The court reasoned that, where the Second Amendment imposes substantive limits on what conduct may be defined as a crime, a legislature may not “circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence.” *Id.* at 1244. The court did not reach the question of whether the holding in *Logan* would be unconstitutional as applied to a person outside the home. The revised offense resolves this ambiguity.

⁷³ RCC §§ 7-2502.01(c)(1); 22E-4118.

⁷⁴ *Herrington v. United States*, 6 A.3d 1237, n. 31 (D.C. 2010).

RCC § 7-2502.15. Possession of a Stun Gun.

- (a) *Offense.* A person commits possession of a stun gun when that person knowingly possesses a stun gun and is:
- (1) Under 18 years of age; or
 - (2) In a location that:
 - (A) Is a building, or part thereof, occupied by the District of Columbia;
 - (B) Is a building, or part thereof, occupied by a preschool, a primary or secondary school, public youth center, or a children’s day care center; or
 - (C) Displays clear and conspicuous signage indicating that stun guns are prohibited.
- (b) *Exclusion from Liability.* Notwithstanding subsection (a), a person shall not be subject to prosecution under this section, if the person meets any of the exception criteria in RCC § 22E-4118.
- (c) *Effective Consent Affirmative Defense.* In addition to any defenses otherwise applicable, it is an affirmative defense to prosecution under this section, which the defendant must prove by a preponderance of the evidence, that the person lawfully in charge of the location gave effective consent to the conduct charged to constitute the offense or that the accused reasonably believed that a person lawfully in charge of the location gave effective consent to the conduct charged to constitute the offense.
- (d) *Prosecutorial Authority.* The Attorney General shall prosecute violations of this section.
- (e) *Penalties.*
- (1) Possession of a stun gun is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) *Administrative Disposition.* The Attorney General may, in the operation of its discretion, offer an administrative disposition under D.C. Code § 5-335.01 et seq. for a violation of this section.
- (f) *Definitions.* The terms “knowingly” and “negligent” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “Attorney General,” “building,” “effective consent,” “possesses,” and “stun gun” have the meanings specified in RCC § 22E-701.
- (g) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense.

COMMENTARY

Explanatory Note. This section establishes the possession of a stun gun offense for the Revised Criminal Code (RCC). The offense proscribes possession of a stun gun by persons under 18 and possession of a stun gun in a prohibited location. The revised offense replaces D.C. Code §§ 7-2502.15 (Possession of stun guns) and 7-2507.06(b)(1)(E) (Penalties).

Subsection (a) specifies that to commit possession of a stun gun, a person must knowingly⁷⁵ possess a stun gun. “Stun gun” is a defined term and includes weapons that inflict injury by direct contact (commonly referred to as “stun guns”) and weapons that can be fired from a distance (e.g., TASERS). “Possession” is also a defined term and includes both actual and constructive possession.⁷⁶ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.⁷⁷

Paragraph (a)(1) prohibits knowing possession of a stun gun by any person who is under 18 years of age. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is under 18 years of age.

Paragraph (a)(2) prohibits possession of a stun gun by any person in a specified location. Subparagraph (a)(2)(A) specifies that the first type of location where stun guns are prohibited is a District government-occupied building. The term “building” is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a location that is occupied by the District of Columbia.

Subparagraph (a)(2)(B) specifies that the second type of location that may ban stun guns under penalty of criminal prosecution under this section is a location that is a building, or part thereof, occupied by a preschool, primary or secondary school, public youth center, or a children’s day care center.⁷⁸ The term “building” is defined in RCC § 22E-701 and does not include open campus space. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a specified location.

Subparagraph (a)(2)(C) specifies that the third type of location that may ban stun guns under penalty of criminal prosecution under this section is one that displays signage that clearly and conspicuously indicates stun guns are not permitted there. Whether a sign is clear and conspicuous may depend on facts such as its placement, legibility, and word choice.⁷⁹ Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a location where such signage is displayed.

Subsection (b) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (c) codifies an effective consent affirmative defense to the possession of a stun gun offense.⁸⁰ Subsection (c) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the actor’s conduct under District law. The effective consent defense requires either the complainant’s “effective consent” to the

⁷⁵ “Knowingly” is defined in RCC § 22E-206.

⁷⁶ RCC § 22E-701; *see also Rivas v. United States*, 783 A.2d 125, 128 (D.C. 2001).

⁷⁷ *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

⁷⁸ These locations include buildings that are being used for the specified purpose. They do not include, for example, an address that is used only to receive mail for an online education program.

⁷⁹ This is a more flexible standard than provided in the District’s current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

⁸⁰ *See D.C. Code § 7-2502.15(c)* (“Unless permission specific to the individual and occasion is given...”).

actor's conduct or the actor's reasonable belief that the complainant gave "effective consent" to the actor's conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." The burden is on the defendant to raise and prove the effective consent defense by a preponderance of the evidence.

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (e) provides the penalty for the revised offense. [RESERVED.] Paragraph (c)(2) provides that the Attorney General may allow a person charged with possession of a stun gun to resolve the charge using the District's post-and-forfeit procedure.⁸¹

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

Subsection (g) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. The revised possession of a stun gun offense changes current District law in five main ways.

First, the revised offense does not separately prohibit using a stun gun. Current law provides, "No person who possesses a stun gun shall use that weapon except in the exercise of reasonable force in defense of person or property"⁸² and that "brief possession [by a person under 18 years of age] for self-defense in response to an immediate threat of harm shall not be a violation of this subsection."⁸³ In contrast, the RCC punishes using a dangerous weapon (a defined term that includes a stun gun⁸⁴) unlawfully against another person in a wide array of offenses against persons, such as assault,⁸⁵ or menacing.⁸⁶ Where a person acts in defense of one's self, a third person, or property, a general defense may apply.⁸⁷ The revised code does not criminalize using a stun gun in any other manner.⁸⁸ This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised offenses.

Second, the revised code does not specifically criminalize possession of a stun gun in a correctional facility as a weapons offense. Current law prohibits possession of a stun gun in a "penal institution, secure juvenile residential facility, or halfway house" as both possession of a stun gun⁸⁹ and as unlawful possession of contraband.⁹⁰ In contrast, the revised offense applies generally to buildings or parts thereof occupied by the District

⁸¹ Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors.

⁸² D.C. Code § 7-2502.15(b).

⁸³ D.C. Code § 7-2502.15(a).

⁸⁴ RCC § 22E-701.

⁸⁵ RCC § 22E-1202.

⁸⁶ RCC § 22E-1203.

⁸⁷ [The Commission's recommendations for general defenses are forthcoming.]

⁸⁸ Consider, for example, a person who uses a stun gun to see test its operation or to inflict an injury to one's self.

⁸⁹ D.C. Code § 7-2502.15(c)(2).

⁹⁰ D.C. Code § 22-2603.02.

of Columbia, which effectively reaches many correctional facilities in the District. For both District and non-District occupied correctional facilities, the RCC first degree correctional facility contraband offense⁹¹ punishes possession of a dangerous weapon (a defined term that includes a stun gun⁹²) by a person who is confined to a correctional facility or secure juvenile detention facility and also punishes bringing a dangerous weapon to a person who is confined in such a facility.⁹³ The RCC does not separately criminalize possession of a stun gun in a halfway house, however the Director of the Department of Corrections may suspend or revoke work release for any breach of discipline or infraction of institution regulations.⁹⁴ This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised code.

Third, the RCC separately codifies a standard list of exclusions from liability for possessory weapons offenses.⁹⁵ Current D.C. Code § 7-2502.15(c), by cross-reference to § 7-2509.01, provides an exception for police officers, special police officers, and campus police officers who carry stun guns. In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement falls under the general provisions' justification defense for law enforcement authorities.⁹⁶ This change improves the clarity, consistency, and completeness of the revised code.

Fourth, the revised statute's Administrative Disposition⁹⁷ provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor...may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for

⁹¹ RCC § 22E-3403(a).

⁹² RCC § 22E-701.

⁹³ Notably, the correctional facility contraband offense does not reach persons who bring a dangerous weapon to a facility without intent to give it to someone who is confined. If a person brings a dangerous weapon to a facility with intent to use it unlawfully, that conduct is punished as possession of a dangerous weapon during a crime, under RCC § 22E-4104.

⁹⁴ D.C. Code § 24-241.05(a).

⁹⁵ RCC § 22E-4118.

⁹⁶ [The Commission's recommendations for general defenses are forthcoming.]

⁹⁷ The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.

initially charging⁹⁸ any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.⁹⁹ This change improves the clarity and consistency of the revised offenses.

Fifth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E 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 stun gun 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.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute specifies that knowledge the culpable mental states required for each element of the revised possession of a stun gun offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹⁰⁰ The revised statute requires that a person know that they possess a stun gun and that they know the nature of their location. A reading of the statute that makes a person strictly liable for would leave no margin for a reasonable mistake of fact or law by someone otherwise engaged in legal activity.¹⁰¹ The revised statute does not impose criminal liability where a person exercises their constitutionally protected right to carry a stun gun¹⁰² in a reasonably responsible manner. The revised offense applies a standardized definition for the “knowingly” culpable mental state

⁹⁸ [The Commission’s recommendations for penalties are forthcoming and may include eligibility criteria for certain diversion programs.]

⁹⁹ See American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

¹⁰⁰ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

¹⁰¹ Consider, for example, a person who carries a stun gun for self-defense and enters a coffeehouse in a government building that they mistakenly—but understandably—believe to be a private office building. Consider also, a person who cannot read English, who brushes past a large sign stating, “No stun guns allowed,” to ask a security staff person whether stun guns are permitted.

¹⁰² *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

required for possession of stun gun liability. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute codifies an effective consent affirmative defense. Current law prohibits possession of a stun gun in specified locations “Unless permission specific to the individual and occasion is given.”¹⁰³ The statute does not address who must provide permission, whether permission must be freely given, whether the accused must be aware or certain of the permission, or which party has the burden of proving permission or lack of permission. Case law has not addressed these issues. To resolve these ambiguities, the revised possession of a stun gun statute details the meaning, burden of proof, and limitations of an effective consent defense to the revised possession of a stun gun offense. This change improves the clarity, consistency, and proportionality of the revised offense.

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

First, the revised statute requires signage that clearly and conspicuously indicates stun guns are not permitted. Current law criminalizes possession of a stun gun in “Any building or grounds clearly posted by the owner or occupant to prohibit the carrying of a stun gun.”¹⁰⁴ The revised statute’s language is substantively the same as the current statute, but phrased so as to be consistent with other RCC offenses. This change improves the consistency and proportionality of the revised offenses.

Second, the revised code defines “possession” in its general part.¹⁰⁵ 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.¹⁰⁶ The RCC definition of “possession,”¹⁰⁷ with the requirement in the offense that the possession be “knowing,”¹⁰⁸ matches the meaning of possession in current DCCA case law.¹⁰⁹ The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

¹⁰³ D.C. Code § 7-2502.15(c).

¹⁰⁴ D.C. Code § 7-2502.15(c)(4).

¹⁰⁵ RCC § 22E-202.

¹⁰⁶ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

¹⁰⁷ RCC § 22E-701.

¹⁰⁸ RCC § 22E-206.

¹⁰⁹ See *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. See *United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); see also *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re*

Third, the revised statute replaces the phrase “A building or office occupied by the District of Columbia, its agencies, or instrumentalities”¹¹⁰ with the simpler “A building, or part thereof, occupied by the District of Columbia” in subparagraph (a)(1)(A). The term “building” is defined in RCC § 22E-701. The phrase “District of Columbia” is intended to include government agencies. The word “instrumentalities” as used in D.C. Code § 7-2502.15 is not defined in the statute and case law has not interpreted its meaning. Broadly construed, “instrumentalities” may include every person and business contracted to work on behalf of the District government, which would capture many locations that do not have heightened security concerns.¹¹¹

Fourth, the revised statute clarifies the list of prohibited locations related to children. Current D.C. Code § 7-2502.15(c)(3) disallows stun guns in “[a] building or portion thereof, occupied by a children’s facility, preschool, or public or private elementary or secondary school.” The revised offense eliminates the superfluous reference to “public or private” and substitutes for the vague reference to “children’s facility” the terms “public youth center” and “children’s day care center.” The latter terms are locations similarly protected from firearms¹¹² and drug activity¹¹³ under the revised code.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

T.M., 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”.

¹¹⁰ D.C. Code § 7-2502.15(c)(1).

¹¹¹ Consider, for example, a restaurant that provides catering services to a District government event.

¹¹² RCC § 22E-4102.

¹¹³ See RCC § 48-904.01b(g)(7)(C)(i).

RCC § 7-2502.17. Carrying an Air or Spring Gun.

- (a) *Offense.* A person commits carrying an air or spring gun when that person:
- (1) Knowingly possesses any instrument or weapon of the kind commonly known as an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, or bowgun;
 - (2) In a location that is:
 - (A) Conveniently accessible and within reach; and
 - (B) Outside a building.
- (b) *Exclusions from Liability.* Notwithstanding subsection (a):
- (1) A person shall not be subject to prosecution under this section if the conduct occurs:
 - (A) As part of a lawful theatrical performance or athletic contest;
 - (B) In a licensed firing range; or
 - (C) With the permission of the Metropolitan Police Department.
 - (2) A person shall not be subject to prosecution under this section if the person:
 - (A) Is 18 years of age or older; and
 - (B) Transports the instrument or weapon while it is unloaded and securely wrapped.
 - (3) A person shall not be subject to prosecution under this section if the person meets any of the exception criteria in RCC § 22E-4118.
- (c) *Prosecutorial Authority.* The Attorney General shall prosecute violations of this section.
- (d) *Penalty.* Carrying an air or spring gun is a Class [X] crime 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 terms “Attorney General,” “building,” and “possesses” have the meanings specified in RCC § 22E-701.
- (f) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense.

COMMENTARY

***Explanatory Note.** This section establishes the carrying an air or spring gun offense for the Revised Criminal Code (RCC). The offense proscribes carrying an air- or spring-operated gun outside. The revised offense replaces 24 DCMR § 2301 (Possession of Weapons).*

Paragraph (a)(1) specifies that to commit carrying an air or spring gun, a person must knowingly¹¹⁴ possess an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, or bowgun. “Possesses” is a defined term and includes both actual and constructive

¹¹⁴ “Knowingly” is defined in RCC § 22E-206.

possession.¹¹⁵ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.¹¹⁶

Subparagraph (a)(2)(A) specifies that a person must carry the air or spring gun in a manner that it is both conveniently accessible and within reach.¹¹⁷ Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the air or spring gun is conveniently accessible and within reach.

Subparagraph (a)(2)(B) specifies that a person must carry the air or spring gun outside a building. The term “building” is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not inside a building.

Paragraph (b)(1) excludes three categories of conduct from criminal liability under this section. First, a person is not liable under this statute¹¹⁸ for using an air or spring gun outside as part of a lawful¹¹⁹ theatrical performance¹²⁰ or athletic contest.¹²¹ Second, a person is not liable for using an air or spring gun in a licensed firing range.¹²² Third, a person is not liable for using an air or spring gun in a location where use of the gun is permitted by the Metropolitan Police Department (“MPD”). MPD may permit the use of an air or spring gun in a particular location at a specified time or at all times.

Paragraph (b)(2) provides an exception for responsibly transporting an air or spring gun. Subparagraph (b)(2)(A) limits the exception to persons over 18 years of age. Subparagraph (b)(2)(B) requires that the air or spring gun be both unloaded and securely wrapped.

Paragraph (b)(3) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the revised offense. [RESERVED.]

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

Subsection (f) specifies that Chapters 1 – 6 of the RCC’s General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised carrying an air or spring gun offense changes current District law in three main ways.*

¹¹⁵ RCC § 22E-701.

¹¹⁶ *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

¹¹⁷ For example, where there is an obstacle to a person’s access to a weapon, such as a locked trunk, the person has not carried a weapon under the revised statute. *See, e.g., Henderson v. United States*, 687 A.2d 918, 922 (D.C. 1996); *Porter v. United States*, 282 A.2d 559, 560 (D.C. 1971).

¹¹⁸ However, if the use of the air or spring gun in a public place causes any person present to reasonably believe that he or she is likely to suffer immediate criminal harm involving bodily injury, taking of property, or damage to property, it may amount to disorderly conduct per RCC § 22E-4201.

¹¹⁹ For example, a person who orchestrates a B-B gun shooting contest on public property or private property without permission may commit a Trespass. *See* RCC § 22E-2601.

¹²⁰ For example, an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene.

¹²¹ For example, a referee may use an air or spring gun to signal the start of a race.

¹²² Notably, although training at a firearms range is required to obtain and maintain a license to carry a pistol, the District does not currently have any firing ranges or a process to apply to open one.

First, the revised statute does not specifically criminalize possession by a person under 18 of a “bean shooter, sling, projectile, [or] dart” in a public place. Current 24 DCMR § 2301.1 prohibits any person under 18 years of age from carrying in public “any gun, pistol, rifle, bean shooter, sling, projectile, dart, or other dangerous weapon of any character.” The terms “bean shooter,” “sling,” “projectile,” and “dart” are not defined in the DCMR or in District case law. It is unclear whether these terms would reach objects with commonplace recreational uses, such as a ball, a frisbee, or toys that launch foam or plastic rockets or other objects.¹²³ In contrast, the revised carrying an air or spring gun statute does not cover a “bean shooter, sling, projectile, [or] dart” by a person under 18 in public. Such behavior may, in some instances be punishable in the RCC as carrying a dangerous weapon¹²⁴ or possession of a dangerous weapon with intent to commit crime.¹²⁵ This change improves the clarity, consistency, and proportionality of the revised offenses and reduces unnecessary overlap.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses.¹²⁶ Current 24 DCMR § 2301.2 states, “Nothing in this section shall be construed as to prohibit a member of a duly authorized military organization from the proper use of the guns and other equipment used as a member of the organization.” In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions’ justification defense for law enforcement authorities.¹²⁷ This change improves the clarity, consistency, and completeness of the revised code.

Third, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E 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 carrying an air or spring gun 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.

Beyond these changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge

¹²³ Notably, the D.C. Code separately regulates the any projectile or dart that is explosive, incendiary, or poisonous. *See* D.C. Code §§ 7-2501.01 and 7-2502.01.

¹²⁴ RCC § 22E-4102.

¹²⁵ RCC § 22E-4103.

¹²⁶ RCC § 22E-4118.

¹²⁷ [The Commission’s recommendations for general defenses are forthcoming.]

culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹²⁸ This change clarifies the revised statute.

Second, the revised offense requires that the air or spring gun be “conveniently accessible and within reach” and “outside a building.” Current 24 DCMR § 2301.3 makes it unlawful for a person to “to carry or have in his or her possession outside any building...an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, bowgun, or any similar type gun.” It is unclear whether the phrase “outside any building” applies to both carrying and possessing or to possession only. District case law has not interpreted its meaning. To resolve this ambiguity, the revised offense criminalizes possession only if the weapon is conveniently accessible and within reach and outside a building.¹²⁹ This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,¹³⁰ which improves the consistency of the revised code.

Third, the revised offense excludes from liability possession of an air or spring gun if it occurs with the permission of the Metropolitan Police Department (“MPD”). Current 24 DCMR § 2301.5(c) permits the use of an air or spring gun “at other locations where the *use* of the guns is authorized by the Chief of Police” (emphasis added). The word “use” is not defined in the statute and District case law has not clarified whether MPD must authorize both the possession and the firing of air and spring guns. In contrast, the revised statute clarifies that MPD has the flexibility to authorize possession of an air or spring gun in a specific area, without permitting shooting in the same location.

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

First, the revised code defines “possession” in its general part.¹³¹ 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

¹²⁸ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

¹²⁹ For example, a person does not commit carrying an air or spring gun by constructively possessing a B-B gun that is not nearby or carrying a B-B gun in his or her own home.

¹³⁰ RCC § 22E-4102; *see also Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (explaining the phrase “on or about their person,” in current law, is intended to mean “in such proximity to the person as to be convenient of access and within reach”).

¹³¹ RCC § 22E-701.

jointly possessed an unlawful item.¹³² In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Second, the revised code uses a consistent definition for the term “building,” which appears in multiple offenses. The term building is not defined in Title 24, Chapter 23 of the DCMR. In contrast, the RCC codifies a definition to be used uniformly throughout the code.

Third, the revised offense uses the phrase “firing range” instead of “shooting gallery.” Current 24 DCMR § 2301.5(b) permits adults to use an air or spring gun at “a licensed shooting gallery.” This term is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to “shooting galleries,” but do refer to “firing ranges.”¹³³ The revised offense uses the Title 7 terminology to avoid confusion.¹³⁴

Fourth, the revised offense does not include the phrase “or similar type gun.” The specified types of air and spring gun are already broad, undefined terms. The inclusion of a broader catchall is eliminated as duplicative and potentially confusing.

Relation to National Legal Trends. Twenty-nine states (hereafter “reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code.¹³⁵ None of these reform jurisdictions criminalize simple possession of a bean shooter, sling, projectile,¹³⁶ or dart.

¹³² See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

¹³³ D.C. Code § 7-2507.03.

¹³⁴ Additionally, Merriam Webster defines “shooting gallery” to include “a building (usually abandoned) where drug addicts buy and use heroin.” See Merriam-Webster Online Dictionary at <https://www.webster-dictionary.org/definition/shooting%20gallery>.

¹³⁵ The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

¹³⁶ Some states prohibit *explosive* projectiles such as missiles, grenades, and ammunition.

RCC § 7-2507.02. Unlawful Storage of a Firearm.

- (a) *Offense.* An actor commits unlawful storage of a firearm when that actor:
- (1) Knowingly possesses a firearm registered under D.C. Code § 7-2502.07:
 - (A) On premises under the actor’s control; and
 - (B) In a location that is neither:
 - (i) A securely locked container or another location that a reasonable person would believe to be secure; nor
 - (ii) Conveniently accessible and within reach of the actor; and
 - (2) Is negligent as to the fact that:
 - (A) A person under 18 years of age is able to access the firearm without the permission of the person’s parent or guardian; or
 - (B) A person prohibited from possessing a firearm under District law is able to access the firearm.
- (b) *Prosecutorial Authority.* The Attorney General shall prosecute violations of this section.
- (c) *Penalties.*
- (1) Unlawful storage of a firearm is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) *Penalty Enhancements.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense in sub-paragraph (a)(2)(A), it is proven that a person under 18 years of age accesses and uses the firearm to cause either:
 - (A) A criminal harm involving bodily injury; or
 - (B) A bodily injury to himself or herself.
- (d) *Definitions.* The term “negligently” has the meaning specified in RCC § 22E-206; the terms “Attorney General,” “bodily injury,” and “firearm” have the meanings specified in RCC § 22E-701.
- (e) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense.

COMMENTARY

Explanatory Note. This section establishes the unlawful storage of a firearm offense for the Revised Criminal Code (RCC). The offense requires firearm owners to store firearms securely and responsibly. The revised offense replaces D.C. Code §§ 7-2507.02(b)-(d) (Responsibilities regarding storage of firearms) and 24 DCMR § 2348.1 (Safe storage of firearms at a place of business).

Paragraph (a)(1) specifies that to commit unlawful storage of a firearm, a person must knowingly possess a registered¹³⁷ firearm. “Knowingly” is a defined term that here

¹³⁷ With limited exceptions, a person who possesses a firearm without a valid registration certificate commits first degree possession of an unregistered firearm. RCC §§ 7-2502.01; 22E-4118.

requires the person to be practically certain that they possess the registered firearm.¹³⁸ “Firearm” is a defined term,¹³⁹ which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability¹⁴⁰ but excludes antiques.¹⁴¹

Subparagraph (a)(1)(A) specifies that the accused must have authority over the premises. A person does not commit unlawful storage of a firearm by storing a firearm in a home, business, or vehicle that the person does not control.¹⁴² Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have control over the premises.

Subparagraph (a)(1)(B) specifies two ways a firearm owner can store a firearm to avoid prosecution under this section. Sub-subparagraph (a)(1)(B)(i) provides that there is no liability if a person stores a firearm in a securely locked container or in a location that a reasonable person would believe to be secure. The words “securely” and “secure” mean secure from access by people other than the firearm owner. Sub-subparagraph (a)(1)(B)(ii) provides that there is no liability if a person carries the firearm on or about their person.¹⁴³

Paragraph (a)(2) specifies that to commit unlawful storage of a firearm, a registrant must act at least negligently with respect to who might access the firearm.¹⁴⁴ That is, the person should be aware of a substantial risk that that a minor or an unauthorized person will be able to access the firearm. Negligence also requires that the risk is of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s failure to perceive that risk is clearly blameworthy.¹⁴⁵

Paragraph (a)(2) specifies two impermissible risks that will trigger criminal liability.

Subparagraph (a)(2)(A) prohibits storage in a location where a minor is able to access the firearm without the permission of a parent or guardian. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other person being a minor and as to the minor being able to access the weapon without permission.

Subparagraph (a)(2)(B) prohibits storage in a location where a person who is barred under District law from having a firearm¹⁴⁶ is able to access the firearm. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other

¹³⁸ RCC § 22E-206.

¹³⁹ RCC § 22E-701.

¹⁴⁰ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

¹⁴¹ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

¹⁴² The government is not required to prove ownership or exclusive control.

¹⁴³ See *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (explaining the phrase “on or about their person,” in current law, is intended to mean “in such proximity to the person as to be convenient of access and within reach”).

¹⁴⁴ “Negligently” is defined in RCC § 22E-206.

¹⁴⁵ RCC § 22E-206.

¹⁴⁶ RCC § 22E-4105 bars several categories of people from having a firearm, including people with a recent conviction for a felony, weapons offense, or intrafamily offense, as well as people who are fugitives from justice or subject to a court order prohibiting possession of firearms.

person being unauthorized to possess a firearm under District law and as to the other person being able to access the weapon.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [RESERVED.] Paragraph (c)(2) allows a sentence increase if it is proven beyond a reasonable doubt that a person under 18 years of age used the firearm to cause a bodily injury to himself or herself or to cause a criminal harm¹⁴⁷ involving a bodily injury. The term “bodily injury” is defined in RCC § 22E-701 to mean physical pain, illness, or any impairment of physical condition.

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

Subsection (e) specifies that Chapters 1 – 6 of the RCC’s General Part apply to this Title 7 offense.

Relation to Current District Law. The revised unlawful storage of a firearm offense changes current District law in eight main ways.

First, the revised statute the revised statute includes two penalty gradations for unlawful storage of a firearm. Current D.C. Code § 7-2507.02 paragraph (c)(1) specifies a maximum penalty of 180 days of incarceration and fine of \$1,000. Paragraph (c)(2) allows a maximum penalty of 5 years of incarceration and fine of \$5,000, if the negligence results in a minor causing an injury to any person. A violation of 24 DCMR § 2348.1 is subject to a fine of \$300 and is not punishable by jail time.¹⁴⁸ In contrast, the revised statute provides a single offense gradation plus an enhancement of one penalty class if a minor causes an injury. This change logically reorders and improves the consistency and proportionality of the revised statutes.

Second, the revised statute makes a possible basis of liability negligence that a person prohibited from possessing a firearm under District law, generally, is able to access the firearm.¹⁴⁹ Current 24 DCMR § 2348.1 prohibits storing a firearm where a person “reasonably should know that...a person prohibited from possessing a firearm under D.C. Official Code § 22-4503 can gain access to the firearm.” In contrast, the revised statute refers broadly to persons prohibited from possessing a firearm under District law generally (not just persons referred to in D.C. Code § 22-4503). However, given other changes to firearm possession offenses in the RCC, the revised offense is in some ways broader¹⁵⁰ and in other ways narrower¹⁵¹ than current law. This change improves the consistency and proportionality of the revised offenses.

¹⁴⁷ The penalty enhancement does not apply where a minor’s use of a firearm is legally justified or excused. [The Commission’s recommendations for general defenses are forthcoming.]

¹⁴⁸ 24 DCMR § 100.6.

¹⁴⁹ RCC § 22E-4105.

¹⁵⁰ For example, RCC § 22-4105 (Possession of a Firearm by an Unauthorized Person) replaces D.C. Code § 22-4503 (Unlawful possession of a firearm) and bars people with a conviction for a violent intrafamily offense within the last 10 years, as compared to a 5-year ban under current law.

¹⁵¹ For example, RCC § 22-4105 (Possession of a Firearm by an Unauthorized Person) replaces D.C. Code § 22-4503 (Unlawful possession of a firearm) and limits prior convictions incurred in another jurisdiction to offenses that are comparable to a felony, weapons offense, or violent intrafamily offense under District law.

Third, the revised offense requires that a minor or an unauthorized person is able to access the firearm. Current D.C. Code § 7-2507.02(b) requires a risk that a minor is *likely* to gain access to the firearm. Current 24 DCMR § 2348.1 requires only a risk that a minor or unauthorized person can gain access to the firearm. The revised statute incorporates the marginally broader language in Title 7. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised offense specifies that storage in a manner permitting access by a minor is unlawful only if the minor lacks permission from a parent or guardian to access the weapon. Current D.C. Code § 7-2507.02(b) requires that a person “reasonably should know that a minor is likely to gain access to the firearm *without the permission of the parent or guardian*” (emphasis added). However, current 24 DCMR § 2348.1 includes no such qualifying language. The revised statute incorporates the marginally narrower language in Title 7. This change improves the consistency and proportionality of the revised offense.

Fifth, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is in a secure container or other reasonably secure location. Current D.C. Code § 7-2507.02(b)(1) provides an exception where a person “[k]eeps the firearm in a securely locked box, secured container, or in a location which a reasonable person would believe to be secure.” However, current 24 DCMR § 2348.1 includes no such qualifying language. The revised statute incorporates the marginally narrower language in Title 7. This change improves the consistency and proportionality of the revised offense.

Sixth, the revised offense applies only to lawful registrants who store their legal firearms improperly. D.C. Code § 7-2507.02(b) provides that “[n]o person” shall store a firearm irresponsibly,¹⁵² whereas 24 DCMR § 2348.1 states “[n]o registrant.” The revised statute incorporates the narrower language in the DCMR. Under the RCC, a person other than a registrant is punished for mere possession of an unregistered firearm, without any requirement that the government prove unlawful storage, unlawful use, or unlawful intent.¹⁵³ This change reduces unnecessary overlap between the revised offenses.

Seventh, the revised statute does not regulate storage of a muffler or silencer. Current D.C. Code § 7-2501.01 defines “firearm” to include frames, receivers, mufflers, and silencers, and consequently the storage of these items is within the scope of D.C. Code § 7-2507.02(b). Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are “bearable arms” protected by the Second Amendment.¹⁵⁴ In contrast, the revised unlawful storage of a firearm statute, by use of the definition of “firearm” in RCC § 22E-701, does not cover frames, receivers,

¹⁵² This section was enacted shortly after the United States Supreme Court held the District’s prohibition against rendering any lawful firearm in the home operable for purpose of immediate self-defense violated the Second Amendment to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁵³ RCC § 7-2502.01.

¹⁵⁴ See *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).

mufflers, or silencers. With limited exceptions for military and law enforcement,¹⁵⁵ the RCC criminalizes mere possession of a silencer as contraband *per se*¹⁵⁶ and, because any possession is illegal, does not regulate their registration, storage, or carrying. This change improves the proportionality and logically reorganizes the revised offenses.

Eighth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E 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 unlawful storage of a firearm 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.

Beyond these changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is “conveniently accessible and within reach.” Current D.C. Code § 7-2507.02(b)(2) provides an exception where a person “[c]arries the firearm on his person or within such close proximity that he can readily retrieve and use it as if he carried it on his person.” However, current 24 DCMR § 2348.1 includes no such qualifying language. It is not immediately clear how a person can both “store” a firearm and “carry” it and District case law has not addressed the issue. In contrast, the revised offense specifies that there is no unlawful storage liability if the weapon is conveniently accessible and within reach. This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,¹⁵⁷ and improves the consistency of the revised code.

Second, the revised offense authorizes a distinct penalty enhancement if a person under age 18 uses the firearm to cause a criminal harm involving bodily injury or to cause a bodily injury to himself or herself. Current D.C. Code § 7-2507.02(c)(2) provides that if “the minor causes injury or death to himself or another” the maximum penalty increases from 180 days of incarceration and a \$1,000 fine to 5 years of incarceration and a \$5,000 fine. D.C. Code § 7-2507.02(c)(3) provides that the penalty enhancement does not apply “if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person.” Neither statute explicitly provides for general justification defenses that may nevertheless exist at common law. There is no District case law on point, and no relevant legislative history on the meaning of the exception for burglary or unlawful entry. In contrast, the revised offense authorizes a penalty enhancement only if the use of the firearm causes a criminal harm involving bodily injury or results in an intentional or accidental self-inflicted bodily injury to the minor, and no special exceptions for unlawful entry or burglary apply. “Bodily injury” is a defined term in the

¹⁵⁵ RCC § 22E-4118.

¹⁵⁶ RCC § 22E-4101, possession of a prohibited weapon or accessory.

¹⁵⁷ RCC § 22E-4102.

RCC.¹⁵⁸ The degree of the enhancement corresponds to the classification schedule in RCC § 22E-601 and, like other revised offenses,¹⁵⁹ is limited to a severity increase of one class. No special exception for unlawful entry or burglary is provided as such a provision is either unnecessary given the offense elements or irrelevant to the harm of negligent storage.¹⁶⁰ This change improves the consistency and proportionality of District statutes.

Third, the revised code applies a “knowingly” culpable mental state to most offense elements and defines knowledge and negligence consistent with other revised offenses. The current statutes require that a person “knows or reasonably should know” of a risk that an unauthorized person will be able to access the firearm.¹⁶¹ The current statutes do not specify a culpable mental state for other elements, such as the weapon being a firearm. However, the revised statute applies the standard culpable mental state definitions used throughout the RCC.¹⁶² Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹⁶³ This change improves the clarity, consistency, and proportionality of the revised offense.

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

First, the revised code defines “possession” in its general part.¹⁶⁴ 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

¹⁵⁸ RCC § 22E-701.

¹⁵⁹ E.g., RCC §§ 22E-1101 (Murder); 22E-1206 (Stalking); 22E-1301 (Sexual Assault); 22E-1602 (Forced Commercial Sex); 22E-1603 (Trafficking in Labor or Services); 22E-1604 (Trafficking in Commercial Sex); 22E-1605 (Sex Trafficking of Minors).

¹⁶⁰ The meaning of the current D.C. Code § 7-2507.02(c)(3) exception “if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person” is unclear. If the exception is meant to exclude liability for minors who gain access to the firearm by unlawful entry or burglary, such an exception is unnecessary as a firearm possessor would not be negligent as to the possibility that a minor would gain access by such criminal acts. If the exception is meant to exclude liability for minors who gain access to the firearm for use in self-defense while experiencing a burglary or unlawful entry, such an exception is irrelevant to the fact that there was negligent storage (e.g. a parent left the weapon on a table).

¹⁶¹ D.C. Code § 7-2507.02 and 24 DCMR § 2348.1.

¹⁶² RCC § 22E-206.

¹⁶³ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

¹⁶⁴ RCC § 22E-202.

jointly possessed an unlawful item.¹⁶⁵ In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Second, the revised statute does not specially codify a policy statement for the unlawful storage of a firearm offense. Current D.C. Code § 7-2507.02(a) states, “It shall be the policy of the District of Columbia that each registrant should keep any firearm in his or her possession unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device.” However, the remainder of the statute does not require that a firearm be unloaded or disassembled. Nor does the statute require that a firearm be locked away or secured, unless it is readily apparent that an unauthorized person is likely to be able to access the weapon. The policy statement also is not referenced elsewhere in the D.C. Code. The revised unlawful storage of a firearm statute eliminates this language as potentially confusing or misleading as to the extent of criminal liability. This change improves the clarity and consistency of the revised statutes.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

¹⁶⁵ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

RCC § 7-2509.06. Carrying a Pistol in an Unlawful Manner.

- (a) *Offense.* An actor commits carrying a pistol in an unlawful manner when that actor:
- (1) Knowingly possesses a pistol licensed under RCC § 22E-4110 in a location that is:
 - (A) Outside a person’s home or place of business; and
 - (B) Conveniently accessible and within reach; and
 - (2) In addition:
 - (A) Possesses in that location more ammunition than is required to fully load the pistol twice;
 - (B) Possesses in that location more than 20 rounds of ammunition;
 - (C) The pistol is not entirely hidden from public view; or
 - (D) The pistol is not in a holster on their person in a firmly secure manner that is reasonably designed to prevent loss, theft, and accidental discharge of the pistol.
- (b) *Exclusion from Liability.* Notwithstanding subsection (a), a person shall not be subject to prosecution under this section if the person meets any of the exception criteria in RCC § 22E-4118.
- (c) *Prosecutorial Authority.* The Attorney General shall prosecute violations of this section.
- (d) *Penalties.* Carrying a pistol in an unlawful manner is a Class [X] crime 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 terms “ammunition” and “pistol” have the meanings specified in RCC § 22E-701.
- (f) *Interpretation of Statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense.

COMMENTARY

Explanatory Note. This section establishes the carrying a pistol in an unlawful manner offense for the Revised Criminal Code (RCC). The offense prohibits ways of carrying a pistol that may result in an accidentally discharge, pose a risk to public safety, or cause a breach of peace. The revised offense replaces 24 DCMR §§ 2343.1 (Ammunition carried by licensee) and 2344 (Pistol carry methods).

Paragraph (a)(1) specifies that to commit carrying a pistol in an unlawful manner, a person must knowingly¹⁶⁶ possess a pistol that the person is licensed to carry. “Pistol” is a defined term,¹⁶⁷ which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability¹⁶⁸ but excludes antiques.¹⁶⁹ “Possesses” is

¹⁶⁶ RCC § 22E-206.

¹⁶⁷ RCC § 22E-701.

¹⁶⁸ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

a defined term and includes both actual and constructive possession.¹⁷⁰ However, subparagraphs (a)(1)(A) and (a)(1)(B) limit the locations where the offense applies to places outside the person's home or place of business and where the pistol is conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that he or she possesses a licensed pistol in such a location.¹⁷¹

Paragraph (a)(2) establishes four means of carrying a licensed pistol unlawfully. A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice¹⁷² or if they have more than 20 rounds of ammunition,¹⁷³ whichever is least.¹⁷⁴ A person also carries a pistol unlawfully if they know that any part of it is visible to the public.¹⁷⁵ This provision applies equally to a person who is in a public place or inside a motor vehicle.¹⁷⁶ Lastly, a person carries a pistol unlawfully if they know that they have failed to use a holster to firmly secure it.¹⁷⁷ The firearm must be holstered so as to reasonably prevent loss, theft, or accidentally discharge.¹⁷⁸ Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have excess ammunition, the pistol isn't entirely hidden from public view, or the pistol is not holstered.

Paragraph (b) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the revised offense. [RESERVED.]

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

Subsection (f) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised carrying a pistol in an unlawful manner offense changes current District law in one main way.*

The revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code

¹⁶⁹ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

¹⁷⁰ RCC § 22E-701 (stating that: “‘Possess,’ and other parts of speech, including ‘possesses,’ ‘possessing,’ and ‘possession’ means: (A) Hold or carry on one’s person; or (B) Have the ability and desire to exercise control over.”).

¹⁷¹ See *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

¹⁷² RCC § 7-2509.06(a)(1).

¹⁷³ RCC § 7-2509.06(a)(2).

¹⁷⁴ See 24 DCMR § 2343.1.

¹⁷⁵ RCC § 7-2509.06(a)(3).

¹⁷⁶ See 24 DCMR § 2344.1.

¹⁷⁷ RCC § 7-2509.06(a)(4).

¹⁷⁸ See 24 DCMR § 2344.2.

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 carrying a pistol in an unlawful manner 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.

Beyond this change, four other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statutes¹⁷⁹ are silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹⁸⁰ This change clarifies the revised statute.

Second, the revised statute criminalizes possession of a licensed pistol in a location that is conveniently accessible and within reach.¹⁸¹ Current 24 DCMR § 2343.1 refers to conduct “while carrying the pistol,” 24 DCMR § 2344.1 refers to “carry any pistol in a manner that it is entirely hidden from view of the public when carried on or about a person, or when in a vehicle,” and 24 DCMR § 2344.2 refers to “carry any pistol.” The term “carry” in these regulations is not defined by the DCMR and there is no District case law on point. To resolve this ambiguity as to the meaning of “carry,” the revised statute requires that the pistol be “in a location that is accessible and within reach.” This plain language formulation is consistent with the definition of “carrying” as construed by the DCCA for other offenses. This change improves the clarity and consistency of the revised offense.

Third, the RCC codifies a list of exclusions from liability for possessory weapons offenses.¹⁸² Current 24 DCMR §§ 2343 – 2344 do not include any exceptions for law enforcement officers, weapons dealers, or others who routinely need to carry a firearm outside of a holster or in public view. Likewise, current 24 DCMR §§ 2343 – 2344 do not exclude from liability methods of carrying or storing a pistol in one’s home or place

¹⁷⁹ 24 DCMR §§ 2343 – 2344.

¹⁸⁰ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

¹⁸¹ RCC § 22E-202.

¹⁸² RCC § 22E-4118.

of business.¹⁸³ In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.¹⁸⁴ This change improves the clarity, consistency, and completeness of the revised code.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

¹⁸³ The lack of any exception for homes or businesses may lead to some absurd consequences, such as providing liability for any transfer, storage, cleaning, etc. of a firearm in a home or business because such activities would necessarily involve unholstering the weapon (contra 24 DCMR § 2344.2).

¹⁸⁴ [The Commission's recommendations for general defenses are forthcoming.]

RCC § 22E-701. Definitions.

“Ammunition” has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “ammunition” is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to “ammunition” are in some current Title 22 offenses¹⁸⁵). The RCC definition of “ammunition” cross-references the definition of “ammunition” in D.C. Code § 7-2501.01 in the District’s Firearms Control Regulations chapter. The RCC definition of “ammunition” is used in the revised offenses of possession of a prohibited weapon or accessory,¹⁸⁶ possession of an unregistered firearm, destructive device, or ammunition,¹⁸⁷ and carrying a pistol in an unlawful manner,¹⁸⁸ as well as the revised civil provisions for lawful transportation of a firearm or ammunition¹⁸⁹ and exclusions from liability for weapon offenses.¹⁹⁰

Relation to Current District Law. The RCC definition of “ammunition” cross-references the definition of “ammunition” in D.C. Code § 7-2501.01 and does not substantively change current District law.

“Assault weapon” has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “assault weapon” is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of “assault weapon” cross-references the definition of “assault weapon” in D.C. Code § 7-2501.01 in the District’s Firearms Control Regulations chapter.¹⁹¹ The RCC definition of “assault weapon” is used in the revised offenses of possession of a prohibited weapon or accessory,¹⁹² unlawful transfer of a firearm,¹⁹³ sale of firearm without a license,¹⁹⁴ as well as the revised civil provisions for licenses of firearms dealers.¹⁹⁵

Relation to Current District Law. The RCC definition of “assault weapon” cross-references the definition of “assault weapon” in D.C. Code § 7-2501.01 and the interpretation of assault weapons definition provision in 24 DCMR § 2324 and does not substantively change current District law.

“Bump stock” means any object that, when installed in or attached to a firearm, increases the rate of fire of the firearm by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger.

¹⁸⁵ D.C. Code §§ 22-2603.01 (Introduction of contraband in a penal institution); 22-4504.02 (Lawful transportation of firearms).

¹⁸⁶ RCC § 22E-4101.

¹⁸⁷ RCC § 7-2502.01.

¹⁸⁸ RCC § 7-2509.06.

¹⁸⁹ RCC § 22E-4109.

¹⁹⁰ RCC § 22E-4118.

¹⁹¹ See also 24 DCMR § 2324, Interpretation of Assault Weapons Definition.

¹⁹² RCC § 22E-4101.

¹⁹³ RCC § 22E-4112.

¹⁹⁴ RCC § 22E-4113.

¹⁹⁵ RCC § 22E-4114.

Explanatory Note. The RCC definition of “bump stock” replaces the current definition of “bump stock” in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of “bump stock” is used in the revised offense of possession of a prohibited weapon or accessory,¹⁹⁶ as well as the revised civil provisions for taking and destruction of dangerous articles.¹⁹⁷

Relation to Current District Law. The RCC definition of “bump stock” is identical to the statutory definition under current law.¹⁹⁸

“Dangerous weapon”¹⁹⁹ means:

- (A) A firearm;**
- (B) A restricted explosive;**
- (C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk; or**
- (D) A blackjack, billy club, slungshot, sand club, sandbag; or false knuckles;**
- (E) A stun gun; or**
- (F) Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.**

Explanatory Note. The RCC defines “dangerous weapon” to include enumerated weapons and any object that in the manner of its actual, attempted, or threatened use is likely²⁰⁰ to cause death or serious bodily injury. The enumeration of items in the definition of “dangerous weapon” does not mean that the simple possession of these items is criminal. In fact, possession of some enumerated items is constitutionally protected in certain circumstances. Besides firearms, stun guns are arms protected for use in self-defense under the Second Amendment to the United States Constitution²⁰¹ and knives may also be afforded protection.²⁰²

The phrase “[a]ny object” is to be interpreted broadly, including, for example, not only solid objects²⁰³ but fluids and gases. Stationary fixtures such as floors, curbs, and sinks are not dangerous weapons, regardless of how they are used.²⁰⁴ Body parts such as teeth, nails, hands, and feet are not dangerous weapons, regardless of how they are used.

¹⁹⁶ RCC § 22E-4101.

¹⁹⁷ RCC § 22E-4117.

¹⁹⁸ D.C. Code § 22-4501.

¹⁹⁹ This definition and the corresponding commentary have been amended since the First Draft of Report #36 (April 15, 2019).

²⁰⁰ See *Johnson v. United States*, 17-CM-1117, 2019 WL 2041278, at *4 (D.C. May 9, 2019) (explaining that while the *actual* injury inflicted by the object in question is an important factor in establishing its dangerousness (and in some cases the determining factor), the absence of such injury does not necessarily indicate that the object was not dangerous because legal standard is whether such injury is *likely* to occur) (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005)).

²⁰¹ *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016).

²⁰² See *Wooden v. United States*, 6 A.3d 833, 839–40 (D.C. 2010).

²⁰³ E.g., candlestick, lead pipe, wrench, rope.

²⁰⁴ *Edwards v. United States*, 583 A.2d 661 (D.C. 1990).

However, objects used by a person's hands or feet (e.g., steel-toed boots) or expelled from the body (e.g., bodily fluids) potentially may be dangerous weapons. Whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury" is a question of fact, not a question of law.

The RCC definition of "dangerous weapon" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dangerous weapon" are in the possession of dangerous weapons offense²⁰⁵ and the unlawful possession of contraband offense,²⁰⁶ and an apparently non-exhaustive list of "dangerous or deadly" weapons is in the penalty enhancement provision for committing crime while armed²⁰⁷). The terms "false knuckles," "firearm," "restricted explosive," "serious bodily injury," "stun gun" and "switchblade knife" that are used in the definition of "dangerous weapon" are defined elsewhere in RCC § 22E-701. The RCC definition of "dangerous weapon" is used in the revised definitions of "Class A contraband" and "imitation dangerous weapon" as well as the revised offenses of robbery,²⁰⁸ assault,²⁰⁹ menacing,²¹⁰ sexual assault,²¹¹ kidnapping,²¹² criminal restraint,²¹³ correctional facility contraband,²¹⁴ carrying a dangerous weapon,²¹⁵ possession of a dangerous weapon with intent to commit crime,²¹⁶ and possession of a dangerous weapon during a crime,²¹⁷ as well as the revised civil provisions for taking and destruction of dangerous articles.²¹⁸

Relation to Current District Law. The RCC definition of "dangerous weapon" is new and does not substantively change an existing statute.

As applied in the revised offenses of robbery, assault, menacing, sexual assault, kidnapping, criminal restraint, possession of a prohibited weapon or accessory, carrying a dangerous weapon, possession of a dangerous weapon with intent to commit crime, and possession of a dangerous weapon during a crime, the term "dangerous weapon" is generally consistent with, but in several ways changes or may change, current District law.

²⁰⁵ D.C. Code § 22-4514 makes it unlawful to possess with intent to use unlawfully against another "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon." However, the phrase "other dangerous weapon" is not defined.

²⁰⁶ D.C. Code § 22-2603.01(2)(A)(iii).

²⁰⁷ D.C. Code § 22-4502 provides a heightened penalty where a person commits a crime of violence or dangerous crime while 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)." However, the statute does not specify that the list provided is exhaustive.

²⁰⁸ RCC § 22E-1201.

²⁰⁹ RCC § 22E-1202.

²¹⁰ RCC § 22E-1203.

²¹¹ RCC § 22E-1301.

²¹² RCC § 22E-1401.

²¹³ RCC § 22E-1402.

²¹⁴ RCC § 22E-3403.

²¹⁵ RCC § 22E-4102.

²¹⁶ RCC § 22E-4103.

²¹⁷ RCC § 22E-4104.

²¹⁸ RCC § 22E-4117.

First, subsections (A) - (E) of the revised definition specify a complete list of items which constitute inherently “dangerous weapons.” Together, subsections (A) - (E) include nearly all the objects specifically listed in the District’s current possession of a prohibited weapon offense²¹⁹ and while armed penalty enhancement.²²⁰ However, there are various differences between the items listed in these current statutes and the RCC statute. For the RCC offenses against persons subtitle, an “imitation dangerous weapon” is a separately defined term in RCC § 22E-701 that is incorporated into various specific offenses,²²¹ but is not a *per se* dangerous weapon.²²² District case law has recognized that many of the objects listed in the possession of a prohibited weapon offense and while armed penalty enhancement are inherently dangerous.²²³ However, District case law has been unclear as to what other weapons may be *per se* dangerous weapons besides those listed in the statutes, and at times has appeared to say that inherently dangerous weapons, even those included in the statutes, are actually dangerous only in certain circumstances and ordinarily the matter of whether a weapon is dangerous is a question of fact.²²⁴ Under the RCC “dangerous weapon” definition, only the items listed in subsections (A) - (E) are considered inherently or *per se* dangerous weapons, based on their design rather than the manner of their use.²²⁵ Providing a single, complete list of items that are inherently dangerous clarifies District law.

²¹⁹ D.C. Code § 22-4514.

²²⁰ D.C. Code § 22-4502(a).

²²¹ See, e.g., RCC §§ 22E-1201 (robbery); 22E-1203 (menacing); 22E-1301 (sexual assault); 22E-1401 (kidnapping).

²²² The commentaries for relevant RCC offenses against persons discuss further, below, how excluding imitation firearms affects current District law. Besides the current while-armed penalty enhancement statute, DCCA case law currently establishes that an imitation pistol may be sufficient for ADW liability. *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975).

²²³ See *Dade v. United States*, 663 A.2d 547, 553 (D.C. 1995) (“The only grammatical way to construe this statute [D.C. Code § 22-4502(a)] is to read it, first, as including all pistols and other firearms (or imitations thereof) within the category of dangerous or deadly weapons, and second, as identifying a dozen other objects as dangerous or deadly weapons, in addition to pistols and other firearms. Thus any pistol or other firearm is, by statutory definition, a dangerous or deadly weapon, and the jury need not find specifically that a particular pistol is a dangerous or deadly weapon in order to find the defendant guilty of an armed offense.”); *Jones v. United States*, 67 A.3d 547, 550–51 (D.C. 2013) (“We have acknowledged that § 22–4515(b) includes a “non-exhaustive list of weapons readily classifiable as dangerous *per se*.” (citing *In re D.T.*, 977 A.2d 346, 349, 353 (D.C.2009)).

²²⁴ See *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (“Some weapons, under appropriate circumstances, are so clearly dangerous that it is prudent for the court to declare them to be such, as a matter of law. Included in this class are rifles, pistols, swords, and daggers, when used in the manner that they were designed to be used and within striking distance of the victim. Whether an object or material which is not specifically designed as a dangerous weapon is a “dangerous weapon” under an aggravated assault statute, however, is ordinarily a question of fact to be determined by all the circumstances surrounding the assault. See generally 2 C. Torcia, Wharton’s Criminal Law § 200 (14th ed. 1979). The trier of fact must consider whether the object or material is known to be “likely to produce death or great bodily injury” in the manner it is used, intended to be used, or threatened to be used. The jurors’ knowledge of the dangerous character of the weapon used generally can be based on “familiar and common experience.” [citation omitted].”

²²⁵ The design of an object may be an important fact in determining whether the object is a “dangerous weapon” per subsection (I), but it is not determinative.

Second, the RCC definition in subsection (F) provides a functional definition of ways any item may be deemed a dangerous weapon. Any “object or substance, other than a body part” can be a “dangerous weapon” if “the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.” The DCCA has said that, to determine whether an item is a dangerous weapon, “the manner [in which an item] is used, intended to be used, or threatened to be used”²²⁶ should be considered. However, there is also District case law which suggests that “intended use” may be the same as “attempted use.”²²⁷ Subsection (F) of the RCC definition of “dangerous weapon” codifies actual use, threatened use, and “attempted use” (instead of “intended use”). Under the RCC definition, a mere “intended use” of an item as a dangerous weapon (separate from an actual, threatened, or attempted use) still may be sufficient to make that item a dangerous weapon, but only if such an intended use of the weapon is sufficient to satisfy the requirements of a criminal attempt.²²⁸ Notably, current District practice with respect to charges of assault with a dangerous weapon does not appear to distinctly recognize as dangerous weapons either objects that are “intended to be used” or are involved in an “attempted” use to cause serious bodily injury or death.²²⁹ Creating a functional test as to whether an item is a dangerous weapon based on its actual, attempted, or threatened use clarifies District law with respect to attempts, and may provide a more objective basis for determining liability as compared to a general inquiry, per current law, as to the defendant’s intent for the item.

Third, under the RCC definition of “dangerous weapon” in subsection (F) the object or substance must be “likely” to cause death or serious bodily injury. The DCCA has discussed whether an object or substance is a “dangerous weapon” both in terms of whether it is “capable” of producing death or serious bodily injury, as well as “likely” to produce death or serious bodily injury, without discussion.²³⁰ The RCC definition adopts

²²⁶ See, e.g., *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (emphasis in original omitted) (internal quotations omitted). Although *Williamson* is an ADW case, several cases use the same standard to determine whether an object is a “dangerous weapon” under the “while armed” enhancement in D.C. Code § 22-4502. its standard for determining whether an object is a “dangerous weapon” is used in “while armed” enhancement cases under D.C. Code § 22-4502. See, e.g., *Arthur v. United States*, 602 A.2d 174, 177-78 (D.C. 1992) (discussing *Williamson v. United States*, 445 A.2d 975 (D.C. 1982) and other District precedent for determining whether an object is a “dangerous weapon” in an assault with intent to kill while armed case charged under the “while armed” enhancement in D.C. Code § 22-4502).

²²⁷ *McGill v. United States*, 270 F.2d 329, 331 (D.C. Cir. 1959) (“A pistol [used as a club] is undoubtedly a dangerous weapon; and the fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any less an assault with a dangerous weapon.”).

²²⁸ See RCC § 22E-301. For example, if a person carries an iron spike in their pocket with intent to use that object as a weapon to cause serious bodily injury to an enemy, that person may be guilty of an attempted assault with a dangerous weapon if the person satisfies the requirements for attempt liability, including the requisite intent as to the result (i.e. causing serious bodily injury by means of the spike) and being “dangerously close” to completing the offense.

²²⁹ See, D.C. Crim. Jur. Instr. § 4-101. (“An object is a dangerous weapon if it designed to be used, actually used, or threatened to be used, in a manner likely to produce death or serious bodily injury.”).

²³⁰ *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (“A deadly or dangerous weapon is an object ‘which is likely to produce death or great bodily injury by the use made of it.’ Thus, an instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others.”) (internal citations omitted).

a “likely” standard as is consistent with current District practice²³¹ and long-established case law.²³² This change clarifies District law.

Fourth, the RCC definition of dangerous weapon in subsection (F) refers to the revised definition for “serious bodily injury.” Current DCCA case law has discussed whether an object or substance is a “dangerous weapon” both in terms of causing death or “great bodily injury,”²³³ and death or “serious bodily injury.”²³⁴ The DCCA has explicitly stated that in this context the terms “great” and “serious” are interchangeable.²³⁵ Using “serious bodily injury” does not appear to constitute a change in District law, except to the extent the RCC definition of “serious bodily injury” differs from the current definition.²³⁶ Referencing “serious bodily injury” in the RCC definition of “dangerous weapon” improves the consistency of language and definitions across offenses.

Fifth, the RCC definition of a dangerous weapon does not include items that a complaining witness incorrectly perceives as a dangerous weapon, changing current District law.²³⁷ Imitation dangerous weapons are now separately defined in RCC § 22E-701 and do not constitute *per se* dangerous weapons. Liability for use of such apparently dangerous objects is provided in specified RCC offenses, such as the revised menacing offense.²³⁸ Excluding these objects from the scope of “dangerous weapon” does not change District case law holding that circumstantial evidence may be sufficient to establish an object or substance is a dangerous weapon.²³⁹ These changes clarify and improve the proportionality of the definition of a dangerous weapon, basing the definition on objective criteria and increasing penalties based on the actual increased risk of harm.

Sixth, the RCC definition of a “dangerous weapon” in subsection (F) precludes a body part from being deemed a dangerous weapon. A panel of the DCCA has specifically upheld a conviction for assault of a police officer using a deadly or dangerous

²³¹ D.C. Crim. Jur. Instr. §§ 4.101 (jury instruction for ADW); 8.101 (jury instruction for “while armed” enhancement under D.C. Code § 22-4502).

²³² See, e.g., *Tatum v. United States*, 110 F.2d 555, 556 (D.C. Cir. 1940) (“A dangerous weapon is one likely to produce death or great bodily injury.”)

²³³ See, e.g., *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

²³⁴ *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) (“Similarly, “an instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon, whether it is used to effect an attack or is handled with reckless disregard for the safety of others.”).

²³⁵ *In re D.T.*, 977 A.2d 346, 356 (D.C. 2009) (“This court has interpreted the term “great bodily injury” to be equivalent to the term “serious bodily injury...” (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004).

²³⁶ See Commentary to “serious bodily injury.”

²³⁷ D.C. Code § 22-4502(a) (“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)...”). See, also *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) (“In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon.”); *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (“[P]resent ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required.”).

²³⁸ RCC § 22E-1203.

²³⁹ See, e.g., *In re M.M.S.*, 691 A.2d 136, 138 (D.C. 1997) (“Finally, without direct evidence, the government may prove the existence of a weapon by adequate circumstantial evidence.”).

weapon based on the defendant’s use of his teeth to bite an officer’s leg.²⁴⁰ Dicta in the case indicated that any other body part could similarly be a deadly or dangerous weapon depending on its usage,²⁴¹ although there does not appear to be an appellate ruling to date in the District on whether other body parts may be considered dangerous weapons. The DCCA ruling that some uses of a person’s body parts—without an external item—may constitute use of a dangerous weapon creates uncertainty as to what types of physical contacts should and should not be subject to enhanced liability. The RCC definition, by contrast, clarifies that a person’s body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon.²⁴² This change clarifies the law by providing a bright-line distinction as to what may be a dangerous weapon, penalizing more severely a defendant’s use of external objects to inflict damage.

The revised definition of a “dangerous weapon” does not change other DCCA case law as to whether certain objects—be they cars,²⁴³ flip flops²⁴⁴ or stationary bathroom fixtures²⁴⁵—constitute dangerous weapons under the facts in those cases. Inoperable and unloaded firearms also remain dangerous weapons under subsection (A) of the RCC definition.

Seventh, the revised definition of dangerous weapon includes any object that is actually likely to cause death or serious bodily injury. The DCCA has explained that when an object is not dangerous *per se*, the trier of fact must consider whether that object is “known” to be likely to produce death or “great” bodily injury in the manner it is used or threatened to be used. *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) (quoting *Arthur v. United States*, 602 A.2d 174, 177 (D.C.1992) (citing *Williamson v. United States*, 445 A.2d 975, 979 (D.C.1982); *Harper v. United States*, 811 A.2d 808, 810 (D.C. 2002))). In contrast, the revised definition uses an

²⁴⁰ *In re D.T.*, 977 A.2d 346 (D.C. 2009).

²⁴¹ *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) (“We no more implied that bare feet were not dangerous weapons in our shod foot cases by highlighting the presence of the shoe, than we intimated that a cold clothes iron could not be a dangerous weapon when we held that a “hot” one was.”).

²⁴² However, as noted above, bodily fluids are not considered a body part and may constitute a “dangerous weapon” under the RCC definition. For example, a defendant who recklessly exposes another person to infectious bodily fluids that results in harm to that person may be liable for assault by means of a dangerous weapon—his or her own bodily fluid.

²⁴³ *See, e.g., Frye v. United States*, 926 A.2d 1085, 1097 (D.C. 2005) (“The complainant’s testimony concerning the manner in which appellant used his vehicle, trying to run her off the road and force her into oncoming traffic, over a substantial stretch of roadway was sufficient to permit the jury to find reasonably that appellant used his vehicle as a dangerous weapon in committing an assault against [the complaining witness].”); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (finding the evidence sufficient for ADW and the “while armed” enhancement because the “evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that the Cadillac, driven at the speeds and in the manner that appellant employed, was likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others.”).

²⁴⁴ *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) (“Even viewing the evidence in a light most favorable to the government, we hold as a matter of law that the flip flop was not a prohibited weapon under § 22-4514(b) [possession of a dangerous weapon].”)

²⁴⁵ *Edwards v. United States*, 583 A.2d 661, 662 (D.C. 1990) (“We hold that the evidence was insufficient to support the jury’s finding that Edwards inflicted his wife’s injuries while armed, within the meaning of Section 22-3202, when his alleged weapon consisted of one or more fixed or stationary plumbing fixtures against which he hurled his hapless wife.”).

objective analysis of likelihood and a standardized definition of the term “serious bodily injury” used across the RCC. This change improves the clarity and consistency of the revised code.

“False knuckles” means an object, whether made of metal, wood, plastic, or other similarly durable material that is constructed of one piece, the outside part of which is designed to fit over and cover the fingers on a hand and the inside part of which is designed to be gripped by the fist.

Explanatory Note. The RCC definition of “false knuckles” replaces the current definition of “knuckles” in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of “false knuckles” is used in the revised definition of “dangerous weapon” and in the revised offense of possession of a prohibited weapon or accessory.²⁴⁶

Relation to Current District Law. The RCC definition of “false knuckles” is identical to the statutory definition of “knuckles” under current law.²⁴⁷ The word “false” clarifies that the term does not include a body part.

“Firearm” has the meaning specified in D.C. Code § 7-2501.01, except that in Chapter 41 of Title 22 the term “firearm”:

- (A) Shall not include a firearm frame or receiver;**
- (B) Shall not include a firearm muffler or silencer; and**
- (C) Shall include operable antique pistols.**

Explanatory Note. The RCC definition of “firearm” replaces the current definition of “firearm” in D.C. Code § 22-4501 and the exceptions provision in D.C. Code § 22-4513. The RCC definition of “firearm” is used in the revised definitions of “dangerous weapon” and “imitation firearm” and in the revised offenses of possession of a prohibited weapon, or accessory,²⁴⁸ carrying a dangerous weapon,²⁴⁹ possession of a dangerous weapon with intent to commit crime,²⁵⁰ possession of a dangerous weapon during a crime,²⁵¹ possession of a firearm by an unauthorized person,²⁵² negligent discharge of firearm,²⁵³ alteration of a firearm identification mark,²⁵⁴ possession of an unregistered firearm, destructive device, or ammunition,²⁵⁵ carrying a pistol in an unlawful manner,²⁵⁶ unlawful storage of a firearm,²⁵⁷ unlawful sale of a pistol,²⁵⁸

²⁴⁶ RCC § 22E-4101.

²⁴⁷ D.C. Code § 22-4501.

²⁴⁸ RCC § 22E-4101.

²⁴⁹ RCC § 22E-4102.

²⁵⁰ RCC § 22E-4103.

²⁵¹ RCC § 22E-4104.

²⁵² RCC § 22E-4105.

²⁵³ RCC § 22E-4106.

²⁵⁴ RCC § 22E-4107.

²⁵⁵ RCC § 7-2502.01.

²⁵⁶ RCC § 7-2509.06.

²⁵⁷ RCC § 7-2507.02.

²⁵⁸ RCC § 22E-4111.

unlawful transfer of a firearm,²⁵⁹ sale of firearm without a license,²⁶⁰ and use of false information for purchase or licensure of a firearm,²⁶¹ as well as the revised civil provisions for lawful transportation of a firearm or ammunition,²⁶² and the revised civil provisions for licenses of firearms dealers²⁶³ and exclusions from liability for weapon offenses.²⁶⁴

Relation to Current District Law. The RCC definition of “firearm” is identical to the statutory definition of “firearm” under current D.C. Code Title 22 Chapter 45,²⁶⁵ except that it does not include frames, receivers, mufflers, or silencers. The RCC instead separately criminalizes silencers as a firearm accessory in the revised possession of a prohibited weapon or accessory offense.²⁶⁶

As applied in the revised possession of a dangerous weapon during a crime offense, the revised definition may change current law in one way. The revised definition categorically excludes toy and antique pistols unsuitable for use as firearms. Current D.C. Code § 22-4513 excludes toys and antiques for all sections in Chapter 45 of Title 22 except possession of a firearm during a crime of violence or dangerous crime,²⁶⁷ possession of a prohibited weapon with intent to use unlawfully against another,²⁶⁸ and the while armed enhancement.²⁶⁹ In contrast, the revised code combines these three provisions into two offenses titled possession of a dangerous weapon with intent to commit crime²⁷⁰ and possession of a dangerous weapon during a crime.²⁷¹ The revised offenses criminalize possession of a toy or antique firearm if used as an imitation firearm or as a dangerous weapon. An imitation firearm is “any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real.”²⁷² Dangerous weapons include “any object, 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.”²⁷³

“Firearms dealer” has the meaning specified in D.C. Code § 7-2505.03.

Explanatory Note. The RCC definition of “firearms dealer” is new, the term is not currently defined in Title 22 of the D.C. Code¹ (although undefined references to “dealer,” “seller,” or “licensee” are in some current Title 22 provisions¹). The RCC definition of “firearms dealer” cross-references the definition of “firearms dealer” in D.C. Code § 7-2505.03 in the District’s Firearms Control Regulations chapter. The RCC

²⁵⁹ RCC § 22E-4112.

²⁶⁰ RCC § 22E-4113.

²⁶¹ RCC § 22E-4116.

²⁶² RCC § 22E-4109.

²⁶³ RCC § 22E-4114.

²⁶⁴ RCC § 22E-4118.

²⁶⁵ D.C. Code § 22-4501.

²⁶⁶ RCC § 22E-4101.

²⁶⁷ D.C. Code § 22-4504(b).

²⁶⁸ D.C. Code § 22-4514(b).

²⁶⁹ D.C. Code § 22-4502.

²⁷⁰ RCC § 22E-4103.

²⁷¹ RCC § 22E-4104.

²⁷² RCC § 22E-701.

²⁷³ RCC § 22E-701.

definition of “firearms dealer” is used in the revised offenses of sale of firearm without a license²⁷⁴ and unlawful sale of a firearm by a licensed dealer²⁷⁵ and in revised exclusions from liability for weapons offenses provision.²⁷⁶

Relation to Current District Law. The RCC definition of “firearms dealer” cross-references the definition of “firearms dealer” in D.C. Code § 7-2505.03 and does not substantively change current District law.

“Firearms instructor” has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “firearms instructor” is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of “firearms instructor” cross-references the definition of “firearms instructor” in D.C. Code § 7-2501.01 in the District’s Firearms Control Regulations chapter. The RCC definition of “firearms instructor” is used in the revised exclusions from liability for weapon offenses provision.²⁷⁷

Relation to Current District Law. The RCC definition of “firearms instructor” cross-references the definition of “firearms instructor” in D.C. Code § 7-2501.01 and does not substantively change current District law.

“Imitation firearm” means any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real.

Explanatory Note. It is the actual design of the object rather than a victim’s perception that is the critical consideration for whether an object is an imitation firearm.²⁷⁸

The RCC definition of “imitation firearm” is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined reference to “imitation firearm” and “imitation pistol” are in some current Title 22 provisions²⁷⁹). The term “firearm” used in the definition of “imitation firearm” is defined elsewhere in RCC § 22E-701. The RCC definition of “imitation firearm” is used in the revised offenses of possession of a dangerous weapon with intent to commit crime²⁸⁰ and possession of a dangerous weapon during a crime,²⁸¹ as well as the revised civil provisions for licenses of firearms dealers.²⁸²

²⁷⁴ RCC § 22E-4113.

²⁷⁵ RCC § 22E-4115.

²⁷⁶ RCC § 22E-4118.

²⁷⁷ RCC § 22E-4118.

²⁷⁸ See *Washington v. United States*, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring).

²⁷⁹ D.C. Code §§ 22-2603.01 (Introduction of contraband into a penal institution); 22-4504 (Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty); 22-4514 (Possession of certain dangerous weapons prohibited; exceptions); see also D.C. Code §§ 16-2310 (Criteria for detaining children); 23-1322 (Detention prior to trial); and 23-1325 (Release in first degree murder, second degree murder, and assault with intent to kill while armed cases or after conviction).

²⁸⁰ RCC § 22E-4103.

²⁸¹ RCC § 22E-4104.

²⁸² RCC § 22E-4114.

Relation to Current District Law. The RCC definition of “imitation firearm” codifies the definition articulated by the D.C. Court of Appeals in *Bates v. United States*²⁸³ and does not substantively change current District law.

“Gun offense” has the meaning specified in D.C. Code § 7-2508.01.

Explanatory Note. The RCC definition of “gun offense” is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of “gun offense” cross-references the definition of “gun offense” in D.C. Code § 7-2508.01 in the District’s Firearms Control Regulations chapter.²⁸⁴ The RCC definition of “gun offense” is used in the revised offense of possession of a firearm by an unauthorized person.²⁸⁵

Relation to Current District Law. The RCC definition of “gun offense” cross-references the definition of “gun offense” in D.C. Code § 7-2508.01 and does not substantively change current District law.

As applied in the revised possession of a firearm by an unauthorized person offense, the term “gun offense” broadens the scope of criminal liability in some ways and narrows it in others.

First, current D.C. Code § 22-4503(a)(2) punishes possession of a firearm by any person who has been convicted of violating Chapter 45 of Title 22,²⁸⁶ which includes offenses that are nonviolent and unrelated to firearms. The revised offense instead relies on the definition of “gun offense” that appears in the District’s Firearms Control Regulations chapter,²⁸⁷ which is limited to offenses involving firearms and ammunition.

Second, current D.C. Code § 22-4503(a)(2) applies only to a person who is “not licensed under § 22-4510 to sell weapons.” There is no clear rationale for this exception. The revised offense applies to all persons convicted of a gun offense, including licensed firearms dealers. This change improves the consistency of the revised offense and eliminates unnecessary gaps in liability.

“Large capacity ammunition feeding device” means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition. The term “large capacity ammunition feeding device” shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

Explanatory Note. The RCC definition of “large capacity ammunition feeding device” is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of “large capacity ammunition feeding device” is identical to the definition in

²⁸³ 619 A.2d 984, 985 (D.C. 1993) (finding no error in an instruction reading, “[A] firearm is any weapon that will expel a projectile by means of an explosive. An imitation firearm is any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real.”).

²⁸⁴ Paragraph (A) – (C) of the current definition of “gun offense” each begin with the phrase “a conviction for.” Grammatically, as applied in current D.C. Code § 7-2508.01 et seq. and in RCC § 22E-4105, the definition should instead begin with “an offense involving,” so that the statutes do not effectively read “a conviction for ‘a conviction for.’”

²⁸⁵ RCC § 22E-4105.

²⁸⁶ Chapter 45 primarily concerns firearms, however, it also punishes the possession of other weapons such as knives, blackjacks, and slungshots. *See, e.g.*, D.C. Code § 22-4514.

²⁸⁷ RCC § 22E-701; D.C. Code § 7-2508.01.

D.C. Code § 7-2506.01 (Person permitted to possess ammunition). The RCC definition of “large capacity ammunition feeding device” is used in the revised offense of possession of a prohibited weapon or accessory,²⁸⁸ as well as the revised civil provisions for taking and destruction of dangerous articles.²⁸⁹

Relation to Current District Law. The RCC definition of “large capacity ammunition feeding device” is identical to the definition in D.C. Code § 7-2506.01 and does not substantively change current District law.

“Machine gun” has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “machine gun” replaces the current definition of “machine gun” in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of “machine gun” is used in the revised offenses of possession of a prohibited weapon or accessory,²⁹⁰ unlawful transfer of a firearm,²⁹¹ and sale of firearm without a license,²⁹² as well as the revised civil provisions for licenses of firearms dealers.²⁹³

Relation to Current District Law. The RCC definition of “machine gun” is identical to the statutory definition under current law.²⁹⁴

“Pistol” has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “pistol” replaces the current definition of “pistol” in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of “pistol” is used in the revised offenses of carrying a dangerous weapon²⁹⁵ carrying a pistol in an unlawful manner,²⁹⁶ unlawful sale of a pistol,²⁹⁷ and use of false information for purchase or licensure of a firearm,²⁹⁸ as well as the revised civil provisions on issuance of a license to carry a pistol²⁹⁹ and exclusions from liability for weapon offenses.³⁰⁰

Relation to Current District Law. The RCC definition of “pistol” is identical to the statutory definition under current law.³⁰¹

“Restricted explosive” means any device designed to explode or produce uncontained combustion upon impact, including a breakable container containing flammable liquid and having a wick or a similar device capable of being ignited.

²⁸⁸ RCC § 22E-4101.

²⁸⁹ RCC § 22E-4117.

²⁹⁰ RCC § 22E-4101.

²⁹¹ RCC § 22E-4112.

²⁹² RCC § 22E-4113.

²⁹³ RCC § 22E-4114.

²⁹⁴ D.C. Code § 22-4501.

²⁹⁵ RCC § 22E-4102.

²⁹⁶ RCC § 7-2509.06.

²⁹⁷ RCC § 22E-4111.

²⁹⁸ RCC § 22E-4415.

²⁹⁹ RCC § 22E-4110.

³⁰⁰ RCC § 22E-4118.

³⁰¹ D.C. Code § 22-4501. This definition differs from the definition of “pistol” under federal law. *See* 26 U.S. Code § 5845; 27 CFR § 479.11.

The term “restricted explosive” does not include any device lawfully and commercially manufactured primarily for the purpose of illumination, construction work, or other lawful purpose.

Explanatory Note. Lawfully and commercially manufactured explosives may include, but are not limited to, fireworks, emergency flares, kerosene lamps, candles, toy pistol paper caps, bottle rockets, chemistry sets, liquid nitrogen,³⁰² gunpowder,³⁰³ pest control bombs, and mining equipment.

The RCC definition of “restricted explosive” replaces the current definition of “molotov cocktail” D.C. Code § 22-4515a(a). The RCC definition of “restricted explosive” is used in the revised definition of “dangerous weapon” and in the revised offenses of possession of a prohibited weapon or accessory³⁰⁴ and carrying a dangerous weapon.³⁰⁵

Relation to Current District Law. The RCC definition of “restricted explosive” is similar to the definition “molotov cocktail” in D.C. Code § 22-4515a(a) and does not substantively change current District law.

“Restricted pistol bullet” has the meaning specified for “restricted pistol bullet” in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “restricted pistol bullet” is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of “restricted pistol bullet” cross-references the definition of “restricted pistol³⁰⁶ bullet” in D.C. Code § 7-2501.01 in the District’s Firearms Control Regulations chapter. The RCC definition of “restricted pistol bullet” is used in the revised offense of possession of a prohibited weapon or accessory.³⁰⁷

Relation to Current District Law. The RCC definition of “restricted pistol bullet” cross-references the definition of “restricted pistol bullet” in D.C. Code § 7-2501.01 and does not substantively change current District law.

“Sawed-off shotgun” has the meaning specified for “sawed-off shotgun” in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “sawed-off shotgun” replaces the current definition of “sawed-off³⁰⁸ shotgun” in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of “sawed-off shotgun” is used in the revised offenses of possession of a prohibited weapon

³⁰² Often used in medicine.

³⁰³ Often used for yardwork such as tree stump removal.

³⁰⁴ RCC § 22E-4101.

³⁰⁵ RCC § 22E-4102.

³⁰⁶ The word “pistol” is potentially confusing, as the definition also includes rifle bullets. Although the term “restricted bullet” would be clearer, the current term is retained at this time in the interest of consistency with the District’s civil statutes.

³⁰⁷ RCC § 22E-4101.

³⁰⁸ The word “sawed-off” is potentially confusing, as the definition includes any short-barreled rifle. Although the term “short-barreled shotgun” would be clearer, the current term is retained at this time in the interest of consistency with the District’s civil statutes.

or accessory,³⁰⁹ and unlawful transfer of a firearm,³¹⁰ as well as the revised civil provisions for licenses of firearms dealers.³¹¹

Relation to Current District Law. The RCC definition of “sawed-off shotgun” is identical to the statutory definition for “sawed-off shotgun” under current law.³¹²

“Stun gun” has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of “stun gun” is new, the term is not currently defined in Title 22 of the D.C. Code (although an undefined reference to “stun gun” appears in the current while armed penalty enhancement³¹³). The RCC definition of “stun gun” cross-references the definition of “stun gun” in D.C. Code § 7-2501.01 in the District’s Firearms Control Regulations chapter. The RCC definition of “stun gun” is used in the revised definition of “dangerous weapon” and the revised offenses of carrying a dangerous weapon³¹⁴ and possession of a stun gun.³¹⁵

Relation to Current District Law. The RCC definition of “stun gun” cross-references the definition of “stun gun” in D.C. Code § 7-2501.01 and does not substantively change current District law.

³⁰⁹ RCC § 22E-4101.

³¹⁰ RCC § 22E-4112.

³¹¹ RCC § 22E-4114.

³¹² D.C. Code § 22-4501.

³¹³ D.C. Code § 22-4502.

³¹⁴ RCC § 22E-4102.

³¹⁵ RCC § 7-2502.15.

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

- (a) *First Degree.* A person commits first degree possession of a prohibited weapon or accessory when that person:
- (1) Knowingly possesses a firearm or explosive;
 - (2) Reckless as to the fact that the firearm or explosive is:
 - (A) An assault weapon,
 - (B) Machine gun;
 - (C) Sawed-off shotgun; or
 - (D) A restricted explosive.
- (b) *Second Degree.* A person commits second degree possession of a prohibited weapon or accessory when that person:
- (1) Knowingly possesses a firearm accessory;
 - (2) Reckless as to the fact that the firearm accessory is:
 - (A) A firearm silencer;
 - (B) A bump stock; or
 - (C) A large capacity ammunition feeding device.
- (c) *Exclusions from Liability.* Notwithstanding subsections (a) and (b):
- (1) A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object.
 - (2) A person shall not be subject to prosecution under this section if the person meets any of the exception criteria in RCC § 22E-4118.
- (d) *Merger.* A conviction for possession of a prohibited weapon or accessory does not merge with any other offense arising from the same course of conduct.
- (e) *Penalties.*
- (1) First degree possession of a prohibited weapon or accessory is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree possession of a prohibited weapon or accessory is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (f) *Definitions.* The terms “intent” and “knowingly” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “ammunition,” “assault weapon,” “bump stock,” “court,” “large capacity ammunition feeding device,” “machine gun,” “possesses,” “restricted explosive,” and “sawed-off shotgun” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the possession of a prohibited weapon or accessory offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of particular weapons that are so highly suspect and devoid of lawful use that their mere possession is forbidden, without

requiring any proof of intent to use the weapon for an unlawful purpose.³¹⁶ The revised offense replaces D.C. Code §§ 22-4514(a) (Possession of certain dangerous weapons prohibited)³¹⁷ and 22-4515a(a) and (c) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes).³¹⁸

Subsection (a) specifies the elements of first degree possession of a prohibited weapon or accessory. Paragraph (a)(1) specifies that to commit first degree possession of a prohibited weapon or accessory, a person must act at least knowingly.³¹⁹ That is, the person must be practically certain that they possess an item³²⁰ and must be practically certain that the item they possess is a firearm or an explosive.³²¹ “Firearm” is a defined term,³²² which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability³²³ but excludes antiques.³²⁴ “Possesses” is a defined term and includes both actual and constructive possession.³²⁵ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.³²⁶ With respect to firearms, the person must know they possess a firearm³²⁷ or that they possess component parts that could be arranged to make a whole firearm.³²⁸ Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate

³¹⁶ See *Worthy v. United States*, 420 A.2d 1216 (D.C. 1980).

³¹⁷ The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4514(c) – (d).

³¹⁸ The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4515a(d) – (e).

³¹⁹ “Knowingly” is defined in RCC § 22E-206.

³²⁰ Knowledge of a gun’s presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); see also *Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer’s knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

³²¹ Consider, for example, a person who finds firearm silencer on the street and, without recognizing the object, carries it away out of curiosity. That person does not commit possession of a prohibited weapon or accessory.

³²² RCC § 22E-701.

³²³ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

³²⁴ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

³²⁵ RCC § 22E-701.

³²⁶ See, e.g., *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

³²⁷ See *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

³²⁸ *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

constructive possession.³²⁹ No intent to use the firearm, accessory, or ammunition is required for this possessory offense.³³⁰

Paragraph (a)(2) specifies that a person must be at least reckless as to whether the weapon or accessory is of the prohibited variety.³³¹ “Reckless” is a defined term,³³² which, applied here, means the person must consciously disregard a substantial risk that the item is an assault weapon, machine gun, sawed-off shotgun, or restricted explosive. The risk must be of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s conscious disregard of that risk is clearly blameworthy.³³³ The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (a)(2)(A) – (D) criminalize possession of four classes of prohibited objects.

Subparagraph (a)(2)(A) makes it unlawful to possess an assault weapon. “Assault weapon” is a defined term³³⁴ that includes an enumerated list of semiautomatic rifles, pistols, and shotguns. The term also includes semiautomatic firearms with specific features that make a firearm more readily capable of mass destruction, such as grenade launchers, flash suppressors, or vertical handgrips. Accordingly, an otherwise lawful firearm may be modified in a manner that converts it into contraband under the statute. It is not a defense that firearm was compliant at the time of manufacture or acquisition.

Subparagraph (a)(2)(B) makes it unlawful to possess a machine gun. “Machine gun” is a defined term³³⁵ and includes any firearm that is capable of automatically firing multiple shots with a single trigger pull. The term also includes a machine gun frame or receiver and parts that are designed and intended to convert a firearm into a machine gun.

Subparagraph (a)(2)(C) makes it unlawful to possess a sawed-off shotgun. “Sawed-off shotgun” is a defined term³³⁶ and means a shotgun having a barrel of less than 18 inches in length or a firearm made from a shotgun if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 18 inches in length.

Subparagraph (a)(2)(D) makes it unlawful to possess a restricted explosive. The term “restricted explosive” is defined³³⁷ to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.³³⁸

³²⁹ See, e.g., *Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

³³⁰ *Bsharah v. United States*, 646 A.2d 993 (D.C. 1994).

³³¹ RCC § 22E-207; see *Moore v. United States*, 927 A.2d 1040, 1054–55 (D.C. 2007); *In re D.S.*, 747 A.2d 1182 (D.C. 2000).

³³² RCC § 22E-206.

³³³ RCC § 22E-206.

³³⁴ RCC § 22E-701.

³³⁵ RCC § 22E-701.

³³⁶ RCC § 22E-701.

³³⁷ RCC § 22E-701.

³³⁸ A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or

Subsection (b) specifies the elements of second degree possession of a prohibited weapon or accessory. Paragraph (b)(1) specifies that to commit second degree possession of a prohibited weapon or accessory, a person must act at least knowingly.³³⁹ That is, the person must be practically certain that they possess an item³⁴⁰ and must be practically certain that the item they possess is a firearm accessory or ammunition.³⁴¹ “Ammunition” is a defined term,³⁴² which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. “Possesses” is a defined term and includes both actual and constructive possession.³⁴³ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.³⁴⁴ Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate constructive possession.³⁴⁵

Paragraph (b)(2) specifies that a person must be at least reckless as to whether the accessory or ammunition is of the prohibited variety.³⁴⁶ “Reckless” is a defined term,³⁴⁷ which, applied here, means the person must consciously disregard a substantial risk that the item is a firearm silencer, bump stock, or large capacity ammunition feeding device. The risk must be of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s conscious disregard of that risk is clearly blameworthy.³⁴⁸ The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (b)(2)(A) – (C) categorically criminalize possession of three classes of prohibited objects.

Subparagraph (b)(2)(A) makes it unlawful to possess a firearm silencer. A silencer is a device that is designed³⁴⁹ to reduce the sound of gunfire.

explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

³³⁹ “Knowingly” is defined in RCC § 22E-206.

³⁴⁰ Knowledge of a gun’s presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer’s knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

³⁴¹ Consider, for example, a person who finds firearm silencer on the street and, without recognizing the object, carries it away out of curiosity. That person does not commit possession of a prohibited weapon or accessory.

³⁴² RCC § 22E-701.

³⁴³ RCC § 22E-701.

³⁴⁴ *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

³⁴⁵ *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

³⁴⁶ RCC § 22E-207.

³⁴⁷ RCC § 22E-206.

³⁴⁸ RCC § 22E-206.

³⁴⁹ Although everyday household items, such as soda bottles, may also be used to muffle noise, possession of such items which are not designed as silencers is not prohibited under this section, irrespective of unlawful intent.

Subparagraph (b)(2)(B) makes it unlawful to possess a bump stock. The term “bump stock” is defined in RCC § 22E-701. The term includes any rifle stock or other device that enables the shooter to fire repeatedly—though less accurately—without moving the trigger finger. These stocks use spring action to propel the stock forward using the kickback from each previous shot.

Subparagraph (b)(2)(C) makes it unlawful to possess a large capacity ammunition feeding device. The term “large capacity ammunition feeding device” is defined³⁵⁰ to include extended clips or drums that hold more than 10 rounds at a time.

Paragraph (c)(1) excludes from liability a person who is voluntarily surrendering a weapon from criminal prosecution. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.³⁵¹ Under D.C. Code § 7-2507.05, for example, the accused must show not only an absence of criminal purpose but also that the possession was excused and justified as stemming from effort to aid and enhance social policy underlying law enforcement.³⁵² The accused must also show an intent to abandon and an act or omission by which such intention is put into effect.³⁵³ Proof of that intent, must be clear and unequivocal.³⁵⁴ A firearm must be unloaded and securely wrapped in package at time of surrender.³⁵⁵

Paragraph (c)(2) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (d) specifies that a conviction for possession of a prohibited weapon or accessory does not merge with any other offense arising from the same course of conduct.

Subsection (e) provides the penalty for each gradation of the revised offense. [RESERVED.]

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

Relation to Current District Law. *The revised possession of a prohibited weapon or accessory offense changes current District law in four main ways.*

First, the RCC limits prohibited items to restricted explosives, firearms, and firearm accessories, grading possession of firearm accessories lower than possession of restricted explosives and firearms. D.C. Code § 22-4514(a) provides a single penalty gradation for possession of “any machine gun, sawed-off shotgun, bump stock, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms...” In contrast, the revised offense punishes only possession of

³⁵⁰ See RCC § 22E-701 (“such term does not include a device lawfully and commercially manufactured primarily for the purpose of illumination, construction work, or other lawful purpose.”).

³⁵¹ See, e.g., D.C. Code §§ 7-2507.05; 7-2510.07(f)(1). [The Commission’s recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

³⁵² *Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)).

³⁵³ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987).

³⁵⁴ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); see also; *Lewis v. United States*, 871 A.2d 470, 474 (D.C. 2005).

³⁵⁵ *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

specified items that are likely to cause or facilitate multiple fatalities in a single event. Possession of blackjacks and other dangerous weapons³⁵⁶ is illegal if they are carried outside of the home,³⁵⁷ possessed with intent to commit a crime,³⁵⁸ or possessed during a crime.³⁵⁹ Additionally, the RCC punishes some offenses more severely if a dangerous weapon is displayed or used, including robbery,³⁶⁰ assault,³⁶¹ menacing,³⁶² sexual assault,³⁶³ kidnapping,³⁶⁴ and criminal restraint.³⁶⁵ This change logically reorders and improves the proportionality of the revised offenses.

Second, the revised offense changes the prosecutorial jurisdiction for possession of a large capacity ammunition feeding device. Under current law, possession of an extended clip is criminalized in Title 7's firearm regulations chapter³⁶⁶ and is prosecuted by the Office of the Attorney General for the District of Columbia. However, this offense appears to be coextensive with the prohibition of machine guns in D.C. Code § 22-4514.³⁶⁷ Combining these offenses improves the logical order of the revised offenses and reduces unnecessary overlap.

Third, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 22-4514(c) provides that a first possession of a prohibited weapon offense is punishable by a maximum of one year in jail and a second possession of a prohibited weapon offense (or a possession of a prohibited weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. Current D.C. Code § 22-4515a(d) provides that a first possession of a Molotov cocktail offense is punishable by 1-5 years in prison, a second is punishable by 3-15, and a third is punishable by 5-30. It further provides that a person convicted for a third time may not benefit from the Federal Youth Corrections Act. In contrast, the RCC does not provide an offense-specific

³⁵⁶ The term “dangerous weapon” is defined in RCC § 22E-701 to include “[a]ny object, 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.”

³⁵⁷ RCC § 22E-4102.

³⁵⁸ RCC § 22E-4103.

³⁵⁹ RCC § 22E-4104.

³⁶⁰ RCC § 22E-1201.

³⁶¹ RCC § 22E-1202.

³⁶² RCC § 22E-1203.

³⁶³ RCC § 22E-1301.

³⁶⁴ RCC § 22E-1401.

³⁶⁵ RCC § 22E-1402.

³⁶⁶ See D.C. Code § 7-2506.01(b).

³⁶⁷ Before 2009, the term “machine gun” was defined in D.C. Code § 7-2501.01 to include “any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot...[s]emiautomatically, more than 12 shots without manual reloading.” The District of Columbia Court of Appeals interpreted this language to include a handgun fitted with a magazine that holds more than twelve rounds of ammunition (even if the magazine is defective). See *Moore v. United States*, 927 A.2d 1040, 1054 (D.C. 2007); *United States v. Woodfolk*, 656 A.2d 1145, 1147–48 (D.C. 1995). In 2009, the D.C. Council redefined “machine gun” to include only fully automatic weapons and simultaneously criminalized possession of a large capacity ammunition feeding device under D.C. Code § 7-2506.01(b). D.C. Law 17-372, Firearms Control Amendment Act of 2008. It appears both categories of items were made criminal by the D.C. Council post-Home Rule, such that a change in prosecutorial jurisdiction at this time is feasible. See *In re Hall*, 31 A.3d 453 (D.C. 2011).

penalty enhancement for a second or subsequent offense. Repeat violations of a prohibited weapon or accessory offense may be subject to a general repeat offender penalty enhancement just as other offenses.³⁶⁸ The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Fourth, the revised statute requires that a person be at least reckless as to the weapon or accessory being of the variety that is prohibited. Current D.C. Code § 22-4514(a) does not specify a requisite mental state.³⁶⁹ However, legislative history indicates that Congress intended to create a general intent crime,³⁷⁰ such that the mere possession of certain enumerated weapons is prohibited, even if the person is unaware of the attributes that render the weapon unlawful.³⁷¹ In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted, either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute.³⁷² The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁷³ However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.³⁷⁴ This change improves the proportionality of the revised offense.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute does not include an explicit reference to manufacturing, transferring, using, transporting, or selling a prohibited weapon. D.C. Code § 7-2506.01(b) makes it unlawful to possess, sell, or transfer any large capacity ammunition

³⁶⁸ RCC §§ 22E-606(a) and (b).

³⁶⁹ District case law requires knowledge for the actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

³⁷⁰ “General intent” is not used in or defined in the current statute, but the DCCA has said that it is frequently defined as “intent to do the prohibited act” which requires “the absence of an exculpatory state of mind.” *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

³⁷¹ *See McBride v. United States*, 441 A.2d 644, 660 n. 7 (D.C.1982); *Worthy v. United States*, 420 A.2d 1216, 1218 (1980); *United States v. Brooks*, 330 A.2d 245, 247 (D.C.1974); *In re D.S.*, 747 A.2d 1182, 1186 (D.C. 2000).

³⁷² *See Staples v. United States*, 511 U.S. 600, 614-15 (1994).

³⁷³ *Elonis v. United States*,” 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) (“When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-citement Video*, 513 U.S., at 72, 115 S.Ct. 464).”).

³⁷⁴ *Elonis v. United States*,” 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)(“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.”).

feeding device. This conduct is also prohibited by D.C. Code § 7-2504.01(b).³⁷⁵ D.C. Code § 22-4515a makes it unlawful to manufacture, transfer, use, possess, or transport a Molotov cocktail. This conduct is also prohibited by D.C. Code §§ 7-2502.01³⁷⁶ and 7-2505.01.³⁷⁷ In contrast, the RCC's definition of possess³⁷⁸ includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, transports, or sells a prohibited weapon appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.³⁷⁹ This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

Second, the revised statute does not include an explicit exception for possession of a Molotov cocktail during a state of emergency. D.C. Code § 22-4515a(c) provides that a person may not manufacture, transfer, use, possess, or transport an explosive during a state of emergency “except at his or her residence or place of business.” There is no clear rationale for why, at present, person can make and transfer explosives during a state of emergency. This conduct is prohibited by D.C. Code §§ 7-2502.01, 7-2504.01(b), and 7-2505.01, none of which contain a similar state-of-emergency exception. Where a state of emergency is occasioned by mass disorder such as rioting, the sale of Molotov cocktails may be even more dangerous than during a time of peace. This change improves the consistency of the revised statutes and reduces an unnecessary gap in liability.

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

First, the revised statute uses the undefined term “firearm silencer.” Current D.C. Code § 22-4514(a) makes it unlawful to possess “any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms.” It is unclear from the statute whether it is intended to include only items that are designed to silence firearms or to also include any object³⁸⁰ that is actually used or could be used to muffle the sound of gunfire. Case law has not addressed the issue. In contrast, the phrase “firearm silencer,” which appears

³⁷⁵ “No person or organization shall engage in the business of selling...any firearm...[or] parts therefor...without first obtaining a dealer’s license.”

³⁷⁶ “[N]o person or organization...shall...transfer, offer for sale, sell, give, or deliver any destructive device.” See also D.C. Code § 7-2501.01 (defining the term “destructive device” to include “[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device,” such as a Molotov cocktail).

³⁷⁷ “No person or organization shall sell, transfer or otherwise dispose of any...destructive device...except as provided in § 7-2502.10(c), § 7-2505.02, or § 7-2507.05.” See also D.C. Code § 7-2501.01 (defining the term “destructive device” to include “[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device,” such as a Molotov cocktail).

³⁷⁸ RCC § 22E-701.

³⁷⁹ See D.C. Code § 22-1511 (Fraudulent advertising).

³⁸⁰ For example, a plastic bottle may muffle the sound of a firearm discharging.

twice in D.C. Code § 7-2501.01,³⁸¹ more directly refers to items that are designed to silence a firearm.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

³⁸¹ "Firearm muffler or silencer" appears in the current definition of "firearm." "Silencer" appears in the definition of "assault weapon."

RCC § 22E-4102. Carrying a Dangerous Weapon.

- (a) *First Degree.* A person commits first degree carrying a dangerous weapon when that person:
 - (1) Knowingly possesses:
 - (A) A firearm other than a pistol;
 - (B) A pistol, without a license to carry under RCC § 22E-4110; or
 - (C) A restricted explosive;
 - (2) In a location that is:
 - (A) Not the person's home, place of business, or land;
 - (B) Conveniently accessible and within reach; and
 - (C) In fact:
 - (i) Within 300 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 indicating that firearms or explosives are prohibited.
- (b) *Second Degree.* A person commits second degree carrying a dangerous weapon or when that person:
 - (1) Knowingly possesses:
 - (A) A firearm other than a pistol;
 - (B) A pistol, without a license to carry under RCC § 22E-4110; or
 - (C) A restricted explosive;
 - (2) In a location that is:
 - (A) Not the person's home, place of business, or land;
 - (B) Conveniently accessible and within reach; and
- (c) *Third Degree.* A person commits third degree carrying a dangerous weapon when that person:
 - (1) Knowingly possesses a dangerous weapon;
 - (2) In a location that is:
 - (A) Not the person's home, place of business, or land; and
 - (B) Conveniently accessible and within reach;
 - (3) With intent to use the weapon, anytime in the future or if any condition is met, in a manner that is likely to cause death or serious bodily injury to another person.
- (d) *Exclusions from Liability.*
 - (1) A person shall not be subject to prosecution under this section for carrying a dangerous weapon when voluntarily surrendering the object.
 - (2) Notwithstanding subsections (a), (b), and (c), a person shall not be subject to prosecution under this section, if the person meets any of the exception criteria in RCC § 22E-4118.
- (e) *Penalties.*
 - (1) First degree carrying a dangerous weapon is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

- (2) Second degree carrying a dangerous weapon is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (3) Third degree carrying a dangerous weapon is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (f) *Definitions.* The terms “intent” and “knowingly” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “building,” “dangerous weapon,” “firearm,” “pistol,” “serious bodily injury,” and “stun gun” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the carrying a dangerous weapon offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes carrying a firearm without a license. It also proscribes carrying another dangerous weapon with intent to use it in a manner likely to cause death or a serious bodily injury. The revised offense replaces D.C. Code §§ 22-4502.01 (Gun free zones; enhanced penalty) and 22-4504(a) and (a-1).

Subsection (a) punishes carrying a firearm, unlicensed pistol, or restricted explosive in a prohibited location³⁸² as first degree carrying a dangerous weapon.³⁸³

Paragraph (a)(1) specifies that a person must knowingly possess a weapon.³⁸⁴ “Knowingly” is a defined term³⁸⁵ and applied here means that the person must be practically certain that they possess the weapon. “Possesses” is a defined term and includes both actual and constructive possession.³⁸⁶ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.³⁸⁷ The person must know they possess a weapon³⁸⁸ or that they possess component parts that could be arranged to make a whole firearm.³⁸⁹ Evidence of knowledge of an item’s

³⁸² See *Wrenn v. Dist. of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017) (stating, “[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places...” By contrast, a ban on owning or storing guns at home leaves no alternative channels for *keeping* arms.” (Emphasis in original.) (Internal citations omitted.)).

³⁸³ The revised first degree carrying a dangerous weapon offense replaces D.C. Code § 22-4502.01, which provides an enhanced penalty for illegally carrying a firearm in a gun free zone.

³⁸⁴ Knowledge of a gun’s presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); see also *Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer’s knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

³⁸⁵ “Knowingly” is defined in RCC § 22E-206.

³⁸⁶ RCC § 22E-701.

³⁸⁷ See, e.g., *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

³⁸⁸ See *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

³⁸⁹ *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

location is required, but not necessarily sufficient, to demonstrate constructive possession.³⁹⁰

Subparagraphs (a)(1)(A) – (C) specify that a person commits the offense by having a firearm other than a pistol, a pistol without a license, or a restricted explosive. “Firearm,” and “pistol” are defined terms,³⁹¹ which include inoperable weapons that may be redesigned, remade or readily converted or restored to operability³⁹² but exclude antiques.³⁹³ Pistols are a subset of firearms that are either designed to be fired by a single hand or have a barrel shorter than 12 inches.³⁹⁴ District law allows civilians to apply for a license to carry a pistol,³⁹⁵ however, carrying a larger firearm is categorically prohibited. The term “restricted explosive” is defined³⁹⁶ to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.³⁹⁷

Subparagraphs (a)(2)(A) and (a)(2)(B) explain that two elements must be proven to establish that a person “carried” a firearm or explosive. Subparagraph (a)(2)(A) requires that the person possess the weapon in a location other than their own home,³⁹⁸ place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land. Subparagraph (a)(2)(B) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach.³⁹⁹ Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach.

³⁹⁰ See, e.g., *Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

³⁹¹ RCC § 22E-701.

³⁹² *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

³⁹³ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

³⁹⁴ RCC § 22E-701.

³⁹⁵ D.C. Code § 22-4506; 24 DCMR §§ 2332 – 2342; see also *Wrenn v. Dist. of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

³⁹⁶ RCC § 22E-701.

³⁹⁷ A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

³⁹⁸ Unlike the term “dwelling,” which is defined in RCC § 22E-701, the word “home” refers to the person’s own place of abode. It is not necessary to prove that the location is the person’s *bona fide* residence or domicile. However, “home” does not include momentary sleeping quarters such as a guest room or hotel room. See, e.g., *Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013).

³⁹⁹ See *White v. United States*, 714 A.2d 115, 119 (D.C.1998); *Johnson v. United States*, 840 A.2d 1277, 1280 (D.C. 2004). For example, where there is an obstacle to a person’s access to a weapon, such as a locked trunk, the person has not carried a weapon under the revised statute. See, e.g., *Henderson v. United States*, 687 A.2d 918, 922 (D.C. 1996); *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952).

Subparagraph (a)(2)(C) provides elevated liability for illegally carrying a firearm or explosive within 300 feet of a location that operates as a school, college, university, public swimming pool, public playground, public youth center, or public library, or children's day care center.⁴⁰⁰ The 300-foot distance is calculated from the property line, not from the edge of a building.⁴⁰¹ Sub-subparagraph (a)(2)(C)(ii) requires that the location displays clear and conspicuous signage that indicates firearms or explosives are prohibited.⁴⁰² Whether a sign is clear and conspicuous may depend on facts including its placement, legibility, and word choice.⁴⁰³ Subparagraph (a)(2)(C) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is in an appropriately identified school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center.

Subsection (b) punishes carrying a firearm, unlicensed pistol, or restricted explosive in any location anywhere outside the person's home, place of business, or land as second degree carrying a dangerous weapon.⁴⁰⁴ This gradation of the offense does not require proof of a prohibited location but otherwise has elements identical to first degree carrying a dangerous weapon.

Subsection (c) punishes carrying a dangerous weapon with intent to use the weapon in a manner likely to seriously injure or kill another person⁴⁰⁵ as third degree carrying a dangerous weapon.⁴⁰⁶ Paragraph (c)(1) specifies that a person must knowingly⁴⁰⁷ possess a dangerous weapon.⁴⁰⁸ "Possesses" is a defined term and includes both actual and constructive possession.⁴⁰⁹ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.⁴¹⁰ The person must be practically certain that the item is one of the objects that qualifies as a dangerous

⁴⁰⁰ These locations include buildings or building grounds that are being used for the specified purpose. They do not include, for example, an address that is used only to receive mail for an online education program or a Free Little Library book exchange box.

⁴⁰¹ See *Jeffrey v. United States*, 892 A.2d 1122 (D.C. 2006).

⁴⁰² E.g., a sign reading, "Gun Free Zone."

⁴⁰³ This is a more flexible standard than provided in the District's current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

⁴⁰⁴ The revised second and third degree carrying a dangerous weapon offenses replace D.C. Code §§ 22-4504(a) and (a-1), which criminalize carrying a pistol without a license, a deadly or dangerous weapon, or a rifle or shotgun.

⁴⁰⁵ The revised third degree carrying a dangerous weapon offense differs from the revised third degree possession of a dangerous weapon during a crime offense RCC § 22E-4104(c) insofar as: (1) it does not include stun guns, (2) it requires carrying in a manner that is conveniently accessible and within reach, and (3) it criminalizes possession for purposes of non-immediate, conditional self-defense.

⁴⁰⁶ The revised second and third degree carrying a dangerous weapon offenses replace D.C. Code §§ 22-4504(a) and (a-1), which criminalize carrying a pistol without a license, a deadly or dangerous weapon, or a rifle or shotgun.

⁴⁰⁷ "Knowingly" is defined in RCC § 22E-206.

⁴⁰⁸ See, e.g., *United States v. Matthews*, 480 F.2d 1191, 1192 (D.C. Cir. 1973).

⁴⁰⁹ RCC § 22E-701.

⁴¹⁰ See, e.g., *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

weapon.⁴¹¹ Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.⁴¹²

Subparagraphs (c)(2)(A) and (c)(2)(B) explain that two elements must be proven to establish that a person "carried" a dangerous weapon. Subparagraph (c)(2)(A) requires that the person possess the weapon in a location other than their own home, place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land. Subparagraph (c)(2)(B) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach.

Paragraph (c)(3) specifies that the person must possess the dangerous weapon with intent to use the weapon in a manner that is likely to cause death or serious bodily injury to another person. "Intent" is a defined term,⁴¹³ which, applied here, means the accused must be practically certain that the intended use would cause a serious bodily injury or death. The government is not required to prove intent to use the weapon unlawfully,⁴¹⁴ but is required to prove intent to use the item as a dangerous weapon.⁴¹⁵ "Serious bodily injury" is defined in the RCC to require a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.⁴¹⁶ The word "likely" clarifies that the danger of harm must be objectively more probable than not. Some dangerous weapons are of such limited lethality and dangerousness that they typically will not meet this standard.⁴¹⁷ Paragraph (c)(3) specifies that the intent to use the weapon may be conditional.⁴¹⁸ Although general

⁴¹¹ "Dangerous weapon" is defined in RCC § 22E-701 to include firearms, explosives, daggers, blackjacks, false knuckles and other items. It also includes any object, if the actual, attempted, or threatened use is likely to inflict a serious bodily injury. Consider, for example, a person who picks up a brick with intent to strike another person. The person commits carrying a dangerous weapon only if they intend to strike the person in a manner that will likely cause a serious bodily injury (e.g., a blow to the head).

⁴¹² See, e.g., *Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

⁴¹³ RCC § 22E-206.

⁴¹⁴ See *In re S.P.*, 465 A.2d 823, 824 (D.C. 1983) (affirming a conviction for carrying a dangerous weapon where the defendant was swinging and twirling nunchaku in a crowd of onlookers); see also *Cooke v. United States*, 275 F.2d 887, 888 (D.C. Cir. 1960) (upholding a conviction for carrying a pistol in self-defense).

⁴¹⁵ *Strong v. United States*, 581 A.2d 383 (D.C. 1990); see also *Tuckson v. United States*, 77 A.3d 357, 361 (D.C. 2013) (finding no probable cause for possession of a prohibited weapon where a defendant possessed a collapsible police baton in his car, as the design and purpose of the instrument was not for use as a weapon, and defendant did not display, wield, or hold the baton in the presence of police officers).

⁴¹⁶ RCC § 22E-701.

⁴¹⁷ In most instances, use of a stun gun is unlikely to cause "serious bodily injury," which is defined in RCC § 22E-701 to require "protracted loss or impairment of the function of a bodily member or organ."

⁴¹⁸ Proof of an intent to use the weapon for an unlawful purpose is not an element of the offense. *Scott v. United States*, 243 A.2d 54, 56 (D.C. 1968) (citing *United States v. Shannon*, D.C.Mun.App., 144 A.2d 267 (1958)). Proof of intent to use the weapon for a dangerous purpose is sufficient. See *In re M.L.*, 24 A.3d 63, 68 (D.C. 2011) (citing *Lewis v. United States*, 767 A.2d 219, 222-23 (D.C. 2001); *Monroe v. United States*, 598 A.2d 439, 441 (D.C.1991)).

defenses⁴¹⁹ such as self-defense⁴²⁰ and defense of property⁴²¹ apply to this offense, carrying a dangerous weapon for purposes of non-immediate self-defense is prohibited.⁴²²

Subsection (d) excludes from liability a person who is voluntarily surrendering a weapon from criminal prosecution. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.⁴²³ Under D.C. Code § 7-2507.05, for example, the accused must show not only an absence of criminal purpose but also that the possession was excused and justified as stemming from effort to aid and enhance social policy underlying law enforcement.⁴²⁴ The accused must also show an intent to abandon and an act or omission by which such intention is put into effect.⁴²⁵ Proof of that intent, must be clear and unequivocal.⁴²⁶ A firearm must be unloaded and securely wrapped in package at time of surrender.⁴²⁷

Subsection (e) provides the penalty for each gradation of the revised offense. [RESERVED.]

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

Relation to Current District Law. *The revised carrying a dangerous weapon offense changes current District law in five main ways.*

First, the revised offense applies only to people who are outside of their own home, place of business, or land. D.C. Code § 22-4504 distinguishes a higher penalty gradation for possession of a firearm outside of “the person’s dwelling place, place of business, or on other land possessed by the person.”⁴²⁸ In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to inhibit the operability of a lawful firearm in the home for the purpose of immediate self-defense.⁴²⁹ The Court required the District to permit the plaintiff to register his handgun and to issue him a license to carry it in the home, fully assembled, loaded, and without a trigger lock. The RCC does not separately punish carrying a lawfully registered firearm at home.⁴³⁰ This

⁴¹⁹ [The Commission’s recommendations for general defenses are forthcoming.]

⁴²⁰ See *Williams v. United States*, 90 A.3d 1124, 1127 (D.C. 2014); *Reid v. United States*, 581 A.2d 359, 367 (D.C. 1990); *Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987); *McBride v. United States*, 441 A.2d 644, 649 (D.C. 1982); *Cooke v. United States*, 213 A.2d 508, 510 (D.C. 1965); *United States v. Christian*, 187 F.3d 663, 666 (D.C. Cir. 1999).

⁴²¹ See, e.g., *Doby v. United States*, 550 A.2d 919 (D.C. 1988).

⁴²² For example, a person who carries a dagger in their purse to protect against any potential attackers commits third degree carrying a dangerous weapon. This is true even if the perceived threat is objectively reasonable under the circumstances.

⁴²³ See, e.g., D.C. Code §§ 7-2507.05; 7-2510.07(f)(1). [The Commission’s recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

⁴²⁴ *Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)).

⁴²⁵ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987).

⁴²⁶ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); see also; *Lewis v. United States*, 871 A.2d 470, 474 (D.C. 2005).

⁴²⁷ *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

⁴²⁸ D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carries a gun within 1000 feet of a school, playground, or public housing, without any exception for a person whose dwelling, business or land is located inside a gun free zone.

⁴²⁹ 554 U.S. 570 (2008).

⁴³⁰ Mere possession of an unregistered firearm is punished under RCC § 7-2502.01.

change reduces unnecessary overlap between the possession and carrying offenses and may improve the constitutionality of the revised offense.

Second, the revised offense punishes carrying a firearm or a restricted explosive in a school zone. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person who carries a gun within 1000 feet of a school, playground, or public housing. The term “gun” is not defined in the statute and case law does not clarify whether it is intended to include air guns, spring guns, stun guns, imitation firearms, toys, or antiques. There is no clear rationale for excluding explosives—which may be as lethal or more lethal than firearms—from the reach of the enhancement. In contrast, the revised code defines the terms “firearm” and “restricted explosive”⁴³¹ and specifies that a person who unlawfully carries either class of weapon near a school, playground, or day care center is subject to a more severe penalty than a person who carries such a weapon in another location. This change clarifies the revised offense, eliminates an unnecessary gap in liability, and improves the proportionality of the revised offenses.

Third, the first degree of the revised offense requires that the person know that they are proximate to a school, college, university, public swimming pool, public playground, public youth center, public library, or children’s day care center. D.C. Code § 22-4502.01 does not specify a culpable mental state as to the location. It does, however, require that the location be “appropriately identified,” that is, bearing “a sign that identifies the building or area as a gun free zone.” In contrast, the revised offense applies the standard culpable mental state definition of “knowingly” used throughout the RCC.⁴³² Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁴³³ This change improves the clarity and consistency of the revised offense.

Fourth, the revised statute narrows the list of locations that elevate a carrying a dangerous weapon offense from second degree to first degree. Current D.C. Code § 22-4502.01 establishes a 1000-foot radius for gun free zones and describes them to include any “video arcade” and “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 the United States 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.” Video arcades are considerably less common in modern times than when the statute became law

⁴³¹ RCC § 22E-701.

⁴³² RCC § 22E-206.

⁴³³ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256-258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

in 1981. In fact, the District does not appear to have any arcades that are open to minor children presently advertised online. On the other hand, large sections of the District fall within a 1000-foot radius of public housing.⁴³⁴ In contrast, the revised offense protects a 300-foot radius around every “school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children’s day care center.” These locations are similarly protected from stun guns⁴³⁵ and drug activity⁴³⁶ under the revised code. This change improves the consistency of the revised offenses and eliminates an unnecessary gap in liability.

Fifth, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 22-4504 provides that a first carrying a dangerous weapon offense is punishable by a maximum of one year in jail and a second carrying a dangerous weapon offense (or a carrying a dangerous weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of a prohibited weapon or accessory offense may be subject to a general repeat offender penalty enhancement just as other offenses.⁴³⁷ The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised offense applies a heightened penalty for carrying a firearm in a gun free zone only if the firearm is carried without a license. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carrying a gun illegally in a prohibited location. The term “illegally” is not defined in the statute and District case law has not addressed its meaning.⁴³⁸ The revised code attaches a location enhancement to the offense of carrying a firearm or explosive without permission only when a person

⁴³⁴ At least one court has held that public housing tenants have a right to bear arms in common areas. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014); *see also* Mo. Ann. Stat. § 571.107(1)(6) (explicitly exempting any building used for public housing by private persons from any restriction on the carrying or possession of a firearm); *but see* *People v. Cunningham*, 1-16-0709, 2019 WL 1429072 (Ill. App. Ct. Mar. 29, 2019) (holding that a ban in public housing is constitutional). The D.C. Department of Housing and Community Development, along with Urban Institute, the Coalition for Non Profit Housing and Economic Development, and Code for D.C., produced an interactive tool at HousingInsights.org. The map illustrates that large portions of some neighborhoods—and much of an entire city ward—are subject to the current enhancement penalty.

⁴³⁵ RCC § 7-2502.15.

⁴³⁶ *See* RCC § 48-904.01b(g)(7)(C)(i).

⁴³⁷ RCC §§ 22E-606(a) and (b).

⁴³⁸ D.C. Code § 22-4502.01(c) provides an exception for licensees who live or work within 1000 feet of a gun free zone. This may indicate that licensees are otherwise included within the statute’s intended reach.

carries a pistol without a license.⁴³⁹ This change improves the clarity of the revised offenses.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses that are incorporated into the revised carrying a dangerous weapon offense by reference.⁴⁴⁰ Current D.C. Code § 22-4504 does not include any exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who carry a dangerous weapon. In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.⁴⁴¹ This change improves the clarity, consistency, and completeness of the revised code.

Relation to National Legal Trends. Twenty-nine states (hereafter “reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code.⁴⁴² The statutes in these reform jurisdictions provide strong support for the recommended changes to District law.

First, the revised offense applies only to people who are outside of their own home, place of business, or land. No reform jurisdictions impose categorical bans on carrying a firearm in one’s home or place of business.⁴⁴³ As for other dangerous weapons, staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.⁴⁴⁴

Second, the revised statute narrows the list of locations that elevate a carrying a dangerous weapon offense from second degree to first degree, so as to not include video arcades or public housing. No reform jurisdiction includes a statutory enhancement for mere possession of a firearm near public housing.⁴⁴⁵ One reform jurisdiction explicitly

⁴³⁹ A person who has a license to carry but does so in an illegal manner per RCC § 7-2509.06, carrying a pistol in an unlawful manner, is not liable for carrying a firearm or explosive without permission or its first degree gradation containing a location enhancement.

⁴⁴⁰ RCC § 22E-4118.

⁴⁴¹ [The Commission’s recommendations for general defenses are forthcoming.]

⁴⁴² The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

⁴⁴³ See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴⁴⁴ For example, the terms “weapon,” “dangerous weapon,” and “dangerous instrument” are defined differently from state to state.

⁴⁴⁵ But see 720 Ill. Comp. Stat. Ann. 5/24-3 (punishing selling or transferring a firearm); Minn. Stat. Ann. § 609.66 (punishing recklessly handling, using, or brandishing a firearm).

exempts any building used for public housing by private persons from any restriction on the carrying or possession of a firearm.⁴⁴⁶

Third, the revised statute reduces the radius for a gun free zone from 1000 feet to 300 feet. Of the five reform jurisdictions that specify a 1000-foot radius for gun free school zones,⁴⁴⁷ none includes every college, university, public swimming pool, public playground, public youth center, public library, and children's day care center. Unlike the District, these jurisdictions are not comprised of a single, densely-populated city.

⁴⁴⁶ Mo. Ann. Stat. § 571.107(1)(6); *see also Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (holding that public housing tenants have a right to bear arms in common areas).

⁴⁴⁷ Del. Code Ann. tit. 11, § 1457; N.Y. Penal Law § 265.01-a; Tex. Penal Code Ann. § 46.03; Utah Code Ann. § 76-3-203.2 (requiring display or use of the firearm); Wis. Stat. Ann. § 948.605.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

- (a) *First Degree.* An actor commits first degree possession of a dangerous weapon with intent to commit crime when that actor:
 - (1) Knowingly possesses an object designed to explode or produce uncontained combustion;
 - (2) With intent to use the object to commit a criminal harm that is, in fact:
 - (A) An offense against persons under Subtitle II of this Title; or
 - (B) An offense against property under Subtitle III of this Title.
- (b) *Second Degree.* An actor commits second degree possession of a dangerous weapon with intent to commit crime when that actor:
 - (1) Knowingly possesses:
 - (A) A dangerous weapon; or
 - (B) An imitation firearm;
 - (2) With intent to use the imitation firearm or dangerous weapon to commit a criminal harm that is, in fact:
 - (A) An offense against persons under Subtitle II of this Title; or
 - (B) Burglary under RCC § 22E-2701.
- (c) *No Attempt Possession of a Dangerous Weapon with Intent to Commit Crime.* It is not an offense to attempt to commit the offense described in this section.
- (d) *Penalties.*
 - (1) First degree possession of a dangerous weapon with intent to commit crime is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree possession of a dangerous weapon with intent to commit crime is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (e) *Definitions.* The terms “intent” and “knowingly” have the meanings specified in RCC § 22E-206; the terms “dangerous weapon,” “imitation firearm,” and “possesses” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the possession of a dangerous weapon with intent to commit crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having an explosive, imitation firearm or other dangerous weapon with intent to commit an offense against persons or specified property crimes. The revised offense replaces D.C. Code §§ 22-4514(b) (Possession of a dangerous weapon with intent to use unlawfully against another)⁴⁴⁸ and 22-4515a(b)

⁴⁴⁸ The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4514(c) – (d).

(*Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties*).⁴⁴⁹

Subsection (a) specifies the elements of first degree possession of a dangerous with intent to commit crime.

Paragraph (a)(1) specifies that a person must at least knowingly⁴⁵⁰ possess an object designed to explode or produce uncontained combustion. “Possesses” is a defined term and includes both actual and constructive possession.⁴⁵¹ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.⁴⁵² The person must be practically certain that the item is explosive. Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate constructive possession.⁴⁵³

Paragraph (a)(2) specifies that the person must possess the explosive with intent to commit a crime. “Intent” is a defined term⁴⁵⁴ which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or an offense against property. The intended conduct must be criminal.⁴⁵⁵ The burden of proof rests with the government and does not shift to the defense to prove innocent possession.⁴⁵⁶ Evidence of an actual attempt to do harm is not required.⁴⁵⁷

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must intend to commit a criminal harm that is either an offense against persons⁴⁵⁸ or an offense against property.⁴⁵⁹ Subparagraphs (a)(2)(A) and (a)(2)(B) use the term “in fact” to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or offense against property.⁴⁶⁰ A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (a)(2)(A) and (a)(2)(B).⁴⁶¹

Subsection (b) specifies the elements of second degree possession of a dangerous with intent to commit crime.

⁴⁴⁹ The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4515a(d) – (e).

⁴⁵⁰ “Knowingly” is defined in RCC § 22E-206.

⁴⁵¹ RCC § 22E-701.

⁴⁵² See, e.g., *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

⁴⁵³ See, e.g., *Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

⁴⁵⁴ RCC § 22E-206.

⁴⁵⁵ General defenses such as self-defense are applicable to the offense. [The Commission’s recommendations for general defenses are forthcoming.]

⁴⁵⁶ *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).

⁴⁵⁷ *Jones v. United States*, 401 A.2d 473 (D.C. 1979).

⁴⁵⁸ Subtitle II of Title 22E.

⁴⁵⁹ Subtitle III of Title 22E.

⁴⁶⁰ RCC § 22E-207.

⁴⁶¹ Although a person is strictly liable, justification defenses may apply. See *Blades v. United States*, 2019, 2019 WL 291888. [The Commission’s recommendations for general defenses are forthcoming.]

Subparagraphs (b)(1)(A) and (b)(1)(B) specify that a person must at least knowingly⁴⁶² possess an imitation firearm or a dangerous weapon. The terms “imitation firearm” and “dangerous weapon” are defined in the RCC. An imitation firearm is “any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real.”⁴⁶³ A dangerous weapon includes restricted explosives,⁴⁶⁴ other enumerated weapons, and “any object, 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.”⁴⁶⁵ It does not include attached fixtures.⁴⁶⁶

Paragraph (b)(2) specifies that the person must possess the imitation firearm or dangerous weapon with intent to commit a crime. “Intent” is a defined term⁴⁶⁷ which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or burglary.⁴⁶⁸ The intended conduct must be criminal.⁴⁶⁹ The burden of proof rests with the government and does not shift to the defense to prove innocent possession.⁴⁷⁰ There is no requirement of evidence of an attempt to do harm.⁴⁷¹

Subparagraphs (b)(2)(A) and (b)(2)(B) specify that the person must intend to commit either an offense against persons⁴⁷² or a burglary.⁴⁷³ Subparagraphs (b)(2)(A) and (b)(2)(B) uses the term “in fact” to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or burglary.⁴⁷⁴ A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (b)(2)(A) and (b)(2)(B).⁴⁷⁵

Subsection (c) specifies that attempted possession of a dangerous weapon with intent to commit crime is not an offense.

Subsection (d) provides the penalty for each gradation of the revised offense.

[RESERVED.]

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

⁴⁶² “Knowingly” is defined in RCC § 22E-206.

⁴⁶³ RCC § 22E-701.

⁴⁶⁴ Second degree possession of a dangerous weapon with intent to commit crime is a lesser-included offense of first degree possession of a dangerous weapon with intent to commit crime. The term “dangerous weapon” broadly includes objects designed to explode or produce uncontained combustion. RCC § 22E-701.

⁴⁶⁵ RCC § 22E-701.

⁴⁶⁶ *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

⁴⁶⁷ RCC § 22E-206.

⁴⁶⁸ The person must intend to use the object unlawfully against another person. See D.C. Code § 22-4514(b); *In re M.L.*, 24 A.3d 63 (D.C. 2011); *Mihos v. United States*, 618 A.2d 197 (D.C. 1992); *Reid v. United States*, 581 A.2d 359 (D.C. 1990).

⁴⁶⁹ General defenses such as self-defense are applicable to the offense. [The Commission’s recommendations for general defenses are forthcoming.]

⁴⁷⁰ *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).

⁴⁷¹ *Jones v. United States*, 401 A.2d 473 (D.C. 1979).

⁴⁷² Subtitle II of Title 22E.

⁴⁷³ RCC § 22E-2701.

⁴⁷⁴ RCC § 22E-207.

⁴⁷⁵ Although a person is strictly liable, justification defenses may apply. See *Blades v. United States*, 2019, 2019 WL 291888. [The Commission’s recommendations for general defenses are forthcoming.]

Relation to Current District Law. *The revised possession of a dangerous weapon with intent to commit crime offense changes current District law in one main way.*

The revised statute specifies the intended harm required for the offense must be a particular type of District crime. D.C. Code § 22-4514(b) disallows possession of a weapon “with intent to use [it] unlawfully against another.”⁴⁷⁶ D.C. Code § 22-4515a(b) disallows possession of a weapon “with the intent that the same may be used unlawfully against any person or property.” District case law has explained that the phrase “unlawfully against another” requires the accused carry the object with the purpose of using it “as a weapon.”⁴⁷⁷ However, case law has not specifically ruled whether “as a weapon” is limited to criminal infliction of bodily injury or also property damage or threatening conduct. In contrast, the revised offense cross-references all RCC offenses against persons and either offenses against property (for first degree) or burglary (for second degree). This change clarifies the revised offense and may eliminate an unnecessary gap in liability.

Beyond this change, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires the accused know that they possess the weapon. The current statutes⁴⁷⁸ do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.⁴⁷⁹ The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁴⁸⁰ This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised statute does not include an explicit reference to manufacturing, transferring, using, or transporting an explosive. D.C. Code § 22-4515a(b) makes it unlawful to manufacture, transfer, use, possess, or transport any device, instrument, or object designed to explode or produce uncontained combustion. This conduct is also prohibited by D.C. Code §§ 7-2502.01⁴⁸¹ and 7-2505.01.⁴⁸² In

⁴⁷⁶ Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive “with the intent that the same may be used unlawfully against any person or property.”

⁴⁷⁷ See *Peay v. United States*, 597 A.2d 1318, 1321 (D.C. 1991) (explaining the test to be applied in determining whether an item is a “deadly or dangerous weapon” is whether, under the circumstances, the purpose of carrying the item was its use as a weapon) (citing *Nelson v. United States*, 280 A.2d 531, 533 (D.C.1971) (per curiam); *Clarke v. United States*, 256 A.2d 782, 786 (D.C.1969)).

⁴⁷⁸ D.C. Code §§ 22-4514(b); 22-4515a(b).

⁴⁷⁹ See, e.g., *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

⁴⁸⁰ 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.)).

⁴⁸¹ “[N]o person or organization...shall...transfer, offer for sale, sell, give, or deliver any destructive device.” See also D.C. Code § 7-2501.01 (defining the term “destructive device” to include “[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device,” such as a Molotov cocktail).

contrast, the RCC’s definition of possess⁴⁸³ includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, or transports an explosive appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.⁴⁸⁴ This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

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

First, the revised code defines “possession” in its general part.⁴⁸⁵ 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.⁴⁸⁶ The RCC definition of “possession,”⁴⁸⁷ with the requirement in the offense that the possession be “knowing,”⁴⁸⁸ matches the meaning of possession in current DCCA case law.⁴⁸⁹ The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised statute applies the RCC’s standardized definition of “with intent.” D.C. Code § 22-4514(b) disallows possession of a weapon “with intent to use [it] unlawfully against another.”⁴⁹⁰ D.C. Code § 22-4515a(b) disallows possession of a weapon “with the intent that the same may be used unlawfully against any person or property.” The current statutes do not define “with intent.” In contrast, the RCC defines

⁴⁸² “No person or organization shall sell, transfer or otherwise dispose of any...destructive device...except as provided in § 7-2502.10(c), § 7-2505.02, or § 7-2507.05.” See also D.C. Code § 7-2501.01 (defining the term “destructive device” to include “[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device,” such as a Molotov cocktail).

⁴⁸³ RCC § 22E-701.

⁴⁸⁴ See D.C. Code § 22-1511 (Fraudulent advertising).

⁴⁸⁵ RCC § 22E-202.

⁴⁸⁶ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

⁴⁸⁷ RCC § 22E-701.

⁴⁸⁸ RCC § 22E-206.

⁴⁸⁹ See *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. See *United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); see also *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”).

⁴⁹⁰ Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive “with the intent that the same may be used unlawfully against any person or property.”

all culpable mental states in its general part.⁴⁹¹ This change improves the clarity and consistency of the revised statutes.

Third, the revised offense applies a standardized definition of “dangerous weapon” used throughout the RCC. D.C. Code § 22-4514(b) prohibits possession of “an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon.” The term “dangerous weapon” is not defined in Chapter 45.⁴⁹² However, District case law has held that an object is a dangerous weapon if it is detached⁴⁹³ and “known to be ‘likely to produce death or great bodily injury’ in the manner it is used, intended to be used, or threatened to be used.”⁴⁹⁴ The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

⁴⁹¹ RCC § 22E-206.

⁴⁹² See D.C. Code § 22-4501 (Definitions).

⁴⁹³ *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

⁴⁹⁴ *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States*, 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005);

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

- (a) *First Degree.* An actor commits first degree possession of a dangerous weapon during a crime when that actor:
 - (1) Knowingly possesses a firearm;
 - (2) In furtherance of and while committing what, in fact, is:
 - (A) An offense against persons under Subtitle II of this Title; or
 - (B) Burglary under RCC § 22E-2701.
- (b) *Second Degree.* An actor commits second degree possession of a dangerous weapon during a crime when that actor:
 - (1) Knowingly possesses:
 - (A) An imitation firearm; or
 - (B) A dangerous weapon;
 - (2) In furtherance of and while committing what, in fact, is:
 - (A) An offense against persons under Subtitle II of this Title; or
 - (B) Burglary under RCC § 22E-2701.
- (c) *No Attempt Possession of a Dangerous Weapon During a Crime Offense.* It is not an offense to attempt to commit the offense described in this section.
- (d) *Penalties.*
 - (1) First degree possession of a dangerous weapon during a crime is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree possession of a dangerous weapon during a crime is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (e) *Definitions.* The terms “intent” and “knowingly” have the meanings specified in RCC § 22E-206; the terms “dangerous weapon,” “firearm,” “imitation firearm,” and “possesses” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the possession of a dangerous weapon during a crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having a firearm or other dangerous weapon in furtherance of an offense against persons or a burglary. In conjunction with the revised Trafficking of a Controlled Substance statute,⁴⁹⁵ the revised offense replaces D.C. Code § 22-4502 (Additional penalty for committing crime when armed). The revised offense also replaces D.C. Code §§ 22-4504(b) (Possession of a firearm during a crime of violence or dangerous crime).

Subsection (a) specifies the elements of first degree possession of a dangerous weapon during a crime. Paragraph (a)(1) specifies that a person must knowingly possess

⁴⁹⁵ RCC § 48-904.01b.

a firearm.⁴⁹⁶ “Knowingly” is a defined term⁴⁹⁷ and applied here means that the person must be practically certain that they possess the firearm. “Possesses” is a defined term and includes both actual and constructive possession.⁴⁹⁸ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.⁴⁹⁹ The person must know they possess a firearm⁵⁰⁰ or that they possess component parts that could be arranged to make a whole firearm.⁵⁰¹ Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate constructive possession.⁵⁰² “Firearm” is a defined term,⁵⁰³ which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability⁵⁰⁴ but excludes antiques.⁵⁰⁵

Paragraph (a)(2) requires that the person possess the firearm in furtherance of and while committing a crime. The phrase “in furtherance of” has the same meaning as in 18 U.S.C. § 924(c)(1).⁵⁰⁶ This requires specific evidence of a nexus between the weapon and the defendant’s intent to advance or facilitate the underlying criminal activity.⁵⁰⁷ The mere presence of a firearm near a criminal act, criminal proceeds, or contraband is insufficient.⁵⁰⁸ The phrase “while committing” requires that the person must engage in

⁴⁹⁶ Knowledge of a gun’s presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); see also *Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer’s knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

⁴⁹⁷ “Knowingly” is defined in RCC § 22E-206.

⁴⁹⁸ RCC § 22E-701.

⁴⁹⁹ See, e.g., *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

⁵⁰⁰ See *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

⁵⁰¹ *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

⁵⁰² See, e.g., *Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

⁵⁰³ RCC § 22E-701.

⁵⁰⁴ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

⁵⁰⁵ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

⁵⁰⁶ Another aspect of this statute was recently held to be unconstitutionally vague. *United States v. Davis*, 18-431, 2019 WL 2570623 (U.S. June 24, 2019).

⁵⁰⁷ See H.R. Rep. No. 105-344, 1997 WL 668339 (reporting that the “fact that drug dealers in general often carry guns for protection is insufficient to show possession in furtherance of drug activity”; rather, the government must clearly show through “specific facts that tie the defendant to the firearm,” that a weapon was possessed to advance or promote the commission of the underlying offense, and the “mere presence of a firearm in an area where a criminal act occurs” is not a sufficient basis for imposing a sentence under this provision).

⁵⁰⁸ Most circuits have identified specific factors that allow a court to distinguish guilty possession from innocent “possession at the scene,” including: the accessibility of the firearm, the type of weapon, whether the possession is illegal, whether the gun is loaded, and the time and circumstances under which the gun is found. *United States v. Renteria*, 720 F.3d 1245, 1255 (10th Cir. 2013); see also *United States v. Brown*, 715 F.3d 985, 993-94 (6th Cir. 2013); *United States v. Gill*, 685 F.3d 606, 611 (6th Cir. 2012); *United*

the conduct constituting the underlying offense at the same time as they possess the firearm. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is acting in furtherance of the predicate crime.

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must commit⁵⁰⁹ either an offense against persons⁵¹⁰ or a burglary.⁵¹¹ Some offenses against persons also provide for a heightened penalty gradation if a firearm or other dangerous weapon is displayed or used.⁵¹² Possession of a firearm in furtherance of a drug crime is punished under RCC § 48-904.01b(g)(7)(B).

Subsection (b) punishes possession of an imitation firearm or a dangerous weapon in furtherance of a crime as second degree possession of a dangerous weapon during a crime. The terms “imitation firearm” and “dangerous weapon” are defined in the RCC. An imitation firearm is “any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real.”⁵¹³ A dangerous weapon includes firearms, other enumerated weapons, and “any object, 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.”⁵¹⁴ It does not include attached fixtures.⁵¹⁵ This gradation of the offense does not require proof of an actual firearm but otherwise has elements identical to first degree possession of a dangerous weapon during a crime.

Subsection (c) specifies that attempted possession of a dangerous weapon during a crime is not an offense.

Subsection (d) provides the penalty for each gradation of the revised offense. **[RESERVED.]**

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

Relation to Current District Law. *The revised possession of a dangerous weapon during a crime offense changes current District law in three main ways.*

States v. Johnson, 677 F.3d 138, 143 (3d Cir. 2012); *United States v. Eller*, 670 F.3d 762, 766 (7th Cir. 2012); *United States v. London*, 568 F.3d 553, 559 (5th Cir. 2009); *United States v. Lopez-Garcia*, 565 F.3d 1306, 1322 (11th Cir. 2009); *United States v. Perry*, 560 F.3d 246, 254 (4th Cir. 2009); *see also United States v. Chavez*, 549 F.3d 119, 130 (2d Cir. 2008); *but see United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007)(internal citations omitted)(“Although the Fifth Circuit has developed a non-exclusive list of factors... we have concluded that this approach is not particularly helpful in close cases... In our most recent case addressing the ‘in furtherance question,’ we reiterated the importance of the factual inquiry. We declined once again to adopt a checklist approach to deciding this issue and held that it is the totality of the circumstances, coupled with a healthy dose of a jury’s common sense when evaluating the facts in evidence, which will determine whether the evidence suffices to support a conviction”).

⁵⁰⁹ Here, the word “commit” includes an attempt to commit and a conspiracy to commit. *See, e.g., Morris v. United States*, 622 A.2d 1116 (D.C. 1993) (sustaining a conviction for possession of a firearm during an attempted armed robbery).

⁵¹⁰ Subtitle II of Title 22E.

⁵¹¹ RCC § 22E-2701.

⁵¹² RCC §§ 22E-1201 (robbery); 22E-1202 (assault); 22E-1203 (menacing); 22E-1301 (sexual assault); 22E-1401 (kidnapping).

⁵¹³ RCC § 22E-701.

⁵¹⁴ RCC § 22E-701.

⁵¹⁵ *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

First, the revised offense generally expands the number of crimes that are a predicate for possession of a dangerous weapon during a crime liability. Current D.C. Code §§ 22-4502 and 22-4504 prohibit possession of a weapon only during a “crime of violence” which is defined in D.C. Code § 22-4501 to include felony offenses enumerated in D.C. Code § 23-1331(4).⁵¹⁶ In contrast, the revised offense punishes possession of a weapon during any offense against persons—including misdemeanor assault or misdemeanor sex offenses—or during the commission of a burglary as defined in RCC § 22E-2701. It is not clear that the *potential* risk in possessing (but not displaying or using) a dangerous weapon when engaged in an offense against person varies significantly between misdemeanor and felony level conduct. In a few instances, changes to offenses against persons in the RCC may narrow liability for possession of a dangerous weapon during a crime.⁵¹⁷ This change improves the proportionality of the revised statute and eliminates an unnecessary gap in liability.

Second, the revised offense does not require proof that the weapon is readily available. Current D.C. Code § 22-4502 requires evidence that a firearm was “in close proximity or easily accessible” during the commission of the underlying offense.⁵¹⁸ However, D.C. Code § 22-4504(b) does not include a similar proximity requirement. In contrast, liability under the revised statute turns only on the relationship between the weapon and the unlawful activity instead of ease of access.⁵¹⁹ That is, the revised offense requires that the weapon—wherever it is located—be possessed “in furtherance of” the underlying crime. This change improves the consistency and proportionality of the revised offenses.

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The term “crime of violence” means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

⁵¹⁷ For example, the RCC robbery statute, RCC § 22E-1201, is narrower than the current D.C. Code robbery statute, D.C. Code § 22-2801, insofar as some of the current statute’s conduct (sudden and stealthy snatching) is criminalized as third degree theft, RCC § 22E-2101(c), which is not within the scope of the revised offense of possession of a dangerous weapon during a crime.

⁵¹⁸ *Clyburn v. United States*, 48 A.3d 147, 153-54 (D.C. 2012).

⁵¹⁹ Compare for example, Person A who carries a pocketknife for self-defense but does not use it during a simple assault and Person B who threatens to retrieve a firearm from the trunk of his car while committing a robbery. *See Strong v. United States*, 581 A.2d 383, 387 (D.C. 1990) (explaining “The prevention of coercion is at the heart of enhancement provisions which include imitation weapons within their scope” and holding “Convictions under the ‘while armed’ statute will stand only if a defendant (1) has committed some violent crime, and (2) has used the threat of injury by a dangerous weapon to force his victims to comply with his illegal requests”) (citing *Paris v. United States*, 515 A.2d 199 (D.C.1986)).

Third, the revised offense bars any attempt liability. Under current law attempted possession of a firearm during a crime of violence or dangerous crime is subject to the general attempt statute.⁵²⁰ In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to revised possession of a dangerous weapon during a crime, that person has committed no offense under the revised code. Completed possession of a dangerous weapon during a crime is itself an inchoate crime that requires no actual harm to another and is closely related to an attempted form of the predicate offense, for which the RCC provides liability. This change improves the proportionality of the revised statute.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires the accused know that they possess the weapon. The current statutes⁵²¹ do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.⁵²² The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon or imitation firearm. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁵²³ This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

The revised offense does not include possession of a firearm in furtherance of a drug crime. Current D.C. Code §§ 22-4502(a) and 22-4504(b) punish possession of a firearm during a dangerous crime. The term “dangerous crime” is defined in D.C. Code § 22-4501 to mean “distribution of or possession with intent to distribute a controlled substance.” In contrast, the RCC reorganizes the controlled substances statutes to include an enhancement for drug trafficking while armed.⁵²⁴ The enhancement requires that the firearm is “readily available,” which is consistent with D.C. Code § 22-4502(a)⁵²⁵ but

⁵²⁰ D.C. Code § 22-1803 (“Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.”).

⁵²¹ D.C. Code §§ 22-4502; 22-4504(b).

⁵²² See, e.g., *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

⁵²³ 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.)).

⁵²⁴ RCC § 48-904.01b(g)(7)(B).

⁵²⁵ “Armed with” means “actual physical possession of the pistol or other firearm.” *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010). “Readily available” means “in close proximity or easily accessible during the commission of the underlying PWID offense, as evidenced by lay or expert testimony (and reasonable inferences) describing the distance between the appellant and the firearm, and the ease with which the appellant can reach the firearm during the commission of the offense.” *Clyburn v. United States*, 48 A.3d 147, 153-54 (D.C. 2012).

possibly narrower than § 22-4504(b).⁵²⁶ This change logically reorders and improves the consistency of the revised offenses.

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

First, the revised code defines “possession” in its general part.⁵²⁷ 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.⁵²⁸ The RCC definition of “possession,”⁵²⁹ with the requirement in the offense that the possession be “knowing,”⁵³⁰ matches the meaning of possession in current DCCA case law.⁵³¹ The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised offense applies a standardized definition of “dangerous weapon” used throughout the RCC. D.C. Code § 22-4502 prohibits possession of “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 weapon” is not defined in Chapter 45.⁵³² However, District case law has held that an object is a dangerous weapon if it is detached⁵³³ and “known to be ‘likely to produce death or great bodily injury’ in the manner it is used, intended to be used, or threatened to be used.”⁵³⁴ The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

⁵²⁶ D.C. Code § 22-4504(b) makes it unlawful to possess any firearm or imitation firearm “while committing a crime.”

⁵²⁷ RCC § 22E-202.

⁵²⁸ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

⁵²⁹ RCC § 22E-701.

⁵³⁰ RCC § 22E-206.

⁵³¹ See *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. See *United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); see also *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”).

⁵³² See D.C. Code § 22-4501 (Definitions).

⁵³³ *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

⁵³⁴ *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States*, 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005);

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

- (a) *First Degree.* An actor commits first degree possession of a firearm by an unauthorized person when that actor:
- (1) Knowingly possesses a firearm; and
 - (2) Has a prior conviction for what is, in fact:
 - (A) A District offense that is a crime of violence other than conspiracy;
or
 - (B) A comparable offense in another jurisdiction or under prior District law.
- (b) *Second Degree.* An actor commits second degree possession of a firearm by an unauthorized person when that actor:
- (1) Knowingly possesses a firearm; and
 - (2) In addition:
 - (A) Has a prior conviction for what is, in fact:
 - (i) A District offense that is currently punishable by imprisonment for a term exceeding 1 year, or a comparable offense in another jurisdiction, within the last 10 years;
 - (ii) A gun offense, or a comparable offense in another jurisdiction, within the last 5 years; or
 - (iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), that requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats, or a comparable offense in another jurisdiction within the last 5 years.
 - (B) Is a fugitive from justice; or
 - (C) Is, in fact, subject to a court order that:
 - (i) Requires the actor to relinquish possession of any firearms or ammunition, or to not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the order is in effect;
 - (ii) Restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order, and:
 - (I) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or
 - (II) Remained in effect after the person failed to appear for a hearing of which the person received actual notice.
- (c) *Exclusions from Liability.*
- (1) A person shall not be subject to prosecution under this section for possession of a firearm when voluntarily surrendering the object.
 - (2) A person shall not be subject to prosecution for violation of subsection (a) or subsection (b)(2)(A) of this section and a repeat offender penalty enhancement in RCC § 22E-606 for the same conduct.

(d) *Penalties.*

- (1) First degree possession of a firearm by an unauthorized person is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree possession of a firearm by an unauthorized person is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.*

- (1) The term “knowingly” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “comparable offense,” [“crime of violence,”]⁵³⁵ “firearm,” “gun offense,” and “possess,” have the meanings specified in RCC § 22E-701.
- (2) In this section, the term “fugitive from justice” means a person who has an open arrest warrant for:
 - (A) Fleeing to avoid prosecution for a crime;
 - (B) Fleeing to avoid giving testimony in a criminal proceeding; or
 - (C) Escape from a correctional facility or officer under RCC § 22E-3401.
- (3) In this section, the term “prior conviction” means a final order, by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term “prior conviction” does not include:
 - (A) An adjudication of juvenile delinquency;
 - (B) A conviction that is subject to successful completion of a diversion program or probation under D.C. Code § 48-904.01(e);
 - (C) A conviction that is subject to a conditional plea agreement;
 - (D) A conviction that has been vacated, sealed, or expunged; or
 - (E) A conviction for which a person has been granted clemency or a pardon.

COMMENTARY

Explanatory Note. *This section establishes the possession of a firearm by an unauthorized person offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowing possession of a firearm by a person who has been previously been involved in criminal activity or is subject to a relevant court order. The revised offense replaces D.C. Code § 22-4503 (Unlawful Possession of a Firearm).*

Subsection (a) generally punishes possession of a firearm by a person who has been convicted of a violent felony as first degree possession of a firearm by an unauthorized person.

⁵³⁵ [The Commission’s recommendation for a definition of the term “crime of violence” is forthcoming.]

Paragraph (a)(1) specifies that a person must knowingly possess a firearm.⁵³⁶ “Knowingly” is a defined term⁵³⁷ and applied here means that the person must be practically certain that they possess the firearm. “Possesses” is a defined term and includes both actual and constructive possession.⁵³⁸ Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.⁵³⁹ The person must know they possess a firearm⁵⁴⁰ or that they possess component parts that could be arranged to make a whole firearm.⁵⁴¹ Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate constructive possession.⁵⁴² “Firearm” is a defined term,⁵⁴³ which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability⁵⁴⁴ but excludes antiques.⁵⁴⁵

Paragraph (a)(2) requires that the person has a prior conviction. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she has a prior conviction. The term “prior conviction” is defined in paragraph (e)(3) to mean a finding of guilt for a criminal offense committed by an adult, with limited exceptions. Paragraph (a)(2) uses the term “in fact” to specify that there is no culpable mental state required as to whether the prior conviction was for a crime of violence.⁵⁴⁶ A person is strictly liable as to the prior conviction being of the variety described in paragraph (a)(2).⁵⁴⁷ Paragraph (a)(2) requires that the prior offense is a crime of violence other than conspiracy. The term “crime of violence” is defined in the RCC’s general part.⁵⁴⁸ Whether a prior conviction is for conspiracy is based upon how

⁵³⁶ Knowledge of a gun’s presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer’s knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

⁵³⁷ “Knowingly” is defined in RCC § 22E-206.

⁵³⁸ RCC § 22E-701.

⁵³⁹ *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

⁵⁴⁰ *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

⁵⁴¹ *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

⁵⁴² *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion’s sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

⁵⁴³ RCC § 22E-701.

⁵⁴⁴ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

⁵⁴⁵ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

⁵⁴⁶ RCC § 22E-207.

⁵⁴⁷ Although a person is strictly liable, justification defenses may apply. *See Blades v. United States*, 2019, 2019 WL 291888. [The Commission’s recommendations for general defenses are forthcoming.]

⁵⁴⁸ RCC § 22E-701. [The Commission’s recommendation for a definition of the term “crime of violence” is forthcoming.]

the crime is charged, not based on the theory of liability that is described in the charging documents or advanced at trial.⁵⁴⁹

Subparagraph (a)(2)(B) specifies that the second type of prior conviction that disqualifies a person from possessing a firearm is a similarly serious violent crime committed in another jurisdiction or committed in the District before the enactment of the RCC. The term “comparable offense” is defined to require elements that would necessarily prove the elements of a corresponding District crime.⁵⁵⁰

Subsection (b) establishes six classes of persons who are subject to second degree liability for possession of a firearm by an unauthorized person. The first four classes are persons with recent prior convictions for crimes. The first two elements of these four classes are identical to the first two elements of first degree possession of a firearm by an unauthorized person. Just as in the first degree offense, the defendant must be practically certain that they possess a firearm and practically certain that they have a prior conviction. “Possess,” “firearm,” and “prior conviction” are defined in RCC § 22E-701 and in subsection (e)(3) of this section. Subparagraph (b)(2)(A) uses the term “in fact” to specify that there is no culpable mental state required as to whether the prior conviction was for one of the predicate offenses.⁵⁵¹ A person is strictly liable as to the prior conviction being of the variety described in sub-subparagraphs (b)(2)(A)(i) – (iii).⁵⁵² RCC § 22E-203 requires that a person commit the offense voluntarily. A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person is convicted of a disqualifying offense.

Sub-subparagraph (b)(2)(A)(i) generally criminalizes gun ownership by any person who has been convicted of a District felony, i.e. a crime punishable by more than a year of incarceration.⁵⁵³ The term “comparable offense” is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.⁵⁵⁴ The term “comparable offense” does not mean any offense in another jurisdiction that is punishable by more than a year of incarceration. Sub-subparagraph (b)(2)(A)(i) specifies that the prior conviction must have been committed within 10 years of the firearm possession.

Sub-subparagraph (b)(2)(A)(ii) criminalizes gun ownership by any person who has been convicted of a gun offense. The term “gun offense” is defined in RCC § 22E-701 and includes a wide array of crimes involving improper possession or use of firearms. The term “comparable offense” is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.⁵⁵⁵ Sub-subparagraph

⁵⁴⁹ See *Bland v. United States*, 153 A.3d 78, 81 (D.C. 2016).

⁵⁵⁰ RCC § 22E-701.

⁵⁵¹ RCC § 22E-207.

⁵⁵² Although a person is strictly liable, justification defenses may apply. See *Blades v. United States*, 2019, 2019 WL 291888. [The Commission’s recommendations for general defenses are forthcoming.]

⁵⁵³ [The Commission’s penalty classification recommendations are forthcoming.] Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. See, e.g., Md. Code, Criminal Law § 3-211 (three-year misdemeanor).

⁵⁵⁴ RCC § 22E-701.

⁵⁵⁵ RCC § 22E-701.

(b)(2)(A)(ii) specifies that the prior conviction must have been committed within 5 years of the firearm possession.

Sub-subparagraph (b)(2)(A)(iii) criminalizes gun ownership by any person who has been convicted of violence against a family member, i.e. an intrafamily felony or misdemeanor⁵⁵⁶ offense involving confinement, nonconsensual sexual conduct,⁵⁵⁷ bodily injury, or threats. The term “intrafamily offense” is defined in D.C. Code § 16-1001 to include interpersonal, intimate partner, or intrafamily violence. “Interpersonal violence,” “intimate partner violence,” and “intrafamily violence” are also defined in § 16-1001 and broadly include relationships between blood relatives,⁵⁵⁸ current and former roommates,⁵⁵⁹ and people who have previously shared the same romantic partner.⁵⁶⁰ The term “comparable offense” is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.⁵⁶¹ With respect to out-of-state intrafamily offenses, it is not required that the comparable statute include an identical definition of “intrafamily offense.” However, the familial relationship must be proven beyond a reasonable doubt in the prosecution of the second degree possession of a firearm by an unauthorized person offense.⁵⁶² Sub-subparagraph (b)(2)(A)(iii) specifies that the prior conviction must have been committed within 5 years of the firearm possession.

Subparagraph (b)(2)(B) criminalizes gun ownership by any person who is presently a fugitive from justice. The term “fugitive from justice” is defined in subsection (e)(3). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is avoiding apprehension. RCC § 22E-203 requires that a person commit the offense voluntarily. A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person becomes a fugitive from justice.

Subparagraph (b)(2)(C) criminalizes gun ownership by any person who has been ordered to not possess a firearm. Subparagraph (b)(2)(C) uses the term “in fact” to specify that there is no culpable mental state required as to whether the person is subject to an order to not possess any firearms.⁵⁶³ A person is strictly liable as to the order being of the variety described in sub-subparagraphs (b)(2)(C)(i) or (b)(2)(C)(ii).⁵⁶⁴ The term “court order” includes any judicial directive, oral or written, that clearly restricts possession of a firearm.⁵⁶⁵ RCC § 22E-203 requires that a person commit this offense voluntarily. A person who lawfully owns a firearm does not necessarily commit

⁵⁵⁶ See, e.g., *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010).

⁵⁵⁷ The phrase “sexual conduct” refers to both “sexual acts” or “sexual contacts,” which are defined in RCC § 22E-701.

⁵⁵⁸ D.C. Code § 16-1001(9).

⁵⁵⁹ D.C. Code § 16-1001(6)(A).

⁵⁶⁰ D.C. Code § 16-1001(6)(B).

⁵⁶¹ RCC § 22E-701.

⁵⁶² See *United States v. Hayes*, 555 U.S. 415 (2009) (A domestic relationship, although it must be established beyond a reasonable doubt in an 18 U.S.C. § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense).

⁵⁶³ RCC § 22E-207.

⁵⁶⁴ Although a person is strictly liable, justification defenses may apply. See *Blades v. United States*, 2019, 2019 WL 291888. [The Commission’s recommendations for general defenses are forthcoming.]

⁵⁶⁵ Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees.

possession of a firearm by an unauthorized person at the moment an order to relinquish all firearms is entered.

Paragraph (c)(1) excludes from liability under the statute a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.⁵⁶⁶ Under D.C. Code § 7-2507.05, for example, the accused must show not only an absence of criminal purpose but also that the possession was excused and justified as stemming from effort to aid and enhance social policy underlying law enforcement.⁵⁶⁷ The accused must also show an intent to abandon and an act or omission by which such intention is put into effect.⁵⁶⁸ Proof of that intent, must be clear and unequivocal.⁵⁶⁹ A firearm must be unloaded and securely wrapped in package at time of surrender.⁵⁷⁰

Subsection (c)(2) disallows stacking a repeat offender penalty enhancement⁵⁷¹ on top of a penalty for possession of a firearm by an unauthorized person based on a prior conviction. These provisions in the possession of a firearm by an unauthorized person offense accounts for the defendant's prior criminality, obviating the need for multiple penalties.

Subsection (d) provides the penalty for each gradation of the revised offense. **[RESERVED.]**

Subsection (e) cross-references applicable definitions in the RCC and provides a definition for the terms “fugitive from justice” and “prior conviction.”

Paragraph (e)(2) specifies three types of fugitives from justice. The term refers to people who are presently avoiding apprehension, prosecution, or other government action. It does not include people who have previously been subject to a warrant that is now closed or a subpoena that was never enforced by a court of law.

Subparagraph (e)(2)(A) specifies that a person is classified as a fugitive from justice if they have fled to avoid prosecution for a crime. This classification is not limited by jurisdiction.⁵⁷²

Subparagraph (e)(2)(B) specifies that a person is classified as a fugitive from justice if they have fled to avoid giving testimony in a criminal proceeding. The phrase “criminal proceeding” refers to formal hearings and presentations of evidence, such as a trial or an appearance before a grand jury. It does not include witnesses who have refused to participate in a criminal investigation or negotiation. This classification is not limited by jurisdiction.⁵⁷³

⁵⁶⁶ See, e.g., D.C. Code §§ 7-2507.05; 7-2510.07(f)(1). **[The Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]**

⁵⁶⁷ *Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)).

⁵⁶⁸ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987).

⁵⁶⁹ *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); see also; *Lewis v. United States*, 871 A.2d 470, 474 (D.C. 2005).

⁵⁷⁰ *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

⁵⁷¹ RCC § 22E-606.

⁵⁷² For example, a person who is subject to a non-extraditable bench warrant from another state is a fugitive from justice.

⁵⁷³ For example, a person who is subject to a non-extraditable bench warrant from another state is a fugitive from justice.

Subparagraph (e)(2)(C) specifies that a person is classified as a fugitive from justice if they have committed an escape, as defined in RCC § 22E-3401.⁵⁷⁴

Paragraph (e)(3) defines the term “prior conviction” to attach at the moment a court enters judgment of guilt for a criminal offense. Subparagraphs (e)(3)(A) – (E) carve out exceptions findings of guilt that have been nullified by vacatur, record sealing, or pardon; or that may be nullified after completion of a supervision program or after appellate review of a conditional plea. A conviction that receives a sentence under the Youth Rehabilitation Act is a conviction for purposes of the possession of a firearm by an unauthorized person offense.⁵⁷⁵

Relation to Current District Law. *The revised possession of a firearm by an unauthorized person offense changes current District law in five main ways.*

First, a prior conviction for a nonviolent offense is a predicate for unauthorized possession liability only if it occurred within ten years. Current D.C. Code § 22-4503 generally⁵⁷⁶ imposes a five-year time limit for misdemeanor convictions⁵⁷⁷ and no time limit for felonies. There is no District case law on the constitutionality of these provisions insofar as they involve non-violent offenses, however the matter has been litigated in other jurisdictions. Some courts have held that Second Amendment rights can be curtailed based on a prior conviction only if the conviction indicates a propensity for gun violence.⁵⁷⁸ Other courts have held that a person may prove themselves “unvirtuous”

⁵⁷⁴ This offense includes jailbreaks and escaping a law enforcement officer. It does not include resisting or eluding.

⁵⁷⁵ See D.C. Code §24-901(6) (specifying that a qualifying conviction set aside pursuant to the Youth Rehabilitation Act is a predicate for unlawful possession of a firearm); see also *Wade v. United States*, 173 A.3d 87, 94 (D.C. 2017); *United States v. Aka*, 339 F. Supp. 3d 11 (D.D.C. 2018).

⁵⁷⁶ Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. See, e.g., Md. Code, Criminal Law § 3-211 (three-year misdemeanor).

⁵⁷⁷ D.C. Code § 22-4504(a)(6).

⁵⁷⁸ *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 348 (3d Cir. 2016) (citing *Skoien*, 614 F.3d at 642; *Voisine*, 136 S.Ct. at 2280; *Heller v. District of Columbia*, 554 U.S. at 626; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 *Hastings L.J.* 1339, 1363–64 (2009); *Vongxay*, 594 F.3d at 1115); see also *Halloway v. Sessions*, 349 F. Supp. 3d 451, 460-61 (M.D. Pa. 2018) (holding that federal FIP statute 18 U.S.C. § 922(g) was, per the Second Amendment, unconstitutional as applied to a DUI-offender plaintiff because the government failed to prove, under intermediate scrutiny, that applying the statute to offenders like plaintiff sufficiently furthered the compelling interest of “preventing armed mayhem”); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012), cert. denied, 133 S. Ct. 962 (2013) (dispossession would be improper if a litigant could demonstrate that he fell within “the scope of Second Amendment protections for ‘law-abiding responsible citizens to use arms in defense of hearth and home’”); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011)(“As the Government concedes, *Heller*’s statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose *Barton*’s as-applied challenge.”); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (“[T]here must exist the possibility that [a firearm] ban could be unconstitutional in the face of an as-applied challenge.”); see also *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (“Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.”).

of Second Amendment protections by committing any serious crime.⁵⁷⁹ In contrast, the revised offense generally imposes a five-year time limit for misdemeanor convictions, a ten-year time limit for felonies, and no time limit for violent felonies. This change improves the proportionality and, perhaps, the constitutionality of the revised offense.

Second, an intrafamily misdemeanor conviction is a predicate for unauthorized possession liability only if it involved confinement, nonconsensual sexual conduct, bodily injury, or threats. Current D.C. Code § 22-4503(6) disallows gun ownership within 5 years of any intrafamily misdemeanor conviction. As a result, a person loses their constitutionally protected right to bear arms if they commit a minor nonviolent crime against someone known to them⁵⁸⁰ but not if they commit a violent offense against a stranger.⁵⁸¹ In contrast, the revised offense aligns its unauthorized person criteria with the District’s firearm registration requirements, which define “misdemeanor crime of domestic violence” to require “the use or attempted use of physical force, or the threatened use of a deadly weapon.”⁵⁸² This change improves the consistency and proportionality of the revised offense and may better ensure constitutional applications.⁵⁸³

⁵⁷⁹ See *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674, 179 L. Ed. 2d 645 (2011) (en banc) (explaining why §922(g) may constitutionally be applied to an individual repeatedly convicted of misdemeanor domestic violence). *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); C. Kevin Marshall, *Why Can’t Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol’y 695, 727-28 (2009).

⁵⁸⁰ For example, one roommate who is short on rent may commit misdemeanor check fraud against another roommate. See D.C. Code § 22-1510.

⁵⁸¹ For example, a person may commit simple assault in violation of D.C. Code § 22-404(a)(1) or misdemeanor sexual abuse in violation of D.C. Code § 22-3006.

⁵⁸² See 24 DCMR § 2309; see also *United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (holding that Congress incorporated the common-law meaning of “force”—namely, offensive touching—in § 921(a)(33)(A)’s definition of a “misdemeanor crime of domestic violence”).

⁵⁸³ There is a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens. See *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); C. Kevin Marshall, *Why Can’t Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol’y 695, 727-28 (2009). Conversely, a conviction for an offense that is neither violent nor serious may be an improper basis for dispossession. See *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 348 (3d Cir. 2016) (citing *Skoien*, 614 F.3d at 642; *Voisine*, 136 S.Ct. at 2280; *Heller v. District of Columbia*, 554 U.S. at 626; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009); *Vongxay*, 594 F.3d at 1115); see also *Halloway v. Sessions*, 349 F. Supp. 3d 451, 460-61 (M.D. Pa. 2018) (holding that federal FIP statute 18 U.S.C. § 922(g) was, per the Second Amendment, unconstitutional as applied to a DUI-offender plaintiff because the government failed to prove, under intermediate scrutiny, that applying the statute to offenders like plaintiff sufficiently furthered the compelling interest of “preventing armed mayhem”); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012), cert. denied, 133 S. Ct. 962 (2013) (dispossession would be improper if a litigant could demonstrate that he fell within “the scope of Second Amendment protections for ‘law-abiding responsible citizens to use arms in defense of hearth and home’”); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (“As the Government concedes, *Heller*’s statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose *Barton*’s as-applied challenge.”); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (“[T]here must exist the possibility that [a firearm] ban could be unconstitutional in the face of an as-applied challenge.”); see also *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (“Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.”). But see *U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674, 179 L. Ed. 2d 645

Third, any gun offense conviction is a predicate for unauthorized possession liability. Current D.C. Code § 22-4503(a)(2) punishes possession of a firearm by any person who “[i]s not licensed under § 22-4510 to sell weapons, and...has been convicted of violating [Chapter 45 of Title 22],”⁵⁸⁴ which includes offenses that are nonviolent and unrelated to firearms. The revised offense instead uses the definition of “gun offense” that appears in the District’s Firearms Control Regulations chapter,⁵⁸⁵ which is limited to offenses involving firearms and ammunition. Further, current D.C. Code § 22-4503(a)(2) applies only to a person who is “not licensed under § 22-4510 to sell weapons.” There is no clear rationale for this exception. The revised offense applies to all persons convicted of a gun offense, including licensed firearms dealers. This change improves the consistency of the revised offense and eliminates unnecessary gaps in liability.

Fourth, an out-of-state conviction is a predicate for unauthorized possession liability if it has elements that would necessarily prove the elements of a corresponding District crime. Current D.C. Code § 22-4503(a)(1) disallows gun ownership by any person who has “been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” There are instances in which the District punishes conduct more harshly than other states⁵⁸⁶ and vice versa.⁵⁸⁷ There are also many instances in which other states punish the same conduct differently. As a result, there are cases in which the current statute punishes constitutionally protected activity based on the location instead of the seriousness of the conduct. The revised offense applies to any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District’s specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. This change reduces an unnecessary gap in liability and improves the consistency⁵⁸⁸ and proportionality of the revised offense.

Fifth, a person’s dependency on a controlled substance is not a predicate for unauthorized possession liability. Current law punishes possession of a firearm by a person who is “addicted to any controlled substance.”⁵⁸⁹ The term “addicted” is not defined in Chapter 45 and case law has not interpreted its meaning.⁵⁹⁰ Other

(2011) (en banc) (explaining why §922(g) may constitutionally be applied to an individual repeatedly convicted of misdemeanor domestic violence).

⁵⁸⁴ Chapter 45 primarily concerns firearms, however, it also punishes the possession of other weapons such as knives, blackjacks, and slungshots. *See, e.g.*, D.C. Code § 22-4514.

⁵⁸⁵ RCC § 22E-701; D.C. Code § 7-2508.01.

⁵⁸⁶ For example, inciting a riot currently carries a maximum penalty of 10 years in the District but carries a maximum penalty of one year in New York. *See* D.C. Code § 22-1322(c); N.Y. Penal Law § 240.08.

⁵⁸⁷ For example, possession of 50 grams of marijuana is legal in the District but carries a maximum penalty of 18 months in New Jersey (equivalent to recklessly causing bodily injury with a deadly weapon). *See* D.C. Code § 48-904.01(a)(1)(A); N.J. Stat. Ann. § 2C:35-10.

⁵⁸⁸ Current D.C. Code § 22-4503(a)(6) disallows gun ownership by any person who has “been convicted...of an intrafamily offense, *as defined in D.C. Official Code § 16-1001(8)*, or any similar provision in the law of another jurisdiction.” (Emphasis added.)

⁵⁸⁹ D.C. Code § 22-4503(a)(4).

⁵⁹⁰ D.C. Code § 23-1331(5) defines “addict” to mean any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare. D.C. Code § 48-902.01(24) defines “addict” to mean any individual who habitually uses any narcotic drug or abusive drug so as to endanger the public morals, health, safety, or

considerations of fitness to safely store and use gun—such as age, intellectual disabilities, psychiatric disorders—appear in the District’s registration requirements⁵⁹¹ and not in the current unlawful possession of a firearm offense. In contrast, the revised statute eliminates a vague reference to addiction to a controlled substance. The boundaries of addiction are amorphous,⁵⁹² making the current provision nearly impossible to enforce evenhandedly and inviting challenges on due process grounds.⁵⁹³ This change improves the consistency of the revised code and may ensure the constitutionality of the revised statute.

Beyond these changes, four other aspects of the revised offense may constitute a substantive change to District law.

First, the revised offense requires that the accused know that they have a prior conviction or open warrant. D.C. Code § 22-4503 does not specify a culpable mental state for any element of the current unlawful possession of a firearm offense. The District of Columbia Court of Appeals (“DCCA”) has held that a person must know that they possess a firearm or component parts that can be pieced together to make a firearm.⁵⁹⁴ However, the court has not clearly held whether a person must know that they have a disqualifying conviction, warrant, or court order.⁵⁹⁵ Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁵⁹⁶ At least one federal court considering a similar federal statute has noted that it would be sensible to require the government to prove that the defendant had knowledge of the only fact (his felony status) separating criminal behavior from not just permissible, but constitutionally

welfare, or who is or has been so far addicted to the use of such narcotic drug or abusive drug as to have lost the power of self-control with reference to his addiction.

⁵⁹¹ See, e.g., D.C. Code §§ 7-2502.03 and 22-4507; 24 DCMR §§ 2308; 2313.8; and 2332(d).

⁵⁹² For example, it is unclear whether a person who is predisposed to chemical dependency but is currently drug-free qualifies as an addict.

⁵⁹³ The current statute does not provide a procedure for notifying a person that they are considered an addict for purposes of D.C. Code § 22-4503 or for providing that person with a hearing.

⁵⁹⁴ *Myers v. United States*, 56 A.3d 1148, 1152 (D.C. 2012).

⁵⁹⁵ *But see Goodall v. United States*, 686 A.2d 178 (D.C. 1996) (permitting the parties to stipulate to the existence of a prior felony at trial); *Bland v. United States*, 153 A.3d 78, 79 (D.C. 2016) (finding that whether a crime is a “crime of violence” for purposes of the statute’s sentencing enhancement is a legal question, not a factual question) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

⁵⁹⁶ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Morissette v. United States*, 342 U.S. 246, 256-258 (1952); *Staples v. United States*, 511 U.S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S.Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

protected, conduct.⁵⁹⁷ The United States Supreme Court recently interpreted the penalty provision for the same federal offense⁵⁹⁸ to require exactly that.⁵⁹⁹ The revised statute does not require that a person know of their felony status,⁶⁰⁰ but does require that the person know that they have a prior conviction, open warrant, or order to not possess any firearms.⁶⁰¹ This change improves the consistency and proportionality of the revised offense.

Second, the revised offense holds the accused strictly liable for the existence of a court order to relinquish all firearms. Current D.C. Code § 22-4503(a)(5) does not specify a culpable mental state. However, the statute specifies that it applies only if the order was issued after the person received actual notice of a hearing and either had an opportunity to participate during the hearing or failed to appear. Although applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,⁶⁰² a person who fails to appear for a hearing may not have actual knowledge of the relinquishment order. The revised statute nevertheless holds a person strictly liable, provided that the person had notice of their right to appear at the hearing. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Third, the term “prior conviction” excludes a finding of guilt that is subject to an agreement by the parties to be further reviewed. Title 22 of the D.C. Code does not define the term “conviction.” Other titles define it to mean a finding of guilt, an entry of judgment, or a sentence.⁶⁰³ Defining “conviction” to require a sentencing may result in

⁵⁹⁷ *United States v. Games-Perez*, 667 F.3d 1136, 1144-45 (10th Cir. 2012) (Gorsuch, J., concurring) (interpreting 18 U.S.C. § 922(g)).

⁵⁹⁸ 18 U.S.C. § 924(a)(2).

⁵⁹⁹ *Rehaif v. United States*, 17-9560, 2019 WL 2552487 (U.S. June 21, 2019).

⁶⁰⁰ The phrase “in fact” in RCC §§ 22E-4105(a)(2) and (b)(2)(A) holds an actor strictly liable as to a conviction being disqualifying. *See* RCC § 22E-207.

⁶⁰¹ To require actual knowledge that the prior conviction is disqualifying may impose an insurmountable evidentiary burden in some cases, creating an unnecessary gap in liability. For example, the government might be required to prove that the person was not intoxicated, knew the date of their conviction was within the proscribed period, or knew that their conviction was for conduct that is legally considered an act of domestic violence. *See Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *8 (U.S. June 21, 2019) (J. Alito, dissenting).

⁶⁰² There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

⁶⁰³ In Title 2, it means “a judicial finding, jury verdict, or final administrative order, including a finding of guilt, a plea of nolo contendere, or a plea of guilty to a criminal charge...” D.C. Code § 2-1515.01(3). In Title 3, it means “a finding by a court that an individual is guilty of a criminal offense through adjudication, or entry of a plea of guilt or no contest to the charge by the offender.” D.C. Code § 3-1271.02(3). In Title 4 and Title 42, it means “a verdict or plea of guilty or nolo contendere.”⁶⁰³ D.C. Code §§ 4-1305.01(3); 42-3541.01(4). In Title 16, it means “the judgment (sentence) on a verdict or a finding of guilty, a plea of

some unintuitive outcomes.⁶⁰⁴ On the other hand, defining “conviction” to attach upon a finding of guilt may be overinclusive of pleas that will not ultimately lead to a final sentence. To resolve this ambiguity, the revised offense defines “prior conviction” to mean a finding of guilt but carves out several exceptions for circumstances in which the finding may be only temporary. This change improves the clarity and proportionality of the revised offense.

Fourth, the RCC clarifies that the term “prior conviction” does not include juvenile adjudications⁶⁰⁵ or convictions that have been vacated but does include convictions that have been set aside under the Youth Rehabilitation Act.⁶⁰⁶ D.C. Code § 22-4503 does not define the term “conviction.” This change clarifies the revised statute.

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

First, the revised code defines “possession” in its general part.⁶⁰⁷ 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.⁶⁰⁸ The RCC definition of “possession,”⁶⁰⁹ with the requirement in the offense that the possession be “knowing,”⁶¹⁰ matches the meaning of possession in current DCCA case law.⁶¹¹ The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

guilty or a plea of nolo contendere, or a plea or verdict of not guilty by reason of insanity.” D.C. Code § 16-801(3). In Title 24, it means “the judgment on a verdict or a finding of guilty, a plea of guilty, or a plea of no contest.” D.C. Code § 24-901(2). In Title 32, it means “any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of unconditional discharge.” D.C. Code § 32-1341(4).

⁶⁰⁴ Consider, for example, a person who is found guilty but flees before sentencing. *See* D.C. Super. Ct. R. Crim. P. 32 (requiring a defendant’s presence at sentencing).

⁶⁰⁵ D.C. Code § 16-2318 states that a juvenile delinquency adjudication is not a conviction of a crime.

⁶⁰⁶ *See* D.C. Code §24-901(6) (specifying that a qualifying conviction set aside pursuant to the Youth Rehabilitation Act is a predicate for unlawful possession of a firearm); *see also* *Wade v. United States*, 173 A.3d 87, 94 (D.C. 2017); *United States v. Aka*, 339 F. Supp. 3d 11 (D.D.C. 2018).

⁶⁰⁷ RCC § 22E-202.

⁶⁰⁸ *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

⁶⁰⁹ RCC § 22E-701.

⁶¹⁰ RCC § 22E-206.

⁶¹¹ *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re*

Relation to National Legal Trends. Twenty-nine states (hereafter “reform jurisdictions”) have comprehensively modernized their criminal statutes based in part on the Model Penal Code.⁶¹² These statutes provide mixed support for the recommended changes to District law.

First, under the revised statute, a prior conviction for a nonviolent offense is a predicate for unauthorized possession liability only if it occurred within ten years. Currently, statutes in 11 reform jurisdictions account for the recency of the prior conviction in some manner, none precisely like the revised statute or current D.C. Code.⁶¹³

Second, the revised statute specifies that an out-of-state conviction is a predicate for unauthorized possession liability if it has elements that would necessarily prove the elements of a corresponding District crime. Currently, 25 reform jurisdictions’ statutes explicitly provide some type of restrictions on offenses committed in other jurisdictions.⁶¹⁴ Of those jurisdictions, 11 require some degree of comparability (e.g., similar elements).⁶¹⁵

T.M., 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”)

⁶¹² The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

⁶¹³ See Alaska Stat. Ann. § 11.61.200(b)(1)(C); Colo. Rev. Stat. Ann. § 18-12-108 (punishing recent convictions more severely than older convictions); Kan. Stat. Ann. § 21-6304 (imposing time limits for some convictions and not others); Me. Rev. Stat. tit. 15, § 393 (tolling time limits for any intervening criminal conviction); N.Y. Penal Law § 265.02(5)(i); N.D. Cent. Code Ann. § 62.1-02-01; Or. Rev. Stat. Ann. § 166.270 (4)(a); 18 Pa. Stat. and Cons. Stat. Ann. § 6105(d)(3) (allowing a person to petition for reinstatement of their Second Amendment rights after 10 years); S.D. Codified Laws § 22-14-15 (calculating time limit from the commission instead of the conviction or completion of sentence); Tex. Penal Code Ann. § 46.04 (permitting possession in the home after five years); Utah Code Ann. § 76-10-503 (imposing time limits for juvenile adjudications only).

⁶¹⁴ See Ala. Code § 13A-11-72(a); Alaska Stat. Ann. § 11.61.200(a)(1); Ariz. Rev. Stat. Ann. § 13-3101.A.7(b); Ark. Code Ann. §§ 5-1-106(a)(2), 73-103(a)(1); Colo. Rev. Stat. Ann. § 18-12-108(1); Del. Code. Ann. tit. 11 § 1448(a)(1); Haw. Rev. Stat. Ann. § 134-7(b); 720 Ill. Comp. Stat. Ann. 5/24-1.1(a); Ind. Code Ann. § 35-47-4-5(a)(1)(B), (2)(B); Kan. Stat. Ann. § 21-6304(a)(1)-(3)(B); Minn. Stat. Ann. § 624.712.10; Mo. Ann. Stat. § 571.070(1); Mont. Code Ann. § 45-8-313(1)(b); N.H. Rev. Stat. Ann. § 159:3.III; N.J. Stat. Ann. § 2C:39-7.c; N.D. Cent. Code Ann. § 62.1-02-01.1.a-b; Or. Rev. Stat. Ann. § 166.270(1); 18 Pa. Stat. and Cons. Stat. Ann. § 6105(b); S.D. Codified Laws §§ 22-14-15, 15.1; Tex. Penal Code Ann. § 46.04(f)(1)-(3); Utah Code Ann. §§ 76-3-203.5(a), 10-503(1)(a)(i)-(ii), (b)(i), (2)(a), (3)(a); Wash. Rev. Code Ann. §§ 9.41.010(8), 040(1)(a), (2)(a)(i); Wis. Stat. Ann. § 941.29(1m)(b).

⁶¹⁵ See Ind. Code Ann. § 35-47-4-5(a)(1)(B), (2)(B); Kan. Stat. Ann. § 21-6304(a)(1)-(3)(B); Me. Rev. Stat. Ann. tit. 15, § 393.1.A-1(4); Mo. Ann. Stat. § 571.070(1); Mont. Code Ann. § 45-8-313(1)(b); N.H. Rev. Stat. Ann. § 159:3.III; N.J. Stat. Ann. § 2C:39-7.c; 18 Pa. Stat. and Cons. Stat. Ann. § 6105(b); S.D. Codified Laws § 22-14-15.1; Wash. Rev. Code Ann. §§ 9.41.010(8), 040(2)(a)(i); Wis. Stat. Ann. § 941.29(1m)(b).

Third, under the revised statute, the term “prior conviction” includes convictions that have been set aside under the Youth Rehabilitation Act, but does not include juvenile adjudications, convictions that have been vacated, or convictions that are subject to an agreement by the parties to be further reviewed. Currently, 14 reform jurisdictions’ statutes specify that they do not apply their restrictions to otherwise-qualifying convictions that have been nullified.⁶¹⁶

Fourth, under the revised statute, a person’s dependency on a controlled substance is not a predicate for unauthorized possession liability. The U.S. Code punishes possession by any person who “is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).”⁶¹⁷ However, only one reform state’s statute—Hawaii—punishes possession of a firearm by a person who is addicted to drugs. Hawaii’s statute applies only to minors

⁶¹⁶ See Ala. Code § 13A-11-72(k)(2) (declining to apply felon-in-possession restrictions to persons whose convictions were expunged or who were pardoned or had their civil rights restored unless any of above came with condition that convict could not ship, transport, possess, or receive firearms); Alaska Stat. Ann. § 11.61.200(b)(1)(A)-(B) (declining to apply felon-in-possession restrictions to persons who were pardoned or whose convictions were set aside); Ariz. Rev. Stat. Ann. § 13-3101.A.7(b) (declining to apply felon-in-possession restrictions to persons whose civil right to possess firearms have been restored); Ark. Code Ann. § 5-73-103(a), (b)(2)-(3), (d)(1) (declining to apply felon-in-possession restrictions to persons who have been authorized by a specified officials to possess firearms, who have had their rights restored by the governor, who have received a pardon that explicitly provides that such persons may possess firearms, or whose convictions have been dismissed or expunged); 720 Ill. Comp. Stat. Ann. 5/24-1.1(a) (declining to apply felon-in-possession restrictions to persons who have been granted relief by the Director of the Department of State Police); Kan. Stat. Ann. § 21-6304(a)(3)(A) (declining to apply felon-in-possession restrictions to persons who have been pardoned or whose convictions have been expunged); Ky. Rev. Stat. Ann. § 527.040(1)(a)-(b) (declining to apply felon-in-possession restrictions to persons who have received a full pardon or who have been granted relief by the United States Secretary of the Treasury under the Federal Gun Control Act of 1968); Minn. Stat. Ann. §§ 609.165.1a, 1d, 624.712.10 (declining to apply felon-in-possession restrictions to persons who received relief under 18 U.S.C. § 925, who have had their rights restored by a court, who have received a pardon or had their civil rights restored, or whose convictions have been expunged or set aside unless any of the above comes with an explicit condition that such ex-convicts are still prohibited from shipping, transporting, possessing, or receiving firearms); Ohio Rev. Code Ann. § 2923.13(A), (C) (declining to apply felon-in-possession restrictions to persons have been relieved from disability under operation of law or legal process aside from the mere completion, termination, or expiration of those ex-convicts’ assigned sentences); Or. Rev. Stat. Ann. § 166.270(4)(b) (declining to apply felon-in-possession restrictions to persons who have been granted relief under either 18 U.S.C. § 925(c) or Or. Rev. Stat. § 166.274 or whose criminal records have been expunged); Tenn. Code Ann. § 39-17-1307(c)(1)(A)-(C) (declining to apply apply felon-in-possession restrictions to persons who have been pardoned, whose convictions have been expunged, or whose civil rights have been restored); Utah Code Ann. § 76-10-503(1)(c)(ii) (declining to apply felon-in-possession restrictions to persons whose convictions have been expunged, set aside, or reduced to misdemeanor convictions by court order, who have received a pardoned, or whose civil rights have been restored unless any of the above comes with the explicit condition that such ex-convicts are still prohibited from possessing firearms); Wash. Rev. Code Ann. § 9.41.040(3) (declining to apply felon-in-possession restrictions to persons who have received pardons or certificates of rehabilitation, whose convictions have been annulled, or who have been subject to any other equivalent procedure based on a finding of innocence); Wis. Stat. Ann. § 941.29(5)(a), (b) (declining to apply felon-in-possession restrictions to persons who have received pardons expressly allowing them to possess firearms or who have received relief from disabilities under 18 U.S.C. § 925(c)).

⁶¹⁷ 18 U.S.C. § 922(g)(3).

who have received drug treatment and only until the minor has been medically documented to be no longer adversely affected by the addiction.⁶¹⁸

⁶¹⁸ Haw. Rev. Stat. Ann. § 134-7.

RCC § 22E-4106. Negligent Discharge of Firearm.

- (a) *Offense.* A person commits negligent discharge of a firearm when that person:
 - (1) Negligently discharges a firearm outside a licensed firing range; and
 - (2) In fact, does not have:
 - (A) A written permit issued by the Metropolitan Police Department; or
 - (B) Other permission under District or federal law.
- (b) *Prosecutorial Authority.* The Attorney General shall prosecute violations of this section.
- (c) *Penalty.* Negligent discharge of a firearm is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (d) *Definitions.* The term “negligently” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “Attorney General” and “firearm” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the negligent discharge of a firearm offense for the Revised Criminal Code (RCC). The offense proscribes discharging a firearm without permission to do so.⁶¹⁹ The revised offense replaces D.C. Code § 22-4503.01 (Unlawful discharge of a firearm) and 24 DCMR §§ 2300.1 – 2300.3 (Discharge of weapons).

Paragraph (a)(1) specifies that to be criminally liable for discharging a firearm, a person must act at least negligently, a defined term.⁶²⁰ That is, at a minimum, the person should be aware of a substantial risk that the object is a firearm and that it has discharged in a location other than a licensed firing range. Negligence also requires that the risk is of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s failure to perceive that risk is clearly blameworthy.⁶²¹ To discharge a firearm means to shoot a loaded weapon. A discharge does not require aiming the weapon. “Firearm” is a defined term,⁶²² which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability⁶²³ but excludes antiques.⁶²⁴

Paragraph (a)(2) uses the term “in fact” to specify that there is no culpable mental state required as to whether the person has lawful authority to discharge a firearm.⁶²⁵

⁶¹⁹ RCC § 22E-1202 punishes negligently causing a bodily injury by discharging a firearm as fifth degree assault.

⁶²⁰ RCC § 22E-206.

⁶²¹ RCC § 22E-206.

⁶²² RCC § 22E-701.

⁶²³ *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

⁶²⁴ Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

⁶²⁵ RCC § 22E-207.

Subparagraph (a)(2)(A) provides that a person may discharge a firearm if the Metropolitan Police Department (“MPD”) grants written permission to do so. MPD may permit the discharge of a firearm by a particular person, in a particular location, or at a specified time.

Subparagraph (a)(2)(B) provides that a person may discharge a firearm if they have any other permission to do so under District or federal law. If a discharge is permitted by law⁶²⁶ a person does not violate this section.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [RESERVED.]

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

Relation to Current District Law. *The revised negligent discharge of a firearm offense changes current District law in five main ways.*

First, the revised statute requires that the accused act at least negligently with respect to discharge of a firearm outside a firing range. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. This change applies the standard culpable mental state definition of “negligently” used throughout the RCC,⁶²⁷ even though it is highly unusual to provide criminal liability for merely negligent conduct.⁶²⁸ This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised statute includes only one offense and one penalty gradation for negligent discharge of a firearm. A violation of current D.C. Code § 22-4503.01 is subject to a maximum penalty of specifies a maximum penalty of 1 year of incarceration and a \$2,500 fine.⁶²⁹ A violation of 24 DCMR §§ 2300.1 – 2300.3 is subject to a fine of \$300 and is not punishable by jail time.⁶³⁰ In contrast, the revised statute provides a single offense gradation. This change logically reorders and improves the consistency proportionality of the revised statutes.

⁶²⁶ Consider, for example, a 21-gun salute at a military funeral service.

⁶²⁷ RCC § 22E-206.

⁶²⁸ See *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

Elonis’s conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a “reasonable person” standard is a familiar feature of civil liability in tort law but is inconsistent with “the conventional requirement for criminal conduct—awareness of some wrongdoing.” *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a “reasonable person” regards the communication as a threat—regardless of what the defendant thinks—“reduces culpability on the all-important element of the crime to negligence,” *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes,” *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

⁶²⁹ D.C. Code §§ 22-4515; 22-3571.01.

⁶³⁰ 24 DCMR § 100.6.

Third, the revised offense does not punish discharge of an air gun, spring gun, or torpedo. Current 24 DCMR § 2300.1 prohibits the discharge of any “gun, air gun, rifle, air rifle, pistol, revolver, or other firearm, cannon, or torpedo” without the written permission of the Chief of Police. The term “gun” is not defined in the statute or in District case law and may broadly include spring guns, paintball guns, cap guns, water guns, and other toys. The revised code defines the term “firearm” to include a rifle, pistol, revolver, and cannon,⁶³¹ however, it does not include air rifles or torpedo. Discharging an air rifle outside a building is punished as carrying an air or spring gun.⁶³² Releasing a torpedo—or any other restricted explosive—is punished as possession of a prohibited weapon or accessory.⁶³³ This change improves the logical organization and proportionality of the revised offenses.

Fourth, the revised offense does not allow firearms to be discharged in theaters. Current 24 DCMR § 2300.3 states, “This section shall not apply to the discharge of firearms or explosives in a performance conducted in or at a regular licenses [sic.] theater or show.” The statute does not specify the type of license required and District case law has not addressed the issued. Under the revised code, a person must obtain written permission to discharge a firearm in a theater or during a show. An air or spring gun may be used as part of a lawful theatrical performance or athletic contest.⁶³⁴ Other common stage props such as block-barreled guns designed for movie or theatrical use, block-barreled starter guns, and percussion (cap) guns do not constitute firearms in the RCC or under current D.C. Code definitions in Title 7 or Title 22, and could be used in theaters and shows. This change eliminates an unnecessary gap in the revised offenses.

Fifth, the revised offense clarifies that a person may discharge a firearm if lawful authority to do so exists under District or federal law. Current 24 DCMR § 2300.1 requires “special” written permission from the Chief of Police to discharge a weapon. The revised offense notes that either written permission or other lawful authority is sufficient.

Beyond these changes, two other aspects of the revised offense may constitute a substantive change to District law.

First, the revised statute holds an actor strictly liable as to whether they have permission to discharge a firearm. The current statutes do not specify any culpable mental states and District case law has addressed their meaning. The revised statute nevertheless holds a person strictly liable as to whether there is permission under District or federal law to fire a gun. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts⁶³⁵ and legal

⁶³¹ RCC § 22E-701.

⁶³² RCC § 7-2502.17.

⁶³³ RCC § 22E-4101.

⁶³⁴ E.g., an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene, a referee may use an air or spring gun to signal the start of a race. See RCC § 7-2502.17(b)(1)(A) and corresponding commentary.

⁶³⁵ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) (“When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United*

experts⁶³⁶ for any non-regulatory crimes, the negligent discharge of a firearm offense is largely regulatory in nature. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Second, the revised offense uses the phrase “firing range” instead of “shooting gallery.” Current 24 DCMR § 2300.2 provides, “This section shall not apply to licensed shooting galleries between 6:00 a.m. and 12:00 midnight on Monday through Saturday, or between the hours of 2:00 p.m. and 11:00 p.m. on Sundays.” This term “licensed shooting gallery” is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to “shooting galleries,” but do refer to “firing ranges.”⁶³⁷ The time restriction does not correspond with any District regulations for firing ranges and are incongruent with District regulations of loud noise.⁶³⁸ The revised offense uses the Title 7 terminology and deletes the time restriction.⁶³⁹ This change improves the clarity of the revised statutes.

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

The revised offense does not include a self-defense provision. Current D.C. Code § 22-4503.01 provides that a person may discharge a firearm “as otherwise permitted by law, including legitimate self-defense.” In contrast, under the RCC, where a person acts in defense of one’s self, a third person, or property, a general defense may apply.⁶⁴⁰ This change improves the consistency of the revised offenses.

Relation to National Legal Trends. Twenty-nine states (hereafter “reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code.⁶⁴¹ No reform states’ statutes criminalize discharge of a firearm,

States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-Citement Video*, 513 U.S., at 72, 115 S.Ct. 464.”).

⁶³⁶ See § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) (“For the most part, the commentators have been critical of strict-liability crimes. ‘The consensus can be summarily stated: to punish conduct without reference to the actor’s state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.”) (quoting Packer, *Mens Rea and the Supreme Court*, 1962 Sup.Ct.Rev. 107, 109).

⁶³⁷ D.C. Code § 7-2507.03.

⁶³⁸ Loud noise that recklessly or negligently disturbs others may be punished under 20 DCMR § 2701, depending upon the volume and location.

⁶³⁹ Additionally, Merriam Webster defines “shooting gallery” to include “a building (usually abandoned) where drug addicts buy and use heroin.” See Merriam-Webster Online Dictionary at <https://www.webster-dictionary.org/definition/shooting%20gallery>.

⁶⁴⁰ [The Commission’s recommendations for general defenses are forthcoming.]

⁶⁴¹ 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*

unless the discharge recklessly endangers persons or property or threatens a breach of a peace.

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.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

- (a) *Offense.* A person commits alteration of a firearm identification mark when that person:
- (1) Knowingly alters or removes from a firearm:
 - (A) The name of the maker;
 - (B) The model;
 - (C) The manufacturer’s number; or
 - (D) Other identifying mark;
 - (2) With intent to conceal or misrepresent the identity of the firearm.
- (b) *Penalty.* Alteration of a firearm identification mark is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* The terms “intent” and “knowingly” have the meanings specified in RCC § 22E-206; the term “firearm” has the meaning specified in RCC § 22E-701; the term “manufacturer” has the meaning specified in § 7-2505.03.

COMMENTARY

***Explanatory Note.** This section establishes the alteration of a firearm identification mark offense for the Revised Criminal Code (RCC). The offense proscribes knowingly altering or obscuring identifying marks on a firearm. The revised offense replaces D.C. Code §§ 22-4512 (Alteration of identifying marks of weapons prohibited) and 7-2505.03(d) (Microstamping).*

Paragraph (a)(1) requires that the accused knowingly alters or removes an identification mark. “Alters” is an undefined term, intended to be broadly construed. The term “firearm” is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a “knowingly” culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that their conduct will alter or remove an identification mark.

Paragraph (a)(2) further specifies that the accused must alter a mark “with intent to” conceal or misrepresent the identity of the firearm. “Intent” is a defined term in RCC § 22E-206 which, applied here, means the accused must be practically certain that the alteration would conceal or misrepresent⁶⁴² the identity of the firearm. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually concealed or misrepresented the identity of the firearm, only that the accused was practically certain that he or she would do so.

Subsection (b) provides the penalty for the revised offense. [RESERVED.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

⁶⁴² The government is not required to prove that the accused intended to mislead a specific person, only that the markings are removed or altered.

Relation to Current District Law. The revised alteration of a firearm identification mark offense changes current District law in three main ways.

First, the revised alteration of a firearm identification mark statute applies to any firearm. The current D.C. Code statutes apply only to a pistol, machine gun, or sawed-off shotgun.⁶⁴³ In contrast, the revised offense applies to any firearm, as defined in RCC § 22E-701, which includes other long guns, such as shotguns and rifles. There is no apparent reason to exclude liability for long guns which may be legally purchased and possessed by law enforcement officers. This change eliminates an unnecessary gap in liability.

Second, the revised statute requires that the accused have intent to conceal or misrepresent the identity of the firearm. The current D.C. Code statutes do not specify a culpable mental state,⁶⁴⁴ and it appears that a person commits an offense by any alteration or removal of a mark, including by accident, unless the purpose is experimental work by a government officer or agent,⁶⁴⁵ safety, or sporting.⁶⁴⁶ No case law exists as to whether a person would be guilty under the current statutes for altering an identification mark for some other purpose. In contrast, the revised statute eliminates liability for a person who alters a mark by accident or for purposes other than concealing or misrepresenting the identity of the weapon. The RCC contains similar language for the revised alteration of bicycle identification number⁶⁴⁷ and alteration of a motor vehicle identification number⁶⁴⁸ offenses. This change clarifies and improves the consistency and proportionality of the revised offenses.

Third, the revised alteration of a firearm identification mark statute is prosecutable only by the Office of the United States Attorney for the District of Columbia (“USAO”). Current D.C. Code § 22-4512 (Alteration of identifying marks of weapons prohibited) is prosecutable by USAO. However, current D.C. Code § 7-2505.03(d) (Microstamping) is prosecutable by the Office of the Attorney General for the District of Columbia. In contrast, the revised statute includes only a single gradation of a single offense prosecutable by USAO. This change reduces unnecessary overlap between the revised statutes.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act knowingly with respect to removal or alteration of the identification mark. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. To resolve this ambiguity, the revised offense requires at least knowledge as to the conduct of removing or altering the mark. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-

⁶⁴³ D.C. Code §§ 22-4512 and 7-2505.03(d).

⁶⁴⁴ *But see* D.C. Code § 7-2505.03 which provides an exception for “normal wear.”

⁶⁴⁵ D.C. Code § 22-4512.

⁶⁴⁶ D.C. Code § 7-2505.03(d)(2).

⁶⁴⁷ RCC § 22E-2404.

⁶⁴⁸ RCC § 22E-2403.

established practice in American jurisprudence.⁶⁴⁹ A knowledge culpable mental state is also consistent with similar offenses in the D.C. Code⁶⁵⁰ and RCC. This change clarifies the revised statute.

Second, the revised offense does not specify exceptions for normal wear,⁶⁵¹ experimental work by a government officer or agent,⁶⁵² safety, or sporting.⁶⁵³ These exceptions are not required because the revised offense requires knowledge and intent, as defined in RCC § 22E-206. The RCC will also include standardized general defenses, including a defense for execution of public duties.⁶⁵⁴

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

First, the current statutes make it a crime to “alter, remove, or obliterate” an identifying mark.⁶⁵⁵ The revised statute only uses the words “alter” and “remove,” which are intended to be broadly construed to cover removing or obliterating a mark. The change is not intended to narrow the scope of the offense.

Second, the revised offense does not include a permissive inference. Current D.C. Code § 22-4512 states, “Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia.” The D.C. Court of Appeals held that this inference is “irrational” or “arbitrary,” and hence unconstitutional because it cannot be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.⁶⁵⁶

⁶⁴⁹ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

⁶⁵⁰ See, e.g., § 22–3233, Altering or removing motor vehicle identification numbers (“It is unlawful for a person to knowingly remove, obliterate, tamper with, or alter any identification number on a motor vehicle or a motor vehicle part.”).

⁶⁵¹ D.C. Code § 72505.03(d)(1).

⁶⁵² D.C. Code § 22-4512.

⁶⁵³ D.C. Code § 7-2505.03(d)(2).

⁶⁵⁴ [The Commission’s recommendations for general defenses are forthcoming.] See, e.g., Model Penal Code § 3.03.

⁶⁵⁵ D.C. Code §§ 22-4512 and 7-2505.03(d).

⁶⁵⁶ *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, (1969); *Turner v. United States*, 396 U.S. 398 (1970)); see also *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (noting it would be constitutional to instead criminalize possession of a firearm with an obliterated serial number).

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

- (a) The District may prohibit or restrict the possession of firearms on its property and any property under its control.
- (b) Private persons or entities owning property in the District may prohibit or restrict the possession of firearms on their property; provided, that this subsection shall not apply to a law enforcement officer when lawfully authorized to enter onto private property.
- (c) *Definitions.* The terms “firearm,” “law enforcement officer,” and “property” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note and Relation to Current District Law. This section establishes the civil provisions for prohibits of firearms on public or private property for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 4503.02, (Prohibition of firearms from public or private property). The revised civil provisions for prohibition of firearms on public or private property may change current District law in two ways.

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4503.02 does not explicitly prohibit or affirmatively require any particular conduct.⁶⁵⁷ However, § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised the revised code defines “law enforcement officer” and “property” in its general part.⁶⁵⁸ D.C. Code § 22-4503.02 does not define the terms “law enforcement personnel” or “property” and District case law has not addressed their meaning. It is unclear which employees of which agencies and private businesses qualify as “law enforcement personnel.” In contrast, the revised statute applies standardized definitions for “firearm,” “law enforcement officer,” and “property,” used throughout the revised code.

⁶⁵⁷ The statute does not explicitly require a person carrying a firearm to stay off of premises where firearms are disallowed, it merely describes when persons may disallow firearms. If the statute does create a misdemeanor offense, it largely overlaps with D.C. Code § 7-2509.07, which prohibits carrying a pistol with a license in 15 different locations. It is unclear what, if any, impact the signage requirements in 24 DCMR § 2346 have on a person’s liability under either statute.

⁶⁵⁸ RCC § 22E-202.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

- (a) Notwithstanding any other District law, a person shall be permitted to transport a firearm or ammunition under the following circumstances:
- (1) The person is not otherwise prohibited by law from possessing a firearm or ammunition;
 - (2) The transportation of the firearm or ammunition is:
 - (A) For any lawful purpose;
 - (B) From any place where the person may lawfully possess the firearm or ammunition;
 - (C) To any place where the person may lawfully possess the firearm or ammunition;
 - (3) When the firearm is transported in a motor vehicle, the firearm is unloaded, and:
 - (A) If the motor vehicle has a compartment separate from the passenger compartment, neither the firearm nor any ammunition is conveniently accessible and within reach from the passenger compartment of the motor vehicle; or
 - (B) If the motor vehicle does not have a compartment separate from the passenger compartment, the firearm and any ammunition is in a locked container other than the glove compartment or console; and
 - (2) When the firearm is not transported in a motor vehicle, the firearm is:
 - (A) Unloaded;
 - (B) Inside a locked container; and
 - (C) Separate from any ammunition.
- (b) *Definitions.* The terms “ammunition,” “firearm,” “possess,” and “motor vehicle” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for lawful transportation of a firearm or ammunition for the Revised Criminal Code (RCC). These provisions establish a right to possess and transport a firearm in a specified manner.⁶⁵⁹ The revised statute replaces D.C. Code § 22-4504.02 (Lawful transportation of firearms).⁶⁶⁰*

The revised civil provisions for lawful transportation of a firearm or ammunition provision may change current District law in two ways.

First, the revised provision clarifies that the statute operates as a civil provision and does not, of itself, create criminal liability for non-compliance. Current D.C. Code

⁶⁵⁹ See also 18 U.S.C. § 926A.

⁶⁶⁰ [A conforming amendment will be required for cross-references in Title 7.]

§ 22-4504.02(a) does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4504.02(b)(1) states (in the passive voice), “neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible...” and § 22-4504.02(b)(2) states (in the passive voice), “the firearm or ammunition shall be contained...” and “the firearm shall be unloaded.” D.C. Code § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The District of Columbia Court of Appeals has not published any opinion interpreting this statute. Legislative history for the current provision in D.C. Code § 22-4504.02 does not clearly indicate whether or not the provision was intended to create criminal liability by itself. However, predecessor statutes suggest that D.C. Code § 22-4504.02 may have been intended to create an exclusion from liability for carrying a concealed weapon in violation of D.C. Code § 22-4504(a) and (a-1) rather than a misdemeanor offense.⁶⁶¹ The revised statute establishes the transportation requirements as a right instead of an offense. This change clarifies the revised statute.

Second, the revised statute clarifies that there is a lawful means of transportation whether or not the ammunition is transported at the same time. Current D.C. Code § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating “neither the firearm nor any ammunition being transported shall be readily accessible.” This change clarifies the revised statute.

⁶⁶¹ In 1932, much like current D.C. Code § 22-4504, the District’s carrying a concealed weapon statute stated, “No person shall within the District of Columbia carry concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon.” In addition to the exceptions that appear in current D.C. Code § 22-4505(a)(1), (3), and (5), the 1932 legislation specified that the prohibition did not apply to “any person while carrying a pistol unloaded and in a secure wrapper” to and from the locations specified in the contemporary § 22-4505(a)(6). The 1932 “unloaded and in a secure wrapper” exception language was most recently changed to a cross-reference to § 22-4504.02, which largely mirrors 18 U.S.C. § 926A (Firearm Owners Protection Act), establishing a right and not a criminal offense. Consequently, it appears that D.C. Code § 22-4504.02 may have been intended merely as an exception to the District’s carrying statute.

On the contrary, if current D.C. Code § 22-4504(a) were construed to create a misdemeanor offense, it may run afoul of D.C. Code § 23-101(a) and case law on Home Rule limitations on assignment of prosecutorial authority. Prior to home rule, the only stand-alone offense regarding transportation of firearms appears to have been a police regulation delegated to the Office of the Attorney General for the District of Columbia. See Police Traffic and Motor Vehicle Regulations of the District of Columbia, Art. 52, Sec. 8(b), August 12, 1968 (establishing an offense prosecutable by Corporation Counsel that states, “Any pistol carried by any person not having a licensed issued under these Regulations shall be carried in a closed container or securely wrapped and while being carried shall be kept unloaded. Containers of such pistols or such securely wrapped pistols shall be carried in open view.”). The District is barred from reassigning prosecutorial authority over a crime that is a police regulation to the United States Attorney by D.C. Code § 23-101(a). See *In re Hall*, 31 A.3d 453, 458 (D.C. 2011).

RCC § 22E-4110. Civil Provisions on Issuance of a License to Carry a Pistol.

- (a) The Chief of the Metropolitan Police Department may, upon the application of a person having a bona fide residence or place of business within the District of Columbia, or of a person having a bona fide residence or place of business within the United States and a license to carry a pistol concealed upon his or her person issued by the lawful authorities of any State or subdivision of the United States, issue a license to such person to carry a pistol concealed upon his or her person within the District of Columbia for not more than 2 years from the date of issue, if it appears that he or she is a suitable person to be so licensed.
- (b) A non-resident who lives in a state that does not require a license to carry a concealed pistol may apply to the Chief of the Metropolitan Police Department for a license to carry a pistol concealed upon his or her person within the District of Columbia for not more than 2 years from the date of issue; provided, that he or she meets the same reasons and requirements set forth in subsection (a) of this section.
- (c) For any person issued a license pursuant to this section, or renewed pursuant to D.C. Code § 7-2509.03, the Chief of the Metropolitan Police Department may limit the geographic area, circumstances, or times of the day, week, month, or year in which the license is effective, and may subsequently limit, suspend, or revoke the license as provided under D.C. Code § 7-2509.05.
- (d) The application for a license to carry shall be on a form prescribed by the Chief of the Metropolitan Police Department and shall bear the name, address, description, photograph, and signature of the licensee.
- (e) Except as provided in D.C. Code § 7-2509.05(b), any person whose application has been denied or whose license has been limited or revoked may, within 15 days after the date of the notice of denial or notice of intent, appeal to the Concealed Pistol Licensing Review Board established pursuant to D.C. Code § 7-2509.08.
- (f) *Definitions.* The term “pistol” has the meaning specified in RCC § 22E-701.

COMMENTARY

Explanatory Note and Relation to Current District Law. This section establishes the issuance of a license to carry a pistol civil provision for the Revised Criminal Code (RCC). The provision specifies the requirements for obtaining a carry license in the District. The revised provision replaces D.C. Code § 22-4506 (Issue of a license to carry a pistol). The current statute has been copied verbatim, with the exception of applying standardized RCC definitions and striking a phrase that was held to be unconstitutional in 2016.⁶⁶²

⁶⁶² The District’s requirement that applicants for a license to carry a concealed firearm demonstrate a “good reason to fear injury to his or her person or property” or “any other proper reason for carrying a pistol,” as further defined by District law and regulations (collectively “the ‘good reason’ requirement”), is

RCC § 22E-4111. Unlawful Sale of a Pistol.

- (a) *Offense.* A person commits unlawful sale of a pistol when that person:
- (1) Knowingly sells a pistol;
 - (2) Reckless as to the fact that the purchaser is:
 - (A) Not of sound mind;
 - (B) Prohibited from possessing a firearm by RCC § 22E-4105; or
 - (C) Under 21 years of age, except when the purchaser is a child or ward of the seller.
- (b) *Penalty.* Unlawful sale of a pistol is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* The terms “knowingly” and “reckless” have the meanings specified in RCC § 22E-206; the terms “firearm,” “pistol,” and “possess” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the unlawful sale of a pistol offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4507 (Certain sales of pistols prohibited).*

Paragraph (a)(1) requires that the accused knowingly sells a pistol. “Sells” is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The term “pistol” is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a “knowingly” culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that they are selling and practically certain that the item is a pistol.

Paragraph (a)(2) further specifies that the accused must sell a pistol reckless as to the fact that the purchaser is one of three types of people who are legally unfit to own a firearm. “Reckless” is a defined term in RCC § 22E-206 which, applied here, means the person must consciously disregard a substantial risk that the purchaser is not of sound mind, prohibited from possessing a firearm under RCC § 22E-4105, or under 21 years of age. The risk must be of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s conscious disregard of that risk is clearly blameworthy.⁶⁶³

Subsection (b) provides the penalty for the revised offense. [RESERVED.]

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

Relation to Current District Law. *The revised unlawful sale of a firearm offense changes current District law in one main way.*

The revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references

inconsistent with the individual right to bear arms under the Second Amendment and therefore unconstitutional. *Grace v. Dist. of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016).

⁶⁶³ RCC § 22E-206.

§ 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Beyond this change, three aspects of the revised unlawful sale of a pistol offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4507 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The revised statute clearly establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to selling a pistol. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁶⁶⁴ This change clarifies the revised statute.

Third, the revised statute requires that a person be at least reckless as to the status of the purchaser. Current D.C. Code § 22-4507 requires that a person have “reasonable cause to believe” that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. There is no case law construing the meaning of this language. To resolve this ambiguity, the revised statute applies the RCC’s standard mental state definition for recklessness⁶⁶⁵ which requires that a person consciously disregard a substantial risk that the purchaser is legally barred from having a weapon. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.⁶⁶⁶

⁶⁶⁴ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

⁶⁶⁵ RCC § 22E-206.

⁶⁶⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) (“When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-citement Video*, 513 U.S., at 72, 115 S.Ct. 464).”).

However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.⁶⁶⁷ This change improves the consistency of the revised offenses.

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

The revised code defines “possession” in its general part.⁶⁶⁸ 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.⁶⁶⁹ The RCC definition of “possession,”⁶⁷⁰ with the requirement in the offense that the possession be “knowing,”⁶⁷¹ matches the meaning of possession in current DCCA case law.⁶⁷² The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

⁶⁶⁷ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.”).

⁶⁶⁸ RCC § 22E-202.

⁶⁶⁹ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

⁶⁷⁰ RCC § 22E-701.

⁶⁷¹ RCC § 22E-206.

⁶⁷² See *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. See *United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); see also *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”).

RCC § 22E-4112. Unlawful Transfer of a Firearm.

- (a) *Offense.* A person commits unlawful transfer of a firearm when that person:
- (1) Knowingly, as the seller of a firearm, delivers the firearm to a purchaser:
 - (A) In fewer than 10 days from the date of the purchase thereof, except in the case of sales to law enforcement officers; or
 - (B) In a manner other than as specified in RCC § 22E-4109;
 - (2) Knowingly, as the purchaser of a firearm, fails to sign in duplicate and deliver to the seller a statement containing the purchaser's full name, address, occupation, date and place of birth, the date of purchase, the caliber, make, model, and manufacturer's number of the firearm and a statement that the purchaser is not prohibited from possessing a firearm by RCC § 22E-4105;
 - (3) Knowingly, as the seller of a firearm, fails to sign and attach his or her address to the purchaser's statement described in paragraph (a)(2) of this section and deliver one copy to such person or persons as the Chief of the Metropolitan Police Department may designate, and retain the other copy for 6 years; or
 - (4) Knowingly sells an assault weapon, machine gun, or sawed-off shotgun:
 - (A) To any person other than the persons designated in RCC § 22E-4118(b) as entitled to possess the same; or
 - (B) Without prior permission to make such sale obtained from the Chief of the Metropolitan Police Department.
- (b) *Exclusion from Liability.* This section shall not apply to sales made by wholesale dealers to firearms dealers.
- (c) *Penalty.* Unlawful transfer of a firearm is a Class crime subject to a maximum term of imprisonment of , a maximum fine of , or both.
- (d) *Definitions.* The terms "knowingly" has the meaning specified in RCC § 22E-206; the terms "assault weapon," "firearm," "firearms dealer," "law enforcement officer," "machine gun," and "sawed-off shotgun" have the meanings specified in RCC § 22E-701; the term "manufacturer" has the meaning specified in § 7-2505.03.

COMMENTARY

Explanatory Note. This section establishes the unlawful transfer of firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4508 (*Transfers of firearms regulated*).

Paragraph (a)(1) requires that a person knowingly deliver a firearm to a purchaser. "Delivers" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are delivering an item and practically certain that the item they are delivering is a firearm.

Subparagraph (a)(1)(A) specifies that a transfer that occurs in fewer than 10 days of purchase is an unlawful transfer, unless the purchaser is a law enforcement officer. The term “law enforcement officer” is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the transfer occurred within 10 days of the sale.

Subparagraph (a)(1)(B) specifies that a transfer that occurs in a manner other than the manner specified in RCC § 22E-4109 is an unlawful transfer. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is transporting it in the manner that fails to comply with RCC § 22E-4109.

Alternatively, paragraph (a)(2) requires that a person knowingly fail to deliver a written statement with certain information, when purchasing a firearm. The writing must be duplicated and include the purchaser’s full name, address, occupation, date and place of birth. It must also include the date of purchase, the caliber, make, model, and manufacturer’s number of the firearm. And, it must also include a statement that the purchaser is not prohibited from possessing a firearm by RCC § 22E-4105. Paragraph (a)(2) specifies that a “knowingly” culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are purchasing a firearm.

Alternatively, paragraph (a)(3) requires that a person knowingly fail to deliver a completed purchase statement to the Metropolitan Police Department, when selling a firearm. The writing must be duplicated, include the seller’s signature and address, and be retained for 6 years. Paragraph (a)(3) specifies that a “knowingly” culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are selling a firearm.

Alternatively, paragraph (a)(4) applies to a person who knowingly sells an assault weapon, machine gun, or sawed-off shotgun. A “knowingly” culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that the item they are selling is an assault weapon, machine gun, or sawed-off shotgun.

Subparagraph (a)(4)(A) prohibits selling an assault weapon, machine gun, or sawed-off shotgun to a person who is prohibited from possessing a firearm by RCC § 22E-4105. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are selling an assault weapon to someone who qualifies as an unauthorized person.

Subparagraph (a)(4)(B) prohibits selling an assault weapon, machine gun, or sawed-off shotgun without prior permission to make such sale obtained from the Chief of the Metropolitan Police Department (“MPD”). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are not authorized to sell the assault weapon, machine gun, or sawed-off shotgun.

Subsection (b) excludes liability for wholesalers.

Subsection (c) provides the penalty for the revised offense. [RESERVED.]

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

Relation to Current District Law. *The revised unlawful transfer of a firearm offense changes current District law in four main ways.*

First, paragraph (a)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4508 provides that “No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514...” The revised statute does not address transfers of blackjacks, but does address transfers of assault weapons,⁶⁷³ the possession of which—like machine guns and sawed-off shotguns—is prohibited as contraband under RCC § 22E-4101. It is unclear why blackjacks, as compared to other non-firearm dangerous weapons, are regulated in this manner. The statute’s failure to cover sales of assault weapons may be an oversight during recent legislative changes regarding the definition of a machine gun.⁶⁷⁴ This change improves the consistency of the revised statutes and eliminates an unnecessary gap in liability.

Second, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Third, the revised statute includes a cross-reference to the persons described in RCC § 22E-4118(b), Exclusions from Liability for Weapon Offenses. Current D.C. Code § 22-4508 cross-references “the persons designated in § 22-4514.” The revised code replaces the exceptions in Chapter 45 of current D.C. Code Title 22 with a single, comprehensive list of exclusions from liability in RCC § 22E-4118 and changes current District law as described in the commentary. Each change affects the scope of the revised unlawful transfer of a firearm offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute applies a standardized definition of “law enforcement officer.” Current D.C. Code § 22-4508 except sales to “sales to marshals, sheriffs, prison or jail wardens or their deputies, policemen, or other duly appointed law enforcement officers.” The word “policemen” is not defined in the statute and District case law has not addressed its meaning. In contrast, the RCC defines the term “law enforcement officer” with specificity⁶⁷⁵ and applies this definition to all revised offenses. This change improves the clarity and consistency of the revised offense.

⁶⁷³ The term “assault weapon” is defined in RCC § 22E-701.

⁶⁷⁴ Before 2009, the term “machine gun” was defined in D.C. Code § 7-2501.01 to include “any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot...[s]emiautomatically, more than 12 shots without manual reloading.” The District of Columbia Court of Appeals interpreted this language to include a handgun fitted with a magazine that holds more than twelve rounds of ammunition (even if the magazine is defective). See *Moore v. United States*, 927 A.2d 1040, 1054 (D.C. 2007); *United States v. Woodfolk*, 656 A.2d 1145, 1147–48 (D.C. 1995). In 2009, the D.C. Council redefined “machine gun” to include only fully automatic weapons and simultaneously criminalized possession of a large capacity ammunition feeding device under D.C. Code § 7-2506.01(b). D.C. Law 17-372, Firearms Control Amendment Act of 2008.

⁶⁷⁵ RCC § 22E-701.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4508 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The revised statute more clearly frames the statute as establishing an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁶⁷⁶ This change clarifies the revised statute.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

⁶⁷⁶ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

RCC § 22E-4113. Sale of Firearm Without a License.

- (a) *Offense.* An actor commits unlawful sale of a firearm without a license when that actor knowingly:
 - (1) As a retail dealer:
 - (A) Sells, exposes for sale, or possesses with intent to sell, a firearm;
and
 - (B) Is not licensed under RCC § 22E-4114 to engage in such activity;
or
 - (2) As a wholesale dealer, sells, or has in the actor’s possession with intent to sell, a firearm to any person other than a firearms dealer.
- (b) *Penalty.* Unlawful sale of a firearm without a license is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* The term “knowingly” has the meaning specified in RCC § 22E-206; the terms “assault weapon,” “firearm,” “firearms dealer,” “machine gun,” “possess,” and “sawed-off shotgun” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the sale of a firearm without a license offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4509 (Dealers of weapons to be licensed).

Paragraph (a)(1) applies to retail dealers. Subparagraph (a)(1)(A) requires that a retail dealer knowingly sell, expose for sale, or possess with intent to sell a firearm. “Sells” is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The terms “possess” and “firearm” are defined in RCC § 22E-701. Subsection (a) specifies that a “knowingly” culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are selling, exposing for sale, or possessing with intent to sell a firearm. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are not licensed to sell, expose for sale, or possess with intent to sell a firearm.

Paragraph (a)(2) applies to wholesalers. Paragraph (a)(2) requires that a wholesale dealer sell, expose for sale, or possess with intent to sell a firearm to someone other than a licensed firearms dealer.⁶⁷⁷ Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are selling, exposing for sale, or possessing with intent to sell. The person must also be practically certain that the item is a firearm. The person must also be practically certain that the purchaser is not a licensed firearms dealer.

Subsection (b) provides the penalty for the revised offense. [RESERVED.]

⁶⁷⁷ The term “firearms dealer” is defined in RCC § 22E-701.

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

Relation to Current District Law. The revised sale of a firearm without a license offense changes current District law in one main way.

The revised statute applies to all firearms. Current D.C. Code § 22-4509 restricts the sale of any “pistol, machine gun, sawed-off shotgun, or blackjack.” In contrast, the revised statute does not include address sales of blackjacks, but does address sales of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach “shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter.” D.C. Code § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The revised statute more establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁶⁷⁸ This change clarifies the revised statute.

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

First, the revised code defines “firearm,” “assault weapon,” “machine gun,” “sawed-off shotgun,” and “possession” in its general part.⁶⁷⁹ 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

⁶⁷⁸ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

⁶⁷⁹ RCC § 22E-202.

or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.⁶⁸⁰ The RCC definition of “possession,”⁶⁸¹ with the requirement in the offense that the possession be “knowing,”⁶⁸² matches the meaning of possession in current DCCA case law.⁶⁸³ The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4509 restricts the sale of firearms “within the District of Columbia.” This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District’s boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

⁶⁸⁰ See Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

⁶⁸¹ RCC § 22E-701.

⁶⁸² RCC § 22E-206.

⁶⁸³ See *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (“Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. See *United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).”); see also *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) (“[I]n...constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger intended to exercise dominion or control over the drugs, and was not a mere bystander.” (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (“To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he ‘intended to guide [its] destiny.’ *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).”).

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

- (a) The Mayor of the District of Columbia may, in his or her discretion, grant licenses and may prescribe the form thereof, effective for not more than 1 year from date of issue, permitting the licensee to sell a firearm at retail within the District of Columbia.
- (b) Any license issued pursuant to this section shall require the license holder to follow the following licensure requirements:
 - (1) The business shall be carried on only in the building designated in the license.
 - (2) The license or a copy thereof, certified by the issuing authority, shall be clearly and conspicuously displayed on the premises.
 - (3) No firearm shall be sold if the purchaser is:
 - (A) Not of sound mind;
 - (B) Prohibited from possessing a firearm by RCC § 22E-4105; or
 - (C) Under 21 years of age, unless the purchaser is personally known to the seller or presents clear evidence of the purchaser's identity.
 - (4) No assault weapon, machine gun, or sawed-off shotgun shall be sold to any person other than the persons designated in RCC § 22E-4118(b) as entitled to possess the same, and then only after permission to make such sale has been obtained from the Chief of the Metropolitan Police Department.
 - (5) A true record shall be made in a book kept for the purpose, the form of which may be prescribed by the Mayor, of all firearms in the possession of the licensee, which said record shall contain the date of purchase, the caliber, make, model, and manufacturer's number of the weapon, to which shall be added, when sold, the date of sale.
 - (6) A true record in duplicate shall be made of every firearm sold, said record to be made in a book kept for the purpose, the form of which may be prescribed by the Mayor of the District of Columbia and shall be personally signed by the purchaser and by the person effecting the sale, each in the presence of the other and shall contain the date of sale, the name, address, occupation, color, and place of birth of the purchaser, and, so far as applicable, the caliber, make, model, and manufacturer's number of the weapon, and a statement by the purchaser that the purchaser is not a person prohibited from possessing a firearm by RCC § 22E-4105. One copy of said record shall, within 7 days, be forwarded by mail to the Chief of the Metropolitan Police Department and the other copy retained by the seller for 6 years.
 - (7) No firearm or imitation firearm or placard advertising the sale thereof shall be clearly and conspicuously displayed on the premises, where it can readily be seen from outside.
- (c) Any license shall be subject to forfeiture for any violation of the requirements specified in paragraph (b) of this section.
- (d) Any license issued pursuant to this section shall be issued by the Metropolitan Police Department as a Public Safety endorsement to a basic business license

under the basic business license system as set forth in subchapter I-A of Chapter 28 of Title 47 of the District of Columbia Official Code [§ 47-2851.01 et seq.].

- (e) *Definitions.* The terms “assault weapon,” “building,” “firearm,” “imitation firearm,” “machine gun,” “possess,” and “sawed-off shotgun” have the meanings specified in RCC § 22E-701; the term “manufacturer” has the meaning specified in § 7-2505.03.

COMMENTARY

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for licenses of firearms dealers for the Revised Criminal Code (RCC). Together with RCC § 22E-4115, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

The revised civil provisions for licenses of firearms dealers changes current District law in three main ways.

First, the revised statute regulates all firearms. Current D.C. Code § 22-4510 restricts the sale of any “pistol, machine gun, sawed-off shotgun, or blackjack.” In contrast, the revised statute does not include address sales of blackjacks, but does address transfers of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates an unnecessary gap in liability.

Second, paragraph (b)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4510(a)(3) provides that “No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514...” The revised statute does not include address sales of blackjacks, but does address sales of assault weapons,⁶⁸⁴ which—like machine guns and sawed-off shotguns—are prohibited as contraband under RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. This change improves the consistency of the revised statutes and eliminates an unnecessary gap in liability.

Third, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

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

⁶⁸⁴ The term “assault weapon” is defined in RCC § 22E-701.

First, the revised statute defines the terms “assault weapon,” “building,” “firearm,” “imitation firearm,” “machine gun,” “manufacturer,” “possess,” and “sawed-off shotgun,” using standardized definitions in current law and the RCC. The revised statute also updates the phrase “Chief of Police for the District of Columbia” with “Chief of the Metropolitan Police Department,” consistent with more recent provisions in current law and in the RCC.

Second, the revised statute uses the phrase “clearly and conspicuously displayed” instead of “displayed on the premises where it can be read,” consistent with more recent provisions in current law and in the RCC.⁶⁸⁵ These changes clarify the revised statute and improve the consistency of the revised code.

⁶⁸⁵ See RCC §§ 7-2502.15(a)(1)(C); 22E-4102(a)(2)(C)(ii).

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

- (a) *Offense.* A person commits unlawful sale of a firearm by a licensed dealer when that person:
 - (1) In fact, is a firearms dealer; and
 - (2) Recklessly violates a licensure requirement specified in RCC § 22E-4114(b)(1) – (b)(6).
- (b) *Penalty.* Unlawful sale of a firearm by a licensed dealer is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* The term “recklessly” has the meaning specified in RCC § 22E-206; the term “firearms dealer” has the meaning specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes the unlawful sale of a firearm by a licensed dealer offense for the Revised Criminal Code (RCC). Together with RCC § 22E-4114, the revised statute replaces D.C. Code § 22-4510 (*Licenses of weapons dealers*).

Paragraph (a)(1) specifies that the revised statute applies to anyone who is a firearms dealer. The term “firearms dealer” is defined in RCC § 22E-701. Paragraph (a)(1) uses the term “in fact” to specify that there is no culpable mental state required as to whether the person has a dealer’s license.⁶⁸⁶

Paragraph (a)(2) requires that a firearms dealer recklessly violate one or more of the licensure requirements in RCC § 22E-4114(b)(1) – (b)(6). “Reckless” is a defined term,⁶⁸⁷ which, applied here, means the person must consciously disregard a substantial risk that their conduct violates a licensure requirement. The risk must be of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s conscious disregard of that risk is clearly blameworthy.⁶⁸⁸

Subsection (b) provides the penalty for the revised offense. [RESERVED.]

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

Relation to Current District Law. Two aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act at least recklessly with respect to violating a licensure requirement. Current D.C. Code § 22-4510(a)(3) requires that a person have “reasonable cause to believe” that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. Other provisions in the current statute do not specify a requisite mental state and District case law has not addressed the issue. To resolve this ambiguity, the revised statute applies the

⁶⁸⁶ RCC § 22E-207.

⁶⁸⁷ RCC § 22E-206.

⁶⁸⁸ RCC § 22E-206.

RCC's standard mental state definition of recklessness⁶⁸⁹ which, applied here, requires that a person consciously disregard a substantial risk that they are engaging in the prohibited conduct and that the conduct violates the District's licensing rules. The revised civil provisions for licenses of firearms dealers no longer include the phrase "reasonable cause to believe."⁶⁹⁰ This change improves the consistency of the revised offenses.

Second, the revised statute holds an actor strictly liable as to the existence of a dealer's license. Current D.C. Code § 22-4510 does not specify any culpable mental states. District case law has not interpreted the statute's meaning. The revised statute nevertheless holds a person strictly liable as to this offense element. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts⁶⁹¹ and legal experts⁶⁹² for any non-regulatory crimes, the unlawful sale of a firearm by a licensed dealer offense is largely regulatory in nature and requires recklessness as to the violation of a licensure requirement. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

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

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4510 does not itself provide a criminal penalty, however, it states that a licensee shall be "subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute does not provide liability for violations of D.C. Code § 22-4509. Current D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." The revised code replaces § 22-4509 with RCC § 22-4112. This change logically reorders and clarifies the revised statutes.

⁶⁸⁹ RCC § 22E-206.

⁶⁹⁰ RCC § 22E-4114.

⁶⁹¹ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

⁶⁹² See § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.'" (quoting Packer, *Mens Rea and the Supreme Court*, 1962 Sup.Ct.Rev. 107, 109).

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4510 restricts the sale of firearms “within the District of Columbia.” This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District’s boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

- (a) *Offense.* A person commits use of false information for purchase or licensure of a firearm when that person knowingly gives false information or false evidence of identity to:
 - (1) Purchase a firearm; or
 - (2) Apply for a license to carry a pistol under RCC § 22E-4110.
- (b) *Penalty.* Use of false information for purchase or licensure of a firearm is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* The term “knowingly” has the meaning specified in RCC § 22E-206; the terms “firearm” and “pistol” have the meanings specified in RCC § 22E-701.

COMMENTARY

***Explanatory Note.** This section establishes the use of false information for purchase or licensure of a firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4511 (False information in purchase of weapons).*

Subsection (a) specifies that a “knowingly” culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are giving false information or false evidence. Paragraph (a)(1) requires the false information or evidence be given to purchase a firearm. “Purchase” is an undefined term, intended to include any exchanging of firearm for monetary remuneration. The term “firearm” is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, paragraph (a)(1) requires that the person also know—that is, be practically certain—that they are giving the information in order to purchase a firearm.

Alternatively, paragraph (a)(2) requires the false information or evidence be given to apply for a license to carry a pistol. Paragraph (a)(2) requires that a person know—that is, be practically certain—that they are giving the information in order to apply for a license to carry a pistol under RCC § 22E-4110. The term “pistol” is defined in RCC § 22E-701.

Subsection (b) provides the penalty for the revised offense. [RESERVED.]

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

***Relation to Current District Law.** The revised use of false information for purchase or licensure of a firearm offense changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4511 prohibits using false information to purchase “a machine gun, sawed-off shotgun, or blackjack.” In contrast, the revised statute does not include address purchases of blackjacks, but does address purchases of all firearms. There is no clear rationale for not including other firearms, such as pistols, rifles, and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as

billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates an unnecessary gap in liability.

Beyond this change, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The revised statute establishes the statute as an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁶⁹³ This change clarifies the revised statute.

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

The revised statute defines the terms “firearm” and “pistol” using standardized definitions in current law and the RCC. These changes clarify the revised statute and improve the consistency of the revised code.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4511 restricts the sale of firearms “within the District of Columbia.” This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District’s boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. The wide variability in other states’ weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

⁶⁹³ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

- (a) A dangerous article unlawfully owned, possessed, or carried is hereby declared to be a nuisance.
- (b) When a police officer, in the course of a lawful arrest or lawful search, or when a designated civilian employee of the Metropolitan Police Department in the course of a lawful search, discovers a dangerous article which the officer reasonably believes is a nuisance under subsection (a) of this section the officer shall take it into his or her possession and surrender it to the Property Clerk of the Metropolitan Police Department.
- (c)
 - (1) Within 30 days after the date of such surrender, any person may file in the office of the Property Clerk of the Metropolitan Police Department a written claim for possession of such dangerous article. Upon the expiration of such period, the Property Clerk shall notify each such claimant, by registered mail addressed to the address shown on the claim, of the time and place of a hearing to determine which claimant, if any, is entitled to possession of such dangerous article. Such hearing shall be held within 60 days after the date of such surrender.
 - (2) At the hearing the Property Clerk shall hear and receive evidence with respect to the claims filed under paragraph (1) of this subsection. Thereafter he or she shall determine which claimant, if any, is entitled to possession of such dangerous article and shall reduce his or her decision to writing. The Property Clerk shall send a true copy of such written decision to each claimant by registered mail addressed to the last known address of such claimant.
 - (3) Any claimant may, within 30 days after the day on which the copy of such decision was mailed to such claimant, file an appeal in the Superior Court of the District of Columbia. If the claimant files an appeal, he or she shall at the same time give written notice thereof to the Property Clerk. If the decision of the Property Clerk is so appealed, the Property Clerk shall not dispose of the dangerous article while such appeal is pending and, if the final judgment is entered by such court, he or she shall dispose of such dangerous article in accordance with the judgment of such court. The court is authorized to determine which claimant, if any, is entitled to possession of the dangerous article and to enter a judgment ordering a disposition of such dangerous article consistent with subsection (e) of this section.
 - (4) If there is no such appeal, or if such appeal is dismissed or withdrawn, the Property Clerk shall dispose of such dangerous article in accordance with subsection (e) of this section.
 - (5) The Property Clerk shall make no disposition of a dangerous article under this section, whether in accordance with his or her own decision or in accordance with the judgment of the court, until the United States Attorney for the District of Columbia certifies to the Property Clerk that such dangerous article will not be needed as evidence.

- (d) A person claiming a dangerous article shall be entitled to its possession only if:
 - (1) Such person shows, on satisfactory evidence, that such person is the owner of the dangerous article or is the accredited representative of the owner, and that the ownership is lawful;
 - (2) Such person shows on satisfactory evidence that at the time the dangerous article was taken into possession by a police officer or a designated civilian employee of the Metropolitan Police Department, it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with his or her knowledge or consent; and
 - (3) The receipt of possession by the claimant does not cause the article to be a nuisance. A representative is accredited if such person has a power of attorney from the owner.
- (e) If a person claiming a dangerous article is entitled to its possession as determined under subsections (c) and (d) of this section, possession of such dangerous article shall be given to such person. If no person so claiming is entitled to its possession as determined under subsections (c) and (d) of this section, or if there be no claimant, such dangerous article shall be destroyed. In lieu of such destruction, any such serviceable dangerous article may, upon order of the Mayor of the District of Columbia, be transferred to and used by any federal or District government law-enforcing agency, and the agency receiving same shall establish property responsibility and records of these dangerous articles.
- (f) The Property Clerk shall not be liable in damages for any action performed in good faith under this section.
- (g) *Definitions.*
 - (1) The terms “bump stock,” “court,” “dangerous weapon,” and “large capacity ammunition feeding device” have the meanings specified in RCC § 22E-701.
 - (2) In this section, the term “dangerous article” means:
 - (A) A firearm silencer;
 - (B) A bump stock;
 - (C) A large capacity ammunition feeding device; or
 - (D) A dangerous weapon.

COMMENTARY

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for taking and destruction of dangerous articles for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4517 (Dangerous articles; definition; taking and destruction; procedure).*

The revised civil provisions for taking and destruction of dangerous articles may change current District law in two ways.

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4517 does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4515 provides a criminal penalty for “any violation of any provision of this chapter.” The

revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised statute updates the definition of “dangerous article” to align with the definitions in the revised criminal code. Current D.C. Code § 22-4517 defines the term “dangerous article” to mean “(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms.” The term “weapon” is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute defines the term “dangerous article” to include a firearm silencer, a bump stock, or a large-capacity ammunition feeding device. Although bump stocks and large-capacity ammunition feeding devices do not necessarily constitute weapons, like silencers they are designed to make firearms more lethal. The term “dangerous article” is also defined to include any of the objects included in the revised definition of “dangerous weapon,” including “[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.”⁶⁹⁴ The phrase “any weapon such as” may be broader or narrower than the revised definition. This change clarifies and improves the consistency of the revised statutes.

⁶⁹⁴ RCC § 22E-701.

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

- (a) The exclusions from liability specified in this section apply to the following District crimes:
- (1) RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition;
 - (2) RCC § 7-2502.15, Possession of a Stun Gun;
 - (3) RCC § 7-2502.17, Carrying an Air or Spring Gun;
 - (4) RCC § 7-2509.06, Carrying a pistol in an unlawful manner;
 - (5) RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory; and
 - (6) RCC § 22E-4102, Carrying a Dangerous Weapon.
- (b) Notwithstanding any other District law, a person shall not be subject to prosecution for an offense specified in subsection (a) if that person is:
- (1) A member of the Army, Navy, Air Force, or Marine Corps of the United States;
 - (2) An on-duty member of the National Guard, or Organized Reserves;
 - (3) A qualified law enforcement officer as defined in 18 U.S.C. § 926B;
 - (4) A qualified retired law enforcement officer as defined in 18 U.S.C. § 926C, who carries a concealed pistol that is registered under D.C. Code § 7-2502.07 in a location that is conveniently accessible and within reach;
 - (5) A licensed special police officer or campus police officer, who possesses or carries a firearm registered under D.C. Code § 7-2502.07 in accordance with D.C. Code § 5-129.02 and all rules promulgated under that section;
 - (6) A Director, deputy director, officer, or employee of the District of Columbia Department of Corrections who possesses or carries a firearm registered under D.C. Code § 7-2502.07;
 - (7) An employee of the District or federal government, who is on duty and acting within the scope of those duties;
 - (8) Lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense;
 - (9) Lawfully engaging in the business of shipping or delivering the weapon involved in the offense; or
 - (10) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court.
- (c) Notwithstanding any other District law, a person shall not be subject to prosecution for an offense specified in subsection (a) if that person:
- (1) Holds a valid registration certificate issued under D.C. Code § 7-2502.07; and
 - (2) Possesses the registered firearm or ammunition for a firearm of the same caliber while:
 - (A) At the home or place of business designated on the registration certificate;
 - (B) Transporting the firearm or ammunition, in accordance with RCC § 22E-4109, to or from:
 - (i) A place of sale;
 - (ii) The person's home or place of business;

- (iii) A place of repair;
 - (iv) A firearms training and safety class conducted by a firearms instructor; or
 - (v) A lawful recreational firearm-related activity; or
- (C) Transporting the firearm or ammunition for a lawful purpose as expressly authorized by a District or federal statute and in accordance with the requirements of that statute.
- (d) Notwithstanding any other District law, a person shall not be subject to prosecution for an offense specified in subsection (a) for possessing or carrying a firearm while that person is participating in a firearms training and safety class conducted by a firearms instructor.
- (c) *Definitions.* The terms “ammunition,” “firearm,” “firearms instructor,” “pistol,” and “possess” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes exclusions from liability for specified weapons offenses in the Revised Criminal Code (RCC). The provision excludes liability for legal duties and activities that necessarily require possessing or carrying dangerous weapons. The revised statute replaces D.C. Code §§ 22-4504.01 (Authority to carry firearm in certain places and for certain purposes) and 22-4505 (Exceptions to § 22-4504). The revised statute also effectively replaces the exclusion clauses within D.C. Code §§ 7-2502.15(c) (Possession of stun guns);⁶⁹⁵ 7-2506.01(a)(1), (2), and (5) (Persons permitted to possess ammunition); 22-4514(a) (Possession of certain dangerous weapons prohibited; exceptions);⁶⁹⁶ and 22-4502.01(c) (Gun Free Zones).⁶⁹⁷

Subsection (a) specifies that the exclusions from liability apply only to certain offenses in Chapter 41 of Title 22E. The exclusions apply to possession of an unregistered firearm, destructive device, or ammunition;⁶⁹⁸ possession of a stun

⁶⁹⁵ “...[E]xcept a law enforcement officer as defined in § 7-2509.01.”

⁶⁹⁶ “...[M]achine guns, or sawed-off shotgun, knuckles, and blackjacks may be possessed by the members of the Army, Navy, Air Force, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law enforcement officers, including any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under § 22-4510.”

⁶⁹⁷ “The provisions of this section shall not apply to...members of the Army, Navy, Air Force, or Marine Corps of the United States; the National Guard or Organized Reserves when on duty; the Post Office Department or its employees when on duty; marshals, sheriffs, prison, or jail wardens, or their deputies; policemen or other duly-appointed law enforcement officers; officers or employees of the United States duly authorized to carry such weapons; banking institutions; public carriers who are engaged in the business of transporting mail, money, securities, or other valuables; and licensed wholesale or retail dealers.”

⁶⁹⁸ RCC § 7-2502.01.

gun;⁶⁹⁹ carrying an air or spring gun;⁷⁰⁰ carrying a pistol in an unlawful manner;⁷⁰¹ possession of a prohibited weapon or accessory,⁷⁰² and carrying a dangerous weapon.⁷⁰³ The exclusions do not apply to unlawful storage of a firearm;⁷⁰⁴ possession of a dangerous weapon with intent to commit crime;⁷⁰⁵ possession of a dangerous weapon during a crime;⁷⁰⁶ possession of a firearm by an unauthorized person;⁷⁰⁷ negligent discharge of firearm;⁷⁰⁸ alteration of a firearm identification mark,⁷⁰⁹ or any other weapons offense. However, other exclusions under federal law may apply to these latter offenses.⁷¹⁰

Subsection (b) excepts from liability 10 classes of professionals who handle dangerous weapons as a part of their work. Paragraph (b)(1) excludes liability for a member of the Army, Navy, Air Force, or Marine Corps of the United States.⁷¹¹ Paragraph (b)(2) excludes liability for a member of the National Guard or Organized Reserves when on duty.⁷¹² Paragraph (b)(3) excludes liability for a qualified law enforcement officer as defined in 18 U.S.C. § 926B.⁷¹³ Paragraph (b)(4) excludes liability for a qualified retired law enforcement officer as defined in 18 U.S.C. § 926C, who carries a concealed pistol that is registered under D.C. Code § 7-2502.07 in a location that is conveniently accessible and within reach.⁷¹⁴ Paragraph (b)(5) excludes liability for an on-duty licensed special police officer or campus police officer, who possesses or carries a firearm registered under D.C. Code § 7-2502.07 in accordance with D.C. Code § 5-129.02 and all rules promulgated under that section.⁷¹⁵ Paragraph (b)(6) excludes liability for a Director, deputy director, officer, or employee of the District of Columbia Department of Corrections who possesses or carries a firearm registered under D.C. Code § 7-2502.07,⁷¹⁶ whether on or off duty.⁷¹⁷ Paragraph (b)(7) excludes liability for an employee of the District or federal government, who is on duty and acting within

⁶⁹⁹ RCC § 7-2502.15.

⁷⁰⁰ RCC § 7-2502.17.

⁷⁰¹ RCC § 7-2509.06.

⁷⁰² RCC § 22E-4101.

⁷⁰³ RCC § 22E-4102.

⁷⁰⁴ RCC § 7-2507.02.

⁷⁰⁵ RCC § 22E-4103.

⁷⁰⁶ RCC § 22E-4104.

⁷⁰⁷ RCC § 22E-4105.

⁷⁰⁸ RCC § 22E-4106.

⁷⁰⁹ RCC § 22E-4107.

⁷¹⁰ See, e.g., 18 U.S.C. §§ 926A, B, and C.

⁷¹¹ D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).

⁷¹² D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).

⁷¹³ See D.C. Code §§ 7-2502.15(c); 22-4514(a); 22-4502.01(c); 22-4505(a)(1) and (3) (IRS and OIG agents appear to meet the definition of a “qualified law enforcement officer” in 18 U.S.C. 926B(c)).

⁷¹⁴ D.C. Code § 22-4505(b).

⁷¹⁵ D.C. Code §§ 7-2502.15(c); 22-4514(a) (“other duly-appointed law enforcement officers”); 22-4505(a)(2).

⁷¹⁶ D.C. Code §§ 22-4514(a) (“prison or jail wardens, or their deputies”); 22-4502.01(c) (“prison or jail wardens, or their deputies”); 22-4505(a)(1) (“prison or jail wardens, or their deputies”).

⁷¹⁷ See *United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972).

the scope of those duties.⁷¹⁸ Paragraph (b)(8) excludes liability for a person who is lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense.⁷¹⁹ The word “lawfully” should be construed to require that the person is authorized by law to manufacture, repair, or sell weapons. Paragraph (b)(9) excludes liability for a person who is lawfully acting as a public carrier.⁷²⁰ The word “lawfully” should be construed to require that the person is authorized by law to ship or deliver weapons.⁷²¹ Paragraph (b)(10) excludes liability for a person who is acting within the scope of authority granted by the Metropolitan Police Department⁷²² or a competent court.⁷²³

Subsection (c) applies to registered firearm owners. Subparagraph (c)(2)(A) provides that a registered owner may carry their firearm or ammunition where the firearm is registered.⁷²⁴ Subparagraph (c)(2)(B) provides that a registered owner may carry their firearm or ammunition in accordance with RCC § 22E-4109 to or from their home or business,⁷²⁵ a place of sale,⁷²⁶ a place of repair,⁷²⁷ a training class,⁷²⁸ or a recreational activity.⁷²⁹ Subparagraph (c)(2)(C) provides that a registered owner may carry their firearm while transporting it for any other lawful purpose expressly authorized by a District or federal statute, provided that it is transported in accordance with the requirements of that statute.⁷³⁰

⁷¹⁸ See D.C. Code §§ 7-2506.01(a)(2) (“an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties”); 22-4514(a) (“any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons”); 22-4502.01(c) (“officers or employees of the United States duly authorized to carry such weapons”); 22-4505(a)(4) (“Officers or employees of the United States duly authorized to carry a concealed pistol”). For example, an Assistant United States Attorney may inspect or transport a weapon to court as evidence in a criminal trial.

⁷¹⁹ D.C. Code §§ 7-2506.01(a)(1) (“a licensed dealer pursuant to subchapter IV of this unit”); 22-4505(a)(5) (“Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business”).

⁷²⁰ D.C. Code §§ 22-4514(a); 22-4502.01(c) (“the Post Office Department or its employees when on duty... [or] public carriers who are engaged in the business of transporting mail, money, securities, or other valuables”).

⁷²¹ For example, if a particular FedEx store is out of compliance with the noise regulations in 20 DCMR § 2701, the exclusion from liability nevertheless extends to each carrier in the store.

⁷²² For example, MPD may authorize a defense investigator to view a weapon or authorize a fingerprint expert to inspect a weapon at its evidence control office.

⁷²³ See, e.g., Model Penal Code § 3.03(1)(c).

⁷²⁴ D.C. Code § 22-4504.01(1). In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to forbid carrying a lawful firearm in the home for the purpose of immediate self-defense. 554 U.S. 570 (2008).

⁷²⁵ D.C. Code §§ 22-4504.01(1) and (3); 22-4505(a)(6).

⁷²⁶ See D.C. Code § 22-4505(a)(6) (“place of purchase”). The phrase “place of sale” includes the place where the registrant bought the firearm and the place where the registrant sells the firearm to a licensed dealer, pursuant to D.C. Code § 7-2505.02.

⁷²⁷ D.C. Code § 22-4505(a)(6).

⁷²⁸ D.C. Code § 22-4505(c).

⁷²⁹ D.C. Code §§ 22-4504.01(2); 22-4505(a)(6).

⁷³⁰ D.C. Code §§ 22-4504.01(4); 22-4504.02(a).

Subsection (d) applies to any person who is participating in a class taught by a firearm instructor.⁷³¹ The term “firearm instructor” is defined in RCC § 22E-701.

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

Relation to Current District Law. The revised exclusions from liability for weapons offenses provision changes current District law in six main ways.

First, the revised statute applies standardized exclusions from liability to all possessory weapons offenses. Under current law, there is considerable inconsistency between the exclusionary provisions. The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or from the class⁷³² and is not liable for possessing ammunition during the class,⁷³³ however, there is no exception in current law for possessing a firearm during a firearm training and safety class. Second, a member of the military avoids prosecution for possession of an assault weapon, machine gun, or sawed-off shotgun,⁷³⁴ however, there is no military exception for possession of a large-capacity ammunition feeding device.⁷³⁵ Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon. In contrast, the revised statute applies identical exclusions to all weapons offenses that do not involve some other criminal intent or harm. This change logically reorders the revised statutes and improves the consistency and proportionality of the revised code.

Second, the revised statute excludes liability for a public carrier only if that person is acting within the scope of their professional duties. Current D.C. Code §§ 22-4515(a) (Possession of certain dangerous weapons prohibited; exceptions) and 22-4502.01(c) (Gun Free Zones) exclude from liability “the Post Office Department or its employees when on duty” as well as “public carriers who are engaged in the business of transporting mail, money, securities, or other valuables.” Although a carrier should not be liable for possession of an object it has been hired to ship and deliver, there is no clear rationale for a blanket exception that allows a postal worker to carry their own assault weapon or machine gun while on duty. The revised statute specifies that the exclusion applies only if the person is lawfully engaging in the business of shipping or delivering the weapon involved in the offense. This change eliminates an unnecessary gap in liability.

Third, the revised statute narrows the exclusion from liability for the subclass of law enforcement officers who do not have arrest authority. Current D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) exclude from liability “prison or jail wardens, or their deputies.” Current D.C. Code §§ 7-2502.15(c) (concerning possession of stun

⁷³¹ D.C. Code § 7-2506.01(a)(5).

⁷³² See, e.g., D.C. Code § 22-4504.02(a); 22-4505(c).

⁷³³ D.C. Code § 7-2506.01(a)(5).

⁷³⁴ D.C. Code § 22-4514(a).

⁷³⁵ D.C. Code § 7-2506.01(b).

guns);⁷³⁶ 22-4514(a) (concerning possession of a prohibited weapon);⁷³⁷ and 22-4505(a)(2) (concerning carrying a dangerous weapon)⁷³⁸ each include an exclusion for special police officers and campus police officers. D.C. Code § 22-4505(a)(2) specifies that its exclusion applies only to officers who are carrying a firearm and only if they are acting within the scope of their deputization.⁷³⁹ Although an officer should not be liable for possession of a service weapon, there is no clear rationale for a blanket exception that allows a special police officer or Department of Corrections (“DOC”) employee to carry their own false knuckles, assault weapon, or machine gun while on or off duty. The revised statute limits special police officers to their service weapons and limits DOC employees to firearms that are registerable and registered. This change reduces an unnecessary gap in liability.

Fourth, the revised statute excludes from liability any person who is acting within the scope of authority granted by the Metropolitan Police Department (“MPD”) or a competent court. Current D.C. Code §§ 22-4514(a) and 22-4502.01 exclude liability for “any designated civilian employee of the Metropolitan Police Department.” Although an unsworn administrative staff member may be tasked with ordering weapons or organizing inventory, there is no clear rationale for fully exempting—while on duty and off duty—approximately 600 employees who serve a variety of functions including software development, policy writing, and community outreach. On the other hand, this provision appears to be underinclusive, failing to reach non-employees (e.g., firearms instructors, forensic experts, defense investigators) who are temporarily authorized to handle weapons at a firing range or through the evidence control branch. The revised provision specifies that any person who is authorized by the police chief or a court to possess or carry a weapon may not be prosecuted for any offense listed in subsection (a). This change eliminates an unnecessary gap in liability and improves the proportionality of the revised offenses.

Fifth, the exclusion for manufacturing, repairing, or dealing applies to all weapons, not only firearms. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to “[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business.” There is no similar exclusion under current law for the producers and retailers of other weapons, such as stun guns or ammunition. In contrast, the revised statute provides a safe harbor for anyone who is “lawfully engaging in the business of

⁷³⁶ D.C. Code § 7-2502.15(c) excludes liability for “a law enforcement officer as defined in § 7-2509.01.” The definition that appears in § 7-2509.01 includes “a special police officer appointed pursuant to § 5-129.02, and a campus and a university special police officer appointed pursuant to the College and University Campus Security Amendment Act of 1995, effective October 18, 1995 (D.C. Law 11-63; 6A DCMR § 1200 et seq.).” However, 6A DCMR § 1200 was repealed on September 6, 2016.

⁷³⁷ D.C. Code § 22-4514(a) excludes “other duly-appointed law enforcement officers.”

⁷³⁸ D.C. Code § 22-4505(a)(2) excludes “Special police officers and campus police officers who carry a firearm in accordance with D.C. Official Code § 5-129.02, and rules promulgated pursuant to that section.”

⁷³⁹ *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

manufacturing, repairing, or dealing the weapon involved in the offense.” This change improves the consistency and proportionality of the revised offenses.

Sixth, the revised statute does not provide an exclusion for bankers. Current D.C. Code §§ 22-4514(a) and 22-4502.01 explicitly exclude “banking institutions.” There is no clear rationale for the categorical exception for banks. Where a bank or other public storage provider permits a customer to keep a weapon a safe deposit box, the institution does not meet the revised definition of “possession,” which requires the ability and desire to exercise control over the object and to guide its destiny.⁷⁴⁰ The revised statute eliminates the exception for banking institutions and thereby eliminates an unnecessary gap in liability.

Beyond these changes, six other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute uses standardized definitions of “qualified law enforcement officer” and “qualified retired law enforcement officer” in Title 18 of the United States Code. Current D.C. Code § 7-2502.15(c), by cross reference to § 7-2509.01, provides an exception for members of a law enforcement agency operating in the District of Columbia. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for “policemen,” an undefined term. D.C. Code § 7-2506.01(a)(2) provides an exception for “an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties.” D.C. Code § 22-4505(b) provides an exception for retired MPD officers. The definitions of “qualified law enforcement officer” in 18 U.S.C. § 926B and “qualified retired law enforcement officer” in 17 U.S.C. § 926C appear to be broader than District-operating officers but narrower than “policemen.” The revised statute aligns the revised statutes with federal law. This change improves the consistency and proportionality of the revised offenses.

Second, the revised statute includes an exception for DOC employees. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for “prison or jail wardens, or their deputies.” The term “deputy” is not defined in the statute, however, District case law explains that it includes, not only the warden’s direct supervisees, but also corrections officers.⁷⁴¹ Case law has not addressed whether other DOC employees, such as administrative staff, are also included. Consistent with the definition of “law enforcement officer” in RCC § 22E-701, the revised statute applies to a “Director, deputy director, officer, or employee of the District of Columbia Department of Corrections.” This change improves the clarity and consistency of the revised statute.

Third, the revised statute clarifies and possibly narrows the exclusion for transporting a firearm. D.C. Code § 22-4505(a)(6) provides an exception for someone who is transporting a pistol “from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another, or to or from any lawful recreational firearm-related activity.” The current statutory language does not specify

⁷⁴⁰ RCC § 22E-701; see also *In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

⁷⁴¹ *United States v. Pritchett*, 470 F.2d 455, 456 (D.C. Cir. 1972).

that the pistol must be lawfully purchased or registered. There is no clear rationale for excluding people who purchase firearms illegally from the reach of the carrying a dangerous weapon statute.⁷⁴² The current statutory language includes transportation from “place of purchase” but does not mention transportation to a licensed firearms dealer for the purpose of reselling the firearm pursuant to D.C. Code § 7-2505.02.⁷⁴³ The current statutory language does not define the phrase “moving goods from one place of abode to or business to another.” The statute could be read narrowly to mean changing one’s residence or business address. Or, the statute could be read broadly to include traveling from one’s own residence or business to another person’s residence or business. In contrast, the revised exclusion in RCC § 22E-4118(c)(2) applies only to registered owners and only to transportation to or from a place of sale, the person’s home or business, a place of repair, a training and safety class, or a lawful recreational firearm-related activity. These changes improve the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.

Fourth, the revised statute clarifies that the exclusion only applies to a person who is manufacturing, repairing, or dealing in weapons if that person is doing so lawfully. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to “[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business.” District case law has clarified, however, that this exception does not categorically apply to all persons engaged in manufacturing, repairing, or dealing. For this exception to apply the person’s activity must be more than a hobby⁷⁴⁴ and the conduct in question must coincide with the actual performance of a business duty.⁷⁴⁵ To capture the limitations in District case law and ensure only legitimate business activities are excluded, the revised statute requires that the dealer—or the dealer’s designee—be “lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense.” There is no clear rationale for excepting illegal arms dealers from the carrying a dangerous weapon offense. This change clarifies the revised statute and may reduce an unnecessary gap in liability.

Fifth, the revised statute clarifies that a person who may carry or transport a firearm may also carry or transport ammunition for that firearm. D.C. Code § 22-4504.01 begins, “Notwithstanding any other law, a person holding a valid registration for a

⁷⁴² In contrast, current D.C. Code § 22-4504.01(4) permits a registrant to carry their firearm “While it is being transported for a lawful purpose as expressly authorized by District or federal statute and in accordance with the requirements of that statute.” And, D.C. Code § 22-4504.02(a) more broadly permits any person to “transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm.” Current D.C. Code § 7-2502.01(b)(3) requires that “possession or control of such firearm is lawful in the jurisdiction in which [the defendant] resides.”

⁷⁴³ *But see* D.C. Code § 22-4504.02(a), which more broadly permits any person to “transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm.”

⁷⁴⁴ *Cormier v. United States*, 137 A.2d 212, 215 (D.C. 1957).

⁷⁴⁵ *Bsharah v. United States*, 646 A.2d 993, 998 (D.C. 1994).

firearm may carry the firearm...” D.C. Code § 22-4504.02(a) begins, “Any person who is not otherwise prohibited by the law from transporting, shipping, or receiving a firearm shall be permitted to transport a firearm...” There is no clear rationale for failing to include ammunition within the scope of each exclusion. In fact, § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating “neither the firearm nor any ammunition being transported shall be readily accessible.” However, there is no case law construing this provision. This change clarifies the revised statute and may improve the proportionality of the revised offenses.

Sixth, the revised statute does not contain a specific exclusion for members of an organization duly authorized to purchase or receive weapons from the United States. Current D.C. Code § 22-4505(a)(3) excludes “the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States; provided, that such members are at or are going to or from their places of assembly or target practice.” It is not clear who would meet this classification other than members of the military,⁷⁴⁶ qualified law enforcement officers as defined in 18 U.S.C. 926B,⁷⁴⁷ and persons acting within the authority of the Chief of Police or a competent court,⁷⁴⁸ each of which is excluded under the revised statute. Accordingly, this exception is removed as superfluous. This change improves the logical ordering and clarity of the revised statute and may eliminate an unnecessary gap in liability.

⁷⁴⁶ Excepted under RCC § 22E-4118(b)(1).

⁷⁴⁷ Excepted under RCC § 22E-4118(b)(3).

⁷⁴⁸ Excepted under RCC § 22E-4118(b)(10).

RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapons Offenses.

- (a) A person may be found guilty of any combination of the following offenses for which the person satisfies the requirements for liability, provided that the court shall not enter a judgment of conviction for more than one of the offenses based on the same act or course of conduct:
- (1) RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition;
 - (2) RCC § 7-2502.15, Possession of a Stun Gun;
 - (3) RCC § 7-2502.17, Carrying an Air or Spring Gun;
 - (4) RCC § 22E-4102, Carrying a Dangerous Weapon;
 - (5) RCC § 22E-4103, Possession of a Dangerous Weapon with Intent to Commit Crime; and
 - (6) RCC § 22E-4104, Possession of a Dangerous Weapon During a Crime.
- (b) A person may be found guilty of any combination of the following offenses for which the person satisfies the requirements for liability, provided that the court shall not enter a judgment of conviction for more than one of the offenses based on the same act or course of conduct:
- (1) RCC § 22E-4103, Possession of a Dangerous Weapon with Intent to Commit Crime;
 - (2) RCC § 22E-4104, Possession of a Dangerous Weapon During a Crime; and
 - (3) Any offense against persons under Subtitle II of this Title that includes as an element, of any gradation, that the person displayed or used a dangerous weapon.
- (c) Where subsection (a) or (b) prohibits multiple convictions, the court shall enter a judgment of conviction in accordance with the rules and procedures established in RCC § 212(d)-(e).
- (d) *Definitions.* The terms “act” and “court” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note and Relation to Current District Law. *This section establishes a merger provision for weapons offenses in the Revised Criminal Code (RCC). The provision limits the number of convictions that can be entered for a single instance of possessing, carrying, and using a weapon. There is no corresponding provision in current District law.*

The revised statute is consistent with the procedural aspects of the provisions in RCC § 22E-214, merger of related offenses. The offenses enumerated in subsection (a) involve similar social harms. Namely, each offense requires that a person possess or carry one or more weapons without permission to do so. The offenses enumerated in

subsection (b) are also related by the social harm involved, namely, the possession or carrying of a weapon in order to perpetrate another crime.⁷⁴⁹

The revised statute, by omission, allows for multiple convictions and possible consecutive sentences: unlawful storage of a firearm;⁷⁵⁰ carrying a pistol in an unlawful manner;⁷⁵¹ possession of a prohibited weapon or accessory;⁷⁵² possession of a firearm by an unauthorized person;⁷⁵³ negligent discharge of firearm;⁷⁵⁴ alteration of a firearm identification mark;⁷⁵⁵ and any other offense.

The revised limitation on convictions for multiple related weapons offenses provision changes current District law in three main ways.

First, under the RCC, a conviction for possession of an unregistered firearm, destructive device, or ammunition will merge with a conviction for other possessory weapons offenses arising out of the same course of conduct. The current D.C. Code does not address merger of these offenses. Under current District case law, multiple convictions for a possession of an unregistered firearm⁷⁵⁶ merge and multiple convictions for possession of ammunition⁷⁵⁷ merge.⁷⁵⁸ However, possession of an unregistered firearm⁷⁵⁹ does not merge with carrying a pistol without a license.⁷⁶⁰ In contrast, the revised statute merges possession of an unregistered firearm with carrying without a license as both statutes are directed at similar social harms. This change improves the proportionality of the revised statutes.

Second, under the RCC, a conviction for possession of a dangerous weapon with intent to commit crime⁷⁶¹ and a conviction for possession of a dangerous weapon during a crime⁷⁶² merge with any offense against persons that accounts for the display or use of a dangerous weapon in its gradation structure. Under current law, a conviction for possession of a prohibited weapon with intent to commit crime (“PPW-b”)⁷⁶³ and a conviction for possession of a firearm during a crime of violence or dangerous crime

⁷⁴⁹ See *Hawkins v. United States*, 119 A.3d 687, 703 (D.C. 2015) (explaining that carrying a pistol without a license does not merge with possession of a firearm during a crime of violence because the latter does not require proof that the person was unlicensed to carry the weapon).

⁷⁵⁰ RCC § 7-2507.02.

⁷⁵¹ RCC § 7-2509.06.

⁷⁵² RCC § 22E-4101.

⁷⁵³ RCC § 22E-4105.

⁷⁵⁴ RCC § 22E-4106.

⁷⁵⁵ RCC § 22E-4107.

⁷⁵⁶ D.C. Code § 7-2507.06.

⁷⁵⁷ D.C. Code § 7-2506.01.

⁷⁵⁸ Under current District law, the court may only enter a single judgment of conviction for a single instance of possessing or carrying multiple weapons without permission. *Cormier v. United States*, 137 A.2d 212, 217 (D.C.1957); *Little v. United States*, 709 A.2d 708, 715 (D.C. 1998); *Headspeth v. Dist. of Columbia*, 53 A.3d 304, 307 (D.C. 2012); *but see Chapman v. United States*, 493 A.2d 1026 (1985) (permitting the government to charge one count of possession of an *unregistered* firearm for one gun and one count of carrying pistol without *license* for another gun possessed at the same time).

⁷⁵⁹ D.C. Code § 7-2507.06.

⁷⁶⁰ D.C. Code § 22-4504(a); *Tyree v. United States*, 629 A.2d 20 (D.C. 1993).

⁷⁶¹ RCC § 22E-4103.

⁷⁶² RCC § 22E-4104.

⁷⁶³ D.C. Code § 22-4514(b).

(“PFCV”)⁷⁶⁴ do not merge.⁷⁶⁵ Further, under current law, a crime of violence that includes as an element possession of a firearm—e.g., armed kidnapping, armed burglary, armed robbery, assault with a dangerous weapon—does not merge with PFCV, even though a person who commits the predicate offense necessarily commits PFCV also.⁷⁶⁶ In contrast, the RCC prevents stacking weapons-based penalty enhancements in the Subtitle II with penalties for weapons possession in Chapter 41, as these statutes are directed at similar social harms.⁷⁶⁷ This change improves the proportionality of the revised offenses.

⁷⁶⁴ D.C. Code § 22-4504(b).

⁷⁶⁵ *Bell v. United States*, 950 A.2d 56, 73 (D.C. 2008) (finding each offense requires an element that the other does not).

⁷⁶⁶ See, *Thomas v. United States*, 602 A.2d 647 (D.C. 1992); see also *Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) (affirming convictions for armed robbery, armed burglary, and one count of PFCV for each); *Sanders v. United States*, 809 A.2d 584, 603 (same); *Hanna v. United States*, 666 A.2d 845, 855 (D.C. 1995).

⁷⁶⁷ Consider, for example, a person who carries a concealed, licensed firearm when the person assaults and breaks a person’s finger—the firearm never being used or displayed. Under current law, such a person faces a mandatory minimum of 5 years and a maximum penalty of 48 years imprisonment: 3 years for felony assault (D.C. Code § 22-404(a)(2)) based on the harm of breaking the finger, plus an additional 5-15 years for possessing a firearm during the assault (D.C. Code § 22-4504(b)), plus an additional 5-30 years for having a firearm readily available during the robbery (D.C. Code § 22-4502). The liability for committing the offense while armed but not using the firearm is 16 times the maximum penalty a person would otherwise face for the harm done to the victim under D.C. Code § 22-404(a)(2).

RCC § 22E-4120. Severability.

If any part of this Chapter is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this Chapter.

COMMENTARY

Explanatory Note and Relation to Current District Law. This section establishes the severability provision for weapons offenses in the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4516 (Severability). The current statute has been copied verbatim and does not substantively change current District law.

Severability statutes embody “a well-established rule of statutory construction... to save and not to destroy legislation.”⁷⁶⁸ Although a severability provision is not necessarily required,⁷⁶⁹ codifying the Council’s intent provides better notice to the public and criminal justice system actors.

⁷⁶⁸ *Gamble v. United States*, 30 A.3d 161, 167 (D.C. 2011) (quoting *RDP Dev. Corp. v. District of Columbia*, 645 A.2d 1078, 1082 n.18 (D.C. 1994)).

⁷⁶⁹ Even without a severability provision, there is always a “presumption of severability whenever the remaining provisions, standing alone, are ‘fully operative as a law.’” See *McClough v. United States*, 520 A.2d 285, 289 (D.C. 1987) (quoting *Champlin Refining Co. v. Corp. Comm’n*, 286 U.S. 210, 234, 52 S. Ct. 559, 76 L. Ed. 1062 (1932)); see also *Hooks v. United States*, 191 A.3d 1141, 1145-1146 (D.C. 2018) (finding District firearms statutes remain operative, including the requirement that a person be “suitable” to qualify for a concealed carry license, following the decision in *Wrenn v. Dist. of Columbia*, 864 F.3d 650, (D.C. Cir. 2017)).