First Draft of Report #52 - Cumulative Update to the Revised Criminal Code Chapter 6

SUBMITTED FOR ADVISORY GROUP REVIEW
March 20, 2020

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

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

This Draft Report has two main parts: (1) draft statutory text for an enacted Title 22 (Title 22E) of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

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 #52 - Update to the Revised Criminal Code Chapter 6 is Wednesday April 29, 2020.

Oral comments and written comments received after these dates may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC Title 22E

Chapter 6. Offense Classes, Penalties, & Enhancements.

Chapter 7. Definitions.

RCC § 22E-601. Offense Classifications.

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

(b) *Definitions*. The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

COMMENTARY

***Explanatory Note*.** Subsection (a) classifies all felonies and misdemeanors for the Revised Criminal Code ("RCC"). Felonies, offenses for which more than a year of imprisonment may be imposed, are grouped into nine classes. Misdemeanors, offenses for which a year or less of imprisonment may be imposed, are grouped into five classes. This classification system and definitions provide a clear, consistent, logical framework for organizing offenses of similar seriousness. Subsection (b) cross-references definitions of "felony" and "misdemeanor" in RCC § 22E-701.

***Relation to Current District Law*.** Subsection 22E-601(a) codifies new District law. Current District law does not have any penalty classification scheme.[1] However, the various penalties prescribed for specific offenses *de facto* cluster into approximately eight felony and five misdemeanor groups (see Commentary to RCC § 22E-603, below). Consequently, the classification distinctions in subsection 22E-601(a) approximate the number of distinct felony and misdemeanor penalties in current law.

Subsection 22E-601(b) cross-references standard definitions of "felony" and "misdemeanor" and does not change current District law.

[1] A few offenses in Title 22 are designated "Class A" offenses, but this is not tied to maximum statutory penalties. The "Class A" designation denotes how supervised release following revocation and "backup time" work for purposes of sentencing per D.C. Code 24-403.01. Class A offenses were so designated because they had "life" penalties prior to the Sentencing Reform Amendment Act of 2000 which abolished the existing parole system. There are no "Class B" offenses in current law, just "Class A" and all other offenses.

RCC § 22E-602. Authorized Dispositions.

(a) Unless otherwise expressly specified by statute, a court may sentence a person upon conviction to sanctions that include:
    (1) A term of imprisonment under RCC § 22E-603;
    (2) A fine under RCC § 22E-604;
    (3) Probation under D.C. Code § 16-710;
    (4) Restitution or reparation under D.C. Code § 16-711;
    (5) Community service under D.C. Code § 16-712;
    (6) Post-release supervision under D.C. Code § 24-903; and
    (7) Work release under D.C. Code § 24-241.01.

(b) A court may sentence a person upon conviction to either imprisonment under RCC § 22E-603 or a fine under RCC § 22E-604, but not both, for the following statutes prosecuted by the Attorney General for the District of Columbia:
    (1) [RESERVED.]

COMMENTARY

Explanatory Note. Subsection (a) cross-references the typical sanctions that a court may impose upon conviction, which are elsewhere authorized. This is a non-exhaustive list and does not preclude the availability of other sanctions authorized by statute. This provision provides notice of the typical dispositions that are authorized in scattered sections and titles of the D.C. Code.

Subsection (b) limits the range of dispositions available under subsection (a) for specified offenses prosecuted by the Attorney General for the District of Columbia. Subsection (b) provides that, for the listed offenses a court may sentence a person to either imprisonment or a fine, but not both. The listed offenses include: [RESERVED]. This section is intended to preserve the existing authority of the Attorney General for the District of Columbia to prosecute select crimes and does not itself authorize sanctions.

Relation to Current District Law. RCC § 22E-602(a) cross-references existing District law except for its references to RCC § 22E-603 and RCC § 22E-604, which are provide new RCC imprisonment and fine penalties. RCC § 22E-602(b) codifies limitations on available dispositions for RCC offenses that currently exist in those offenses' comparable D.C. Code offenses. To the extent that prosecutorial authority of the Attorney General for the District of Columbia may currently turns on this limitation,[2] the revised statute preserves this limitation and the designation of prosecutorial authority.

[2] D.C. Code § 23–101(a) ("Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia [Attorney General for the District of Columbia] or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section."). Under DCCA case law, the limitation in as to the offense being fine-only or up to one year imprisonment only applies to "penal statutes in the nature of police or municipal regulations." *D.C. v. Smith*, 329 A.2d 128, 130 (D.C. 1974) ("Here, the context, legislative history, and the long-established application of the statute all support our conclusion that the 'fine only, or imprisonment' phrase

RCC § 22E-603. Authorized Terms of Imprisonment.

(a) *Authorized terms of imprisonment.* Unless otherwise expressly specified by statute, the maximum term of imprisonment authorized for an offense is:
  (1) For a Class 1 felony, 60 years;
  (2) For a Class 2 felony, 48 years;
  (3) For a Class 3 felony, 36 years;
  (4) For a Class 4 felony, 24 years;
  (5) For a Class 5 felony, 18 years;
  (6) For a Class 6 felony, 12 years;
  (7) For a Class 7 felony, 8 years;
  (8) For a Class 8 felony, 5 years;
  (9) For a Class 9 felony, 3 years;
  (10) For a Class A misdemeanor, 1 year;
  (11) For a Class B misdemeanor, 180 days;
  (12) For a Class C misdemeanor, 90 days;
  (13) For a Class D misdemeanor, 30 days; and
  (14) For a Class E misdemeanor, no imprisonment.

(b) *Definitions*. The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. Subsection (a) provides specific, standardized imprisonment penalties for offenses under Title 22E. Subsection (a) designates for each class a maximum term of imprisonment beyond which a court may not sentence a defendant to serve. Subsection (b) cross-references definitions of "felony" and "misdemeanor" in RCC § 22E-701.

Relation to Current District Law. RCC § 22E-603(a) codifies entirely new law. As noted in the Commentary to RCC § 22E-601, above, current District law generally does not classify offenses, let alone assign specific imprisonment penalties for those classes. Currently, each offense has its own penalty which has been determined through piecemeal legislation, without a comprehensive review of other offenses' penalties. Without a formal scheme of offense classification to guide legislative decision making and facilitate comparison of offense penalties, a wide range of authorized imprisonment penalties has arisen across current District offenses.

The RCC penalty classes generally differ from the current penalties most-often

---

modifies only the 'penal statute' phrase. The Corporation Counsel's basic prosecutorial jurisdiction over violations of 'police or municipal ordinances or regulations' is unaffected by the subsequent limitation concerning penal statutes.").

used for lengthy felony punishments,[3] but track current low felony and misdemeanor statutes' common penalties.[4] In order to standardize offenses of similar seriousness, the penalty classifications in RCC § 22E-603 do not accommodate the full range of existing statutory penalties in the D.C. Code. The RCC penalty classes for middle and high felonies have been lowered, in part, in consideration of well-established research evidence that lengthy prison sentences do not deter criminal behavior, people "age out" of crime with a sharp drop in criminal behavior as people enter mid and later life, and that incarceration may have a perverse effect of exacerbating recidivism.[5]

In particular, there are few precedents in current District law for the most severe RCC felony classifications,[6] as several of the most severe imprisonment penalties under current District offenses involve indeterminate (life) penalties. Although a determinate number of years, the Class 1 penalty is intended to authorize an extremely long period of imprisonment that is analogous to a life sentence without the possibility of supervised release. Similarly, the Class 2 penalty is intended to authorize an extremely long period of imprisonment that is analogous to a life sentence with the possibility of supervised release. Given the prior abolition of the District's indeterminate sentences and options for parole under the federal "Revitalization Act,"[7] the current requirement that inmates serve at least 85% of their sentence[8] combined with the life expectancy of incarcerated persons[9] means that under current law a 60-year term of imprisonment is likely to be a *de facto* sentence of life without eligibility for supervised release, depending on the offender's age in a specific case and the availability of a second look[10] review of the sentence. The RCC Class 1 provides such a 60-year maximum imprisonment penalty,

---

[3] The RCC penalty classes generally differ from the common determinate sentence felony penalties in the current D.C. Code, which typically are multiples of "5": 5, 10, 15, 20, 30, 40, and 60 years. The current D.C. Code also uses indeterminate sentences of "life" and "life without the possibility of parole."

[4] For example, the RCC penalty classes maintain 30 days, 90 days, 180 days, 1 year, 3 years, and 5 years.

[5] *See, e.g.*, National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016) at 2 ("Increasing the severity of punishment does little to deter crime.").

[6] *But see* D.C. Code § 24-2104(a) ("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release, except that the court may impose a prison sentence in excess of 60 years only in accordance with § 22-2104.01 or § 24-403.01(b-2).").

[7] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997).

[8] D.C. Code § 24-403.01; 18 U.S.C. § 3624(b).

[9] *See* United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders."). The average age of federal defenders is 36, (*Id*. at S-178) which would suggest a life expectancy of around seventy-five years for a thirty-six-year-old placed in Bureau of Prisons' custody. The life expectancy of District residents at birth (2011-2015) varies sharply by race and geography, ranging from 68-89. D.C. Department of Health, *Health Equity Report for the District of Columbia 2018* (available online at https://dchealth.dc.gov/publication/health-equity-report-district-columbia-2018). Research indicates that incarceration is linked with short-term post-incarceration declines in incarcerated persons' health and life expectancy: Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, American Journal of Public Health 103, 523. However, the long-term effects of incarceration on incarcerated persons' health and mortality are unclear, particularly for black males. *See generally*, Michael Massoglia and William Pridemore, *Incarceration and Health*, Annual Review of Sociology, August 2015, Vol. 41: 291-310 (available online at https://www.annualreviews.org/doi/abs/10.1146/annurev-soc-073014-112326),

[10] D.C. Code § 24-403.03.

having the likely effect of life without release for a person convicted of such an offense. A 48-year term of imprisonment for a Class 2 offense in the RCC is comparable to a sentence of life with eligibility for supervised release, again depending on the offender's age in a specific case and the availability of a second look review of the sentence.

Also notable, RCC § 22E-603 provides for a 180-day penalty for Class B misdemeanors but makes no allowance for a "six month" penalty as is used for several offenses in the current D.C. Code. The distinction between 180 days and six months in current District law does not reflect a substantive distinction in the seriousness of the offense or its imprisonment penalty but a procedural distinction not mentioned in the those offenses. Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth Amendment right to a jury trial, whereas offenses with lesser penalties generally are not.[11] However, nothing prevents a jurisdiction from voluntarily extending jury trial rights to offenses subject to penalties of six months or less and the revised statutes make all offenses with an imprisonment penalty over 90 days jury demandable.[12] Rather than perpetuate a distinction between 180 day and six month penalties in the absence of a difference in jury demandability, the RCC classification system makes all Class B offenses subject to a maximum 180 days imprisonment. There are no six-month penalties in the RCC; instead a Class B misdemeanor with a 180-day penalty.

Lastly, the penalty classes in RCC § 22E-603 do not include a minimum term of imprisonment for any offenses. Sentencing guidelines, rather than statutory mandates, are a more appropriate way to guide judicial decision making among competing[13] sentencing mandates. The ability of the legislature to foresee all circumstances that may be relevant to sentencing is limited, and even the most severe criminal offense, aggravated first degree murder, may not merit a lengthy imprisonment term in some circumstances.[14] Elimination of legislatively-mandated minimum sentences is consistent the reasoning of the Council in recent years when considering whether to extend

---

[11] *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (holding that "we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.' A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."). See also D.C. Code § 16-705 (permitting jury trials when the possible cumulative punishment exceeds two years).

[12] *See* CCRC First draft of Report #51 – Jury Demandability.

[13] D.C. Code § 24–403.01(a) ("For any felony committed on or after August 5, 2000, the court shall impose a sentence that:

(1) Reflects the seriousness of the offense and the criminal history of the offender;

(2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the offender and others; and

(3) Provides the offender with needed educational or vocational training, medical care, and other correctional treatment.").

[14] For example, a spouse or child acting with a bona fide compassionate motive to administer a fatal medication to end the life of a terminally-ill, elderly person may be charged with aggravated first degree murder under RCC § 22E-1101(d)(3)(A) and current D.C. Code § 22–2104.01(b)(10). If an effective consent defense (per RCC § 22E-409) and/or compliance with the procedures for physician assisted death in D.C. Code § 7–661.11 cannot be proven, the actor would face a maximum imprisonment of 60 years for a Class 1 offense under the RCC, or a maximum of life without parole and a mandatory minimum of 30 years under D.C. Code § 22–2104.01.

mandatory minimum sentences.[15] Decades of research evidence indicates that mandatory minimums do not solve the problems of inconsistent sentences that they were intended to solve, but instead exacerbate disproportionality and have numerous other negative effects on the justice system.[16] In light of this evidence, the most prominent legal authorities have called for an end to mandatory minimums, including the Judicial Conference of the United States,[17] the American Law Institute,[18] and the American Bar Association.[19]

---

[15] *See, e.g.,* Committee on the Judiciary, *Report on Bill 16-247, the "Omnibus Public Safety Act of 2006"* at 8-9 (April 28, 2006). ("Mandatory minimum sentences base punishment solely on perceived gravity of the criminal offense. By law, judges must sentence the defendant to a mandated prison term regardless of the defendant's role in the offense, culpability, or seriousness of the actual occurrence. Mandatory minimums severely limit or eliminate a judge's ability to distinguish between the least and most culpable defendants, even though the judge is the most impartial and most familiar with the facts of the case, and the judge's actions are public. Instead, mandatory minimums vest sentencing discretion in the prosecutor, even though the prosecutor is not impartial, and the prosecutor's decision is insulated from public and judicial scrutiny. The prosecutor is the one who seeks to plea bargain. Or who decides what charge (i.e, crime) to prosecute. So the prosecutor decides whether to threaten a mandatory minimum in order to force a plea bargain. Or the prosecutor decides whether to charge a lesser offense, that does not entail a mandatory minimum, because the chance of conviction is better. However the prosecutor chooses to· use the range of offenses available to charge in order to obtain a conviction, the fact is that with mandatory minimums the role of discretion is great with the prosecutor and virtually nonexistent with the judge.").

[16] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 149 ("During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and society. Empirical research and policy analyses have shown time and again that mandatory-minimum penalties fail to promote uniformity in punishment and instead exacerbate sentencing disparities, lead to disproportionate and even bizarre sanctions in individual cases, are ineffective measures for advancing deterrent and incapacitate objectives, distort the plea-bargaining process, shift sentencing authority from courts to prosecutors, result in pronounced geographic disparities due to uneven enforcement patterns in different prosecutors' offices, coerce some innocent defendants to plead guilty to lesser charges to avoid the threat of a mandatory term, undermine the rational ordering of graduated sentencing guidelines, penalize low-level and unsophisticated offenders more so than those in leadership roles, provoke nullification of the law by lawyers, judges, and jurors, and engender public perceptions in some communities that the criminal law lacks moral legitimacy.").

[17] Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017) ("The Commission is well aware of the Judicial Conference's longstanding position opposing mandatory minimum penalties and its support of legislative efforts such as expansion of the "safety valve" at 18 U.S.C. 3553(f). Mandatory minimum sentences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately foster a lack of confidence in the criminal justice system. For over sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing provisions and has supported measures for their repeal or to ameliorate their effects. The Judicial Conference also supports the Commission in its work in pursuit of an amendment to 18 U.S.C. § 924(c) to preclude the stacking of counts and make clear that additional penalties apply only when, prior to the commission of such offense, one or more convictions of such person have become final.") (https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf).

[18] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 166 ("Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and anecdotal

Subsection 22E-603(b) cross-references standard definitions of "felony" and "misdemeanor" and does not change current District law.

accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.").

[19] ABA House of Delegates, Resolution 10B on Mandatory Minimums (2017), at 4. ("RESOLVED, That the American Bar Association opposes the imposition of a mandatory minimum sentence; and FURTHER RESOLVED, That the American Bar Association urges Congress, state and territorial legislatures to repeal existing criminal laws requiring minimum sentences, and to refrain from enacting laws punishable by mandatory minimum sentences.").

RCC § 22E-604. Authorized Fines.

(a) *Authorized fines*. Unless otherwise expressly specified by statute, the maximum fine for an offense is:
- (1) For a Class 1 felony, $1,000,000;
- (2) For a Class 2 felony, $750,000;
- (3) For a Class 3 felony, $500,000;
- (4) For a Class 4 felony, $250,000;
- (5) For a Class 5 felony, $100,000;
- (6) For a Class 6 felony, $75,000;
- (7) For a Class 7 felony, $50,000;
- (8) For a Class 8 felony, $25,000;
- (9) For a Class 9 felony, $10,000;
- (10) For a Class A misdemeanor, $5,000;
- (11) For a Class B misdemeanor, $2,500;
- (12) For a Class C misdemeanor, $1,000;
- (13) For a Class D misdemeanor, $500; and
- (14) For a Class E misdemeanor, $250.

(b) *Alternative fines for pecuniary loss or gain, or organizational defendants*. A court may fine an actor:
- (1) Up to twice the pecuniary loss or pecuniary gain when:
  - (A) The offense, in fact, results in either pecuniary loss to a person other than the actor, or pecuniary gain to any person; and
  - (B) The information or indictment alleges the amount of the pecuniary loss or pecuniary gain and that the actor is subject to a fine double the amount of the pecuniary loss or pecuniary gain; or
- (2) Up to three times the amount otherwise provided by statute for the offense when the actor, in fact, is an organizational defendant and the information or indictment alleges the actor is an organizational defendant and is subject to a fine treble the maximum amount otherwise authorized.

(c) *Limits on fines.* Notwithstanding any other provision of law, a court may not impose a fine that would impair the ability of the person to make restitution or deprive the person of sufficient means for reasonable living expenses and family obligations.

(d) *Definitions*.
- (1) The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," "misdemeanor," "pecuniary gain," and "pecuniary loss" have the meanings specified in RCC § 22E-701.
- (2) In this section, "organizational defendant" means any actor other than a natural person, including a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.

COMMENTARY

Explanatory Note. Subsection (a) provides specific, standardized imprisonment penalties for offenses under Title 22E.

Subsection (b) sets alternative maximum fine penalties, as compared to the standard fines otherwise authorized under subsection (a) or, if applicable, a fine amount expressly specified in another statute. The provisions in paragraphs (b)(1) and (b)(2) are also alternatives to one another—an actor may be subject to an alternative fine under either paragraph (b)(1) or paragraph (b)(2), but not both. Paragraph (b)(1) states that if the offense of conviction is proven to have resulted in pecuniary loss to someone other than the actor, or a pecuniary gain to any person, then the fine imposed may be up to double the pecuniary loss or gain provided that the government's information or indictment alleges the amount of loss or gain and liability for a double fine. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the amount of pecuniary gain or loss. Paragraph (b)(2) states that if the actor is proven to be an organizational defendant then the fine may be up to triple the fines otherwise authorized, provided that the government's information or indictment alleges the actor is an organizational defendant and liability for a triple fine. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the actor's status. Both paragraphs (b)(1) and (b)(2) are subject to the limitations in subsection (c).

Subsection (c) states that courts must take into account the defendant's financial circumstances when sentencing a defendant to pay a fine. In particular, the court must consider how imposing the fine will affect the defendant's ability to pay restitution (if restitution has been ordered). The court may not impose a fine that would leave the defendant without the means to provide for his or her reasonable living expenses. The court must also take into account the defendant's obligations to financially support family members.

Paragraph (d)(1) cross-references the definition of "in fact" in RCC § 22E-207 and the definitions of "actor," "felony," "misdemeanor," "pecuniary gain," and "pecuniary loss" in RCC § 22E-701. Paragraph (d)(2) defines the term "organizational defendant" as any actor other than an individual human being. The term encompasses a range of non-natural organizations such as corporations.

Relation to Current District Law. Subsection (a) codifies entirely new law. District law does not set a schedule of fines by offense class. However, the Criminal Fine Proportionality Act of 2012 (FPA) now codified in D.C. Code §§ 22-3571.01 and 22-3571.02 sets fines for most current District offenses that generally correspond to the imprisonment penalty (although not the class) of each offense. The FPA does not precisely track imprisonment penalties insofar as D.C. Code § 22-3571.01(12) provides a separate maximum fine of $250,000 if the offense resulted in death, regardless of the imprisonment penalty, and D.C. Code 22-3571.02(a) provides that specific offenses may state they are exempt from D.C. Code § 22-3571.01 and state a different penalty.

In contrast, RCC § 22E-604(a) provides for fines that are mostly higher than existing District law and does not treat a result of death as categorically different.[20] The higher authorized fines may provide an alternative punishment to incarceration for some persons, including legal entities like businesses and corporations,[21] while low-income and indigent persons would not be subject to the higher crimes under RCC § 22E-604(c) (discussed below). Making fines track the imprisonment penalty rather than whether the crime resulted in death allows for differentiation in the seriousness of crimes such as negligent homicide and aggravated murder. These changes improve the consistency and proportionality of the revised statutes.

RCC § 22E-604(b) makes several changes to the D.C. Code's FPA provisions in §§ 22-3571.01 and 22-3571.02 regarding alternative fines. First, the current FPA provisions do not specify what, if any culpable mental state applies to the pecuniary loss or gain that must be proven, either the existence or amount of the pecuniary loss or pecuniary gain, or the nature of the actor(s) as an organizational defendant. Resolving this ambiguity, the revised statute specifies, through use of "in fact," that no culpable mental state requirement exists as to these elements in order to be liable for the alternative fines. Second, the FPA provides double fines, and limits the fines to offenses punishable by six months or more imprisonment.[22] In contrast, the revised statute

[20] The FPA authorizes a higher fine for 3-year felonies. This appears to be due to the fact that the FPA does not provide a distinct fine for 3-year felonies, instead grouping such fines with 5-year felonies which are subject to a $12,500 fine. For comparison: a fine-only offense is subject to a $100 fine under the FPA and a $250 fine under the RCC; a 30-day offense is subject to a $250 fine under the FPA and a $500 fine under the RCC; a 90-day offense is subject to a $500 fine under both the FPA and a $1,000 fine under the RCC; a 180-day offense is subject to a $1,000 fine under the FPA and a $2,500 fine under the RCC; a one-year offense is subject to a $2,500 fine under the FPA and a $5,000 fine under the RCC; a 3-year offense is subject to a $12,500 fine under the FPA and a $10,000 fine under the RCC; a 5-year offense is subject to a $12,500 fine under the FPA and a $25,000 fine under the RCC; a 10-year offense is subject to a $25,000 fine under the FPA and a $50,000 fine under the RCC; a 15-year offense is subject to a $37,500 fine under the FPA and a $75,000 fine under the RCC; a 20-year offense is subject to a $50,000 fine under the FPA and a $100,000 fine under the RCC; a 30-year offense is subject to a $125,000 fine under the FPA and a $250,000 fine under the RCC. The RCC further provides escalating fines up to $1,000,000 for 40-, 60-, and 80-year offenses whereas the FPA provides fines above $125,000 only where death results (regardless of the imprisonment penalty) and sets that penalty at $250,000.

[21] With respect to Subtitle III of Title 22E, property offenses, "person" is specifically defined to include non-natural persons. *See* RCC § 22E-701 (defining person to mean "an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity."). For other RCC and D.C. Code offenses, "person" generally includes non-natural entities. *See* D.C. Code § 45-604 ("The word 'person' shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").

[22] Although unclear from legislative history, presumably the underlying concern in this FPA provision was ensuring that such additional penalties only be levied in cases that are jury-demandable (which per current D.C. Code § 16-705 includes offenses with a six month or greater imprisonment). The increased fines for organizational defendants under the current D.C. Code statute has the effect of making charges for 180 day imprisonment offenses jury demandable for organizational defendants but not for natural persons, and this discrepancy would be exacerbated if the alternative fines for organizational defendants apply to all misdemeanors and treble damages are allowed. The revised statute provides the government the choice between pursuing treble fines which would make the charge jury-demandable for even very low-level

provides for treble fines and is applicable to all misdemeanors. Third, the FPA does not have any requirements as to the potential for heightened fines (unlike the alternative fine for pecuniary loss or pecuniary gain). In contrast, the revised statute requires the information or indictment to state that defendant is an organizational defendant subject to treble fines. These changes improve the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-604(c) codifies a new provision of District law limiting the applicability of fines to ensure that victim restitution is a priority over the collection of fines, to deter possible criminogenic effects of fines due to rendering a defendant destitute, and to ensure that family members or dependents of a defendant do not suffer additional negative consequences.. The current D.C. Code FPA provisions in § 22-3571.01 and § 22-3571.02 have no comparable provision. However, the DCCA's reasoning in the case *One 1995 Toyota Pick-up Truck v. District of Columbia*[23] and the consideration of financial means and family obligations when ordering restitution[24] suggest a similar approach. Notably, subsection RCC § 22E-604(c) does not restrict a court's lawful authority to require victim restitution, or otherwise address the relative priority of victim restitution and the defendant's means for reasonable living expenses and family obligations. This change improves the proportionality of the revised statutes.

RCC § 22E-604(d) codifies a definition for "organizational defendant" that is currently undefined in the D.C. Code §§ 22-3571.01 and 22-3571.02. The Fine Proportionality Act fails to define any this term, and no case law is on point. The definition of "organizational defendant" is intended to broadly reach any non-individual person recognized by law and is modeled on a definition in the Federal Sentencing Guidelines.[25] This change improves the clarity and completeness of the revised statutes.

(Class C or Class D) offenses, or pursuing normal fines with the same jury demandability as for natural persons. The revised D.C. Code § 16-705(b)(1) generally makes all offenses punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days jury demandable.

[23] 718 A.2d 558 (D.C. 1998). The DCCA held that, in the conceptually related arena of asset forfeiture, the Eighth Amendment poses *substantive limits* on financial sanctions. A salient fact in the DCCA's analysis was that the truck may have "played a significant role in the maintenance of [the defendant's] livelihood." *Id*. at 566.

[24] D.C. Code § 16-711 provides authority for requiring restitution or reparation and states in subsection (b) that, when ordered: "[T]he court shall take into consideration the number of victims, the actual damage of each victim, the resources of the defendant, the defendant's ability to earn, any obligation of the defendant to support dependents, and other matters as pertain to the defendant's ability to make restitution or reparation."

[25] U.S. Sentencing Guidelines Manual § 8A1.1 (2016). The Sentencing Guidelines in turn reference 18 U.S.C. § 18.

RCC § 22E-605. Charging and Proof of Penalty Enhancements.

(a) *Charging of penalty enhancements.* An offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless notice of the penalty enhancement is specified in the information or indictment for the offense.

(b) *Standard of proof for penalty enhancements*. Except for the establishment of prior convictions under D.C. Code § 23-111, an offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

COMMENTARY

Explanatory Note. RCC § 22E-605 sets certain procedural requirements for a penalty enhancement, whether a general penalty enhancement under RCC chapter 6 or any other penalty enhancement expressly specified by statute, to apply to an offense. Subsection (a) requires that notice of a penalty enhancement be provided in the information or indictment for the offense. Subsection (b) codifies the constitutional requirement[26] of proof beyond a reasonable doubt for the objective elements and culpable mental states specified in a penalty enhancement, excepting the ability of a court to take judicial notice of prior convictions if certain detailed procedures are followed under D.C. Code § 23-111.

Relation to Current District Law. Subsections (a) and (b) codify procedural requirements for penalty enhancements that the Supreme Court held to be constitutionally required in *Apprendi v. New Jersey* and subsequent case law. The subsections do not change current District law and provide improved clarity and notice of relevant limitations on penalty enhancements.

In 2000, the Supreme Court held in *Apprendi v. New Jersey* that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[27] The *Apprendi* decision was foreshadowed by the Court's earlier decision in *Jones v. United States*, which reasoned that: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[28] The *Apprendi* rule has been called "[O]ne of the most important developments in sentencing law since the criminal procedure revolution of the mid-twentieth

[26] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000), and subsequent case law.
[27] *Apprendi*, 530 U.S. at 490. Note, however, that jury findings are not necessary if the defendant consents to judicial factfinding. *Blakely v. Washington*, 542 U.S. 296, 310 (2004).
[28] *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999)).

century,"[29] because of its widespread implications for penalty enhancements and other provisions. Subsequent constitutional jurisprudence in *Alleyne v. United States* clarified that the notice and standard of proof requirements in *Apprendi* also extend to facts that establish mandatory minimum penalties at sentencing[30] and increase fines.[31] However, facts concerning prior convictions are not subject to the notice and standard of proof requirements under longstanding tradition.[32]

The DCCA has repeatedly recognized the *Apprendi* rule in the context of aggravating factors.[33] The DCCA has also recognized exception for facts concerning prior convictions,[34] and questions of law concerning the nature of prior convictions as crimes of violence.[35] Subsections (a) and (b) do not change this case law.

Currently, the D.C. Code does not contain a provision that broadly requires penalty enhancements to be alleged in the predicate offense's information or indictment, or establishes the standard of proof for penalty enhancement elements. D.C. Code § 23-111 addresses charging and standards of proof in the limited context of penalty enhancements that involve proof of prior convictions. However, subsections (a) and (b) and the provisions of D.C. Code § 23-111 are not in conflict. The charging requirement in subsection (a) is also imposed by D.C. Code § 23-111. Although D.C. Code § 23-111 provides greater procedural detail, those details supersede the more general requirement in subsection (a).[36] Similarly, the standard of proof requirement in subsection (b) explicitly allows for a lower standard of proof for the establishment of prior convictions as provided in D.C. Code § 23-111.[37]

[29] Wayne R. LaFave et al., Criminal Procedure § 26.4(i) (4th ed.).

[30] 133 S. Ct. 2151, 2155 (2013) ("Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury." (internal citation omitted)).

[31] *S. Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 2357 (2012).

[32] *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

[33] *See, e.g., Keels v. United States*, 785 A.2d 672, 687 (D.C. 2001) (aggravating factors in homicide sentencing).

[34] *See, e.g., Eady v. United States*, 44 A.3d 257, 261 (D.C. 2012); *Magruder v. United States*, 62 A.3d 720, 721–22 (D.C. 2013).

[35] *Dorsey v. United States*, 154 A.3d 106, 126 (D.C. 2017).

[36] The repeat offender penalty enhancement in RCC § 22E-606 explicitly recognizes the continued applicability of D.C. Code § 23-111. See Commentary to RCC § 22E-606 for more details.

[37] D.C. Code § 23-111 does not state that alleged facts concerning prior convictions must be proven beyond a reasonable doubt in all instances, but it does state that if a defendant denies any allegation in the information concerning a prior conviction the defendant shall file a response and the court shall hold a hearing on the issue. At the hearing, "the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact" except for claims that a conviction was obtained in violation of the Constitution of the United States—in which case the defendant "shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response."

RCC § 22E-606. Repeat Offender Penalty Enhancement.

(a) *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense and at the time has:
  (1) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or
  (2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
    (A) Committed within 10 years; and
    (B) Not committed on the same occasion.

(b) *Misdemeanor repeat offender penalty enhancement.* A misdemeanor repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a misdemeanor offense under Subtitle I of this title and at the time has:
  (1) Two or more prior convictions for a misdemeanor offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion;
  (2) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or
  (3) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
    (A) Committed within the prior ten years; and
    (B) Not committed on the same occasion.

(c) *Proceedings to establish previous convictions.* No person shall be subject to additional punishment for a felony or misdemeanor repeat offender penalty enhancement in this section unless the requirements of D.C. Code § 23-111 are satisfied.

(d) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine:
  (1) A felony repeat offender penalty enhancement under subsection (a) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:
    (A) For a Class 1 or Class 2 felony, 10 years and $50,000;
    (B) For a Class 3 or Class 4 felony, 6 years and $40,000;
    (C) For a Class 5 or Class 6 felony, 3 years and $30,000;
    (D) For a Class 7 or Class 8 felony, 2 years and $20,000; and
    (E) For a Class 9 felony, 1 year and $10,000; and
  (2) A misdemeanor repeat offender penalty enhancement under subsection (b) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:
    (A) For a Class A or Class B misdemeanor, 90 days and $500; and
    (B) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.

(e) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "comparable offense," "felony," "misdemeanor," and "prior conviction" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section provides penalty enhancements for repeat offenders. To provide proportionate penalties, the penalty enhancements are differentiated according to the type of instant offense and prior convictions, as well as the number of prior convictions. The revised repeat offender penalty enhancement statute replaces the general repeat offender statutes[38] in the current D.C. Code.*

Subsection (a) specifies the requirement for application of a felony repeat offender penalty enhancement to be proof that the actor in fact commits a felony offense and, at the time the actor commits the felony, the actor has a prior conviction or convictions of a specified type. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "in fact" in subsection (a) applies to each following element in subsection (a). "In fact," a defined term in RCC § 22E-207, is used in subsection (a) to indicate that there is no additional culpable mental state for the current felony beyond what is otherwise required for proof of the felony, and no culpable mental state requirement as to the existence or type of prior conviction or convictions.

Paragraph (a)(1) specifies that one way of being subject to a felony repeat offender penalty enhancement is to have at least one prior conviction for a felony in Subtitle I (Offenses Against Persons) of Title 22E, or a comparable offense, the offense not being committed on the same occasion. Subtitle I includes murder, sex offenses, robbery, assaults, kidnapping, human trafficking, and almost all of the other most serious offenses in the entire D.C. Code.[39] Only one prior conviction for a felony in Subtitle I (or comparable offense) is necessary for application of a felony repeat offender penalty enhancement. However, the prior conviction cannot be for conduct committed on the same occasion. The terms "felony," "prior conviction," and "comparable offense" are defined terms in RCC § 22E-701. A "felony" is an offense with an authorized penalty of over one year of imprisonment. "Prior conviction" broadly refers to final orders by District or other courts, with exclusions for juvenile delinquency adjudications, District convictions with pending diversion requirements or probation requirements under D.C. Code § 48-904.01(e), and convictions that have been vacated, sealed, expunged, commuted, or pardoned. "Comparable offense" broadly refers to a crime in the District or other jurisdiction with elements that would necessarily prove the elements of a corresponding District offense—here, a felony in Subtitle I of Title 22E. The determination of whether another jurisdiction's statute (or an older District statute) is equivalent to a current District offense is a question of law.

Paragraph (a)(2) specifies that a second way of being subject to a felony repeat offender penalty enhancement is to have at least two prior convictions for any District felony offenses or comparable offenses that were committed within the prior 10 years and were not committed on the same occasion. The terms "felony," "prior conviction," and

[38] D.C. Code §§ 22–1804; 22–1804a.

[39] Felony offenses in Subtitle I of Title 22E include offenses that are comparable to those currently deemed a "crime of violence" as defined in D.C. § 23–1331(4), except for property crimes of arson and burglary, which are not in Subtitle I. The felony offenses in Subtitle I of Title 22E include many additional offenses not in the current definition of "crime of violence" despite their direct and severe impact on complainants, such as human trafficking.

"comparable offense" are defined terms in RCC § 22E-701. A "felony" is an offense with an authorized penalty of over one year of imprisonment. "Prior conviction" broadly refers to final orders by District or other courts, with exclusions for juvenile delinquency adjudications, District convictions with pending diversion requirements or probation requirements under D.C. Code § 48-904.01(e), and convictions that have been vacated, sealed, expunged, commuted, or pardoned. "Comparable offense" broadly refers to a crime in the District or other jurisdiction with elements that would necessarily prove the elements of a corresponding District offense—here, any felony in the D.C. Code. The determination of whether another jurisdiction's statute (or an older District statute) is equivalent to a current District offense is a question of law.

Subsection (b) specifies the requirement for application of a misdemeanor repeat offender penalty enhancement to be proof that the actor in fact commits a misdemeanor offense under Subtitle I of Title 22E (Offenses Against Persons) and, at the time the actor commits the misdemeanor, the actor has a prior conviction or convictions of a specified type. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "in fact" in subsection (b) applies to each following element in subsection (b). "In fact," a defined term in RCC § 22E-207, is used in subsection (b) to indicate that there is no additional culpable mental state for the current misdemeanor beyond what is otherwise required for proof of the misdemeanor, and no culpable mental state requirement as to the existence or type of prior conviction or convictions.

Paragraph (b)(1) specifies that one way of being subject to a misdemeanor repeat offender penalty enhancement is to have at least two prior convictions for a misdemeanor in Subtitle I of Title 22E, or a comparable offense, the offense not being committed on the same occasion. Subtitle I includes misdemeanor sex offenses, assaults, criminal coercion, and other direct harms to persons. The terms "misdemeanor," "prior conviction," and "comparable offense" are defined terms in RCC § 22E-701. A "misdemeanor" is an offense with an authorized penalty of one year or less of imprisonment. "Prior conviction" broadly refers to final orders by District or other courts, with exclusions for juvenile delinquency adjudications, District convictions with pending diversion requirements or probation requirements under D.C. Code § 48-904.01(e), and convictions that have been vacated, sealed, expunged, commuted, or pardoned. "Comparable offense" broadly refers to a crime in the District or other jurisdiction with elements that would necessarily prove the elements of a corresponding District offense—here, any misdemeanor in Subtitle I of Title 22E. The determination of whether another jurisdiction's statute (or an older District statute) is equivalent to a current District offense is a question of law.

Paragraph (b)(2) specifies that one way of being subject to a misdemeanor repeat offender penalty enhancement is to have at least one prior conviction for a felony in Subtitle I of Title 22E, or a comparable offense, the offense not being committed on the same occasion. This provision is identical to the provision in paragraph (a)(1) for the felony repeat offender enhancement, making such a prior conviction also a basis for enhancement of a misdemeanor.

Paragraph (b)(3) also specifies that an additional way of being subject to a misdemeanor repeat offender penalty enhancement is to have two or more prior convictions for District of Columbia felony offenses, or comparable offenses, that were committed within the prior 10 years and not committed on the same occasion. This

provision is identical to the provision in paragraph (a)(2) for the felony repeat offender enhancement, making such prior convictions also a basis for enhancement of a misdemeanor.

Subsection (c) states that the procedural requirements of D.C. Code § 23-111, regarding the establishment of prior convictions, continue to apply to RCC § 22E-606. D.C. Code § 23-111 specifies the manner in which the government must provide notice of the prior convictions to be relied upon for a penalty enhancement, as well as hearing procedures should a defendant either deny an alleged prior conviction or claim that the alleged prior conviction was unlawfully obtained.

Subsection (d) specifies the nature and extent of the punishments for the felony and misdemeanor repeat offender penalty enhancements.

Paragraph (d)(1) specifies the additional imprisonment penalty and fine for a felony repeat offender penalty enhancement. The additional authorized penalty depends on the classification of the current offense and is: for a Class 1 or Class 2 offense is 10 years and $50,000; for a Class 3 or Class 4 felony, 6 years and $40,000; for a Class 5 or Class 6 felony, 3 years and $30,000; for a Class 7 or Class 8 felony, 2 years and $20,000; and for a Class 9 felony, 1 year and $10,000.

Paragraph (d)(2) specifies the additional imprisonment penalty and fine for a misdemeanor repeat offender penalty enhancement. The additional authorized penalty depends on the classification of the current offense and is: for a Class A or Class B misdemeanor, 90 days and $500; for a Class C, Class D, or Class E misdemeanor, 10 days and $50.

Subsection (e) cross-references the RCC § 22E-207 standard definition of "in fact," and the RCC § 22E-701 standard definitions of "comparable offense," "felony," "misdemeanor," and "prior conviction."

Relation to Current District Law. *The RCC repeat offender penalty enhancement statute changes current District law in eleven main ways.*

These changes to current District law are chiefly a result of the fact that the revised statute divides the penalty enhancement into two gradations based on the current offense's seriousness and general nature (i.e. whether the offense is a felony or misdemeanor offense against persons in Subtitle I of Title 22E, or a comparable offense), and the number, seriousness, and general nature of prior convictions. These changes to current District law generally reflect a modest expansion of liability for prior offenses against persons, a significant narrowing of liability for non-violent prior offenses, and a sharp reduction in the authorized punishments for all repeat offender enhancements.

Currently, the D.C. Code contains two separate repeat offender penalty enhancements, each with two penalty gradations, for a total of four gradations. D.C. Code § 22-1804 creates two gradations based on whether the defendant had one, or more than one, prior conviction, but the prior convictions must have been for an offense that "is the same as, constitutes, or necessarily includes" the instant offense. Thus, D.C. Code § 22-1804 does not grade according to the seriousness (misdemeanor or felony) of the current offense or prior convictions, or the nature of the offense (e.g., an offense against persons). Rather, D.C. Code § 22-1804 grades solely on the number and specific nature of the prior conviction (for the same or nearly same kind of offense). A different approach is taken in current D.C. Code § 22-1804a, which grades its penalty enhancement on the seriousness of the current offense and prior convictions (felonies),

the number of prior convictions (two or more), and whether the prior convictions were for a "crime of violence."[40] The current penalty enhancement statutes overlap with each other to the extent that they both are applicable to felonies (including crimes of violence) where the prior convictions are the same or nearly same kind as the instant offense.[41] Nothing in the statutory language for either current D.C. Code §§ 22-1804 or 22-1804a prevents "stacking" both penalty enhancements.[42]

First, in contrast to current District law, the revised repeat offender penalty enhancement is structured as one statute that precludes "stacking" penalties (the application of multiple repeat offender penalty enhancements). Under the revised statute, subsection (a) applies only to felonies and subsection (b) applies only to misdemeanors, and within subsection (a) the felony repeat offender enhancement applies if either paragraph (a)(1) or paragraph (a)(2) applies. This change improves the clarity and proportionality of the revised statutes.

Second, in contrast to current District law, the revised felony repeat offender penalty enhancement expands liability by providing an enhancement when a person has only one prior conviction for any felony in Subtitle I of Title 22E (not just for a crime that has the same elements or a crime that necessarily includes the current offense[43]). For example, under the revised statute, a person who commits a sex assault under RCC § 22E-1301 and has a single prior conviction for kidnapping under RCC § 22E-1401 would be subject to the felony repeat offender enhancement provision. This change improves the proportionality of the revised statutes.

---

[40] "Crime of violence" is a defined term in D.C. Code § 22-1804a which refers to the definition in D.C. Code § 22–4501, which in turn refers to D.C. Code § 23–1331(4). The definition of "crime of violence" in D.C. Code § 23–1331(4) includes many (but not all) crimes comparable to felony offenses against persons in the RCC, as well as some crimes comparable to property crimes in the RCC.

[41] For example, consider a person who commits first degree fraud under current D.C. Code § 22-3222(a) for stealing property by deception worth more than $1,000, and has three prior convictions for first degree fraud not committed on the same occasion. That person appears to be subject to both the repeat offender provision of D.C. Code § 22-1804 (because the prior convictions were the same as the current offense) and D.C. Code § 22-1804a(a)(1) (because the person committed two prior felonies not on the same occasion). Each enhancement involves proof of a fact not required by the other, and the limitation in D.C. Code § 22-1804(b) regarding stacking with a "provision of law which provides an increased penalty for a specific offense by reason of a prior conviction" does not apply to D.C. Code § 22-1804a because it is not concerned with a specific offense. Consequently, whereas first degree fraud is currently subject to up to 10 years imprisonment, the enhancement under D.C. Code § 22-1804 would treble that amount to 30 years, and D.C. Code § 22-1804a would enhance the statutory maximum another 30 years. Stacked, the enhancements would raise the penalty to 60 years for first degree fraud with three prior first degree fraud convictions.

[42] In general, a legislature can impose cumulative punishments, through multiple statutes, for the same conduct. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Thus, if a defendant were convicted of first-degree burglary and that defendant had two prior convictions for first-degree burglary, then that defendant may be subject to both the enhancement in D.C. Code §§ 22-1804 and 22-1804a. But, where the legislative intent to impose cumulative punishments is unclear, there may be litigation challenging the cumulative punishments under the Double Jeopardy Clause. *See, e.g., Whalen*, 445 U.S. at 687. Notably, the legislative history is silent as to the issue of stacking of the overlapping repeat offender enhancements in D.C. Code § 22-1804 and D.C. Code § 22-1804a which were established by Congress in 1971. *See, e.g.*, H.R. REP. NO. 907, 91st Cong., 2d Sess. 73-74 (1970).

[43] *Compare with* D.C. Code § 22-1804.

Third, in contrast to current District law, the revised misdemeanor repeat offender penalty enhancement expands liability by providing an enhancement when a person has two or more prior convictions for any misdemeanor in Subtitle I of Title 22E (not just for a crime that has the same elements or a crime that necessarily includes the current offense[44]). For example, under the revised statute, a person who commits a fifth degree assault that causes bodily injury to a protected person under RCC § 22E-1301 and has two prior convictions for committing first degree criminal threats under RCC § 22E-1204 would be subject to the misdemeanor repeat offender enhancement provision. This change improves the proportionality of the revised statutes.

Fourth, in contrast to current District law,[45] the revised repeat offender penalty enhancement (felony and misdemeanor) expands liability for prior convictions that were adjudicated by courts of federally-recognized Indian tribes. For example, a conviction for an assault adjudicated by the Navajo Nation may be a prior conviction under the revised statute. This change updates District law in line with the recent Supreme Court opinion in *United States v. Bryant*,[46] recognizing that convictions of federally recognized Indian tribes which are subject to the Indian Civil Rights Act (ICRA) of 1968[47] could be used as prior convictions under the federal repeat offender law there at issue.[48] This change fills a possible gap in the revised statutes.

Fifth, in contrast to current District law, except for prior convictions for a felony offense against persons in Subtitle I of Title 22E, the revised repeat offender penalty enhancement statute (felony and misdemeanor) eliminates liability for having just one prior conviction that has the same elements or a crime that necessarily includes the current offense. For example, under the revised statute, a person who commits fraud under RCC § 22E-2201 and has a single prior conviction for fraud of the same or higher value would not be subject to any repeat offender penalty enhancement. This change improves the proportionality of the revised statutes.

Sixth, in contrast to current District law, except for prior convictions for an offense against persons, the revised felony repeat offender penalty enhancement eliminates liability for prior convictions that occurred over 10 years ago. For example, under the revised statute, a person who commits fraud under RCC § 22E-2201 and has two prior convictions for fraud of the same or higher value committed over 10 years ago would not be subject to any repeat offender penalty enhancement. This change improves the proportionality of the revised statutes.

Seventh, in contrast to current District law,[49] the revised repeat offender penalty enhancement (felony and misdemeanor) eliminates liability for prior convictions based on conduct on the same occasion. For example, under the revised statute, a person who

---

[44] *Compare with* D.C. Code § 22-1804.

[45] D.C. Code § 22-1804 is limited to prior convictions under "a criminal offense under any law of the United States or of a state or territory of the United States," and D.C. Code § 22-1804a refers to a conviction by "a court of the District of Columbia, any state, or the United States or its territories."

[46] *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016), *as revised* (July 7, 2016).

[47] 25 U.S.C.A. § 1302.

[48] 18 U.S.C. § 117.

[49] D.C. Code § 22-1804a excludes multiple prior felonies or crimes of violence "committed on the same occasion." D.C. Code § 22-1804, however, has no limitations regarding the prior convictions occurring "on the same occasion."

commits a property crime and has two prior convictions, one a state charge and the other a federal charge arising out of the same occasion, would not be subject to any repeat offender penalty enhancement. This change improves the proportionality of the revised statutes.

Eighth, in contrast to current District law, the revised repeat offender penalty enhancement (felony and misdemeanor) eliminates liability for prior convictions that were juvenile delinquency adjudications, prior convictions subject to diversion or probation under D.C. Code § 48-904.01(e), convictions that were vacated, sealed, or expunged, and convictions that were granted clemency.[50] For example, a person who commits a misdemeanor offense under Subtitle I of Title 22E and has only one prior conviction for a misdemeanor offense under Subtitle I of Title 22E which was sealed, would not be subject to any repeat offender penalty enhancement. This change improves the proportionality of the revised statutes.

Ninth, in contrast to current District law, the revised felony repeat offender penalty enhancement eliminates liability for prior convictions that were felonies or crimes of violence in another jurisdiction or under prior District law, but not under current District law.[51] For example, a person who engages in pickpocketing and receives a felony conviction in another jurisdiction for a "robbery" that does not meet the requirements for robbery under RCC § 22E-1201 or any other felony in Subtitle I of Title 22E, would not be subject to a felony repeat offender penalty enhancement based on that prior conviction because it would not be a "comparable offense." This change requires prior convictions that are used for the revised repeat offender penalty enhancement to meet the requirements of current District laws and excludes convictions based on lower standards.[52] This change improves the proportionality of the revised statutes.

Tenth, in contrast to current District law, the revised repeat offender penalty enhancement authorizes an increase in penalty that is significant but works out to half or less than the penalty otherwise applicable to the current offense. This change is

[50] Neither D.C. Code §§ 22-1804 nor 22-1804a limit application in these circumstances, though both statutes specifically exclude prior convictions that were "pardoned."

[51] The plain language of D.C. Code § 22-1804a(b)(1) refers simply to being "convicted of a felony by a court of the District of Columbia, any state, or the United States or its territories," without any limitation as to whether the felony in the other jurisdiction would count as a felony under current District law. While jurisdictions may vary on what crimes constitute felonies and misdemeanors, for most offenses and jurisdictions there is a consistent differentiation between misdemeanors and felonies based solely on whether the imprisonment penalty is over one year. However, the meaning of a "crime of violence" in another jurisdiction is unclear and the meaning of the current D.C. Code § 22-1804a(b)(2) is arguably ambiguous when it requires that a person "was convicted of a crime of violence as defined by § 22-4501, by a court of the District of Columbia, any state, or the United States or its territories." This language may be construed to mean that a conviction for any crime in another jurisdiction, regardless of its elements, is a "crime of violence" conviction if it has the label of "burglary" or one of the other enumerated "crimes of violence" in the D.C. Code. Alternatively, it may be that a conviction in another jurisdiction that has the same elements as "burglary" in the D.C. Code, but has a different name, would still be considered a predicate "crime of violence" for purposes of D.C. Code § 22-1804a(b)(2). Given the ambiguity of the current D.C. Code § 22-1804a(b)(2), the revised felony repeat offender enhancement's requirements for a "comparable offense" may be viewed as a possible, rather than a clear, change in law.

[52] For example, theft of $200 would constitute a felony in the Commonwealth of Virginia punishable by one to twenty years imprisonment (Va. Code § 18.2-95), but would constitute a misdemeanor in the District punishable by up to 180 days (D.C. Code § 22-3212).

consistent with the District's ongoing reliance on prior convictions to determine punishments within the statutorily-authorized range. This change improves the proportionality of the revised statutes.

Eleventh, in contrast to current District law, the revised repeat offender penalty enhancement is not classified as a "Class A" offense for purposes of imprisonment following revocation of release. Current D.C. Code § 22–1804a(a)(3) provides that any felony enhanced under that statute is a "Class A" felony for purposes of imprisonment following revocation of release authorized by § 24-403.01.[53] However, offenses to which a felony repeat offender penalty enhancement is applicable include repeat property crimes which still may be of significantly lower seriousness than other offenses classified as "Class A" offenses.[54] This change improves the proportionality of the revised statutes.

[53] D.C. Code § 22–1804a(a)(3) ("For purposes of imprisonment following revocation of release authorized by § 24-403.01, the third or subsequent felony committed by a person who had previously been convicted of 2 prior felonies not committed on the same occasion and the third or subsequent crime of violence committed by a person who had previously been convicted of 2 prior crimes of violence not committed on the same occasion are Class A felonies.").

[54] *See, e.g.,* D.C. Code § 22–2101, Murder.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

(a) *Pretrial release penalty enhancement.* A pretrial release penalty enhancement applies to an offense when, in fact, at the time the actor commits the offense the actor is on pretrial release under D.C. Code § 23-1321.

(b) *Exceptions.* Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense of contempt under D.C. Code § 11-741, Third Degree Escape from a Correctional Facility or Officer under RCC § 22E-3401(c), tampering with a detection device under RCC § 22E-3402(a)(1)(B), or violation of a condition of release under D.C. Code § 23-1329 for the same conduct.

(c) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine, a pretrial release penalty enhancement increases the authorized term of imprisonment and fine for an offense above the otherwise authorized penalty classification:

(1) For a Class 1 or Class 2 offense, 10 years and $50,000
(2) For a Class 3 or Class 4 felony, 6 years and $40,000;
(3) For a Class 5 or Class 6 felony, 3 years and $30,000;
(4) For a Class 7 or Class 8 felony, 2 years and $20,000;
(5) For a Class 9 felony, 1 year and $10,000;
(6) For a Class A or B misdemeanor, 90 days and $500; and
(7) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.

(d) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," and "misdemeanor" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *RCC § 22E-607 provides a penalty enhancement for offenses committed while on pretrial release under D.C. Code § 23-1321. The revised Pretrial release penalty enhancement statute replaces the penalty enhancement for offenses committed during release (OCDR) statute*[55] *in the current D.C. Code.*

Subsection (a) specifies the requirement for application of a pretrial release penalty enhancement to be proof that the actor in fact commits an offense and, at the time the actor commits the offense, the actor is on pretrial release under D.C. Code § 23-1321. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "in fact" in subsection (a) applies to each following element in subsection (a). "In fact," a defined term in RCC § 22E-207, is used in subsection (a) to indicate that there is no additional culpable mental state for the current offense beyond what is otherwise required for proof of the offense, and no culpable mental state requirement as to the fact that the actor is on pretrial release under D.C. Code § 23-1321.

[55] D.C. Code § 23–1328. Notably, although the language of D.C. Code § 23-1328 has led to confusion by some as to whether OCDR is a separate offense or a penalty enhancement, the DCCA has clearly ruled that OCDR is a penalty enhancement. *See Tanismore v. United States*, 355 A.3d 799, 803 (D.C. 1979).

Subsection (b) specifies offenses to which the pretrial release penalty enhancement does not apply. Paragraph (b)(1) provides that the enhancement does not apply to contempt, tampering with a detection device under 22E-3402(a)(1)(B) (which specifically addresses detection devices worn pretrial), or a violation of a condition of release under D.C. Code § 23-1329. Paragraph (b)(2) provides that the enhancement does not apply to any offense when the person is convicted of contempt, escape from a Correctional Facility or Officer under RCC § 22E-3401(c), tampering with a detection device under RCC § 22E-3402, or a violation of a condition of release under D.C. Code § 23-1329 for the same conduct.

Subsection (c) specifies the nature and extent of the punishments for the pretrial release penalty enhancement. Subsection (c) specifies the additional imprisonment penalty and fine an actor is subject to for the enhancement, which depends on the classification of the current offense. The additional authorized penalty for commission of a Class 1 or Class 2 offense is 10 years and $50,000; for a Class 3 or Class 4 felony, 6 years and $40,000; for a Class 5 or Class 6 felony, 3 years and $30,000; for a Class 7 or Class 8 felony, 2 years and $20,000; for a Class 9 felony, 1 year and $10,000; for a Class A or B misdemeanor, 90 days and $500; for a Class C, Class D, or Class E misdemeanor, 10 days and $50.

Subsection (d) cross-references the RCC § 22E-207 standard definition of "in fact," and the RCC § 22E-701 standard definitions of "actor," "felony," and "misdemeanor."

Relation to Current District Law. *The RCC pretrial release penalty enhancement changes current District law in three main ways.*

First, the revised pretrial release penalty enhancement penalties vary by the particular penalty classification of the current offense, authorizing more severe fine and imprisonment punishment for committing a more severe offense during pretrial release. Current D.C. Code § 23-1329(a) grades the offense by whether the current offense is a felony (subject to up to 5 years additional imprisonment) or a misdemeanor (subject to up to 180 days additional imprisonment), with fines dependent on a more precise breakdown of the length of imprisonment penalty specified in D.C. Code § 22-3571.01. In contrast, the revised statute specifies six different penalties, imprisonment and fine, based on the penalty classification of the offense committed during release. This change improves the proportionality of the revised statutes.

Second, a revised pretrial release penalty enhancement penalty may be set to run consecutive or concurrent to any other sentence. Current D.C. Code § 23-1329(c) requires that any term of imprisonment for OCDR be consecutive to any other imprisonment. In contrast, the revised statute allows judges to decide whether a consecutive sentence is appropriate. This change improves the proportionality of the revised statutes.

Third, the revised pretrial release penalty enhancement expressly bars application of the enhancement to certain listed crimes or any offense when a person is also convicted of one of the listed crimes. Current D.C. Code § 23-1329 has no prohibitions on what offenses can be enhanced. In contrast, the revised statute bars use of the enhancement in relation to several offenses dealing with violation of judicial orders while on release—contempt under D.C. Code § 11-741, escape from a Correctional Facility or Officer under RCC § 22E-3401(c), tampering with a detection device under RCC § 22E-

3402, or violation of a condition of release under D.C. Code § 23-1329—or any offense when a person is also convicted of one of these crimes. When a defendant commits an offense while on pretrial release, in virtually every such case a defendant is also subject to the separate but overlapping crimes of violating a condition of release[56] and the general offense of contempt of court[57] for the same conduct based on the practice of prohibiting criminal activity as a condition of release.[58] Also, the tampering with a detection device offense under RCC § 22E-3402(a)(1)(B) specifically refers to the conduct occurring during pretrial release, and escape from a correctional facility or officer under RCC § 22E-3401(c) covers persons in a half-way house pretrial. The subsection (d) limitation on applying RCC § 22E-608 preserves existing charging options and does not affect in any manner liability for the contempt offense in Title 11,[59] but reduces the practical effect of the overlapping statutes.[60] This change improves the clarity and proportionality of the revised statutes.

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

The revised statute, in conjunction with RCC § 22E-605, specifies that the fact that the actor was on pretrial release at the time of the offense is a circumstance element that must be proven beyond a reasonable doubt. Current D.C. Code § 23-1329 is silent as to whether OCDR requires proof beyond a reasonable doubt as to the status of being on pretrial release. The DCCA has twice recognized in recent years that the constitutional protections described in *Apprendi* may apply to OCDR but declined to resolve the question.[61] In contrast, the revised statute requires proof beyond a reasonable doubt as to the actor's pretrial release status at the time of the offense. By requiring proof beyond a reasonable doubt, the revised OCDR offense moots the question whether proof is required under *Apprendi*. This statutory clarification of the burden of proof is consistent with pre-*Apprendi* DCCA case law that previously recognized that the prosecution has the burden of proof for showing a defendant was on release at the time he committed the second offense.[62] Consistent with DCCA case law, however, at trial, a defendant may stipulate as to the fact that the actor was on pretrial release at the time of an offense in order to avoid potentially prejudicial evidence being brought to bear in a case.[63] This change clarifies and fills a possible gap in the revised statutes.

[56] D.C. Code § 23-1329.
[57] D.C. Code § 11-944.
[58] *See Speight v. United States*, 569 A.2d 124, 127 (D.C. 1989) (en banc).
[59] Under the Home Rule Act, the District lacks the ability to legislate changes to Title 11 provisions.
[60] The DCCA has shown great reluctance toward punishing these overlapping offenses separately. *See Speight*, 569 A.2d at 130-31 (narrow concurring opinion forming the en banc plurality relied upon underlying violation of a condition of release to uphold OCDR liability).
[61] *Williams v. United States*, 137 A.3d 154, 164 (D.C. 2016); *Eady v. United States*, 44 A.3d 257, 265 (D.C. 2012).
[62] *Tansimore*, 355 A.2d at 804.
[63] *Williams v. United States*, 137 A.3d 154, 164 (D.C. 2016).

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

The revised statute clarifies that no culpable mental state is required as to the actor's status on being on pretrial release. Current D.C. Code § 23-1329 is silent as to what, in any culpable mental states are required for the offense, but subsection (b) of the current statute expressly states that: "The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section." The revised statute eliminates this provision as unnecessary, particularly because the revised statute specifies there is no culpable mental state requirement.

RCC § 22E-608. Hate Crime Penalty Enhancement.

(a) *Hate crime penalty enhancement.* A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, or political affiliation of a person or group of persons.
(b) *Penalty.* A hate crime penalty enhancement increases the otherwise applicable penalty classification for any offense or gradation of an offense by one class.
(c) *Definitions.* The term "purpose" has the meaning specified in RCC § 22E-206; and the terms "actor," "homelessness" "property," "pecuniary loss," and "person acting in the place of a parent per civil law," have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the hate crime penalty enhancement for the Revised Criminal Code (RCC). This general penalty provides a penalty enhancement where the defendant selected the target of the offense because of prejudice against certain perceived attributes of the target. The hate crime penalty enhancement provides additional punishment based on the nature of a person's criminal action, , in compliance with the Supreme Court's holding in Wisconsin v. Mitchell.*[64] *The revised hate crime penalty enhancement replaces the bias-related crime statute definition and penalty provisions*[65] *in the current D.C. Code.*

Subsection (a) first requires a person to have committed all the elements of a predicate offense as elsewhere defined in Title 22E, including any culpable mental states required for the predicate offense. Any offense to which the general provisions in Subtitle I of Title 22E apply is subject to this penalty enhancement, whether a misdemeanor or felony, or an offense against persons, a property offense, or otherwise. The penalty enhancement also is applicable to inchoate offenses in Title 22E (including attempts and conspiracies).

Subsection (a) also requires the predicate offense to have been committed with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to another person or group of persons. The terms "pecuniary loss" and "property" are defined terms in defined at RCC § 22E-701. "Purpose," a term defined at RCC § 22E-206, here means that the actor must consciously desire to intimidate, physically harm, etc. the person or group of persons. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Consequently, it is not necessary to prove that the actor succeeded in

[64] 508 U.S. 476 (1993).
[65] D.C. Code §§ 22-3701, 22-3703.

intimidating, physically harming, etc. the person or group of persons, and the predicate offense may involve a complainant mistakenly harmed by the actor.[66]

Subsection (a) clarifies through use of the phrase "in whole or part" that the actor's conscious desire to intimidate, physically harm, etc. need not have been the sole or primary reason for the conduct.[67] However, the conscious desire to intimidate, physically harm, etc. must have been "because" of one of the specified types of prejudice, meaning the prejudice was a "but for"[68] cause of the actor's desire. Targeting a person because of that person's sex or other characteristic, would not suffice for the enhancement unless prejudice against the person was a but-for cause of the actor's motive. For example, a burglar who targeted the homes of elderly persons not out of prejudice against the elderly, but because of a belief that these homes were most likely to have expensive medications that could be stolen, would not be subject to a hate crime penalty enhancement.

Subsection (a) further requires the prejudice against another that is a cause of the actor's conduct be against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression, homelessness, physical disability, or political affiliation of a targeted person or group of persons. Mistakes as to the actual existence of the race, color, religion, or other protected attribute do not limit liability as it is the actor's perception of the protected attribute that matters. In addition, the complainant harmed by actor's conduct may be chosen despite the actor's awareness that the complainant does not themselves possess one of the protected attributes.[69] The complainant who experiences the offense, the target of the harm, and the person or group of persons against whom the actor is prejudiced also need not be a particular identifiable person for the hate crime penalty enhancement to apply.[70] All that is required regarding the person or group of persons is that the actor's conduct is committed in part because of prejudice against the perceived race, color, etc. of a person or group of persons.

---

[66] For an example of a mistake, consider a person who throws a bottle at a target person with the purpose of harming the person because of their race. If the bottle misses the target person and instead strikes and causes bodily injury to a person passing by, and the actor was reckless as to the bottle hitting the person passing by, then the assault charge against the passerby is subject to the hate crime penalty enhancement even though the complainant was not the target of the prejudiced action. (In addition, an attempted assault charge against the target also would be subject to a hate crime penalty enhancement under this fact pattern.)

[67] For example, the prejudiced desire to intimidate the complainant because of their religion may have been in addition to an intent to obtain money from the complainant by robbery or because of a prior slight by the complainant.

[68] For further details of the meaning of "but for" causation, see RCC § 22E-204(b) ("A person's conduct is the factual cause of a result if: (1) The result would not have occurred but for the person's conduct;") and associated commentary.

[69] For example, a hate crime penalty enhancement is applicable to an actor who destroys the office of a lawyer representing a political party when the actor's purpose was to engage in criminal damage to the property in part because of prejudice against the perceived political affiliation of the lawyer's client.

[70] For example, if other requirements are proven regarding the purpose to cause harm because of prejudice against others, it would suffice for liability that the actor painted graffiti on a church, mosque, or synagogue without understanding or desiring that the conduct would affect any particular person who is a member of that church, mosque, or synagogue.

Subsection (a), through the requirement that the offense be "with the purpose", excludes liability based on unconscious[71] bias and other circumstances where the actor does not consciously desire to cause a harm because of their prejudice against another.[72] The revised statute also requires that the actor to have a "prejudice against" a target, precluding liability for action because of positive biases.

Subsection (b) establishes that the effect of the penalty enhancement is an increase of one class to the predicate offense's otherwise applicable penalty classification.

Subsection (c) cross references definitions elsewhere in the revised criminal code.

Relation to Current District Law. *The RCC hate crimes penalty enhancement statute changes current District law for bias-related crimes in four main ways.*

First, the revised statute bases liability for the hate crime penalty enhancement on the subjective intent and personal prejudice of the actor when committing a crime. Under current D.C. Code § 22-3701(1), there is only an objective standard of whether there is a "designated act [crime] that demonstrates an accused's prejudice," with no express culpable mental state requirement for any aspect of the enhancement. Case law has not addressed whether the current statute has any subjective requirement that the actor be aware of their reasons for committing the crime. In contrast, the revised statute requires the actor to consciously desire—at least to some degree—that the crime harm the target person or persons because of prejudice. The revised statute does this by requiring proof that a crime was committed "with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to another person or group of persons because of prejudice…". "Purposely" is a defined term in the RCC[73] meaning the actor must consciously desire that the harm occur because of their prejudice. Applying at least a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[74] and insofar as the statute addresses a motive for criminal conduct it is the actor's desire (not knowledge as to their internal state) that is relevant.

---

[71] For example, while it may be relevant to the question whether a person acted with the purpose to harm another because of their prejudice against those of the opposite gender, it may not be sufficient to prove through testing (see e.g. https://implicit.harvard.edu/implicit/) that the actor is implicitly biased against another gender.

[72] For example, consider a straight person who knows that he has a prejudice against gay people and is aware another person is gay. If the straight person then assaults the gay person because the latter is an Astros fan, the straight person is not subject to liability under the revised statute unless the factfinder determines that, at least in part, the assaultive conduct was committed with the conscious desire to harm the complainant because of their sexual orientation.

For example, Person A (straight) doesn't like Person B (gay) simply because B is an Astros fan. Person C (straight) is B's friend. If A starts a bar fight with B, and C joins in on B's side, should A be precluded from claiming a heat of passion defense as to C but not B? This does not appear to be the intent of the bills, but the possibility arises from the drafting of the statute and the ambiguity of "associated with" language. In this hypothetical, A's fight was not "related to" B's identity in the sense of being causally linked (strongly or loosely), but if A knew B was gay and that C appears to b

[73] RCC § 22E-206.

[74] *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)").

The approach of the revised statute avoids challenges to the statute's constitutionality that may arise under the current statute's purely objective requirement that a designated act merely "demonstrate" prejudice.[75] This change improves the clarity, completeness, and constitutionality of the revised statutes.

Second, the revised statute extends liability for the penalty enhancement in some situations to a complainant who is not themselves perceived to have (or actually have) one of the protected characteristics. Under current D.C. Code § 22-3701, the penalty enhancement applies to a crime that "demonstrates the accused's prejudice based on the actual or perceived race…of a victim of the subject [crime]". While there is no case law on point, the plain language of the current statutory text appears to require the prejudice be toward a characteristic of the complainant. In contrast, the revised statute permits application of the penalty enhancement when the complainant of the predicate offense is not the person possessing the attribute that is the subject of the actor's prejudice—so long as the actor's criminal conduct results from the actor's desire to intimidate, physically harm, etc. because of a specified type of prejudice against anyone (e.g., a third party). This change allows the hate crime penalty enhancement to apply to crimes which are motivated by one of the specified types of prejudice but the person who experiences the harm is a third party.[76] This change fills a possible gap in liability in the revised statute.

Third, the revised statute eliminates liability for relevant conduct in connection with prejudice based on marital status, personal appearance, family responsibility, and matriculation. Under current D.C. Code § 22-3701, the penalty enhancement applies to prejudice based on these four characteristics, as well as more traditional protected characteristics such as race, color, religion, national origin, and gender. The list of protected characteristics in the current bias-related crime statute tracks the list of characteristics protected under District civil law in the areas of employment, housing, etc.[77] In contrast, the revised statute applies to prejudice concerning a more limited list of characteristics, omitting marital status, personal appearance, family responsibility, and matriculation. While any prejudice based on the omitted characteristics is condemnable, in practice, criminal action in connection with these four matters may be more rare[78] and be difficult to distinguish from individual dislikes and hatred (as compared to a categorical prejudice against an identifiable class). The omission of these characteristics as separate, independent bases of liability for the hate crimes penalty enhancement does not preclude their evidentiary value in proving another characteristic that is recognized in

[75] *See State v. Pomianek*, 110 A.3d 841, 843 (2015) ("We hold that N.J.S.A. 2C:16–1(a)(3) [N.J. bias enhancement], due to its vagueness, violates the Due Process Clause of the Fourteenth Amendment. In focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law. That is so because a defendant may be convicted of a bias crime even though a jury may conclude that the defendant had no intent to commit such a crime.").

[76] For example, a hate crime penalty enhancement is applicable to an actor who destroys the office of a politically unaffiliated lawyer representing a political party when the actor's purpose was to engage in criminal damage to the property in part because of prejudice against the perceived political affiliation of the lawyer's client.

[77] *See, e.g.*, D.C. Code § 2-1401.11 (employment prohibitions).

[78] In recent years, MPD has no record of crimes based on these types of prejudice, in contrast to other types. *See* https://mpdc.dc.gov/hatecrimes.

the revised statute.[79] This change improves the clarity and proportionality of the revised statutes.

Fourth, the effect of the revised hate crime penalty enhancement is to raise by one class the penalty classification of the predicate offense to which the actor is otherwise subject. Under current D.C. Code § 22-3701 the effect of the enhancement is to raise the fine and imprisonment penalties by one and one-half times. In contrast, the revised statute utilizes the standardized set of penalty classifications in RCC §§ 22E-603 and 22E-604 to provide more severe, proportionate enhancement penalties. This change improves the consistency and proportionality of the revised statutes.

Beyond these four changes to current District law, one other aspect of the revised hate crime penalty enhancement statute may constitute a substantive change of law.

The revised statute clarifies the existence and nature of the link between the predicate crime and the actor's prejudice. Under current D.C. Code § 22-3701 it is unclear whether there is any required connection between the crime and the actor's prejudice because the current statute only requires that the crime "demonstrates an accused's prejudice." However, in *Shepard v. United States*[80] the DCCA rejected claims that the language of D.C. Code § 22-3701 was unconstitutionally vague and criminalized beliefs, based on a finding that the trial court "implicitly applied the statute as requiring a clear nexus between the bias identified in the statute and the assault," and the facts of the case.[81] But, the *Shepard* opinion also noted that it was not definitively ruling on the constitutionality of the statute, given the plain error standard it was applying in the case.[82] In contrast, the revised statute clearly requires a causal nexus between the actor's criminal act and his or her prejudice—the crime must be committed with the purpose, in whole or part, of intimidating, physically harming, etc. a person or group of persons *because of* the actor's prejudiced perception of another person or group of persons. The reference to "in whole or part" clarifies that the there may be other purposes involved in the criminal act, but that for the enhancement to apply the actor must have engaged in the crime consciously desiring to intimidate, physically harm, etc. a person because of the prejudice. RCC § 22E-204, as applied to RCC § 22E-607, further clarifies the role of prejudice compared to other motives—the prejudice must have been the "but for" cause of the commission of the predicate offense. This change improves the clarity, completeness, and proportionality of 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 statute clarifies what the DCCA has called the "puzzling wording"[83] of existing D.C. Code § 22-3701, which refers to a "designated act" as the predicate for the penalty enhancement. Consistent with current District law and the

[79] For example, personal appearance in the form of hairstyle or dress may be relevant to assessing whether a person was perceived to be of a particular race, religion, or gender identity or expression.
[80] 905 A.2d 260 (D.C. 2006).
[81] *Shepherd v. United States*, 905 A.2d 260, 262-63 (D.C. 2006).
[82] *Id*. at 262.
[83] *Aboye v. United States*, 121 A.3d 1245, 1249 (D.C. 2015)

DCCA holding in *Aboye*, RCC § 22E-607 clarifies that any criminal offense is subject to the hate crime penalty enhancement.

Second, the revised statute is renamed a "hate crime" penalty enhancement instead of the "bias-related crime" title currently used in D.C. Code § 22-3701. The term "hate crime" is popularly used to denote criminal acts of this nature.[84]

Third, the revised statute combines the multiple statutory sections currently in D.C. Code §§ 22-3701, 22-3703 into one section. The revised statute also makes conforming changes to the civil provisions to match the changes made regarding the penalty enhancement.

[84] *See, e.g.*, 18 U.S.C. § 249 ("Hate crime acts"); MPD statistics and description available online at: https://mpdc.dc.gov/hatecrimes.

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(a) *Civil Provisions on Data Collection and Publication.*

(1) The Metropolitan Police Department shall afford each crime victim the opportunity to submit with their complaint a written statement that contains information to support a claim that the conduct that occurred is a crime subject to a hate crime penalty enhancement under RCC § 22E-608.

(2) The Mayor shall collect and compile data on the incidence of crime subject to a hate crime penalty enhancement under this section, provided that such data shall be used for research or statistical purposes and shall not contain information that may reveal the identity of an individual crime victim.

(3) The Mayor shall publish an annual summary of the data collected under paragraph (b)(2) of this section and transmit the summary and recommendations based on the summary to the Council.

(b) *Civil Action.*

(1) Irrespective of any criminal prosecution or the result of a criminal prosecution, a civil cause of action in a court of competent jurisdiction for appropriate relief shall be available for any person who alleges that they have been subjected to conduct that constitutes a criminal offense committed with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, or political affiliation of a person or group of persons.

(2) In a civil action under paragraph (b)(1) of this section, the relief available shall include:

(A) An injunction;

(B) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

(C) Punitive damages in an amount to be determined by a jury or a court sitting without a jury; or

(D) Reasonable attorneys' fees and costs.

(3) An actor's parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor shall be liable for any damages that an actor under 18 years of age is required to pay in a civil action brought under paragraph (b)(1) of this section, if any action or omission of the parent or person acting in the place of a parent per civil law contributed to the conduct of the actor.

(c) *Definitions.* The terms "actor" and "person acting in the place of a parent per civil law" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes civil provisions for the hate crime penalty enhancement for the Revised Criminal Code (RCC). The civil provisions concern data collection and civil legal actions related to the hate crime penalty enhancement. These civil provisions replace the civil provisions of the bias-related crime statute*[85] *in the current D.C. Code.*

Subsection (a) provides for data collection and publication concerning the incidence of crimes subject to a hate crime penalty enhancement. Paragraph (a)(1) specifies that MPD shall afford a victim the opportunity to submit a written statement in support of a claim that the conduct that occurred was a crime subject to a hate crime penalty enhancement. Paragraph (a)(2) requires the Mayor to collect and compile data on the incidence of crime subject to a hate crime penalty enhancement provided that the information gathered does not reveal a complainant's identity. Paragraph (a)(3) requires the Mayor to publish an annual summary of the data it collects and submit the summary and recommendations to the Council.

Subsection (b) provides civil liability for conduct that constitutes a hate crime penalty enhancement. Paragraph (b)(1) specifies that a civil action may be brought by any person who alleges that they have been subjected to conduct that constitutes a criminal offense committed with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, or political affiliation of a person or group of persons.

Paragraph (b)(2) specifies a non-exhaustive list of remedies that shall be available in a civil action under subsection (a).

Paragraph (b)(3) specifies that an actor's parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor is responsible for the payment of any damages required in a civil action against an actor who is under 18 years of age, if the parent or person acting in the place of a parent per civil law contributed to the actor's conduct. The term "person acting in the place of a parent per civil law" is a defined term in RCC § 22E-701 and includes both persons who have put themselves in the situation of a lawful parent in practice, and those formally appointed by a court. Parents who are not legally responsible for the health, welfare, or supervision of the actor are not liable under paragraph (b)(3).

Subsection (c) cross references definitions found elsewhere in the revised criminal code.

Relation to Current District Law. *The RCC hate crimes penalty enhancement civil provisions statute changes current District law for bias-related crimes in one main way.*

The revised hate crimes penalty enhancement statute civil provisions describe the conduct that is the subject of data collection and a civil action in accordance with the

[85] D.C. Code §§ 22-3702, 22-3704.

revised elements in the hate crimes penalty enhancement, RCC § 22E-608. The current civil provisions in D.C. Code §§ 22-3702 and 22-3704 restate the elements of the current bias enhancement in D.C. Code § 22-3701, including reference to an "act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, homelessness, physical disability, matriculation, or political affiliation." In contrast, the revised civil provisions track the articulation of elements provided in the revised hate crimes penalty enhancement statute, RCC § 22E-608, which makes multiple changes to current District law. This change clarifies the revised statutes.

Beyond this one change to current District law, two other aspects of the revised hate crime penalty enhancement civil provisions statute may constitute substantive changes of law.

First, the revised statute makes a "parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor, " responsible for any civil damages assessed against an actor under 18 years of age. The current D.C. Code § 22-3704(c) states that the "parent of a minor shall be liable for any damages that a minor is required to pay under subsection (a) of this section, if any action or omission of the parent or legal guardian contributed to the actions of the minor." It is unclear whether the reference to a "legal guardian" in the second half of this sentence (regarding acts and omissions) means that legal guardians also have financial liability along with parents per the first half of this sentence. The terms "legal guardian" and "minor" are also undefined and there is no DCCA case law on point. It is also unclear whether any biological parent, regardless whether the parent has custody, is liable. To resolve these ambiguities, the revised statute consistently refers to "parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor, " who is under 18 years of age. The term "person acting in the place of a parent per civil law" is defined in RCC § 22E-701 and consistently applied to multiple statutes. The language excludes parents who are not at the time legally responsible for the welfare of their child. This change clarifies the revised statutes.

Second, the revised statute does not include an evidentiary standard for the civil proceeding. The current D.C. Code § 22-3704(b) states that whether a person has been subjected to conduct under the bias-related crime statute "shall be determined by reliable, probative, and substantial evidence." The statute does not define the meaning of these terms and there is no case law on point as to whether codification of this standard—particularly the use of the term "substantial"—is intended to limit the otherwise applicable rules of evidence in a civil proceeding. To resolve this ambiguity, the revised statute eliminates reference to "reliable, probative, and substantial evidence." This change clarifies the revised statute.

RCC § 22E-701. Generally Applicable Definitions.

"Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year; or

(B) In other jurisdictions, an offense punishable by death.

Explanatory Note. The RCC definition of the term "felony" includes offenses for which more than a year of imprisonment may be imposed, in the District or any jurisdiction. In addition, felonies include criminal offenses under the laws of other jurisdictions that are punishable by death.

The term "felony" is new, and term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "felony" is used in the de minimis defense[86], the offense classification statute[87], statutes specifying authorized terms of imprisonment[88] and fines[89], the repeat offender penalty enhancement[90], the pretrial release penalty enhancement[91], and the revised kidnapping statute.[92]

Relation to Current District Law. This RCC's definition of "felony" generally codifies current District case law on the meaning of felony and misdemeanor.[93] Current District case law does not specify whether offenses punishable by death in other jurisdictions are classified as felonies. The definition resolves this ambiguity by specifying that felonies include offenses punishable by death in other jurisdictions.

"**Homelessness" means the status or circumstance of an individual who:**

(A) Lacks a fixed, regular, and adequate nighttime residence; or

(B) Has a primary nighttime residence that is:

(1) A supervised, publicly- or privately-operated shelter designed to provide temporary living accommodations, including motels, hotels, congregate shelters, and transitional housing for the mentally ill;

(2) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(3) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

Explanatory Note. The RCC defines "homelessness" as the status or circumstance of an individual who satisfies one of the four categories specified in (A) and (B)(1)-(3). "Homelessness" includes either lacking any fixed, regular, or adequate nighttime residence, or having any primary nighttime residence specified in (B)(1)-(3).

---

[86] RCC § 22E-215.
[87] RCC § 22E-601.
[88] RCC § 22E-603.
[89] RCC § 22E-604
[90] RCC § 22E-606.
[91] RCC § 22E-607.
[92] RCC § 22E-1401.
[93] *See Henson v. United States*, 399 A.2d 16, 20 (D.C. 1979) ("Largely for historical reasons, the courts in this jurisdiction generally define " felony" as any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors.").

The term "homelessness" is currently defined in D.C. Code § 22-3701. The RCC definition of "homelessness" is used in the hate crime penalty enhancement[94] and hate crime enhancement civil provisions statute.[95]

Relation to Current District Law. The RCC's definition of "homelessness" is almost identical to the current definition of "homelessness" under D.C. Code § 22-3701. The revised definition omits a repeated reference to the "status or circumstance of an individual," and this omission does not substantively alter the definition. The RCC definition differs slightly by including the status of having as a primary residence a "motels," whereas the definition under § 22-3701 refers to "welfare motels." It is unclear, which motels qualify as "welfare motels" under current law. Omitting the word "welfare" is not intended to change the scope of the revised definition.

"Misdemeanor" means an offense punishable by a term of imprisonment that is one year or less.

Explanatory Note. The RCC defines "misdemeanor" as criminal offenses punishable by imprisonment of one year or less.

The term "misdemeanor" is new, and is not currently defined in Title 22 of the D.C. Code. The RCC definition of "misdemeanor" is used in the de minimis defense[96], the offense classifications statute[97], statutes specifying authorized terms of imprisonment[98] and fines[99], the repeat offender penalty enhancement[100], and the pretrial release penalty enhancement.[101]

Relation to Current District Law. The RCC definition of "misdemeanor" generally codifies existing District case law on the meaning of felony and misdemeanor.[102] A misdemeanor is defined to include crimes that are not punishable by any term of imprisonment.

"Pecuniary gain" means before-tax profit that is monetary or readily measured in money, including additional revenue or cost savings.

Explanatory Note. The RCC definition of "pecuniary gain" means before-tax profit that is monetary or readily measured in money. The definition specifies that pecuniary gain includes non-monetary benefits that are readily measured in money, such as cost savings.

---

[94] RCC § 22E-608.
[95] RCC § 22E-609.
[96] RCC § 22E-215.
[97] RCC § 22E-601.
[98] RCC § 22E-603.
[99] RCC § 22E-604
[100] RCC § 22E-606.
[101] RCC § 22E-607.
[102] *See Henson v. United States*, 399 A.2d 16, 20 (D.C. 1979) ("Largely for historical reasons, the courts in this jurisdiction generally define " felony" as any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors.").

The term "pecuniary gain" is used in D.C. Code § 22-357102, but the term is undefined. The RCC definition of "pecuniary gain" is used in the statute specifying authorized fines.[103]

Relation to Current District Law. The term "pecuniary gain" is used in D.C. Code § 22-3571.02 (b), but the term is undefined. The Fine Proportionality Act authorizes fines of up to twice the pecuniary gain to the actor, or the pecuniary loss to the complainant.[104] However, the Fine Proportionality Act fails to define any of these terms, and no case law has been published interpreting these phrases. The definitions of "pecuniary loss" and "pecuniary gain" are modeled on the definitions provided in the Federal Sentencing Guidelines.[105] This change improves the clarity and completeness of the revised statutes.

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

Explanatory Note. The RCC definition of "pecuniary loss" means actual harm that is monetary or readily measurable in money. The definition specifies that "pecuniary loss" includes actual monetary losses, as well as other losses that are readily measurable in money.[106]

The term "pecuniary loss" is used in D.C. Code § 22-357102, but the term is undefined. The RCC definition of "pecuniary loss" is used in the statute specifying authorized fines[107], the hate crime penalty enhancement[108], and hate crime enhancement civil provisions statute.[109]

Relation to Current District Law. The term "pecuniary loss" is used in D.C. Code § 22-3571.02 (b), but the term is undefined. The Fine Proportionality Act authorizes fines of up to twice the pecuniary gain to the actor, or the pecuniary loss to the complainant.[110] However, the Fine Proportionality Act fails to define any of these terms, and no case law has been published interpreting these phrases. The definitions of "pecuniary loss" and "pecuniary gain" are modeled on the definitions provided in the Federal Sentencing Guidelines.[111] This change improves the clarity and completeness of the revised statutes.

"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;

---

[103] RCC § 22E-604.
[104] D.C. Code § 22-3571.02 (b)(1).
[105] U.S. Sentencing Guidelines Manual §§ 2B1.1, 8A1.2 (2016).
[106] For example, property damage may constitute actual harm that is readily measurable in money.
[107] RCC § 22E-604.
[108] RCC § 22E-608.
[109] RCC § 22E-609.
[110] D.C. Code § 22-3571.02 (b)(1).
[111] U.S. Sentencing Guidelines Manual §§ 2B1.1, 8A1.2 (2016).

(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 has been vacated, sealed, or expunged; or

(D) A conviction for which a person has been granted clemency or a pardon.

Explanatory Note. The RCC defines "prior conviction" as 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. As defined, the term "prior conviction" attaches at the moment a court enters judgment of guilt for a criminal offense. The definition specifies that adjudications of juvenile delinquency do not constitute a "prior conviction." The definition also carves out exceptions for findings of guilt that have been nullified by vacatur, record sealing, expungement, clemency, or pardon; or that may be nullified after completion of a supervision program. 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.[112]

The term "prior conviction" is new and is not currently defined in Title 22 of the D.C. Code. The RCC definition of "prior conviction" is used in the statute specifying rules for charging and proving penalty enhancements[113], repeat offender penalty enhancement[114], the stalking[115], as well as in the revised offenses of electronic stalking[116], and possession of a firearm by an unauthorized person.[117]

Relation to Current District Law. *One provisions of the RCC definition of "prior conviction" may constitute a substantive change to current District law.*

The RCC clarifies that the term "prior conviction" does not include juvenile adjudications[118] or convictions that have been vacated but does include convictions that have been set aside under the Youth Rehabilitation Act.[119] D.C. Code § 22-4503 does not define the term "conviction." This change clarifies the revised statute.

[112] 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).
[113] RCC § 22E-605.
[114] RCC § 22E-606.
[115] RCC § 22E-1801.
[116] RCC § 22E-1802.
[117] RCC § 22E-4105.
[118] D.C. Code § 16-2318 states that a juvenile delinquency adjudication is not a conviction of a crime.
[119] 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).