Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements

FIRST DRAFT OF REPORT NO. 6 SUBMITTED FOR ADVISORY GROUP REVIEW
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report No. 6, *Recommendations for Chapter 8 of the Revised Criminal Code—Penalty Enhancements*, is July 21, 2017 (over six weeks from the date of issue). Oral comments and written comments received after July 21, 2017 will not be reflected in the Second Draft of Report No. 6. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Subtitle I. General Part
Chapter 8. Offense Classes, Penalties, & Penalty Enhancements

RCC § 22A-805 LIMITATIONS ON PENALTY ENHANCEMENTS.

(a) PENALTY ENHANCEMENTS NOT APPLICABLE TO OFFENSES WITH EQUIVALENT ELEMENTS. Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

(b) CHARGING OF PENALTY ENHANCEMENTS. A person is not subject to additional punishment for a penalty enhancement unless notice of the penalty enhancement is provided by an information or indictment.

(c) STANDARD OF PROOF FOR PENALTY ENHANCEMENTS. Except for the establishment of prior convictions as provided in D.C. Code § 23-111, a person is not subject to additional punishment for a penalty enhancement unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

(d) MULTIPLE PENALTY ENHANCEMENTS PERMITTED IN CHARGING AND PROOF. Multiple penalty enhancements may be applied to an offense for purposes of charging and proof at trial. However an offense with multiple penalty enhancements is subject to Section 22A-70[X] of this Title.

Commentary

Explanatory Note. RCC § 22A-805 sets certain procedural requirements for applying penalty enhancements, including requirements established by *Apprendi v. New Jersey*[1] and subsequent case law. Subsection (a) bars applying a penalty enhancement in Chapter 8 to an offense which has equivalent elements in one of its gradations. Subsection (b) codifies case law holding that notice of penalty enhancements must be provided by an information or indictment. Subsection (c) similarly codifies the constitutional requirement of proof beyond a reasonable doubt for the objective elements and culpable mental states specified in a penalty enhancement. Subsection (d)

[1] 530 U.S. 466 (2000).

authorizes application of multiple penalty enhancements to an offense for purposes of charging and proof at trial, but provides that the provisions in RCC § 22A-70[X] apply to the application of multiple penalty enhancements at the time of sentencing.

Relation to Current District Law. Subsection (a) fills a gap in the D.C. Code by clarifying how the general penalty enhancements in RCC §§ 22A-806 - 22A-808 apply to offenses already containing equivalent elements in their gradations.[2] With one exception, the D.C. Code is silent on whether penalty enhancements apply to such offenses, even though such overlap between general penalty enhancements and offenses currently exists.[3] For instance, a bias-related crime penalty enhancement[4] could conceivably be applied to a conviction for first degree murder that was also enhanced for having been "committed because of the victim's race, color, religion…."[5] In general, a legislature can impose cumulative punishments, through multiple statutes, for the same conduct.[6] But, where the legislative intent to impose cumulative punishments is unclear, there may be litigation challenging the cumulative punishments under the Double Jeopardy Clause.[7]

Subsection (a) may change District case law, at least with respect to RCC § 22A-806. In *Bigelow v. United States*,[8] the DCCA upheld application of the enhancement provisions of D.C. Code § 22-104a (the predecessor statute to the repeat offender provisions now in D.C. Code § 22-1804a) to an aggravated grade of carrying a pistol without a license based on having a prior felony conviction or a misdemeanor concerning weapons. Although both the general penalty enhancement and the aggravated form of the offense relied upon proof of prior convictions, the *Bigelow* ruling found that "the policies underlying the enhancement provisions [] are different" and the enhancement provisions did not have "the same precondition to applicability."[9] RCC § 22A-805 is consistent with *Bigelow* insofar as its assessment of whether elements of an offense are "equivalent" to the elements of a penalty enhancement would reasonably entail review of the policies and specific language of each statute, and different policies and language would be evidence that the enhancement and offense provision are not equivalent. However, insofar as RCC § 22A-805 is intended to reduce unnecessary overlap in statutes, courts may construe the term "equivalent" in RCC § 22A-805 more broadly than under current law.

Subsections (b) and (c) 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 provide improved clarity and notice of relevant limitations on penalty enhancements.

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[2] For purposes of RCC § 22A-806 no distinction is intended between elements that must be proven, regardless of the element being labeled an "aggravating circumstance" or "penalty enhancement."

[3] In one instance, the D.C. Code has barred application of a general penalty enhancement to a specific offense where that offense already provides increased punishment for the element in the general penalty enhancement. *See* D.C. Code Ann. § 22-1804(b) ("This section shall not apply in the event of conflict with any other provision of law which provides an increased penalty for a specific offense by reason of a prior conviction of the same or any other offense.").

[4] D.C. Code §§ 22-3701, 22-3703.

[5] D.C. Code § 22-2104.01.

[6] *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

[7] *See, e.g., Whalen v. United States*, 445 U.S. 684, 687 (1980).

[8] 498 A.2d 210 (D.C. 1985)

[9] *Bigelow v. United States*, 498 A.2d 210, 215 (D.C. 1985)

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."[10] 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."[11] 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 century,"[12] 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[13] and increase fines.[14] However, facts concerning prior convictions are not subject to the notice and standard of proof requirements under longstanding tradition.[15]

The DCCA has repeatedly recognized the *Apprendi* rule in the context of aggravating factors.[16] The DCCA has also recognized exception for facts concerning prior convictions,[17] and questions of law concerning the nature of prior convictions as crimes of violence.[18] 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 (b) and (c) and the provisions of D.C. Code § 23-111 are not in conflict. The charging requirement in subsection (b) 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 (b).[19] Similarly, the standard of proof requirement in subsection (c) explicitly allows for a lower standard of proof for the establishment of prior convictions as provided in D.C. Code § 23-111.[20]

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[10] *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).

[11] *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999)).

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

[13] 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)).

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

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

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

[17] *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).

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

[19] The repeat offender penalty enhancement in RCC §22A-806 explicitly recognizes the continued applicability of D.C. Code § 23-111. See Commentary to RCC §22A-806 for more details.

[20] 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

Finally, Subsection 22A-805 (d) cross-references other provisions of the RCC concerning liability for conduct constituting multiple offenses. See Section 22A-70[X] regarding RCC changes to current District law concerning sentencing when multiple penalty enhancements are applied to an offense.

Relation to National Legal Trends. Most states do not have statutory provisions addressing whether general penalty enhancements may be applied to equivalent offenses, although there is some precedent for addressing overlap with specific offenses in specific penalty enhancements.[21]

Most states also have not adopted general rules of procedure that set out the standards demanded by *Apprendi*. Only a few state codes state that enhancements only apply after having been proven beyond a reasonable doubt.[22] None of these states codify the requirement that the enhancements be alleged in a charging document. Yet, states seem to commonly adopt *Apprendi* standards for specific enhancements.[23] These states more frequently address the burden of proof (i.e., requiring proof beyond a reasonable doubt), and less frequently codify notice requirements (i.e., requiring the enhancement be alleged in the indictment or information).

Neither the Model Penal Code nor the Proposed Federal Criminal Code address the burden of proof required when a court is asked to apply an enhancement. However, both of these model codes were drafted prior to the Supreme Court's decision in *Apprendi*.

Subsection 22A-805(d) cross-references other provisions of the RCC concerning liability for conduct constituting multiple offenses. See Section 22A-70[X] regarding the relation to national legal trends of RCC recommendations for sentencing when multiple penalty enhancements are applied to an offense.

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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."

[21] *See, e.g.,* Mont. Code Ann. § 45-5-222 (excepting overlapping crimes of malicious intimidation or harassment from hate crimes penalty enhancement).

[22] Ariz. Rev. Stat. Ann. § 13-701; Haw. Rev. Stat. Ann. § 706-662; N.H. Rev. Stat. Ann. § 651:6; N.C. Gen. Stat. Ann. § 15A-1340.16.

[23] Ark. Code Ann. § 5-4-702; Colo. Rev. Stat. Ann. § 18-1.3-803; Ind. Code Ann. § 35-50-2-11; Iowa Code Ann. § 902.7; Mo. Ann. Stat. § 558.021; N.M. Stat. Ann. § 31-18-20; N.C. Gen. Stat. Ann. § 15A-1340.16; Or. Rev. Stat. Ann. § 161.610; Tenn. Code Ann. § 40-35-202; Utah Code Ann. § 76-3-203.5.

RCC § 22A-806 REPEAT OFFENDER PENALTY ENHANCEMENTS

(a) MISDEMEANOR REPEAT OFFENDER PENALTY ENHANCEMENT. A misdemeanor repeat offender penalty enhancement applies to a misdemeanor when the defendant, in fact, has two or more prior convictions for District of Columbia offenses or offenses equivalent to current District of Columbia offenses.

(b) FELONY REPEAT OFFENDER PENALTY ENHANCEMENT. A felony repeat offender penalty enhancement applies to a felony when the offender, in fact, has two or more prior convictions for District of Columbia felonies or offenses equivalent to current District of Columbia felonies.

(c) CRIME OF VIOLENCE REPEAT OFFENDER PENALTY ENHANCEMENT. A crime of violence repeat offender penalty enhancement applies to a crime of violence when the offender, in fact, has one or more prior convictions for a District of Columbia crime of violence or an offense equivalent to a current District of Columbia crime of violence.

(d) ADDITIONAL PROCEDURAL REQUIREMENTS. No person shall be subject to additional punishment for a repeat offender penalty enhancement in this section unless the requirements of § 23-111 are satisfied.

(e) PENALTIES.

(1) *Misdemeanor Repeat Offender.* A misdemeanor repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(2) *Felony Repeat Offender.* A felony repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(3) *Crime of Violence Repeat Offender.* A crime of violence repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(f) DEFINITIONS.

(1) *Crime of Violence.* For purposes of this section, "crime of violence" has the meaning defined in §22A-[XXX]. .

(2) *Equivalent.* For purposes of this section, "equivalent" means a criminal offense with elements that would necessarily prove the elements of a District criminal offense.

(3) *Felony.* "Felony" has the meaning specified in §22A-801.

(4) *Misdemeanor.* "Misdemeanor" has the meaning specified in §22A-801.

(5) *Prior Convictions.* For purposes of this section, "prior convictions" means convictions by any court or courts of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, provided that:

(i) Convictions for two or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction;

(ii) A conviction for an offense with a sentence that was completed more than 10 years prior to the commission of the instant offense shall not be counted for determining repeat misdemeanor offender and repeat felony offender penalty enhancements;

(iii) An offense that was committed when the defendant was a minor shall not be counted for determining misdemeanor repeat offender or felony repeat offender penalty enhancements; and

(iv) A conviction for which a person has been pardoned shall not be counted as a conviction.

Commentary

Explanatory Note. RCC § 22A-806 provides penalty enhancements for repeat offenders. The penalty enhancements are differentiated according to the type of instant offense and prior convictions, as well as the number of prior convictions. This structure is intended to provide proportionate penalties. The statute clarifies what constitutes a prior conviction using consistent definitions.

Subsections (a) – (c) establish three gradations of the enhancement. The gradations differ as to whether the instant offense is a misdemeanor (subsection (a)) with two prior convictions for any type of offense, felony (subsection (b)) with two prior felony convictions or equivalent offenses, or crime of violence (subsection (c)) with one prior crime of violence conviction. Under all gradations of the penalty enhancement, the prior convictions may be either for District offenses, or for offenses equivalent to current District offenses. There is no culpable mental state requirement as to the prior convictions, as specified by the phrase "in fact."

Subsection (d) states that the procedural requirements of D.C. Code § 23-111, regarding the establishment of prior convictions, continue to apply to RCC § 22A-806. 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 (e) specifies the nature and extent of the punishment for the penalty enhancement gradations. [Reserved]

Subsection (f) defines critical terms within RCC § 22A-806. Subsection (f)(1) states that "crime of violence," for purposes of the section, refers to the revised definition in RCC §22A-[XXX]. However, prior crime of violence convictions under D.C. Code §23-1331(4) may still be relevant to the repeat offender penalty enhancement to the extent those offenses are "equivalent" to RCC §22A-XXX. Subsection (f)(2) defines an "equivalent" offense as an offense with elements that, if proven, would prove the elements of a District offense. This definition clarifies that 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. Subsections (f)(3) & (f)(4) cross-reference the definitions of "felony" and "misdemeanor" in RCC §22A-801.

Subsection (f) also provides a definition of "prior convictions" that details the scope of convictions which may be the basis for a repeat offender penalty enhancement. Convictions relied upon for the penalty enhancement must have been committed on different occasions or during different courses of conduct per subsection (f)(5)(A). Prior convictions must have been entered ten years or less from the time of commission of the instant offense to be relied upon for the misdemeanor or felony repeat offender enhancements per subsection (f)(5)(B) (there is no time limit, however, for consideration of crimes of violence). Convictions must have been committed as an adult to be relied upon for the misdemeanor or felony repeat offender enhancements per subsection (f)(5)(C) (there is no age limit for consideration of crimes of violence). Convictions must not have been pardoned to be relied upon for a repeat offender penalty enhancement per subsection (f)(5)(D).

Relation to Current District Law. RCC § 22A-806 changes the D.C. Code's existing penalty enhancements for repeat offenders in several respects.[24] The primary changes are in the framework in subsections (a) – (c) that creates a single repeat offender penalty enhancement differentiated into three gradations by the seriousness of the offenses—i.e., whether the instant and prior convictions are for misdemeanors, felonies, or crimes of violence. The framework in subsections (a) – (c) improves the clarity of the repeat offender penalty enhancements in current D.C. Code §§ 22-1804 and 22-1804a, adjusts the gradations to provide for more proportionate punishment, and reduces unnecessary overlap in existing statutes.

Currently, the D.C. Code contains two, separate repeat offender penalty enhancements with 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, felony, or crime of violence) of the prior convictions, but on whether the prior conviction is for the same or nearly same kind of offense.

By contrast, D.C. Code § 22-1804a grades its penalty enhancement only on the seriousness of the instant offense and prior convictions, whether it was a felony with two prior felonies or a crime of violence with two prior crimes of violence. The current penalty enhancement statutes overlap 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. Nothing in the statutory language for either current D.C. Code §§ 22-1804 or 22-1804a prevents "stacking" both penalty enhancements. In general, a legislature can impose cumulative punishments, through multiple statutes, for the same conduct.[25] Thus, if a defendant were

[24] D.C. Code §§ 22-1804 and 22-1804a.

[25] *Hunter*, 459 U.S. at 366.

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.[26]

The framework of subsections (a) – (c) combines aspects of current D.C. Code §§ 22-1804 and 22-1804a. Section 806 generally follows D.C. Code § 22-1804a insofar as it grades the penalty enhancement according to the seriousness of the instant and prior offenses. However, RCC § 22A-806 expands the scope of D.C. Code § 22-1804a by: 1) including the commission of a misdemeanor with two prior misdemeanors; and, 2) by lowering the number of prior convictions for crimes of violence to one. Both of these changes are derived from D.C. Code § 22-1804, though there the prior convictions must be offenses that are the same or nearly same kind of offense.

The framework of subsections (a) – (c) both expands and reduces liability as compared to current repeat offender penalty enhancements. Subject to constraints imposed by the definitions in RCC § 22A-806(f), the Revised Criminal Code adds liability in instances where a defendant either: 1) commits a crime of violence and has a single prior conviction for a crime of violence that is of a different nature than the prior conviction; or 2) commits a misdemeanor offense and has two prior convictions for misdemeanors that are of a different nature than the prior convictions.

Conversely, RCC § 22A-806 eliminates liability where a defendant: 1) commits a misdemeanor or felony and has only one prior conviction that is the same or nearly same kind of offense; 2) has prior convictions that do not meet the more restrictive requirements in the RCC § 22A-806 (f) definitions; or 3) has three or more prior convictions that potentially would allow application of both current D.C. Code §§ 22-1804 and 22-1804a. These three instances would be covered under current District recidivist enhancements.

Beyond the framework in subsections (a) – (c), the remaining differences between RCC § 22A-806 and existing District law lie in the subsection (f) definitions.

Subsection (f)(2) requires prior convictions to meet District standards about the seriousness of an offense by stating that an "equivalent" offense in another jurisdiction is one that has elements that would necessarily prove the elements of a District criminal offense. This definition is generally more restrictive than the language currently in D.C. Code § 22-1804a. For example, current D.C. Code § 22-1804a, by its plain language, would admit as a prior conviction any crime designated as a felony in another jurisdiction, even if that crime would not constitute a felony if committed in the District.[27]

Also, under the plain language of current D.C. Code § 22-1804a, it is unclear whether an offense in another jurisdiction that has the same elements as a current District crime of violence but is not labeled the same as one of the offenses listed in the crime of violence definition of D.C. Code § 22-4501 (e.g. "burglary") could be used for the crime of violence penalty enhancement. RCC § 22A-806(f)(2) would clarify that equivalent offenses are those offenses

[26] *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).

[27] 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).

that would meet or exceed the elements of a current District offense, regardless of how the other jurisdiction labels or punishes the offense. This change also clarifies that whether offenses are equivalent is a legal judgment based on the elements of offenses, established in statutory or case law, not the facts of a particular criminal case. Subsection (f)(2) is intended to improve the clarity, consistency, and proportionality with which other jurisdictions' convictions subject District defendants to a penalty enhancement.

Subsection (f)(5) slightly expands the courts whose convictions may constitute prior convictions to include courts of federally-recognized Indian tribes. Under current D.C. Code §§ 22-1804 and 22-1804a, a person's prior convictions in a tribal court subject to the Indian Civil Rights Act (ICRA) of 1968[28] would not be recognized. However, in *United States v. Bryant*,[29] the Supreme Court recently recognized that convictions of federally recognized Indian tribes, which subject to ICRA, meet constitutional due process requirements and could be used as prior convictions under the federal repeat offender law there at issue.[30] The change to subsection (f)(5) updates District law accordingly.

Subsection (f)(5)(A) clarifies that convictions for multiple offenses committed during the same occasion or course of conduct count as one conviction. Current D.C. Code §§ 22-1804 and 22-1804a only aggregate convictions committed on the "same occasion." However, the word "occasion" is not defined in D.C. Code §§ 22-1804 and 22-1804a and may refer to either a particular time or a particular incident.[31]

Subsection (f)(5)(B) restricts the meaning of prior convictions for purposes of the misdemeanor and felony penalty enhancements to convictions with sentences that were completed ten years, at most, prior to commission of the instant offense. No such time limitation is imposed on convictions for crimes of violence. This change is intended to improve the proportionality of the penalty enhancement and is consistent with national best practice recommendations (see *Relation to National Legal Trends* section below).

Subsection (f)(5)(C) restricts the meaning of prior convictions for purposes of the misdemeanor and felony penalty enhancements to convictions for crimes committed as an adult, i.e., 18 years or older. No such age limitation is imposed on convictions for crimes of violence. This change is intended to improve the proportionality of the penalty enhancement and is consistent with national best practice recommendations (see *Relation to National Legal Trends* section below).

With respect to the practice of District law, available data indicate that repeat offender penalty enhancements have been rarely applied to felony convictions in recent years—on average only about one felony conviction each year has included the enhancement.[32] The available data indicate that, even when applied, the repeat offender penalty enhancement did not

[28] 25 U.S.C.A. § 1302.
[29] *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016), *as revised* (July 7, 2016).
[30] 18 U.S.C. § 117.
[31] https://www.merriam-webster.com/dictionary/occasion
[32] The data referenced here was provided by the D.C. Sentencing Commission in 2016. These data provided sentencing statistics, including the data concerning application of enhancements, for 2010-2015. These data are limited to enhancements for felony offenses where there has been a conviction; they do not include juvenile cases, misdemeanor cases, or cases where there was a disposition other than a conviction. **Disclaimer**: The sentencing data referenced is a statistical representation of information related to the D.C. Voluntary Sentencing Guidelines. Further interpretation of the data by the Criminal Code Reform Commission does not reflect the opinions or advisement of the D.C. Sentencing Commission, or its members.

always result in a sentence that exceeded the sentence otherwise authorized by the unenhanced offense.

However, it bears emphasis that a defendant's record of prior convictions is one of the two dominant features, along with the offense of conviction, of the District's Voluntary Sentencing Guidelines ("Guidelines").[33] While there may be relatively little use of prior convictions to enhance penalties above their currently authorized maxima, prior convictions are routinely used as the primary basis to increase punishment: "In general, as the seriousness of the offense and the criminal history of the offender increase, the length of the prison sentences increase and the alternatives to incarceration decrease."[34] The District's use of Guidelines for over a decade has led to a well-developed practice of how to treat prior convictions that may be instructive for revising the statutory repeat offender penalty enhancement. For instance, while D.C. Code §§ 22-1804 and 22-1804a do not contain any time limitation provisions, the Guidelines generally hold that prior convictions with sentences completed more than ten years prior to commission of the instant offense are not to be considered in sentencing.[35] Also, while D.C. Code §§ 22-1804 and 22-1804a do not contain any time limitation provisions, the Guidelines recognize a distinction between the length of time a juvenile and adult adjudication may be considered.[36]

Lastly, relevant to some experts' warnings that the use of prior convictions to increase punishment may have disparate impacts on racial or other disadvantaged groups (see *Relation to National Legal Trends* section below), it should be noted that at this time no significant analyses have been conducted on how the operation of criminal history in District sentencing may affect racial disparities. Although there are notable differences in the average criminal history scores for black and white defendants in the District, the Sentencing Commission has said that the number of non-black, felony offenders present too small a sample size for meaningful statistical analysis.[37] Absent evidence that racial disparities in the District's criminal justice system are perpetuated by the use of prior convictions to enhance sentencing penalties, RCC § 22A-806 continues the District's longstanding practice of providing statutory penalty enhancements for repeat offenders.

Relation to National Legal Trends. RCC § 22A-806 would bring the District's repeat offender penalty enhancement more in line with national norms. In particular, adoption of the framework in subsections (a) – (c), differentiating the repeat offender provision by the severity of the instant and prior offenses, would bring the District into greater conformity with most other jurisdictions.

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[33] D.C. Sentencing Commission Voluntary Sentencing Guidelines Manual § 1.1 (2016).
[34] *Id.*
[35] *Id.* at § 2.2.3.
[36] *Id.* at § 2.2.4 (2016) (providing a five-year window before juvenile convictions lapse, compared to a ten-year window for adult convictions.)
[37] The average criminal history score for a black defendant in 2015 was 1.7, as opposed to a white defendant's average score of 1.2; in 2014, the average scores for these groups were 1.7 and 0.9, respectively. D.C. Sentencing and Criminal Code Revision Commission, 2015 Annual Report, at 57, *available at* https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Annual%20Report%202015%20Website%205-2-16.pdf.

Nearly all of the jurisdictions with comprehensively revised criminal codes based on the Model Penal Code provide a recidivist penalty enhancement.[38] However, in many jurisdictions, the recidivist penalty enhancement is integrated with the jurisdiction's sentencing guidelines. All sixteen states with non-statutory sentencing guidelines systems make use of criminal history as a major factor in setting an appropriate sentence.[39] However, of these sixteen states, just six use criminal history both as a guidelines factor and as a basis for a standalone statutory enhancement as the District does.[40] States that do not make use of a guidelines system also routinely codify some kind of repeat offender or recidivist enhancement.[41]

The requirements of repeat offender penalty enhancements vary widely across states. Nearly all states make felonies subject to repeat offender penalty enhancements,[42] but a few also permit such penalty enhancements for misdemeanors,[43] as the District does. Most states require two prior convictions before applying a repeat offender enhancement, but a minority of states, like the District, have "two-strikes" provisions that apply repeat offenders for committing a serious felony with one prior conviction for a serious felony.[44] Some states limit the prior offenses that count toward establishing a repeat offender penalty enhancement to those committed within a certain time frame,[45] or provide that the priors must have been committed while the defendant was an adult.[46] Some states limit the types of prior convictions that count to certain kinds of offenses, such as crimes of violence.[47] Some states also do not permit convictions that have been pardoned on the ground of innocence.[48] Most states admit felony

[38] Alaska Stat. Ann. § 12.55.125; Ala. Code § 13A-5-9; Ark. Code Ann. § 5-4-501; Ariz. Rev. Stat. Ann. § 13-703; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-40; Del. Code Ann. tit. 11, § 4214; Haw. Rev. Stat. Ann. § 706-661; 730 Ill. Comp. Stat. Ann. 5/5-5-3.2; Ind. Code Ann. § 35-50-2-8; Ky. Rev. Stat. Ann. § 532.080; Me. Rev. Stat. tit. 17-A, § 1252; Minn. Stat. Ann. § 609.1095; Mo. Ann. Stat. § 558.016; Mont. Code Ann. § 46-18-502; N.H. Rev. Stat. Ann. § 651:6; N.J. Stat. Ann. § 2C:43-7.1; N.Y. Penal Law § 70.04; N.D. Cent. Code Ann. § 12.1-32-09; Ohio Rev. Code Ann. § 2929.14; 42 Pa. Stat. and Cons. Stat. Ann. § 9714; S.D. Codified Laws § 22-7-7; Tenn. Code Ann. § 40-35-106; Tex. Penal Code Ann. § 12.42; Utah Code Ann. § 76-3-203.5; Wis. Stat. Ann. § 939.619; Wash. Rev. Code Ann. § 9.94A.570.

[39] Robina Institute, Criminal History Enhancements Sourcebook at 2 (2015), *available at* https://robinainstitute.umn.edu/areas-expertise/criminal-history-enhancements ("An offender's criminal history (record of prior convictions) is a major sentencing factor in all American jurisdictions that have implemented sentencing guidelines—offenders in the highest criminal history category often have recommended prison sentences that are many times longer than the recommended sentences for offenders in the lowest category."). The Robina Institute identified sixteen states (plus the federal system and the District) that it considers to have sentencing guidelines systems. States with statutory guidelines system, e.g. California and Ohio, were excluded the Robina Institute's analysis.

[40] Ala. Code § 13A-5-9; Ark. Code Ann. § 5-4-501; Del. Code Ann. tit. 11, § 4214; Minn. Stat. Ann. § 609.1095; 42 Pa. Stat. and Cons. Stat. Ann. § 9714; Utah Code Ann. § 76-3-203.5.

[41] E.g., Alaska Stat. Ann. § 12.55.125; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-40; Ind. Code Ann. § 35-50-2-8; Me. Rev. Stat. tit. 17-A, § 1252; Mo. Ann. Stat. § 558.016; N.J. Stat. Ann. § 2C:43-7.1; N.Y. Penal Law § 70.04; N.D. Cent. Code Ann. § 12.1-32-09; S.D. Codified Laws § 22-7-7; Tex. Penal Code Ann. § 12.42; Wis. Stat. Ann. § 939.619.

[42] See *id*.

[43] Me. Rev. Stat. tit. 17-A, § 1252; Mo. Ann. Stat. § 558.016; N.H. Rev. Stat. Ann. § 651:6.

[44] § 26.6(b)Recidivist statutes, 6 Crim. Proc. § 26.6(b) (4th ed.).

[45] E.g., 730 Ill. Comp. Stat. Ann. 5/5-5-3.2; Ky. Rev. Stat. Ann. § 532.080.

[46] E.g., Haw. Rev. Stat. Ann. § 706-661; Ky. Rev. Stat. Ann. § 532.080; Minn. Stat. Ann. § 609.1095.

[47] E.g., N.Y. Penal Law § 70.04; S.D. Codified Laws § 22-7-8.

[48] E.g., Ind. Code Ann. § 35-50-2-8.

convictions from other jurisdictions.[49] Some states specifically include convictions by tribal courts.[50] The American Bar Association has called for gradation of repeat offender enhancements according to the severity of the instant offense and time limits on the applicability of prior convictions.[51]

Some states grade repeat offender enhancements, providing varying penalties. These states might have specific enhancements for misdemeanors as compared to felonies,[52] but it is more common to have grading distinctions between felonies and serious or violent felonies.[53] Some states even differentiate repeat offender enhancements for each felony class in their code.[54]

Notwithstanding the commonality of repeat offender enhancements in state criminal codes, an array of policy-based criminal justice reforms across the country recently have aimed at reducing their severity.[55] Most notably, California, whose "three strikes" law was the subject of the Supreme Court's case in *Ewing v. California*, has (by popular referendum) recently added the requirement that the instant offense be a "serious or violent" felony in order for the defendant to qualify for a sentence of up to life.[56] Georgia excluded some drug convictions from the scope of possible prior convictions that trigger its recidivist enhancement.[57] North Carolina narrowed its recidivist enhancement's effects somewhat, by reducing the penalty associated with it for certain felony classes.[58] Montana has made the conditions for its repeat offender enhancement more strenuous.[59]

There also has been significant expert and scholarly criticism of repeat offender provisions. Such criticisms are based in various penal theories, including retributivism, the

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[49] *See* Wayne R. LaFave et al., Criminal Procedure § 26.6(b) (4th ed.) ("The majority rule is that a state counts convictions from other jurisdictions when the offense would have been a felony if committed in that state. A minority of states count convictions from other jurisdictions if the offense was considered a felony in the other jurisdiction, punishable by death or more than one year of imprisonment.").

[50] *See, e.g.*, Mass. Gen. Laws Ann. ch. 279, § 25.

[51] STANDARD 18-3.5 CRIMINAL HISTORY; RECIDIVISM, ABA Standards for Criminal Justice 18-3.5 3rd Ed. (1994) ("(a) The legislature should authorize more severe sentences for convicted offenders with prior convictions. The extent of enhancement should be reasonably related to the sentence severity levels authorized for the offense of conviction. (b) Standards for enhancement of sentence on the basis of criminal history should take into account the nature and number of prior convictions and the time elapsed since an offender's most recent prior conviction and completion of service of sentence. The legislature should fix time periods after which offenders' prior convictions may not be taken into account to enhance sentence; these periods may vary with the nature of the prior offenses. (c) The agency performing the intermediate function should guide sentencing courts to the appropriate weight to be given to an offender's criminal history. (d) If a jurisdiction has an "habitual offender" statute or comparable law regarding recidivists, the statute should provide that sentences imposed because of prior convictions should be reasonably related in severity to the level of sentence appropriate for the offense of current conviction.").

[52] Mo. Ann. Stat. § 558.016; N.H. Rev. Stat. Ann. § 651:6.

[53] E.g., Compare Wis. Stat. Ann. § 939.619 with Wis. Stat. Ann. § 939.62; compare N.Y. Penal Law § 70.04 with N.Y. Penal Law § 70.06; Minn. Stat. Ann. § 609.1095;

[54] E.g., Alaska Stat. Ann. § 12.55.125; Tex. Penal Code Ann. § 12.42. See also Ind. Code Ann. § 35-50-2-8.

[55] *But, see* Mass. Gen. Laws Ann. ch. 279, § 25 (amended in 2012 to expand the crimes subject to recidivist penalty enhancements and increase the punishment for such enhancements to life without parole (LWOP)).

[56] Cal. Penal Code § 1170.12.

[57] Ga. Code Ann. § 17-10-7. Maryland and Kentucky similarly addressed the use of enhancements for drug offenders. *See* Pew Charitable Trusts, "Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States", http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment (last visited May 19, 2017).

[58] N.C. Gen. Stat. Ann. § 14-7.6.

[59] E.g., 2017 Mont. Laws Ch. 321 (H.B. 133).

various arguments arising from utility, and incapacitation.[60] Often, these criticisms are hotly disputed, and justifications for enhanced sentences based on criminal history are also offered from the exact same theoretical perspectives as those opposing such enhanced sentences.

Some retributivists, for example, argue that using criminal history essentially punishes the defendant twice for a single offense. "If a defendant has already discharged the previous sentence of the court, is he not being sentenced a second time for the same criminal conduct?"[61] Other recidivists respond that increasing punishment for subsequent crimes is not an increase in punishment, but a decrease in the leniency the state is willing to afford the defendant.[62]

Utilitarians also criticize the use of criminal history, both in its application to the individual defendant (specific deterrence) and in its value in deterring crime broadly (general deterrence).[63] With respect to specific deterrence, utilitarians maintain that "there is little evidence that longer sentences actually promote specific deterrence. A number of studies conclude that the length of time spent in prison does not affect recidivism rates."[64] A Department of Justice study examined the effects of lengthy sentences on recidivism and concluded that "[t]hese results offer little support for the policy trends, prominent since this project began, that have supported increased use of confinement as a sentencing choice, emphasized longer terms, or accepted specific deterrence to reduce offenders' recidivism."[65] As for general deterrence, "[m]any question whether general deterrence works . . . arguing that most people are either unaware of penalties or do not think they will be caught when they commit a crime."[66] Furthermore, empirical studies suggest that there is no evidence that sentence length corresponds to a general deterrence effect.[67]

Additionally, there has been discussion on the use of criminal records to advance interests in incapacitation. In a certain sense, incapacitation refers to a species of specific deterrence, insofar as it seeks to ensure that a person will not enter society and reoffend; however, the emphasis is on rendering the person incapable of doing so by imprisoning such an offender for a sufficiently lengthy period of time. Using criminal history to predict a person's future dangerousness, however, has been criticized as a "crude approximation" that can "result in the incarceration of offenders who present little danger to public safety . . . ."[68] According to critics, such false positives "represent policy failure, needless expenditures, and great and avoidable unfairness," and therefore should be avoided.[69]

Lastly, outside the traditional, philosophical justifications for punishment, experts have expressed increasing concern that criminal history as a mechanism for ratcheting up punishment is the primary (or at least a significant) driver of the pernicious racial disparities present in American criminal justice. The American Law Institute (ALI) has maintained that "it is

[60] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1151-53 (2010).
[61] Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316 (1997).
[62] Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316 (1997).
[63] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1152 (2010).
[64] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1152 (2010).
[65] DON M. GOTTFREDSON, NAT'L INSTIT. OF JUSTICE, U.S. DEP'T OF JUSTICE, EFFECTS OF SENTENCING DECISIONS ON CRIMINAL CAREERS, at 9 (1999).
[66] Russell, *supra* note 60, at 1153.
[67] *Id.* (citing a large body of literature).
[68] MPC Sentencing § 6B.07 cmt. c(2) (Proposed Final Draft, Apr. 10, 2017).
[69] *Id.*

imperative that the sentencing system do nothing to exacerbate the preexisting racial disparities arising from life conditions in segregated and disadvantaged communities, or disparities introduced in earlier stages of the criminal justice process."[70] In furtherance of this goal, the ALI has considered an "accumulating body of research" and concluded that "criminal-history formulas in sentencing are responsible for much of the 'unexplained' disparities in black and white incarceration rates - that is, disparities that cannot be 'accounted for' by differential rates of crime commission, arrest, and conviction."[71]

The ALI has not developed a position with respect to statutory repeat offender enhancements, however, with respect to the use of criminal history in sentencing, the ALI has stated that sentencing commissions should be aware "that offenders have already been punished for their prior convictions," that "the use of criminal history by itself may over-predict those risks," and that "the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups."[72] As noted above, the CCRC is not aware of any District-specific studies that have attempted to show whether the consideration of criminal history disproportionately affects black offenders. Nevertheless, the general phenomena and its possible perpetuation within the Revised Criminal Code is an issue of concern.

[70] *Id.* at § 6B.07 cmt. c(3) (Proposed Final Draft, Apr. 10, 2017).
[71] *Id.*
[72] MPC Sentencing § 6B.07 (Proposed Final Draft, Apr. 10, 2017).

RCC 22A-807 HATE CRIME PENALTY ENHANCEMENT

(a) HATE CRIME PENALTY ENHANCEMENT: A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person's perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation.

(b) PENALTY. A hate crime penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(c) DEFINITIONS.

(1) *Definition of Gender Identity or Expression.* For purposes of this section, "Gender identity or expression" shall have the same meaning as provided in section 2-1401.02 (12A).

(2) *Definition of Homelessness.* For purposes of this section, "Homelessness" means:

(i) The status or circumstance of an individual who lacks a fixed, regular, and adequate nighttime residence; or

(ii) The status or circumstance of an individual who has a primary nighttime residence that is:

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

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

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

Commentary

Explanatory Note. RCC § 22A-807 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 sanctions a person's biased action, not the person's beliefs, in compliance with the Supreme Court's holding in *Wisconsin v. Mitchell*.[73]

[73] 508 U.S. 476 (1993).

Subsection (a) first requires a person to have committed all the elements of a predicate offense as elsewhere defined in Title 22A, including any culpable mental states required for the predicate offense. The penalty enhancement may be applied to inchoate offenses in Title 22A, including attempts and conspiracies.

Subsection (a) also requires the predicate offense to have been committed with intent to injure or intimidate a person because of prejudice. That is, the defendant must have believed, or consciously desired, that commission of the predicate crime would result in injury or intimidation to another. The penalty enhancement cannot be applied where the defendant was merely negligent or reckless as to whether commission of the predicate crime would result in injury or intimidation. While the predicate crime may have concerned property, the intended intimidation or harm must have been to a person.

The statute also clarifies that the intent to injure or intimidate must be based on the defendant's animus toward persons with a perceived characteristic. Targeting a person because of that person's characteristics alone would not suffice for application of the enhancement. Thus, for example, a burglar who targeted the homes of elderly persons not out of prejudice against the elderly, but out 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.

Per the statute, the victim of the predicate offense need not be the person whom the defendant intends to injure or intimidate. For example, destroying the windows of a home may be a predicate offense where the defendant intends to intimidate an occupant because of prejudice toward that occupant's perceived sexual orientation—even though the victim of the property damage is an unrelated landlord.

Subsections (b) and (c) describe the applicable penalty and provide a cross-reference to the relevant definition of gender identity or expression, and provide a definition of homelessness for the statute.

Relation to Current District Law. RCC § 22A-807 changes the D.C. Code's existing penalty enhancement for bias-related crime in several respects.[74]

Most importantly, RCC § 22A-807 states that it is the defendant's intent to injure or intimidate another because of a prejudiced perception that triggers the penalty enhancement. By contrast, under current law it is unclear what connection there must be between the predicate crime and defendant's prejudice—the statute simply says the crime must "demonstrate an accused's prejudice." The lack of specification in current law as to how the predicate crime must "demonstrate" prejudice has led to litigation, questioning whether the statute is unconstitutionally vague or applies additional punishment merely on the basis of a person's beliefs.

In *Shepard v. United States*[75] the DCCA evaluated the constitutionality of the bias crime penalty enhancement. The court 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.[76] But, the *Shepard* opinion also noted that it was not

[74] D.C. Code §§ 22-3701, 22-3703.
[75] 905 A.2d 260 (D.C. 2006).
[76] *Shepherd v. United States*, 905 A.2d 260, 262-63 (D.C. 2006).

definitively ruling on the constitutionality of the statute, given the plain error standard it was applying in the case.[77]

To improve the clarity of the statute, RCC § 22A-807 requires a causal nexus between the defendant's criminal act and his or her prejudice—the crime must be committed because of the defendant's prejudiced perception of another person (or group of persons).[78] RCC § 22A-204, as applied to RCC § 22A-807, 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.

The second major change in RCC § 22A-807 as compared to D.C. Code § 22-3701 is the specification of culpable mental state requirements. The penalty enhancement does not change any culpable mental state requirements that may have to be proved with respect to the predicate crime. However, the use of "with intent to" in subsection 22A-807(a) requires the defendant to believe to a practical certainty, or consciously desire, that commission of the crime will injure or intimidate a person. By contrast, D.C. Code § 22-3701 does not specify any culpable mental state requirement. The current penalty enhancement's current reference to an act that "demonstrates" prejudice suggests an objective assessment may be sufficient to establish bias and the defendant need not have had any intent to commit the predicate crime because of his or her prejudiced perception. The DCCA in *Shepard* did not address whether a culpable mental state was required for the hate crimes penalty enhancement, nor have any subsequent appellate opinions.

Another possible change to current District law is the wording of RCC § 22A-807, which permits application of the enhancement when the victim of the predicate offense is the person whom the defendant intends to injure or intimidate. Under existing 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 untested in published case law, the current statutory text could reasonably be construed to require the prejudice be toward the victim of the predicate offense.

Finally, RCC § 22A-807 clarifies what the DCCA has called the "puzzling wording"[79] 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 DCCA holding in *Aboye*, the RCC § 22A-807 clarifies that any criminal offense is subject to the hate crime penalty enhancement.

No change is made to the protected characteristics listed in RCC § 22A-807 as compared to current D.C. Code § 22-3701. Consistent with current law, the penalty enhancement is applicable to inchoate offenses.

With respect to the practice of District law, available data indicate that the current bias-related crime penalty enhancement in D.C. Code § 22-3701 has been rarely applied to felony convictions in recent years—on average only about two felony convictions each year have included the enhancement. [80] The available data indicate that, even when applied, the bias-

[77] *Id*. at 262.
[78] Use of the singular in the statute is meant to include multiple persons. D.C. Code § 45-602.
[79] *Aboye v. United States*, 121 A.3d 1245, 1249 (D.C. 2015)
[80] The data referenced here was provided by the D.C. Sentencing Commission in 2016. These data provided sentencing statistics, including the data concerning application of enhancements, for 2010-2015. These data are limited to enhancements for felony offenses where there has been a conviction; they do not include juvenile cases, misdemeanor cases, or cases where there was a disposition other than a conviction. **Disclaimer**: The sentencing data referenced is a statistical representation of information related to the D.C. Voluntary Sentencing Guidelines. Further interpretation of the data by the Criminal Code Reform Commission does not reflect the opinions or advisement of the D.C. Sentencing Commission, or its members.

related crime penalty enhancement did not result in a sentence that exceeded the sentence otherwise authorized by the unenhanced offense.

Relation to National Legal Trends. Forty-five other American jurisdictions sanction the commission of crimes motivated by hate, though they are divided in the structure and form of their sanctions.[81] A majority of these states, twenty-four, treat discriminatory motivation as a penalty enhancement or aggravating factor in sentencing.[82] The remaining twenty-one states treat hate crimes as separate offenses.[83] The federal code also treats hate crime as a separate offense.[84] Neither the Model Penal Code, the Proposed D.C. Basic Criminal Code, nor the Proposed Federal Criminal Code, by contrast, codify a hate crime enhancement or hate crime offense. More recent code reform efforts, such as the Kentucky Code Revision Project and the Illinois Reform Project, also do not provide enhancements for bias.

The particular language that states use in their hate crime statutes' varies widely. A slight plurality of states either say the enhancement applies if the defendant commits the offense "because of" the victim's status (seven states)[85] or require the defendant be "motivated" to commit the offense because of the victim's status (five states).[86] Eleven states sanction defendants who commit a criminal act with "intent to intimidate or harass another because of the actual or perceived race"[87] or close variants. Seven states punish those who "select" the victim because of the victim's status.[88] The remaining states use a collection of various terms. Only

[81] *See* Sara Ainsworth, Nadia Bryan, *Hate Crime Regulation and Challenges*, 17 GEO. J. GENDER & L. 303, 317 n. 144 (2016) (providing statutory citations).

[82] *See id*. at 321 n. 151 (providing statutory citations).

[83] As compiled from the Ainsworth and Bryan article, the states included are: Alaska Stat. Ann. § 12.55.155; Ariz. Rev. Stat. Ann. § 13-701; Cal. Penal Code § 422.55; Colo. Rev. Stat. Ann. § 18-9-121; Idaho Code Ann. § 18-7902; 720 Ill. Comp. Stat. Ann. 5/12-7.1; Kan. Stat. Ann. § 21-6815; Ky. Rev. Stat. Ann. § 532.031; La. Stat. Ann. § 14:107.2; Me. Rev. Stat. tit. 5, § 4684-B; Md. Code Ann., Crim. Law § 10-304; Mass. Gen. Laws Ann. ch. 265, § 39; Mich. Comp. Laws Ann. § 750.147b; N.M. Stat. Ann. § 31-18B-3; N.D. Cent. Code Ann. § 12.1-14-04; Okla. Stat. Ann. tit. 21, § 850; Or. Rev. Stat. Ann. § 166.155; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; S.C. Code Ann. § 16-5-10; S.D. Codified Laws § 22-19B-1; Wash. Rev. Code Ann. § 9A.36.080; W. Va. Code Ann. § 61-6-21; Wis. Stat. Ann. § 939.645. By CCRC staff's own examination, however, the list is somewhat different. Although determining what is an offense and what is an enhancement is a task where minds can reasonably differ, staff's list of hate crime offenses includes: Cal. Penal Code § 422.6; Colo. Rev. Stat. Ann. § 18-9-121; Conn. Gen. Stat. Ann. § 53-37a; Idaho Code Ann. § 18-7902; 720 Ill. Comp. Stat. Ann. 5/12-7.1; Mass. Gen. Laws Ann. ch. 265, § 39; Mich. Comp. Laws Ann. § 750.147b; Mont. Code Ann. § 45-5-221; N.J. Stat. Ann. § 2C:16-1; N.D. Cent. Code Ann. § 12.1-14-04; Okla. Stat. Ann. tit. 21, § 850; Or. Rev. Stat. Ann. § 166.155; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; 12 R.I. Gen. Laws Ann. § 12-19-38; S.C. Code Ann. § 16-5-10; S.D. Codified Laws § 22-19B-1; Wash. Rev. Code Ann. § 9A.36.080; Va. Code Ann. § 61-6-21.

[84] 18 U.S.C.A. § 249.

[85] Ariz. Rev. Stat. Ann. § 13-701; Iowa Code Ann. § 729A.2; Ky. Rev. Stat. Ann. § 532.031; Md. Code Ann., Crim. Law § 10-304; Miss. Code. Ann. § 99-19-301; Neb. Rev. Stat. Ann. § 28-111; Nev. Rev. Stat. Ann. § 193.1675; N.Y. Penal Law § 485.05; N.C. Gen. Stat. Ann. § 14-3; Ohio Rev. Code Ann. § 2927.12; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; Wash. Rev. Code Ann. § 9A.36.080.

[86] Ala. Code § 13A-5-13; Kan. Stat. Ann. § 21-6815; Mo. Ann. Stat. § 557.035; N.M. Stat. Ann. § 31-18B-3; Vt. Stat. Ann. tit. 13, § 1455.

[87] Colo. Rev. Stat. Ann. § 18-9-121; Conn. Gen. Stat. Ann. § 53-37a; Idaho Code Ann. § 18-7902; Mass. Gen. Laws Ann. ch. 265, § 39; Mich. Comp. Laws Ann. § 750.147b; N.J. Stat. Ann. § 2C:16-1; N.D. Cent. Code Ann. § 12.1-14-04; Okla. Stat. Ann. tit. 21, § 850; Or. Rev. Stat. Ann. § 166.155; S.D. Codified Laws § 22-19B-1; Utah Code Ann. § 76-3-203.3.

[88] Del. Code Ann. tit. 11, § 1304; Haw. Rev. Stat. Ann. § 706-662; La. Stat. Ann. § 14:107.2; 12 R.I. Gen. Laws Ann. § 12-19-38; Tenn. Code Ann. § 40-35-114; Tex. Crim. Proc. Code Ann. art. 42.014; Va. Code Ann. § 18.2-57; Wis. Stat. Ann. § 939.645.

Florida uses language that, like the District currently, suggests an objective standard for determining whether a person's offense is connected to their prejudiced beliefs.[89]

Regarding the protected characteristics involved in a hate crime charge, all forty-five states have legislation regarding racial, religious, and ethnic bias.[90] Thirty states reference sexual orientation bias, twenty-seven states reference gender bias, and thirty-one concern disability bias.[91] Among the less common attributes, twelve states protect against crimes based on age bias, ten protect transgender or gender identity bias, and five protect against political affiliation bias.[92] The federal code's hate crime statute protects race, color, religion, national origin, gender, sexual orientation, gender identity, and disability,[93] which the Federal Sentencing Guidelines also incorporate as a sentencing factor (with the addition of "gender identity" as a protected status).[94] The list of protected characteristics in RCC § 22A-807 is more expansive than other jurisdictions: it includes all of the above statuses (race, religion, ethnicity, sexual orientation, gender, disability, age, gender identity or expression, and political affiliation), and also includes several characteristics many states do not (personal appearance, matriculation, family responsibility, and homelessness).[95]

With respect to mental states, a majority of the forty-five jurisdictions with hate crime statutes specify some sort of culpable mental state requirement in the statutes. Of those states that specify a mental state, twenty-two refer to knowledge, intent, or their seeming equivalents.[96] Seven states arguably use a less demanding mental state, a variation on "malice,"[97] though all but one of these[98] further stipulate that the person act "maliciously, and with specific intent" or "maliciously and intentionally." Sixteen jurisdictions do not specify a mental state in their hate crimes statutes. [99] The Revised Criminal Code's adoption of "intent" is in line with national practice, at least among those jurisdictions that define a mental state for the enhancement.

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[89] *Compare* D.C. Code § 22-3703 ("demonstrates") *with* Fla. Stat. Ann. § 775.085 ("evidences").

[90] *See* Ainsworth& Bryan, *supra* note 81, at 317 n. 143-44 (providing statutory citations).

[91] *See id*. at 318 -319 n. 145-147 (providing statutory citations).

[92] *See id*. at 320 n. 148-50 (providing statutory citations).

[93] 18 U.S.C.A. § 249.

[94] U.S. SENTENCING GUIDELINE MANUAL § 3A1.1 (2017).

[95] Some states do have categories not protected by the Revised Criminal Code. New Mexico's hate crime statute covers "ancestry." N.M. Stat. Ann. § 31-18B-3. Vermont includes "service in the U.S. Armed Forces" as a protected status. Vt. Stat. Ann. tit. 13, § 1455. These two statuses, however, are not commonly protected.

[96] Alaska Stat. Ann. § 12.55.155; Cal. Penal Code § 422.6; Colo. Rev. Stat. Ann. § 18-9-121; Del. Code Ann. tit. 11, § 1304; Haw. Rev. Stat. Ann. § 706-662; Ky. Rev. Stat. Ann. § 532.031; Me. Rev. Stat. tit. 5, § 4684-A; Mass. Gen. Laws Ann. ch. 265, § 39; Mo. Ann. Stat. § 557.035; Mont. Code Ann. § 45-5-221; Nev. Rev. Stat. Ann. § 193.1675; N.J. Stat. Ann. § 2C:16-1; N.Y. Penal Law § 485.05; N.D. Cent. Code Ann. § 12.1-14-04; Or. Rev. Stat. Ann. § 166.155; 12 R.I. Gen. Laws Ann. § 12-19-38; Tenn. Code Ann. § 40-35-114; Tex. Crim. Proc. Code Ann. art. 42.014; Va. Code Ann. § 18.2-57; Wash. Rev. Code Ann. § 9A.36.080; W. Va. Code Ann. § 61-6-21; Wis. Stat. Ann. § 939.645.

[97] Conn. Gen. Stat. Ann. § 53-37a ; Idaho Code Ann. § 18-7902; Mich. Comp. Laws Ann. § 750.147b; Okla. Stat. Ann. tit. 21, § 850; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; S.D. Codified Laws § 22-19B-1; Vt. Stat. Ann. tit. 13, § 1455.

[98] Vt. Stat. Ann. tit. 13, § 1455.

[99] Ala. Code § 13A-5-13; Ariz. Rev. Stat. Ann. § 13-701; Fla. Stat. Ann. § 775.085; 720 Ill. Comp. Stat. Ann. 5/12-7.1; Iowa Code Ann. § 729A.2; Kan. Stat. Ann. § 21-6815; La. Stat. Ann. § 14:107.2; Md. Code Ann., Crim. Law § 10-304; Minn. Stat. Ann. § 609.2231; Miss. Code. Ann. § 99-19-301; Neb. Rev. Stat. Ann. § 28-111; N.H. Rev. Stat. Ann. § 651:6; N.M. Stat. Ann. § 31-18B-3; N.C. Gen. Stat. Ann. § 14-3; Ohio Rev. Code Ann. § 2927.12; S.C. Code Ann. § 16-5-10. (Note, however, that the lack of specified culpable mental state in a given statute does not necessarily indicate that one is not otherwise required. E.g., codes in IL, KS, and OH contain default general provisions may apply a mental state of recklessness automatically, even if not specified in a given statute. 720 Ill.

A few jurisdictions have statutes that clarify the extent of the causal nexus between the crime and the improper motive, e.g., requiring the discriminatory motive to be "in whole or substantial part"[100] the cause of the crime or, explicitly stating that there may be other motives[101]. Some of the other jurisdictions that don't statutorily specify the extent of the causal nexus have faced significant litigation over the issue, often arising in the context of a crime that may have begun with another non-hate motive but which transformed into a possible hate crime due to the defendant's shifting motivations during the commission of the offense.[102] To avoid this problem, and consistent with the drafting of other provisions, the Revised Criminal Code does not require the defendant's blameworthy intent to have been the sole or primary reason for the conduct—e.g., the prejudiced intent to harm or intimidate may have been in addition to an intent to rob a victim.[103]

Besides examining the issue of multiple motives, more recent litigation has focused on the significance of the discriminatory motive. On this point, some state[104] and federal courts[105] have recognized that the discriminatory motive must be the "but-for" cause of the purported hate crime. The Supreme Court's reasoning about the meaning of "because of" language in *Burrage v. United States*[106] further supports interpreting the most states' hate crime statutes as requiring the discriminatory motive to be the but-for causation of the predicate crime.[107]

Nearly all post-*Mitchell* constitutional challenges to hate crimes statutes in other jurisdictions have failed. However, one notable exception is the 2015 decision of the New Jersey Supreme Court striking part of its hate crime statute that violated constitutional due process protections in *State v. Pomianek*.[108] New Jersey criminalized committing a crime under three possible circumstances, two of which required culpable mental states ("with a purpose to intimidate" or "with knowledge").[109] The third alternative means of being subject to the penalty enhancement focused not on the state of mind of the accused, but the victim's reasonable perception of the crime as being committed because of a prohibited characteristic.[110] The New Jersey Supreme Court found the lack of a subjective mental state requirement in this third alternative unconstitutional,[111] noting that the Supreme Court in *Mitchell* had upheld only

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Comp. Stat. Ann. 5/4-3 ; Kan. Stat. Ann. § 21-5202; Ohio Rev. Code Ann. § 2901.21. Also, research was not performed to determine the extent to which case law may require a mental state in jurisdictions without a statutorily-specified culpable mental state.)

[100] N.Y. Penal Law § 485.05; see also Ky. Rev. Stat. Ann. § 532.031 (""a primary factor,") and N.H. Rev. Stat. Ann. § 651:6 (""substantially motivated").

[101] Fla. Stat. Ann. § 775.085 ("regardless of the existence of any other motivating factor or factors"); Iowa Code Ann. § 729A.2 ("entirely or in part").

[102] See, e.g., *People v. Schutter*, 695 N.W.2d 360, 364 (2005) ("what may have started out as merely road rage escalated into an act of ethnic intimidation").

[103] But, as noted below, the prejudiced intent must have been the but-for cause of the instant conduct.

[104] See, e.g., *People v. Lindberg*, 190 P.3d 664, 693–95 (Cal.2008); *State v. Hennings*, 776 N.W.2d 112, 2009 WL 2960616 at *6–8 (Iowa Ct.App.2009), aff'd in relevant part, 791 N.W.2d 828 (Iowa 2010).

[105] *See, e.g., United States v. Miller*, 767 F.3d 585, 593 (6th Cir. 2014); *United States v. Hill*, 182 F. Supp. 3d 546, 549 (E.D. Va. 2016).

[106] 134 S. Ct. 881 (2014).

[107] *Id*. at 889 ("In sum, it is one of the traditional background principles "against which Congress legislate[s]," [] that a phrase such as "results from" imposes a requirement of but-for causation" (internal citation omitted)).

[108] 110 A.3d 841, 856 (2015).

[109] N.J.S.A. 2C:16–1.

[110] *State v. Pomianek*, 110 A.3d 841, 850 (2015).

[111] *Id*. at 853.

"intentionally" committing crimes because of a protected characteristic.[112] The *Pomianek* court rejected the statute's language allowing a person to be subject to the hate crime statute without being aware that he was acting out of bias in committing the crime.[113] While the *Pomianek* court stressed that it was the only state to have a hate crimes statute relying upon the victim's perceptions,[114] its reasoning about the unconstitutionality of a hate crimes statute based on strict liability or a reasonableness standard may be applicable to hate crime statutes that do not require subjective awareness of the bias motivation by the perpetrator.

[112] *Id*. at 852.
[113] *Id*. at 854..
[114] *Id*. at 855.

RCC 22A-808 PRETRIAL RELEASE PENALTY ENHANCEMENTS

(a) MISDEMEANOR PRETRIAL RELEASE PENALTY ENHANCEMENT. A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense.

(b) FELONY PRETRIAL RELEASE PENALTY ENHANCEMENT. A felony pretrial release penalty enhancement applies to a felony when the offender committed the felony while on release pursuant to D.C. Code § 23-1321 for another offense.

(c) CRIME OF VIOLENCE PRETRIAL RELEASE PENALTY ENHANCEMENT. A crime of violence pretrial release penalty enhancement applies to a crime of violence when the defendant committed the crime of violence while on release pursuant to D.C. Code § 23-1321 for another offense.

(d) PENALTY ENHANCEMENT NOT APPLICABLE WHERE CONDUCT PUNISHED AS CONTEMPT OR VIOLATION OF CONDITION OF RELEASE. Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense when a person is convicted of contempt pursuant to D.C. Code § 11-741 or violation of a condition of release pursuant to D.C. Code § 23-1329 for the same conduct.

(e) PENALTIES.

(1) *Misdemeanor Pretrial Release Penalty Enhancement.* A misdemeanor pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(2) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(3) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(f) DEFINITIONS.

(1) *Crime of Violence.* For purposes of this section, "crime of violence" has the meaning defined in section 22A-[XXX].

(2) *Felony.* "Felony" has the meaning specified in section §22A-801.

(3) *Misdemeanor.* "Misdemeanor" has the meaning specified in section §22A-801.

Commentary

Explanatory Note. RCC § 22A-808 provides a penalty enhancement for defendants who are convicted of committing an offense while on pretrial release. Specifically, the enhancement applies where a defendant is arrested and charged with a (first) offense, is released pursuant to D.C. Code § 23-1321 for the offense, and then commits a second offense while on release. In such an instance the sentence for the second offense may be enhanced under this section. The enhancement applies regardless of the defendant's mental state with respect to his or her release status. The grade of the enhancement depends on the nature of the offense committed while on release—misdemeanors, felonies, and crimes of violence are enhanced differently pursuant to subsections (a)-(c). However, per subsection (d), the penalty enhancement does not apply when the person is convicted of contempt or a violation of a condition of release for the same conduct of committing an offense while on pretrial release. Subsection (e) provides variable punishments based on the seriousness of the offense committed while on release.

Relation to Current District Law. RCC § 22A-808 creates a general penalty enhancement for RCC offenses that is similar to D.C. Code § 23-1328, the current "offense committed while on release" (OCDR) penalty enhancement.[115] However, RCC § 22A-808 changes the existing OCDR penalty enhancement by providing an additional gradation for persons committing crimes of violence while on release, while the current OCDR statute only distinguishes between misdemeanors and felonies. Section 22A-808, in conjunction with RCC § 22A-805, also fills a gap in current law by clarifying that the fact that the defendant was on pretrial release is a circumstance element that must be proven beyond a reasonable doubt. Lastly, RCC § 22A-808 changes District law by explicitly barring use of the penalty enhancement when a person is convicted of either contempt or violation of a condition of release for the same conduct.

Providing an additional gradation for persons committing crimes of violence while on release is recommended in order to improve the proportionality and consistency of the RCC. Crimes of violence are distinguished in the repeat offender penalty enhancement RCC § 22A-806 and other places in the current D.C. Code as meriting different penalties as compared to other felonies. This change would grade the OCDR penalty enhancement consistently with RCC § 22A-806 and other offenses.

The recommendation in RCC § 22A-808, in conjunction with RCC § 22A-805(c), also statutorily clarifies that the relevant standard is proof beyond a reasonable doubt. 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.[116] By requiring proof beyond a reasonable doubt, the revised OCDR offense moots one[117] of the issues that may arise under *Apprendi*. This statutory clarification of the burden of proof is consistent with pre-*Apprendi*

[115] 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).

[116] *Williams v. United States*, 137 A.3d 154, 164 (D.C. 2016); *Eady*, 44 A.3d at .

[117] RCC § 22A-808 does not resolve whether the fact that an offense was committed during pretrial release is a type of fact that must be submitted to a jury per *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.[118]

The subsection (d) limitation on applying a pretrial release penalty enhancement addresses the near-complete overlap between RCC § 22A-808 and the crimes of violating a condition of release and contempt for violating an order not to reoffend. 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[119] and the general offense of contempt of court[120] for the same conduct based on the practice of prohibiting criminal activity as a condition of release.[121]

The social harm reflected in the OCDR penalty enhancement is distinguishable from these overlapping offenses. Congress created the OCDR penalty enhancement in 1970 (at the same time as the violations of conditions of release offense) with the aim of supporting the 1966 Bail Reform Act (BRA) by deterring reoffending while on pretrial release.[122] However, the harms involved in conduct constituting a violation of the OCDR penalty enhancement and overlapping crimes of violating a condition of release and contempt of court also may all be viewed, collectively, as a single harm against the adjudicatory process in general. Moreover, the DCCA itself has shown great reluctance toward punishing these overlapping offenses separately.[123] The subsection (d) limitation on applying RCC § 22A-808 preserves existing charging options and does not affect in any manner liability for the contempt offense in Title 11,[124] but reduces the practical effect of the overlapping statutes. Subsection (d) only provides that, if a defendant is convicted of either contempt or violating a condition of release based on the fact that he committed an offense during pretrial release contrary to judicial order, then the pretrial release penalty enhancement may not also be applied.

With respect to the practice of District law, available data indicates an average of just twenty-two felony cases per year being sentenced with an OCDR penalty enhancement during the years 2010-2015.[125] By contrast, according to one source, the District's bail system, which has been cited as a model for criminal justice reform, [126] has resulted in about 90% of defendants in pre-trial release remaining arrest-free until their cases are resolved.[127] Consequently, the

[118] *Tansimore*, 355 A.2d at 804.
[119] D.C. Code § 23-1329.
[120] D.C. Code § 11-944.
[121] *See Speight v. United States*, 569 A.2d 124, 127 (D.C. 1989) (en banc).
[122] H.R. REP. NO. 907, 91st Cong., 2d Sess. 89 (1970); *Daniel v. United States*, 408 A.2d 1231, 1233 (D.C. 1979).
[123] *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).
[124] Under the Home Rule Act, the District lacks the ability to legislate changes to Title 11 provisions.
[125] The data referenced here was provided by the D.C. Sentencing Commission in 2016. These data provided sentencing statistics, including the data concerning application of enhancements, for 2010-2015. These data are limited to enhancements for felony offenses where there has been a conviction; they do not include juvenile cases, misdemeanor cases, or cases where there was a disposition other than a conviction. **Disclaimer**: The sentencing data referenced is a statistical representation of information related to the D.C. Voluntary Sentencing Guidelines. Further interpretation of the data by the Criminal Code Reform Commission does not reflect the opinions or advisement of the D.C. Sentencing Commission, or its members.
[126] David Boyle, *Going Against the Grain: D.C.'s No-Bail Pretrial Release System*, D.C. Bar (July 13, 2016) (available online at: https://www.dcbar.org/about-the-bar/news/dc-no-bail-release.cfm).
[127] Ann E. Marimow, When It Comes To Pretrial Release, Few Other Jurisdictions Do It D.C.'S Way, Washington Post (July 4, 2016) (available online at https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.185dae5c1681).

frequency with which OCDR is being applied appears to be significantly lower than the incidence of the commission of pre-trial release crimes. The overlap between RCC § 22A-808 and the crime of violating a condition of release may partly explain why OCDR is rarely applied in felony cases.

Relation to National Legal Trends. OCDR is relatively uncommon as an enhancement or separate crime in American jurisdictions. This may stem from the fact that most jurisdictions do not use a pretrial release system comparable to the District's system, instead relying on bail to ensure defendants appear in court. Nevertheless, at least ten states (as well as the federal code[128]) do have similar statutes.[129]

Regarding the *actus reus* of these other states' OCDR-like penalty enhancements, two states have an additional requirement that there be a conviction for the first offense, unlike the District. Tennessee and New Jersey state that the penalty enhancement only applies if the person has been convicted of both the first offense that is the basis for the defendant's release status and the second offense which the defendant committed on release.[130] Four more states apply a consecutive sentence rule to penalize OCDR-like conduct, thereby implicitly requiring that the defendant be convicted of the first offense. Therefore, it seems that the majority of states that make use of OCDR-like offenses do, in some way, require that the defendant be guilty of both the first and second offenses.

There are two main approaches regarding penalties for OCDR-type enhancements in other jurisdictions. The first is to enhance the penalty in a manner similar to the current D.C. Code and RCC proposal, by increasing the statutory maximum of the offense committed on release. Similar to the RCC, five states and the federal code apply different enhanced penalties for the commission of felonies and misdemeanors.[131] No state makes use of the "crimes of violence" category as a grading factor, although New Jersey does enumerate a list of seemingly dangerous offenses that are subject to an increase in the statutory penalty if those dangerous offenses are committed while on release.[132]

The second main approach to OCDR penalties, taken by five jurisdictions, is to order that the sentences for the first and second offense be served consecutively (without actually enhancing the offense penalties).[133] These jurisdictions generally do not differentiate between the commission of a felony or a misdemeanor on release.[134]

Two other jurisdictions take different approaches to offenses committed while on release. Ohio uses release status as a factor in determining the type of punishment (i.e., the imposition of

[128] 18 U.S.C.A. § 3147.

[129] Ariz. Rev. Stat. Ann. § 13-708(D); Conn. Gen. Stat. Ann. § 53a-40b; 730 Ill. Comp. Stat. Ann. 5/5-8-4; Ind. Code Ann. § 35-50-1-2; Kan. Stat. Ann. § 21-6606; N.H. Rev. Stat. Ann. § 597:14-b; N.J. Stat. Ann. § 2C:44-5; N.Y. Penal Law § 70.25; Ohio Rev. Code Ann. § 2929.13; Tenn. Code Ann. § 40-35-114.

[130] N.J. Stat. Ann. § 2C:44-5(h); Tenn. Code Ann. § 40-35-114.

[131] Ariz. Rev. Stat. Ann. § 13-708(D); Conn. Gen. Stat. Ann. § 53a-40b; N.H. Rev. Stat. Ann. § 597:14-b; 18 U.S.C.A. § 3147.

[132] N.J. Stat. Ann. § 2C:44-5(h).

[133] 730 Ill. Comp. Stat. Ann. 5/5-8-4; Ind. Code Ann. § 35-50-1-2; Kan. Stat. Ann. § 21-6606; N.J. Stat. Ann. § 2C:44-5; N.Y. Penal Law § 70.25. New Jersey actually applies both approaches: one provision, limited to seemingly dangerous offenses, makes use of an increased penalty; another provision that applies to all offenses orders consecutive service of sentences.

[134] But compare N.J. Stat. Ann. § 2C:44-5(h) with N.J. Stat. Ann. § 2C:44-5(a).

a "community control sanction").[135] Tennessee uses release status as a factor in the application of its statutory sentencing guidelines system.[136]

With respect to model codes, the Model Penal Code, the Proposed Federal Criminal Code, the Kentucky Revision Project, and the Illinois Reform Project do not provide an OCDR-like offense in their sentencing provisions.

Finally, it is notable that state courts differ on whether the provisions of *Apprendi* apply to OCDR-type penalty enhancements. Because *Apprendi* commonly has been interpreted to omit "legal determinations" from its general rule,[137] the question regarding OCDR-type offenses is often framed as whether release status constitutes a legal determination that can be made by a judge and not by the factfinder.[138] Of those jurisdictions that have addressed the question, there is no uniform answer. For example, Connecticut holds that release status is a legal determination excepted from *Apprendi*, while Arizona except release status from *Apprendi*.[139] Federal courts have frequently avoided the question by holding that *Apprendi* only applies if the actual sentence exceeds the statutory maximum.[140] It has been rare that a defendant is sentenced to imprisonment greater than the statutory maximum permitted and a federal court has had to consider the question directly.[141] In sum, there appears to be no generalizable national legal trend with respect to the application of *Apprendi* to OCDR.

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[135] Ohio Rev. Code Ann. § 2929.13.

[136] Tenn. Code Ann. § 40-35-114.

[137] *State v. Fagan*, 905 A.2d 1101, 1118 (2006) ("numerous federal courts that have applied *Apprendi* and its progeny have understood that these cases clearly do not limit a judge's authority to make legal determinations that precede a jury's fact-finding and imposition of sentence.").

[138] *Id*. at 1118-19 (collecting cases). Many cases discussed and cited in *Fagan* concern related, but distinct, enhancements for crimes committed while on probation or parole. *See id.* (collecting cases); e.g., *People v. Montoya*, 141 P.3d 916, 922 (Colo. App. 2006) (holding that parole and probation status falls within exception to *Apprendi*).

[139] *Compare Fagan*, 905 A.2d at 1119 *with State v. Gross*, 31 P.3d 815, 819 (Ariz. 2001). In other situations similar to release (like parole or probation status), courts are equally split. Compare *State v. Jones*, 149 P.3d 636, 638 (Wash. 2006) with *State v. Perez*, 102 P.3d 705, 709 (Or. Ct. App. 2004), rev'd on other grounds, 131 P.3d 168 (Or. 2006).

[140] *See United States v. Samuel*, 296 F.3d 1169 (D.C. Cir. 2002) (holding that *Apprendi* does not apply to OCDR enhancement as codified in the federal Sentencing Guidelines, because the Guidelines do not permit the enhancement to exceed the statutory maximum); *United States v. Randall*, 287 F.3d 27, 30 (1st Cir. 2002); *United States v. Confredo*, 528 F.3d 143, 153 (2nd Cir. 2008).

[141] *United States v. Lewis*, 660 F.3d 189, 190 (3rd. Cir. 2011). As late as 2011, the Third Circuit claimed that the issue presented in *Lewis* was one of "first impression," and that no circuit had been faced with the case of the federal OCDR statute increasing the defendant's sentence beyond the statutory maximum. Pursuant to the district court's instructions, the jury had convicted the defendant of OCDR as a separate offense, which the Third Circuit held was error. But the Third Circuit also stated that "The error in treating § 3147 as an offense, here, turned out to be a wise move from an Apprendi standpoint, as the jury found that the elements of § 3147 had been proven beyond a reasonable doubt, thus allowing the judge to impose a sentence that exceeded the statutory maximum sentence for the underlying crime. Therefore, the District Court committed no error in sentencing Lewis to 138 months' imprisonment." *Id*. at 195. It appears that the Third Circuit would, therefore, not permit OCDR to fall within the *Apprendi* exception. *See also, United States v. Gillon*, 348 F.3d 755, 757 (8th Cir. 2003) ("assum[ing] without deciding that under current law it was error to omit the factual basis for the enhancement from the indictment," the omission of OCDR from the indictment was harmless error).