COMMENTARY
SUBTITLE III. PROPERTY OFFENSES

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

Explanatory Note. *For specified property offenses in the Revised Criminal Code (RCC), this section permits the government to aggregate the values, amounts of damage, or quantities of property involved in a single scheme or course of conduct in order to bring one charge of a more serious grade, instead of multiple charges of a less serious grade. Aggregation is permitted regardless of whether the property was taken, transferred, etc. from one person or several, provided that the taking, transferring, etc. was pursuant to one scheme or course of conduct. The revised aggregation to determine property offense grades statute ("aggregation statute") replaces the "Aggregation of amounts received to determine grade of offense" statute*[1] *in the current D.C. Code.*

Relation to Current District Law. *The revised aggregation statute clearly changes current District law in one main way.*

The revised aggregation statute expands the number of offenses for which values and quantities of property may be aggregated to fourteen. Under the current D.C. Code aggregation statute, only six statutes are subject to aggregation.[2] The eight RCC offenses[3] added to the revised aggregation statute comprise all the property offenses in the RCC which have more than one gradation based on the quantity, value, or damage done to property. Some of the added offenses seem particularly likely to involve a scheme or systematic course of conduct involving multiple properties.[4] The expansion of offenses subject to the aggregation statute improves the administrative efficiency and proportionality of these offenses.

Beyond this change to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised aggregation statute refers generally to "the values, amounts of damage, or quantities of the property involved in" the scheme or systematic course of conduct. The current D.C. Code aggregation statute refers to "amounts or property received" pursuant to a single scheme or systematic course of conduct. There is no case law interpreting this phrase in the current D.C. Code statute. The revised aggregation

[1] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[2] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[3] The eight offenses are: § 22E-2105 Unlawful Creation or Possession of a Recording; § 22E-2203 Check Fraud; § 22E-2204 Forgery; § 22E-2206 Unlawful Labeling of a Recording; § 22E-2208 Financial Exploitation of a Vulnerable Adult; § 22E-2301 Extortion; § 22E-2401 Possession of Stolen Property; § 22E-2403 Alteration of Motor Vehicle Identification Number; and § 22E-2503 Criminal Damage to Property.

[4] E.g., § 22E-2403 Alteration of Motor Vehicle Identification Number, which specifically applies not only to motor vehicles but to motor vehicle parts, in part targets fences of stolen property similar to the trafficking in stolen property offense.

statute's reference to "the values, amounts of damage, or quantities of the property involved in" the scheme or systematic course of conduct is intended to cover all the ways in which property may be the subject of one of the listed offenses, not just "receives."[5] In many RCC property offenses, it is the values of the relevant property that may be aggregated.[6] For some offenses, however, it is the quantity of property, not the value, which may be aggregated.[7] In still other offenses, it is the amount of damage that may be aggregated.[8] This change improves the clarity, consistency, and proportionality of the revised statutes.

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

The revised aggregation statute states that aggregation applies to a "single scheme or systematic course of conduct [that] could give rise to multiple charges of the same offense." The current D.C. Code aggregation statute refers to aggregation for "determining the grade of *the* offense and the sentence for *the* offense" (emphasis added).[9] There is no case law on point. The revised statute clarifies that only property involved in a scheme or systematic course of conduct for one offense may be aggregated. This revision clarifies the aggregation statute and improves the proportionality of the referenced offenses.

[5] There is no indication in the legislative history or otherwise that the use of the word "receives" was intended to omit property that was stolen or part of a fraudulent scheme that a person exercised control over, transferred, paid for, etc., but never "received."

[6] For example, if an actor watching an unattended table walks by and commits theft under RCC § 22E-2101 by taking a coat and a laptop left at the table, those items may be aggregated as being stolen pursuant to the same act or course of conduct. The value of those items would be added together to determine the appropriate grade of theft.

[7] For example, a person who, in violation of unlawful creation or possession of a recording (UCPR) per RCC § 22E-2105, one afternoon unlawfully makes 60 copies of one sound recording and 60 copies of different sound recording as part of the same act or course of conduct, may be charged with felony UCPR instead of two misdemeanor charges of UCPR pursuant to the revised aggregation statute. The number of recordings would be added together to determine the appropriate grade of UCPR.

[8] For example, if a person throws a rock through a display case, breaking multiple glass objects in violation of criminal damage to property (CDP) per RCC § 22E-2503, those items may be aggregated as being damaged pursuant to the same act or course of conduct. The amount of damage to each item would be added together to determine the appropriate grade of CDP. (See Commentary to RCC § 22E-2503).

[9] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft)… *or* § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense."(emphasis added)).

RCC § 22E-2101. Theft.

Explanatory Note. *This section establishes the revised theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct in which there is an intent to deprive another of property without an owner's consent. The penalty gradations are primarily based on the value of the property involved in the crime. The revised theft offense replaces the theft statute[1] and the breaking and entering a vending machine and similar devices statute[2] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct for first degree theft—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in paragraph (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the consent of an owner." "Consent" is a defined term in RCC § 22E-701 that means "a word or action that indicates, explicitly or implicitly, agreement to particular conduct or a particular result" and given by a person that is generally competent to do so. Any indication of agreement that satisfies the definition of "consent," even if obtained by deception, coercive threat, or physical force, negates the element "without the consent of an owner" and the accused is not guilty of theft. However, there may be liability under the RCC fraud offense (RCC § 22E-2101) or the RCC extortion offense (RCC § 22E-2301) if the taking was committed by deception, a coercive threat, or physical force. "Owner" is defined to mean a person holding an interest in property with which the actor is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the accused to be aware to a practical certainty that he or she lacks the consent of an owner.

Paragraph (a)(3) requires that the defendant had an "intent to deprive" that owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206

[1] D.C. Code § 22-3211.

[2] D.C. Code § 22-601 (Whoever in the District of Columbia breaks open, opens, or enters, without right, any parking meter, coin telephone, vending machine dispensing goods or services, money changer, or any other device designed to receive currency, with intent to carry away any part of such device or anything contained therein, shall be sentenced to a term of imprisonment of not more than 3 years or to a fine of not more than the amount set forth in § 22-3571.01, or both.).

that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

The requirements for liability in paragraphs (b)(1) - (b)(3) (second degree theft), paragraphs (c)(1) - (c)(3) (third degree theft), paragraphs (d)(1) - (d)(3) (fourth degree theft), and paragraphs (e)(1) - (e)(3) (fifth degree theft) are the same as those in paragraphs (a)(1) - (a)(3) for first degree theft. The theft gradations differ only in the requirements as to the amount and type of property at issue.

The various gradation requirements for theft are in paragraph (a)(4) (first degree theft), in paragraph (b)(4) (second degree theft), under paragraph (c)(4) (third degree theft), under paragraph (d)(4) (fourth degree theft), and in paragraph (e)(4) (fifth degree theft). Paragraphs (a)(4), (b)(4), (c)(4), (d)(4), and (e)(4) specify "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. Each gradation of theft refers to "value," a defined term in RCC § 22E-701 that generally means the fair market value of property, although, as will be discussed, some gradations of the RCC theft offense have additional bases for liability.

Paragraph (a)(4) specifies that first degree theft requires that "in fact" the property has a value of $500,000 or more. The defendant is strictly liable as to the value of the property.

Paragraph (b)(4) specifies that second degree theft requires that "in fact" the property has a value of $50,000 or more. The defendant is strictly liable as to the value of the property.

For third degree theft, paragraph (c)(4) and subparagraph (c)(4)(A) require "in fact" that the property has a value of $5,000 or more. The defendant is strictly liable as to the value of the property. Paragraph (c)(4) and subparagraph (c)(4)(B) specify an alternative basis for liability for third degree theft—that the property "in fact" is a motor vehicle. "Motor vehicle" is defined in RCC § 22E-701 as a vehicle designed to be propelled only by an internal-combustion engine or electricity. The defendant is strictly liable as to whether the property is a motor vehicle.

For fourth degree theft, paragraph (d)(4) and subparagraph (d)(4)(A) require that "in fact" the property has a value of $500 or more. The defendant is strictly liable as to the value of the property. Paragraph (d)(4) and subparagraph (d)(4)(B) specify an alternative basis for liability for fourth degree theft—that the property "in fact" is taken from a complaint who "possesses" the property within the complainant's immediate physical control. "Possesses" is defined in RCC § 22E-701 as to "[h]old or carry on one's person or [h]ave the ability and desire to exercise control over." The defendant is strictly liable as to whether the complainant holds or carries the property on his or her

person[3] or the complainant has the ability and desire to exercise control over property within his or her immediate physical control.

Paragraph (e)(4) specifies that fifth degree theft requires that "in fact" the property has any value. The defendant is strictly liable as to the property having any value.

Subsection (f) codifies an exception to liability for fare evasion. Conduct that violates D.C. Code § 35-252 is not a violation of theft. Subsection (f) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state required for the fact that the conduct constitutes a violation of D.C. Code § 35-252.

Subsection (g) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised theft statute clearly changes current District law in five main ways.*

First, the revised theft offense no longer includes conduct that constitutes "obtaining property by trick," "false pretense," "deception," "false token," or "larceny by trick."[4] Under District current law, such conduct is criminalized both as theft[5] and fraud.[6] Currently, a defendant may be convicted of both theft and fraud based on the same act or course of conduct, even though he or she must be concurrently sentenced for these convictions.[7] In contrast, in the RCC, conduct that constitutes "obtaining property by trick," "false pretense," "deception," or "larceny by trick" is criminalized only in RCC § 22E-2201, the revised fraud offense. Conduct previously known as "larceny by trust," "embezzlement," or obtaining property by "tampering" remains part of theft, except insofar as such conduct involves obtaining consent by deception and is therefore part of the revised fraud statute (RCC § 22E-2201). This revision reduces unnecessary overlap among offenses and improves the proportionality of the revised theft and fraud statutes.

Second, the revised theft offense eliminates as a separate means of proving liability for theft that the defendant have an intent to "appropriate"[8] property. The current D.C. Code defines "appropriate" as "to take or make use of without authority or right."[9] As applied to the current D.C. Code theft statute, the definition of "appropriate" means

[3] When to "hold or carry on one's person" in the RCC definition of "possesses" is inserted into subparagraph (d)(4)(B), the gradation requires that the property is taken from a complainant who "holds or carries on one's person the property within the complainant's immediate physical control." However, when a complainant holds or carries the property on the complainant's person, it will also be within the complainant's immediate physical control. Thus, the requirement in subparagraph (d)(4)(B) that the property be within the complainant's immediate physical control only applies to constructive possession—defined in the RCC as when the complainant has the ability and desire to exercise control over the property.
[4] D.C. Code § 22-3211(a)(3).
[5] D.C. Code § 22-3211.
[6] D.C. Code § 22-3221.
[7] D.C. Code § 22-3203. However, even if the imprisonment sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences.
[8] D.C. Code § 22-3211(b)(2).
[9] D.C. Code § 22-3201(1).

that any unauthorized taking or use of property, no matter how brief, can suffice for a theft conviction and is punishable the same as the more serious intent to interfere with property that is required by "with intent to deprive."[10] In contrast, in the RCC, conduct that is punishable under "with intent to appropriate" in the current theft statute instead will be punished under the revised unauthorized use of property offense in section RCC § 22E-2102. This revision improves the proportionality of the revised theft offense and reduces the overlap that currently exists between theft and theft-related offenses such as unauthorized use of a motor vehicle,[11] receiving stolen property,[12] and taking property without right,[13] which either require a lesser intent or no intent with regards to the defendant's level of interference with property.

Third, the revised theft statute increases the number and type of grade distinctions, grading primarily based on the value of the property. The current D.C. Code theft offense is limited to two gradations based solely on value.[14] In contrast, the revised theft offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade, and include a gradation for theft of a motor vehicle. Third degree theft includes theft of any motor vehicle, allowing for theft of low-value motor vehicles to be treated as higher value property, with correspondingly greater penalties than they would otherwise receive if treated as fourth or fifth degree theft. This special treatment of low-value motor vehicles recognizes that such vehicles are often targeted for theft. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft and fraud offenses.

Fourth, the revised theft statute criminalizes as property crimes the non-violent taking of a motor vehicle (third degree) and most[15] non-violent takings of any property[16] from the actual possession of another person or from within his or her immediate physical control (fourth degree). The current D.C. Code robbery[17] and carjacking[18] statutes criminalize takings of property from the immediate actual possession of another person[19]

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[10] D.C. Code §§ 22-3201(2); 22-3211(b)(1).
[11] D.C. Code § 22-3215.
[12] D.C. Code § 22-3232.
[13] D.C. Code § 22-3213.
[14] First degree theft involves property with a value of $1,000 or more and is punished as a serious felony; second degree theft involves property valued at less than $1,000 and is a misdemeanor. D.C. Code § 22-3212.
[15] The RCC robbery statute prohibits removing property from the "hand or arms of the complainant." This conduct overlaps with the theft from a person gradation in subparagraph (d)(4)(B) of the revised theft statute. If a defendant were charged with both robbery and theft for this conduct based on the same course of conduct, the convictions would merge under the RCC merger provision (RCC § 22E-214).
[16] "Property" in subparagraph (d)(4)(B) of fourth degree theft would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a basis of liability for third degree theft under subparagraph (c)(4)(B).
[17] D.C. Code § 22-2801.
[18] D.C. Code § 22-2803.
[19] The DCCA has defined "immediate actual possession" under the robbery statute as "the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also, Beaner v. United States*, 845 A.2d 525, 532-33

"by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." The DCCA has interpreted the current D.C. Code robbery statute to include taking property that was not on the complainant's person[20] and taking property without the complainant's knowledge,[21] when the only "force or violence" involved was the force of moving the object taken.[22] It appears that the current D.C. Code carjacking statute has a similar scope.[23] While the DCCA has suggested that there is a limit to sudden or stealthy seizures or snatchings under the current robbery statute due to the statutory "by force or violence" requirement, the precise contours of this limit have not been articulated.[24] In contrast, the RCC criminalizes as a property crime non-violent takings of a motor vehicle (third degree) and most[25] non-violent

(D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

[20] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

[21] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

[22] District case law states that any taking from the immediate actual possession of another person satisfies the "by force or violence" requirement in the current robbery statute. *See, e.g.*, *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926) ("[T]he requirement for force is satisfied within the sense of the statute by an actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.").

[23] Unlike the clear case law on robbery, whether current District law on carjacking extends liability to takings that occur without a threat or use of force is not firmly established in District case law. However, the statutory language regarding "sudden or stealthy seizure, or snatching" that requires no use of force or criminal menace is identical in the current robbery and carjacking statutes. And, in at least one case, the DCCA, ruling on other issues, appears to have upheld a carjacking conviction on facts that involved a sudden and stealthy seizure with no apparent threat, use of physical force, or bodily injury. *See Young v. United States*, 111 A.3d 13, 14 (D.C. 2015) (affirming multiple convictions for carjacking, first degree theft, and unauthorized use of a motor vehicle based on the defendant's taking a car with keys in it while the owner was standing nearby).

[24] In a 2017 case, in response to an argument in the dissent, the DCCA rejected the proposition that any taking from the immediate actual possession of another person is robbery instead of theft because "[s]uch a principle would completely nullify the 'by force or violence' element of robbery." *Gray v. United States*, 155 A.3d 377, 386 (D.C. 2017); *see also id.* at 386 n.18 (recognizing that "there are passages in opinions . . . that, divorced from context, could be read as supporting the broad proposition advanced by the dissent" that any theft from a person or from his or her immediate possession constitutes a robbery, but stating that "[w]e are unaware of any opinion binding on us that actually *holds* that this is the case."). However, this discussion about the limits of sudden or stealthy seizure or snatching under the current robbery statute is dicta. The jury was not instructed on sudden or stealthy seizure or snatching, *id.* at 382 & n. 13, and this provision of the current robbery statute was not addressed in the court's holding. The issue in *Gray* was whether the trial court erred in refusing to instruct the jury on the lesser included offense of second degree theft. *Id.* at 382. The court stated that "[o]ur earlier opinions glossed 'by force or violence' as 'using force or violence' or 'accomplished by force of by putting the victim in fear' . . . suggesting that we understood the statute to require proof of some sort of purposeful employment or at least knowing exploitation of force or violence." *Id.* at 384 (internal citations omitted). The DCCA held that the trial court did err because, under the "unusual" facts of the case, "the jury rationally could have doubted that [appellant] assaulted the women intending to effectuate the theft or that, in taking [complainant's] money, [appellant] was conscious of any fear (and lowered resistance) [complainant] might have experienced from the assaults." *Id.* at 383.

[25] The RCC robbery statute prohibits removing property from the "hand or arms of the complainant." This conduct overlaps with the theft from a person gradation in subparagraph (d)(4)(B) of the revised theft

takings of any property[26] from the actual possession of another person or from within his or her immediate physical control (fourth degree), instead of as robbery or carjacking offenses against persons. Such non-violent takings merit less severe punishment as theft as opposed to robbery.

This revision leads to several additional changes to current District law. First, under the revised theft statute, non-violent takings of motor vehicles and non-violent takings of any property[27] from the actual possession of another person or from within his or her immediate physical control are no longer subject to the "while armed" penalty enhancement in D.C. Code § 22-4502[28] or to penalty enhancements for the status of the complainant[29] as they are under current law. These enhanced penalties are unnecessary for non-violent conduct that constitutes theft, although there may be liability for

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statute. If a defendant were charged with both robbery and theft for this conduct based on the same course of conduct, the convictions would merge under the RCC merger provision (RCC § 22E-214).

[26] "Property" in subparagraph (d)(4)(B) of fourth degree theft would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a basis of liability for third degree theft under subparagraph (c)(4)(B).

[27] "Property" in subparagraph (d)(4)(B) of fourth degree theft would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a basis of liability for third degree theft under subparagraph (c)(4)(B).

[28] The current robbery statute is subject to enhanced penalties for committing robbery "while armed" with or "having readily available" a dangerous weapon. D.C. Code § 22-4502. In most non-violent takings of property from the actual possession of another person or from within his or her immediate physical control, the defendant will not be "armed" with a dangerous weapon and will only have it "readily available." Regardless, under current law, the entire enhancement in D.C. Code § 22-4502 applies to the current robbery statute. The current D.C. Code has a separate armed carjacking offense for committing carjacking "while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles)." D.C. Code § 22-2803(b)(1). Despite this offense, both carjacking and armed carjacking are subject to the additional penalty in D.C. Code § 22-4502 for committing the offenses "while armed" or "having readily available" a dangerous weapon.

However, DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the while armed enhancement in D.C. Code § 22-4502(a)(1) may not be applied to the current armed carjacking offense because it overlaps with an element of the offense. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[29] The District's protection of District public officials statute penalizes various actions, including taking the property of any District official or employee while in the course of his or her duties or on account of those duties. D.C. Code § 22-851(c). The District has penalty enhancements for robbery when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751; 22-3752); a transit operator or Metrorail station manager (D.C. Code §§ 22-3751.01; 22-3752); or a member of a citizen patrol (D.C. Code § 22-3602). The District has penalty enhancements for carjacking when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751.01; 22-3752); and a transit operator or Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

possession of a dangerous weapon in such circumstances under other provisions in the RCC.[30] Second, the revised theft statute punishes attempted non-violent takings of property from the actual possession of another person or from within his or her immediate physical control consistent with other criminal attempts. The D.C. Code currently codifies a penalty for attempted robbery[31] that differs from the general penalty for attempted crimes, but there is no clear rationale for such special attempt penalties in robbery as compared to other offenses. Under the revised theft statute, the RCC attempt provision (RCC § 22E-301) specifies what must be proven to establish attempt liability and establish penalties for attempted theft consistent with other offenses. Third, the revised theft statute requires a person to act "knowingly" with respect to taking or exercising control over a motor vehicle and whether the motor vehicle satisfies the RCC definitions of "property" and "property of another." The current carjacking statute requires only that a person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle,[32] although it is unclear in the legislative history whether the Council intended this culpable mental state.[33] DCCA case law and current District practice suggest that the offense requires the property to be of another.[34] Requiring a "knowingly" culpable mental state is consistent with the culpable mental state in other RCC property offenses,[35] which generally require that the defendant act knowingly with

[30] *See, e.g.*, RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition. In addition, an actor may face an enhanced penalty under RCC § 22E-608, the hate crime penalty enhancement, if he or she targets the complainant because of a characteristic such as his or her sex.

[31] D.C. Code § 22-2802 (making attempted robbery punishable with a maximum term of imprisonment of three years).

[32] D.C. Code § 22-2803(a)(1).

[33] The legislative history of the current carjacking statute does not discuss why a recklessly mental state was adopted. The committee report makes no mention of recklessness, and actually states that the statute "[d]efines the offenses of carjacking and armed carjacking as the knowing and/or forceful taking from another the possession of that person's motor vehicle." Committee Report to the Carjacking Prevention Act of 1993, Bill 10-16 at 3.

[34] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").

[35] There are two additional changes in current District law for carjacking that are related to culpable mental states. First, the revised theft statute requires an intent to deprive. Current District law does not have such a requirement for carjacking. In the RCC, a non-violent taking of a motor vehicle without intent to deprive would be criminalized under either the unauthorized use of property statute (RCC § 22E-2102) or unauthorized use of a motor vehicle statute (RCC § 22E-2103). Second, the revised theft statute requires that the defendant know that he or she lack the consent of the owner. As this commentary discusses later, District practice supports requiring lack of consent as an element of carjacking. The current carjacking statute requires a "knowingly or recklessly" culpable mental state, but it is unclear how the DCCA would construe these mental states in relation to the lack of consent of the owner, particularly when this element is not in the current statute. The current unauthorized use of a motor vehicle statute, for example, requires "without the consent of the owner," but does not contain any culpable mental states. D.C. Code § 22-3215(b). DCCA case law for UUV, however, requires a "knowing" mental state for this element. *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations

respect to the elements of the offense, as is requiring that the motor vehicle be "property" and "property of another," as those terms are defined in the RCC.[36] Collectively, these revisions improve the consistency of the revised theft statute with other offenses and the proportionality of penalties.

Fifth, the revised theft offense eliminates the special recidivist theft penalty set forth in current D.C. Code § 22-3212(c).[37] The current D.C. Code recidivist theft penalty provides that a defendant convicted of first or second degree theft who has two or more prior convictions for theft not committed on the same occasion shall be sentenced to a term of imprisonment of not more than 15 years and is subject to a mandatory minimum term of imprisonment of one year. In contrast, for the revised theft statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist theft, consistent with other offenses. There is no clear basis for singling out recidivist theft offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

Beyond these five changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised theft statute eliminates the evidentiary provision for theft of services that is in subsection (c) of the current D.C. Code theft statute.[38] The evidentiary provision states that "proof" of certain facts "shall be prima facie evidence that the person had committed the offense of theft." The provision neither specifies the government's burden of proof for those facts nor states whether the finding of prima facie evidence is a mandatory presumption that the trier of fact must make or a permissive presumption that

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omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[36] RCC § 22E-701 defines property as "anything of value" which would include a motor vehicle. The RCC definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest with which the actor is not privileged to interfere, regardless of whether the actor also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[37] D.C. Code § 22-3212:

> (c) A person convicted of theft in the first or second degree who has 2 or more prior convictions for theft, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 15 years and for a mandatory-minimum term of not less than one year, or both. A person sentenced under this subsection shall not be released from prison, granted probation, or granted suspension of sentence, prior to serving the mandatory-minimum.
>
> (d) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for theft if he or she has been convicted on at least 2 occasions of violations of:
>
> (1) § 22-3211;
>
> (2) A statute in one or more jurisdictions prohibiting theft or larceny; or
>
> (3) Conduct that would constitute a violation of § 22-3211 if committed in the District of Columbia.

[38] D.C. Code § 22-3211(c).

the trier of fact may, but is not required, to make. There is no District case law concerning the theft of services provision. Resolving this ambiguity, the revised theft statute eliminates this evidentiary provision for theft of services. It appears that the language in the theft of services provision is superfluous[39] and deletion of the provision clarifies the revised theft offense.

Second, the revised theft offense requires a "knowingly" culpable mental state for whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." The current D.C. Code theft statute does not specify a culpable mental state for these elements and no case law exists directly on point. The current D.C. Code robbery statute does not refer to "property" or "property of another," but the statute and case law support using these elements as they are defined in the RCC,[40] and applying a culpable mental similar to that of theft.[41] Resolving these ambiguities, the revised theft statute requires a "knowingly" culpable mental state whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[42] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[43]

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[39] In practice, it is unclear whether there are fact patterns where it could be said the government would satisfy the requirements of the theft of services provision and not also established a prima facie case for theft. Indeed, the theft of services evidentiary provision requires the government to establish additional facts beyond what the theft offense requires—for example that the services were rendered "in circumstances where payment is ordinarily made immediately upon the rendering of services or prior to departure from the place where the services were obtained."

[40] The current robbery statute requires that the defendant "take" "anything of value." D.C. Code § 22-2801. RCC § 22E-701 defines property as "anything of value." In addition, the DCCA has held that the current robbery statute incorporates the elements of "larceny," *Lattimore*, 684 A.2d at 359, which requires that property belong to another person. *See, e.g., Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

The definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[41] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

[42] *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)").

[43] *See, e.g.*, RCC § 22E-2201.

Third, the revised theft gradations, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property, as to whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, and as to the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. The current D.C. Code theft, robbery, and carjacking statutes are silent as to what culpable mental state applies to these elements and there is no District case law on point. However, District practice does not appear to apply a mental state to the values in the current theft gradations.[44] In addition, the current D.C. Code carjacking statute does not define "motor vehicle" and there is no relevant case law, making the scope of the offense unclear as compared to other offenses in Title 22 that define "motor vehicle."[45] Resolving these ambiguities, the revised theft offense, by use of the phrase "in fact," applies strict liability to the value of the property, to whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, and to the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[46] Clarifying that these elements are matters of strict liability in the revised theft gradations clarifies and potentially fills a gap in District law, as does applying the RCC definition of "motor vehicle."

Fourth, third degree of the revised theft statute does not require asportation of the property for the non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. The current D.C. Code robbery statute does not include an asportation element. However, the DCCA has stated that robbery requires that the defendant "possess the item being stolen and move it."[47] Asportation is a minimal requirement under current robbery law that may be satisfied by "the slightest moving of an object from its original location."[48] Resolving this ambiguity,

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[44] D.C. Crim. Jur. Instr. § 5.300.

[45] *See* D.C. Code §§ 22-3215(a) (defining "motor vehicle" for the unauthorized use of a motor vehicle statute as "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."); D.C. Code § 22-3233(c)(2) (defining "motor vehicle" for the altering or removing motor vehicle identification numbers offense as "any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

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

[47] *Moorer v. United States*, 868 A.2d 137, 142 (D.C. 2005) (discussing *Newman v. United States*, 705 A.2d 246 (D.C. 1997)). *See also* D.C. Crim. Jur. Instr. § 4.300 ("[a]lthough not explicitly required in the statute, the government must prove that the defendant took the property and carried it away[.]").
Current District law does not require asportation for carjacking liability. *Moorer*, 868 A.2d at 141 ("Carjacking simply requires possession or control (or attempted possession or control) of the car. Neither the statute nor the case law requires the government to prove asportation—or, indeed, any movement at all—of the car.").

[48] *See, e.g., Simmons v. United States*, 554 A.2d 1167, 1171 n.9 (D.C. 1989) (citing, *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

third degree of the revised theft statute eliminates the asportation requirement as redundant to liability for non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. It is unclear how a defendant could "take" property without also slightly moving it and satisfying any asportation requirement. However, to the extent that eliminating an asportation requirement expands the scope of current District law, such expansion reflects the gravamen of the gradation—invading the space of the complainant.[49] Eliminating the asportation requirement is also consistent with the revised robbery statute (RCC § 22E-1201) and revised unauthorized use of property statute (RCC § 22E-2102), neither of which requires asportation. This change improves the clarity and consistency of the revised statute.

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

First, the revised theft offense no longer uses the phrase "wrongfully obtains or uses" that is in the current D.C. Code theft statute,[50] and eliminates superfluous language[51] in the long list of predicate conduct. These changes in wording do not affect the limited District case law interpreting this part of the current D.C. Code definition of "wrongfully obtains or uses," such as *In re D.D.*[52] and *Dobyns v. United States*.[53] No change to the scope of the theft statute is intended by these changes.

Second, the revised theft statute requires that the defendant act "without the consent of an owner." This element is intended to clarify the meaning of the ambiguous phrase "without authority or right" in current theft law. The current D.C. Code theft statute does not distinguish "without authority or right" as a separate element, but "without authority or right" is part of one of the statutorily specified means of committing theft.[54] Regardless of the status of "without authority or right" as a separate element in the theft statute, both the legislative history[55] and current practice as reflected by the

[49] *See, e.g.*, § 19.3(b) Carrying away (asportation), 3 Subst. Crim. L. § 19.3(b) (3d ed.) ("The rationale is that, in any taking from the area [within the victim's presence] 'the rights of the person to inviolability would be encroached upon and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket.'") (quoting *State v. Eno*, 8 Minn. 220 (1963)).

[50] D.C. Code § 22-3211(a).

[51] Superfluous terms are: "making an unauthorized use" or unauthorized "disposition," and "interest in or possession of property." The remaining terms in the definition of "wrongfully obtains or uses" are included in either the revised theft offense or revised fraud offense (RCC § 22E-2201) takes, obtains, transfers, or exercises control over

[52] 775 A.2d 1096 (D.C. 2001).

[53] 30 A.3d 155 (D.C. 2011).

[54] D.C. Code §§ 22-3211(b)(2) (requiring "with intent to appropriate the property to his or her own use or to the use of a third person."); 22-3201(1) (defining "appropriate" as "to take or make use of without authority or right."). However, in at least one instance the DCCA has suggested that proof that a defendant act "without authority or right" also is required when the defendant committed theft by an "intent to deprive." *Russell v. United States*, 65 A.3d 1177, 1181 (D.C. 2013) ("[W]e are satisfied that appellants 'wrongfully obtained' [Federal Aviation Administration] property, 'without authority or right,' specifically intending at the time to deprive the [Federal Aviation Administration] of property that the evidence shows had value. Accordingly, the statutory elements of second-degree theft have been satisfied.").

[55] Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of*

Redbook jury instruction[56] acknowledge that theft requires an additional element similar to "without authority or right," although they each use different language to discuss it. The current D.C. Code robbery statute[57] and carjacking statute[58] do not state as an element that the actor lacks the consent of an owner, but case law[59] and current District practice[60] support requiring such an element.

Resolving these ambiguities, the revised theft statute requires that the defendant lack the "consent" of an "owner," as those terms are defined in RCC § 22E-701. "Consent" has been recognized in DCCA case law as providing a grant of authority or right which negates theft[61] and it seems as though it would similarly negate robbery and carjacking. However, under the RCC a person may have a defense to depriving another of their property without consent of an owner, such as in the case of a police seizure of contraband or other government operations.[62] No change in the scope of liability is intended by requiring that the defendant lack the "consent of an owner." The definitions of "consent" and "owner" are discussed in more detail in the commentary to RCC § 22E-701.

Third, the revised theft statute requires that the defendant act "with intent to deprive the other of the property." The current D.C. Code theft statute requires an "intent to deprive the other of a right to the property or a benefit of the property."[63] The revised theft statute deletes the language "a right to the property or a benefit of the property as surplusage, given that the definition of "deprive" in RCC § 22E-701 refers to the property's "value" and "benefit." The current D.C. Code robbery statute does not specify an intent to deprive, but the DCCA has held that the statute incorporates the elements of "larceny,"[64] which requires an intent to deprive.[65] No change to current District law is intended by this change.

Comments on Bill No. 4-193) at 16-17 (discussing how "wrongfully" was added to the phrase "obtains or uses" to "insure that purely innocent transactions are excluded from the scope" of the theft offense and is used to "indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property.").

[56] D.C. Crim. Jur. Instr. § 5.300 cmt. 5-33 to 5-34 (discussing why "against the will" and "against the will or interest" were added to parts of the theft jury instruction).

[57] D.C. Code § 22-2801.

[58] D.C. Code § 22-2803.

[59] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[60] D.C. Crim. Jur. Instr. § 4.300 (listing as an element of robbery that the actor "did so against the will" of the complainant); Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership.").

[61] *Nowlin v. United States*, 782 A.2d 288, 290, 292-93 (D.C. 2001) (discussing the importance of the fact that there was another individual "authorized" to sign checks on the auto body shop account as it pertains to whether the defendant "knew" he was not "entitled" to cash the check); *Russell*, 65 A.3d at 1777-81, n. 27 (discussing the doctrine of apparent authority).

[62] *See* RCC § 22E-402, Execution of Public Duty.

[63] D.C. Code § 22-3211(b)(1).

[64] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements. Thus, the government must prove larceny and assault.") (internal citations omitted).

Fourth, the revised theft statute specifies a "knowingly" culpable mental state as to the fact that the accused lacked an owner's consent. Although the current D.C. Code theft statute is silent as to the applicable culpable mental state, DCCA case law has applied a knowledge requirement to a similar element.[66] The current D.C. Code robbery statute does not state as an element that the actor lacks the consent of an owner, but case law supports such a requirement[67] and applying a culpable mental similar to that of theft.[68] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[69]

Fifth, subsection (f) of the revised theft statute codifies an exclusion from liability for fare evasion. This exception codifies recent law.[70]

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[65] *See, e.g., Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States,* 235 A.2d 326, 327 (D.C.1967)).

[66] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States,* 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States,* 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").
The DCCA has also stated that the culpable mental state of the current theft offense is one of "specific intent." *See, e.g., Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[67] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States,* 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill,* 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[68] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill,* 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

[69] *See, e.g.,* RCC § 22E-2201.

[70] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

RCC § 22E-2102. Unauthorized Use of Property.

Explanatory Note*. This section establishes the unauthorized use of property (UUP) offense in the Revised Criminal Code (RCC). UUP covers conduct that results in the taking, obtaining, transferring, or exercising of control over property of another without an owner's effective consent. UUP criminalizes behavior that does not rise to the level of conduct "with intent to deprive an owner of the property" in the revised theft offense (RCC § 22E- 2101), the revised fraud offense (RCC § 22E-2201), or the revised extortion offense (RCC § 22E-2301). The revised UUP offense replaces the taking property without right (TPWR) statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in paragraph (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) codifies an exclusion from liability for fare evasion. Conduct that constitutes a violation of D.C. Code § 35-252 is not a violation of UUP. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state required for the fact that the conduct constitutes a violation of D.C. Code § 35-252.

Subsection (c) codifies a defense to the unauthorized use of property offense when the defendant intends to return the property to a lawful owner. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. There are two requirements for the defense. First, per paragraph

[1] D.C. Code § 22-3216.

(c)(1), the actor must reasonably believe that the property is lost or was stolen by a third party. Per the rule of interpretation in RCC § 22E-207, the "in fact" specified in subsection (c) applies to all elements in paragraph (c)(1). "In fact" is a defined term in term in RCC § 22E-207 that indicates no culpable mental state, as defined in RCC § 22E-205, applies to a given element, here that the actor reasonably believes that the property is lost or was stolen by a third party. It is not necessary to prove that the actor desired or was practically certain that the property is lost or was stolen by a third party. However, the actor must subjectively believe, and that belief must be reasonable, that the property is lost or was stolen by a third party. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[2] There is no defense under paragraph (c)(1) when the actor makes an unreasonable mistake as to the property being lost or stolen by a third party.

The second requirement for the defense is in paragraph (c)(2). The actor must engage in the conduct constituting the offense "with intent" to return the property to a lawful owner. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor was returning the property to a lawful owner. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually returned the property to a lawful owner, only that the actor believed to a practical certainty that the actor would do so.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised unauthorized use of property statute clearly changes current District law in four main ways.*

First, the revised UUP offense eliminates the current D.C. Code taking property without right (TPWR) statute's asportation requirement[3] and extends liability if the defendant merely "takes," "obtains," "transfers," or "exercises control" over the property without carrying it away. The DCCA has never interpreted the scope of the asportation requirement in the current D.C. Code TPWR statute, but in the context of other offenses has stated it is a minimal requirement.[4] In contrast, the revised UUP statute requires only

[2] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[3] D.C. Code § 22-3216 (requiring takes and "carries away" the property of another).

[4] *Simmons v. United States*, 554 A.2d 1167, 1171 & n. 9(D.C. 1989) ("We have made clear in several cases that the slightest moving of an object from its original location may constitute an asportation." (citing

that the defendant take, obtain, transfer, or exercise control over the property of another. It is unclear why a slight physical movement of property should make the difference between an unauthorized, temporary action being criminal and non-criminal. This revision improves the consistency and proportionality of the revised statute.

Second, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." The current D.C. Code TPWR statute merely requires that the defendant engage in conduct "without right" and does not specify a mental state for this element.[5] Case law interpreting the current D.C. Code TPWR statute has construed the phrase "without right" to mean without the consent of the owner, but has not required a knowledge culpable mental state as to the lack of consent.[6] Similarly, case law suggests that something less than a knowledge culpable mental state is necessary for the element that the property is "property of another."[7] In contrast, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] Requiring a knowing culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[9]

Third, the revised UUP statute, through the general culpability principles for self-induced intoxication in RCC § 22E-209, allows a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current D.C. Code TPWR statute is a general intent crime,[10] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from

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Durphy v. United States, 235 A.2d 326, 327 (D.C.1967) and *Ray v. United States*, 229 A.2d 161, 162 (D.C.1967)).

[5] The DCCA has stated that the culpable mental state of the current TPWR offense is one of "general intent." *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995). "General intent" is not used in or defined in the statute for TPWR, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[6] *Tibbs v. United States*, 507 A.2d 141, 143 (D.C. 1986) ("Only two legal principles can be distilled from the existing case law. First, we held very recently . . . that '[p]roperty cannot be taken 'without right' if it is taken with the knowledge and consent of the owner, or one authorized to consent on his behalf.' . . . Second, it is established that to convict a person of taking property without right, the government need not prove any specific intent; a general intent to commit the proscribed act is all that the law requires." (internal citations omitted)).

[7] *Schafer v. United States*, 656 A.2d 1185, 1189 (D.C. 1995) ("In other words, in the context of this particular case, we must determine whether substantial evidence in the record demonstrates that in removing the television set appellant actually knew, or had reason to know that it was the property of another, not his own.").

[8] *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)").

[9] *See, e.g.*, RCC § 22E-2201.

[10] *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995).

forming the necessary intent for the crime.[11] At the same time, the DCCA has also interpreted the current statute to incorporate a negligence-like culpable mental state, which is not a form of culpability that is susceptible to being negated by self-induced intoxication.[12] As a result, a defendant charged under the current statute would have no basis for even raising—let alone presenting evidence in support of—a claim that he or she, due to his or her self-induced intoxicated state, lacked the necessary intent. By contrast, per the revised UUP offense, a defendant would both have a basis for, and be allowed to raise, a claim of this nature since the revised UUP offense is subject to a more demanding culpable mental state of knowledge.[13] Likewise, where appropriate, under the revised UUP offense the defendant would be entitled to a jury instruction clarifying that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUP. This change improves the clarity, consistency, and proportionality of the offense.

Fourth, subsection (b) of the revised UUP statute codifies an exception for liability for fare evasion. Such an exception exists in current law for the theft statute,[14] but not TPWR. Conduct that satisfies the current theft statute could also be charged as TPWR.[15] Codifying the same exclusion from liability for fare evasion improves the consistency of the revised UUP statute and further clarifies the lesser included relationship between theft and UUP.

Beyond these four changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised UUP offense is made a lesser included offense[16] of the revised theft (RCC § 22E-2101), fraud (RCC § 22E-2201), and extortion (RCC § 22E-2301)

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[11] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[12] *See Schafer*, 656 A.2d at 1188.

[13] This result is a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[14] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

[15] The current theft statute can be satisfied with an intent to "appropriate," which is defined as "to take or make use of without authority or right." D.C. Code §§ 22-3211(b)(2); 22-3201. Since the current TPWR statute does not require any intent to interfere with the property, an intent to "appropriate" could satisfy TPWR.

[16] By being a lesser included offense, a person cannot be convicted of both UUP and theft or UUP and fraud, or UUP and extortion for the same act or course of conduct under either the RCC merger provision (RCC § 22E-214) or current District case law. *See, e.g., Mooney v. United States*, 938 A.2d 710, 723 (D.C. 2007) (discussing how multiple punishments that result from convictions of a greater and a lesser-included offense are prohibited by the Double Jeopardy Clause unless there is clear legislative intent that punishment should be imposed for both offenses). In addition, the defendant is on notice from the time of indictment for theft, fraud, or extortion, that he may be convicted of the lesser included offense. *See Woodard v. United States*, 738 A.2d 254, 259 n. 10 (D.C. 1999) ("the law is settled that an indictment on a greater offense puts the indictee on notice that the prosecution might also press a lesser-included charge"); *see also Schmuck v. United States*, 489 U.S. 705, 718, 109 S. Ct. 1443, 1452, 103 L. Ed. 2d 734 (1989) ("The elements test . . . permits lesser offense instructions only in those cases where the indictment contains

offenses. The current D.C. Code TPWR statute is silent as to whether it constitutes a lesser included offense of the current D.C. Code theft,[17] fraud,[18] and extortion[19] offenses. Based on legislative history,[20] the DCCA has recognized that the current D.C. Code TPWR statute is a lesser included offense of theft,[21] although the current D.C. Code TPWR statute appears to fail the DCCA's current "elements test" as to whether it is a lesser included offense of theft.[22] There is no case law on point with respect to fraud or extortion and these offenses also appear to fail the DCCA's current "elements test."[23] Resolving this ambiguity, the revised UUP statute is clearly a lesser included offense of the revised theft, fraud, and extortion statutes insofar as it has no elements not included in these offenses.[24] This revision removes an unnecessary gap in liability for temporary takings and improves the overall proportionality of these statutes.

Second, the revised UUP offense requires a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." The current statute does not specify a culpable mental state for the comparable elements[25] and no case law exists directly on point.[26] Resolving this ambiguity, the revised UUP statute requires

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the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge."). Upon a showing of some evidence, the defendant may demand an instruction to the jury on the lesser included offense of UUP to accompany theft, fraud, or extortion charges. *Woodward v. United States*, 738 A.2d at 261 ("Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict on the lesser-included offense after crediting the evidence.").

[17] D.C. Code § 22-3211.

[18] D.C. Code § 22-3221.

[19] D.C. Code § 22-3251.

[20] The legislative history for the 1982 Theft Act indicates that the Council of the District of Columbia intended for TPWR to be a lesser included offense of theft. Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 36 ("[I]t is intended that the offense of taking property without right continue to be treated as a lesser included offense of the consolidated theft offense.").

[21] *Moorer v. United States*, 868 A.2d 137, 143 (D.C. 2005).

[22] *Moorer v. United States*, 868 A.2d at 140 ("Under the elements test, one offense is included within another if "(1) the lesser included offense consists of some, but not every element of the greater offense; and (2) the evidence is sufficient to support the lesser charge."). Because the asportation element of the current TPWR statute is not required by the current theft, fraud, or extortion statutes, the current TPWR statute does not appear to be a lesser included offense of the current theft, fraud, or extortion statutes.

[23] See *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*).

[24] The revised UUP statute requires "without the effective consent of the owner." RCC § 22E-701 defines "effective consent" as "consent other than consent induced by the physical force, a coercive threat, or deception." RCC § 22E-701 defines "consent" as "a word or action that indicates, explicitly or implicitly, agreement to particular conduct or a particular result" given by a person generally competent to do so. Thus, in requiring that the defendant lack "effective consent," the revised UUP statute requires either that there is no consent at all, or that there is consent but it is obtained by physical force, coercive threat, or deception, and is not valid. These requirements mirror the requirements in the RCC theft offense ("without the consent of the owner"), fraud ("with the consent of the owner; the consent being obtained by deception), and extortion ("with the consent of the owner; the consent being obtained by a coercive threat.").

[25] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so.").

[26] Insofar as the current TPWR offense has been held to be a "general intent crime," courts have consistently held that there must be an "intent to commit the proscribed act" which here consists of the

a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[27] A knowingly culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[28] This revision improves the clarity and consistency of the revised statute.

Third, the revised UUP offense requires that the person act "without the effective consent of an owner." The current D.C. Code TPWR statute requires that the defendant act "without right." This phrase has been interpreted by the DCCA to refer to "consent of the owner, or one authorized to consent on his behalf,"[29] and to exclude instances where the consent was "the product of trickery" or where the person had consent to take the item for one purpose but then exceeded the terms of that consent.[30] The revised UUP requirement that the person act "without the effective consent of an owner," uses definitions in RCC § 22E-701 for "consent," "effective consent," and "owner" that are consistent across property offenses and also appears to be consistent with existing case law on the current TPWR statute. The change improves the clarity and consistency of the revised UUP offense.

Fourth, the revised UUP statute codifies a defense for intent to return the property to a lawful owner. The current D.C. Code TPWR statute does not codify any such defense.[31] DCCA case law recognizes Good Samaritan[32] and abandoned property[33] defenses to some offenses, but the requirements of the defenses are unclear and the older case law frames the defense in terms of a reasonable mistake of fact as to ownership, which does not reflect the current D.C. Code definition of "property of another."[34] Resolving this ambiguity, the revised TPWR statute codifies a defense when the actor reasonably believes that the property is lost or stolen by a third party and engages in the conduct constituting the offense with intent to return the property to a lawful owner. Without such a defense, a person that takes, obtains, transfers, or exercises control over the property of another without the owner's effective consent, but with the intent to return

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taking. *See, e.g., Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975). However, case law provides no greater specificity as to the nature of the required intent for TPWR.

[27] *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)").

[28] *See, e.g.*, RCC § 22E-2101.

[29] *Fussell v. United States*, 505 A.2d 72 (D.C. 1986).

[30] *Baggett v. United States*, 528 A.2d 444 (D.C. 1987).

[31] D.C. Code § 22-3216.

[32] *See, e.g., Lihlakha v. United States*, 89 A.3d 479, 490 (D.C. 2014).

[33] *See, e.g., Hawkins v. United States*, 103 A.3d 199, 201, 202 (D.C. (2014) ; *Simms v. United States*, 612 A.2d 215, 218-220 (D.C. 1992).

[34] D.C. Code § 22-3201(4) (defining "property of another" as "any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term 'property of another' includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term 'property of another' does not include any property in the possession of the accused as to which any other person has only a security interest.").

the property to its lawful owner, would be guilty of the offense. Under the revised UUP statute, a defendant's belief that property is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that it is "property of another" and that he or she lacks the "effective consent" of the owner. This change improves the clarity, consistency, and proportionality of the revised statute.

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

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

Explanatory Note. *This section establishes the unauthorized use of a motor vehicle (UUV) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes the use of a motor vehicle without the effective consent of an owner. The offense has a single penalty gradation. The revised UUV offense replaces portions of the unauthorized use of motor vehicles statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—operating a motor vehicle. "Motor vehicle" is a defined term in RCC § 22E-701 that includes any vehicle designed to be propelled only by an internal-combustion engine or electricity. Paragraph (a)(1) also specifies a culpable mental state of "knowingly," a term defined at RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is operating a "motor vehicle," as that term is defined in RCC § 22E-701.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-207 that means a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires that the accused be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) codifies a defense to the unauthorized use of a motor vehicle offense when the defendant intends to return the motor vehicle to a lawful owner. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. There are two requirements for the defense. First, per paragraph (b)(1), the actor must reasonably believe that the motor vehicle is lost or was stolen by a third party. Per the rule of interpretation in RCC § 22E-207, the "in fact" specified in subsection (b) applies to all elements in paragraph (b)(1). "In fact" is a defined term in term in RCC § 22E-207 that indicates no culpable mental state, as defined in RCC § 22E-205, applies to a given element, here that the actor reasonably believes that the motor vehicle is lost or was stolen by a third party. It is not necessary to prove that the actor desired or was practically certain that the motor vehicle is lost or was stolen by a third party. However, the actor must subjectively believe, and that belief must be reasonable, that the motor vehicle is lost or was stolen by a third party. Reasonableness is an objective standard that must take into account certain characteristics of the actor but

[1] D.C. Code § 22-3215. Specifically, the revised UUV offense replaces D.C. Code § 22-3215 (b), (d)(1)-(d)(3). The remaining portions of D.C. Code § 22-3215, concerning rented and leased cars under certain conditions, are not part of the RCC and will remain in D.C. Code § 22-3215, subject to conforming amendments as necessary.

not others.[2] There is no defense under paragraph (b)(1) when the actor makes an unreasonable mistake as to the motor vehicle being lost or stolen by a third party.

The second requirement for the defense is in paragraph (b)(2). The actor must engage in the conduct constituting the offense "with intent" to return the motor vehicle to a lawful owner. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor was returning the motor vehicle to a lawful owner. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually returned the motor vehicle to a lawful owner, only that the actor believed to a practical certainty that the actor would do so.

Subsection (c) specifies the penalties for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised unauthorized use of a motor vehicle statute clearly changes current District law in six main ways.*

First, through the revised definition of "motor vehicle" in RCC § 22E-701, the revised UUV offense includes liability with respect to any vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The definition of "motor vehicle" in the current D.C. Code UUV offense, and thus the scope of the current D.C. Code UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."[3] In contrast, the revised definition of "motor vehicle" in RCC § 22E-701 broadens the revised UUV offense to include any watercraft, aircraft, or land vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The "designed to be" language includes vehicles that happen to be moved by human exertion in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity. This revision eliminates possible gaps in the offense and clarifies the statute.

Second, through the revised definition of "motor vehicle" in in RCC § 22E-701, the revised UUV offense no longer includes vehicles like mopeds that are designed to be propelled, in whole or in part, by human exertion. The definition of "motor vehicle" in the current D.C. Code UUV offense, and thus the scope of the current D.C. Code UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck,

[2] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[3] D.C. Code § 22-3215(a).

truck tractor, truck tractor with semitrailer or trailer, or bus,"[4] although the DCCA has held explicitly held that mopeds[5] fall within the current definition of "motor vehicle." In contrast, the revised definition of "motor vehicle" requires that the vehicle that be "designed to be propelled only by an internal-combustion engine or electricity." These types of vehicles are generally more expensive, heavier, and pose more severe safety risks to others than a vehicle that is designed to be propelled, in whole or in part, by human exertion. Unauthorized use of vehicles such as mopeds,[6] that fall outside the RCC definition of "motor vehicle" and the revised UUV offense, remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Third, the revised UUV offense eliminates the special recidivist penalty in the current D.C. Code UUV statute.[7] In contrast, in the RCC, the general recidivism enhancement (RCC § 22E-606) will provide enhanced punishment for recidivist UUV consistent with other offenses. There is no clear basis for singling out UUV for a recidivist enhancement as compared to other offenses of equal seriousness. This change improves the proportionality and consistency of the revised UUV offense.

Fourth, the revised UUV offense eliminates the special penalty for committing UUV during a crime of violence or to facilitate a crime of violence that is in the current D.C. Code UUV statute.[8] This enhancement is particularly unusual in current District

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[4] D.C. Code § 22-3215(a).

[5] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[6] Similarly, a bicycle or scooter designed to run on either an electric motor or bodily propulsion would not constitute a "motor vehicle."

[7] D.C. Code § 22-3215(d)(3).

> (3)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who has 2 or more prior convictions for unauthorized use of a motor vehicle or theft in the first degree, not committed on the same occasion, shall be fined not less than $5,000 nor more than $15,000, or imprisoned for not less than 30 months nor more than 15 years, or both.
>
> (B) For the purposes of this paragraph, a person shall be considered as having 2 prior convictions for unauthorized use of a motor vehicle or theft in the first degree if the person has been twice before convicted on separate occasions of:
>
> (i) A prior violation of subsection (b) of this section or theft in the first degree;
>
> (ii) A statute in one or more other jurisdictions prohibiting unauthorized use of a motor vehicle or theft in the first degree;
>
> (iii) Conduct that would constitute a violation of subsection (b) of this section or a violation of theft in the first degree if committed in the District of Columbia; or
>
> (iv) Conduct that is substantially similar to that prosecuted as a violation of subsection (b) of this section or theft in the first degree.

[8] D.C. Code § 22-3215(d)(2):

> (2)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who took, used, or operated the motor vehicle, or caused the motor vehicle to

law for requiring consecutive sentencing. In contrast, the RCC deletes this special penalty for committing UUV during a crime of violence or to facilitate a crime of violence. There is no clear basis for singling out UUV for a crime of violence enhancement as compared to other offenses of equal seriousness. The RCC reserves theft of a motor vehicle for the RCC theft statute and limits the RCC UUV statute to temporary unauthorized use of a motor vehicle that is a true "joy ride." If an individual uses the motor vehicle during a crime of violence or to facilitate a crime of violence, the defendant will be liable for either theft or UUV, as well as the crime of violence, ensuring that there is added liability for the use of a motor vehicle in conjunction with a crime of violence. This change improves the proportionality and consistency of the revised UUV and theft offenses.

Fifth, the revised UUV offense eliminates the separate offense of "UUV passenger" that currently is recognized in DCCA case law. The current D.C. Code UUV statute is limited to a single gradation,[9] and does not specifically address whether or in what manner it reaches a passenger in a motor vehicle. However, the DCCA has held that riding in a motor vehicle as a passenger with knowledge of its unlawful operation is sufficient for liability.[10] In contrast, the revised UUV offense penalizes only knowingly *operating* a motor vehicle without the effective consent of an owner. A passenger riding in a motor vehicle, with knowledge of its unlawful operation, is not, without more, sufficient for UUV liability in the RCC. However, a passenger that satisfies the requirements of accomplice liability (RCC § 22E-210) may be liable as an accomplice to UUV and consequently receive the same penalty as the driver of the vehicle. The revised UUV statute does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis*[11] and *Stevens v. United States*,[12] nor does it change the requirement in existing case law that a passenger is not liable for aiding and abetting UUV if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized.[13] To the

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be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:

(i) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, consecutive to the penalty imposed for the crime of violence; and

(ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.

(B) For the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4).

[9] D.C. Code § 22-3215(d)(1).

[10] *See, e.g.*, *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016); *In re D.P.*, 996 A.2d 1286, 1288 (D.C. 2010); *In re C.A.P.*, 633 A.2d 787, 792 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006); *see also In re T.T.B.*, 333 A.2d 671 (D.C. 1975) ("To sustain a conviction of a passenger in a stolen vehicle of its unauthorized use, the government must show beyond a reasonable doubt that the passenger rode in the vehicle knowing that it was being used without the consent of the owner.").

[11] *In re Davis*, 264 A.2d 297 (D.C. 1970)

[12] *Stevens v. United States*, 319 F.2d 733 (D.C. Cir. 1963).

[13] *Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968) ("It scarcely brooks denial that a passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission."); *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016) ("A passenger is not to be convicted of aiding and abetting if he discovers only in the course of

extent that District case law holds that riding as a passenger in a motor vehicle with knowledge of its unlawful operation is sufficient for UUV, the revised UUV statute is a change in law.[14] This revision clarifies current law and improves the proportionality of the revised UUV statute.

Sixth, under the revised UUV statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current statute is a general intent crime,[15] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[16] The DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[17]—the claim that, due to his or her self-induced intoxicated state, the defendant not possess the knowledge required for any element of UUV.[18] In contrast, per the revised UUV offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that voluntary intoxication prevented the defendant from forming the knowledge required to prove UUV. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUV.[19] This change improves the clarity, consistency, and proportionality of the offense.

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

First, the revised UUV statute requires a "knowingly" culpable mental state for "operat[ing]" a "motor vehicle." The current statute does not clearly specify a culpable

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a 60 mile per hour chase that the vehicle is being operated without the owner's permission.") (quoting *Jones v United States*, 404 F.2d 212, 216 (D.C. Cir. 1968)).

[14] *See, e.g.*, *Kemp v. United States*, 311 F.2d 774 (D.C. Cir. 1962); *Jones v. United States*, 404 F.2d 212 (D.C. Cir. 1968); *In re D.M.L.*, 293 A.2d 277 (D.C. Cir. 1972); *In re T.T.B.*, 333 A.2d 671 (D.C. 1975); *In re C.A.P.*, 633 A.2d 787 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201 (D.C. 2006); *Bynum v. United States*, 133 A.3d 983 (D.C. 2016).

[15] *See Carter v. United States*, 531 A.2d 956, 960 n.13 (D.C. 1987).

[16] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[17] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[18] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of UUV.

[19] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

mental state for these elements. No case law exists directly on point, although the DCCA does require for UUV that the defendant know he lack the consent of the owner.[20] Instead of this ambiguity, the revised UUV statute requires a "knowingly" culpable mental state for operating a motor vehicle. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] This revision is consistent with the DCCA requirement of knowledge as to the lack of consent of an owner. It also makes the revised UUV offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[22]

Second, the revised UUV statute codifies a defense for intent to return the motor vehicle to a lawful owner. The current D.C. Code UUV statute does not codify any such defense, but requires that the defendant act "without the consent of the owner" and for the defendant's "own profit, use, or purpose."[23] It is unclear whether the current D.C. Code UUV statute would include an individual that operates a motor vehicle with intent to return it to a lawful owner, such that the individual is liable for the offense. There is no DCCA case law on this issue. DCCA case law recognizes Good Samaritan[24] and abandoned property[25] defenses to some offenses, but the requirements of the defenses are unclear. Resolving this ambiguity, the revised UUV statute codifies a defense when the actor reasonably believes that the motor vehicle is lost or stolen by a third party and engages in the conduct constituting the offense with intent to return the motor vehicle to a lawful owner. Without such a defense, a person that operates a motor vehicle without the owner's effective consent, but with the intent to return the motor vehicle to its lawful owner, would be guilty of the offense. This change improves the clarity, consistency, and proportionality of the revised statute. Under the revised UUV statute, a defendant's belief that the motor vehicle is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that he or she lacks the "effective consent" of the owner. This change improves the clarity, consistency, and proportionality of the revised statute.

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

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[20] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[21] *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)").

[22] *See, e.g.*, RCC § 22E-2101.

[23] D.C. Code § 22-3216.

[24] *See, e.g., Lihlakha v. United States*, 89 A.3d 479, 490 (D.C. 2014).

[25] *See, e.g., Hawkins v. United States*, 103 A.3d 199, 201, 202 (D.C. (2014) ; *Simms v. United States*, 612 A.2d 215, 218-220 (D.C. 1992).

First, "takes" and "uses" have been deleted from the revised UUV offense. Deleting "takes" does not change the scope of the UUV offense because, practically, a "taking" of a motor vehicle necessarily involves its operation. "Uses" has been deleted because it is unclear exactly what conduct constitutes "use" of a motor vehicle but does not constitute "operating" it. Possible examples of "use"—but not operation—might include passively sitting in or on a motor vehicle, but, to the extent a person can "use" a motor vehicle without also operating it, that conduct is more proportionally penalized as third degree trespass involving a motor vehicle (RCC § 22E-2601). This change clarifies the revised statute.

Second, the revised UUV offense deletes "for his or her own profit, use, or purpose" that is in the current UUV offense. It appears this language does not actually narrow the scope of the UUV offense, as even a person whose ostensible motive is to benefit another would have as his or her own purpose the unauthorized use of the car to benefit that other person. Deleting "for his or her own profit, use, or purpose" clarifies the scope of the revised UUV offense.

Third, "causes a motor vehicle to be taken, used or operated" has been deleted from the revised statute. It is unclear what this language could mean other than codifying liability for aiding and abetting, conduct addressed generally for all offenses in section RCC § 22E-210. Deleting the language is not intended to change the scope of the revised offense.

Fourth, the revised UUV statute requires that the defendant act without the "effective consent of an owner." The current UUV statute simply requires that the defendant act "without the consent of the owner."[26] However, DCCA case law for UUV expands "consent of the owner" to an "authorized" person" to give consent,[27] and indicates that a person who uses deception to obtain consent to use a motor vehicle commits UUV.[28] Using "effective consent" in the revised UUV statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The change improves the clarity and consistency of definitions throughout property offenses.

Fifth, the revised UUV statute requires a "knowingly" culpable mental state as to the fact that the defendant lacked effective consent of an owner. The current UUV statute requires acting "without the consent of the owner," but does not specify a mental state for

[26] D.C. Code § 22-3215(b).

[27] *Agnew v. United States*, 813 A.2d 192 (D.C. 2002) (stating as an element "at the time the appellant took, used, operated, or removed the vehicle . . . she knew he that she did so without the consent of the owner or some other authorized person.") (citations omitted); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006).

[28] *Evans v. United States*, 417 A.2d 963, 966 (D.C. 1980) (finding in a general UUV case that the "government's evidence that appellant gave a false identity and false addresses in order to procure the rental agreement was sufficient for a jury to conclude that Hertz did not knowingly consent to appellant's use of the vehicle at the time agreement was signed."). *Evans* is a pre-1982 case relying on statutes concerning unauthorized use of motor vehicles that are substantively similar, but not identical, to the current UUV statute.

the element. DCCA case law, however, requires a "knowing" mental state for this element.[29] This change clarifies the revised statute.

[29] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

RCC § 22E-2104. Shoplifting.

Explanatory Note. *This section establishes the revised shoplifting offense and penalty for the Revised Criminal Code (RCC). Shoplifting addresses theft-like conduct specific to stores and retail establishments, but does not require an intent to deprive an owner of property. There are no penalty gradations. The revised shoplifting offense replaces the existing shoplifting statute[1] in the current D.C. Code.*

Subparagraph (a)(1)(A), subparagraph (a)(1)(B), and subparagraph (a)(1)(C) specify the prohibited conduct—conduct that conceals, removes, transfers, etc. an item. Paragraph (a)(1) specifies that the culpable mental state for this conduct is "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(a), subparagraph (a)(1)(B), and subparagraph (a)(1)(c). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is concealing, removing, transferring, etc. an item.

Paragraph (a)(2) specifies several requirements for the item that the defendant must conceal, remove, transfer, etc. First, the item must be "property," a defined term in RCC § 22E-701 meaning an item of value which includes goods, services, and cash. Second, the property must be "property of another," a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in the property. Third, the item must be the "personal" property of another, which excludes property such as real estate. Fourth, the item must be either "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)). Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the elements in paragraph (a)(2), here requiring the accused to be aware to a practical certainty that the item is personal property of another that is displayed, held, stored, or offered for sale in the required manner.

Paragraph (a)(3) states that the proscribed conduct must be done "with intent to take or make use of without complete payment." This is a lesser intent than "with intent to deprive an owner of the property" that the revised theft offense requires in RCC § 22E-2101. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would take or make use of the property without complete payment. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant actually took or made use of the property without complete payment, only that the defendant believed to a practical certainty that this would occur.

Subsection (b) prohibits charging attempted shoplifting. Conduct constituting attempted shoplifting may be chargeable as attempted theft or attempted unauthorized use of property, however.

[1] D.C. Code § 22-3213.

Subsection (c) specifies the penalty for the offense. [*See* Fourth Draft of Report #41.]

Subsection (d) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of shoplifting. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to all the requirements that follow in paragraphs (d)(1) through (d)(4), and there is no culpable mental state for these requirements.

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

Relation to Current District Law. *The revised shoplifting statute clearly changes current District law in one main way.*

The language in subparagraph (a)(1)(C) has been simplified to refer to transfer from any container or package (regardless of the purpose of the container). The current D.C. Code shoplifting statute limits the container involved to those concerning sale or display.[2] There is no case law interpreting the scope of this language. In contrast, the revised language in subparagraph (a)(1)(C), in combination with the requirements that the property be "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)), effectively broadens the revised offense to include transfers between containers that store or otherwise hold property. The nature of the container is irrelevant if the action is done with intent to take or make use of the property without complete payment per paragraph (a)(3). This revision clarifies the statute and reduces possible litigation over whether a given container may be a display or sales container.

Beyond this change to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised shoplifting statute is limited to engaging in the specified conduct "with intent to take or make use of the property without complete payment" and no longer includes with intent to "defraud." The current D.C. Code shoplifting statute requires either "with intent to appropriate without complete payment"[3] or "with intent to defraud an owner of the value of the property."[4] The current D.C. Code defines "appropriate" for theft offenses as "to take or make use without authority or right,"[5] but does not define "defraud." There is no DCCA case law interpreting intent to defraud for shoplifting. As a result, it is unclear in the current D.C. Code shoplifting statute how an

[2] D.C. Code § 22-3216(a)(3) ("knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").
[3] D.C. Code § 22-3213(a).
[4] D.C. Code § 22-3213(a).
[5] D.C. Code § 22-3201(1).

intent to defraud differs from an intent to appropriate. Resolving this ambiguity, the revised shoplifting statute replaces "appropriate" with "to take or make use" from the current D.C. Code definition of that term and requires "with intent to take or make use of the property without complete payment." The revised statute also eliminates the intent to defraud alternative. "Defraud" is a common law term with an unclear meaning. In the context of shoplifting, it is unclear what the use of "defraud" would criminalize that is not already covered by conduct undertaken "with intent to take or make use of the property without complete payment." This change in the revised shoplifting statute clarifies the offense.

Second, the revised shoplifting statute deletes from the qualified immunity provision in paragraph (d)(1) the requirement that the offense be "committed in that person's presence." The qualified immunity provision in the current D.C. Code shoplifting statute requires that the "person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section."[6] There is no case law interpreting the scope of "committed in that person's presence," and it is unclear if it includes the use of technology such as surveillance equipment and anti-theft devices to identify an alleged shoplifter. Resolving this ambiguity, the revised qualified immunity provision deletes the requirement "committed in that person's presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Third, the revised shoplifting statute replaces "within a reasonable time" with "as soon as practicable" in paragraph (d)(3) and paragraph (d)(4) of the qualified immunity provision. The qualified immunity provision in the current D.C. Code shoplifting statute requires that "[l]aw enforcement authorities were notified within a reasonable time"[7] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[8] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Resolving this ambiguity, the revised qualified immunity provision requires "as soon as practicable. This revision improves the clarity of the revised statute.

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

First, paragraph (a)(1) of the revised shoplifting offense applies a culpable mental state of "knowingly" to each type of proscribed conduct in sub paragraph (a)(1)(A), sub paragraph (a)(1)(B), and subparagraph (a)(1)(C) and to whether the property is "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)). The current D.C. Code shoplifting statute[9] requires, in part, a "knowingly" culpable mental state,[10] but it is unclear to which elements the

[6] D.C. Code § 22-3213(d)(1).
[7] D.C. Code § 22-3213(d)(3).
[8] D.C. Code § 22-3213(d)(4).
[9] D.C. Code § 22-3216.
[10] D.C. Code § 22-3213(a) ("A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud

culpable mental state applies. However, it would be difficult for a defendant to satisfy either of the "with intent to" requirements in the current D.C. Code statute without knowing that it was the personal property of another that is offered for sale. The requirement of a "knowingly" culpable mental state for paragraphs (a)(1) and (a)(2) is not intended to change existing law on shoplifting.

Second, in subparagraph (a)(1)(B), "transfers" has been added so that the subsection prohibits conduct which "removes, alters, or transfers" price tags or other specified marks. The current D.C. Code shoplifting statute is limited to "removes or alters" price tags or other specified marks. There is no case law interpreting the scope of this language. Transferring a price tag is accomplished by removing or altering the price tag, an action already covered in the current statute. Adding "transfers" to the statute merely clarifies the scope of the revised shoplifting offense in a common situation.

Third, the revised shoplifting statute clarifies the type of property at issue by requiring either that the property is "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)). The current D.C. Code shoplifting statute requires that the property be "offered for sale."[11] However, in *Harris v. United States*, the DCCA held that the current shoplifting statute extended "at least to merchandise held . . . in reasonably close proximity to the customer area and intended for prompt availability to customers when and as needed."[12] The addition of "displayed or offered for sale" (subparagraph (a)(2)(A)) and "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)) codifies *Harris* as to the scope of "offered for sale" in the current shoplifting statute and is not intended to change District law on shoplifting. Under the revised element in paragraph (a)(2), the property should be in "reasonably close proximity" to the customer area and readily available to customers as needed. Merchandise on a truck in a loading dock, for example, would not fall within the scope of the revised offense.

Lastly, there are two minor changes to the language in the qualified immunity provision in subsection (d). The current qualified immunity subsection refers to "A person who offers tangible personal property for sale to the public."[13] The term "offers" is not defined in the statute and there is no case law on point. The revised subsection (d) expands "offers" to "displays, holds, stores, or offers for sale" in order to match the scope of the revised elements in subparagraph (a)(2). Similarly, the revised shoplifting statute no longer refers to "tangible personal property." Instead, it refers to "personal property"

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the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property; (2) Knowingly removes or alters the price tag, serial number, or other identification mark that is imprinted on or attached to such property; or (3) Knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").

[11] D.C. Code § 22-3213(a).

[12] *Harris v. United States*, 602 A.2d 1140, 1142 (D.C. 1992). The court further characterized the merchandise at issue in the case as "merchandise contained in a storeroom off the customer sales area, which is used to replenish stock in the sales area or which is available as a source of sizes, colors, or the like not on display in the sales area." *Id.* at 1141.

[13] D.C. Code § 22-3213(d).

as specified in subsection (a)(2) so that the qualified immunity provision matches the element.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

Explanatory Note. *This section establishes the unlawful creation or possession of a recording (UCPR) offense and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes making, obtaining, or possessing a sound recording that is a copy of an original sound recording fixed before February 15, 1972, or a sound recording or audiovisual recording of a live performance, without the effective consent of an owner and with intent to derive commercial gain or advantage. The revised offense is structured to avoid criminalizing conduct that is preempted by federal legislation protecting copyright. The revised offense is graded based on the number of recordings that the defendant made, obtained, or possessed. The revised UCPR offense replaces the commercial piracy statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct for first degree UCPR—making, obtaining, or possessing an item. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 that here requires the accused be aware to a practical certainty that the actor is making, obtaining, or possessing an item.

Subparagraph (a)(1)(A) and subparagraph (a)(1)(B) state that the accused must make, obtain, or possess either a sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or a sound recording or audiovisual recording of a live performance. "Sound recording," "audiovisual recording," and "live performance" are defined terms in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) also applies to the elements in subparagraph (a)(1)(A) and subparagraph (a)(1)(B), here requiring the accused to be aware to a practical certainty that the item is the specified kind of audiovisual or sound recording.

Paragraph (a)(2) states that the prohibited conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no consent, or the consent was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is defined in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Paragraph (a)(3) requires proof of "with intent to" sell, rent, or otherwise use the recording for commercial gain or advantage. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would sell, rent, or otherwise use the recording for commercial gain or advantage. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this

[1] D.C. Code § 22-3214.

phrase. It is not necessary to prove that such a use actually occurred, only that the defendant believed to a practical certainty that such a use would result.

Paragraph (a)(4) requires that "in fact," the number of recordings made, obtained, or possessed was 100 or more for first degree UCPR. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact the number of recordings made, obtained, or possessed was 100 or more.

Subsection (b) specifies the requirements for second degree UCPR. The requirements in paragraph (b)(1), subparagraphs (b)(1)(A) and (b)(1)(B), paragraph (b)(2), and paragraph (b)(3) are identical to those in paragraph (a)(1), subparagraphs (a)(1)(A) and (a)(1)(B), paragraph (a)(2), and paragraph (a)(3) for first degree unlawful creation or possession of a recording. Paragraph (b)(4) requires that, "in fact," "any number" of recordings were made obtained, or possessed for second degree UCPR. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact that "any number" of recordings were made, obtained, or possessed.

Subsection (c) contains two exclusions from liability under the revised UCPR statute. Under the exclusion in paragraph (c)(1), the actor does not commit an offense under this section when the actor copies or reproduces a sound recording or audiovisual recording in the manner specifically permitted by Title 17 of the United States Code. Under the exclusion in paragraph (c)(2), the actor does not commit an offense under this section if the actor copies or reproduces a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of interpretation in RCC § 22E-207 applies to the elements in paragraphs (c)(1) and (c)(2) and there is no required mental state for these elements.

Subsection (d) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

Subsection (e) provides judicial discretion to order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

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

Relation to Current District Law. *The revised UCPR offense clearly changes current District law in six main ways.*

First, the revised UCPR offense no longer includes proprietary information within its scope. The current D.C. Code commercial piracy statute concerns not only sound recordings, but "proprietary information" which is broadly defined to include "any [] information, the primary commercial value of which may diminish if its availability is not restricted."[2] In contrast, the revised UCPR offense eliminates the current statute's

[2] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").

definition of "proprietary information" as well as references to "proprietary information" in the offense elements. This revision improves the clarity of the revised UCPR offense and reduces unnecessary overlap that currently exists between commercial piracy, theft, and other property offenses in the D.C. Code.[3]

Second, the revised UCPR offense applies a "knowingly" mental state to the element that the defendant acted "without the effective consent of an owner." The current commercial piracy statute requires "knowing or having reason to believe" for the "without the consent of the owner" element. There is no case law interpreting "having reason to believe" in the current commercial piracy statute, however legislative history suggests that it may be intended to be a lesser culpable mental state than "knowingly."[4] In contrast, the revised UCPR offense applies a "knowingly" culpable mental state to the element that the defendant acted "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[5] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[6] This revision improves the consistency and proportionality of the revised statute.

Third, the revised UCPR offense increases the number and type of grades of the offense. The current commercial piracy offense is a misdemeanor, regardless of the number of recordings the defendant at issue.[7] In contrast, the revised UCPR statute has two gradations, depending on the number of recordings the defendant makes, obtains, or possesses. This revision improves the proportionality of the offense and creates consistency with the gradations in the revised unlawful labeling of a recording statute.[8]

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[3] This overlap exists because the current definition of "property" is "anything of value," D.C. Code § 22-3201(3), which would appear to include intellectual property. Per this broad definition of "property," the current theft, taking property without right, and other property offenses create liability for taking proprietary information, independent of the inclusion of "proprietary information" in the current commercial piracy statute. Since the RCC retains the broad definition of "property" as "anything of value" (RCC § 22E-701), multiple property offenses will continue to cover takings of proprietary information without effective consent or consent.

It should also be noted that federal law makes theft or misappropriation of trade secrets a federal offense, but allows for state action. U.S. Economic Espionage Act of 1996, effective January 1, 1997.

[4] The legislative history suggests that a mistake as to whether or not a person has permission must be reasonable. "[I]t is a defense under this section that the defendant honestly and reasonably believed that he or she made the copy with the owner's permission or possessed a copy which was legitimate." Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 28.

[5] *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)").

[6] *See, e.g.*, RCC § 22E-2101.

[7] D.C. Code § 22-3214(d) ("Any person convicted of commercial piracy shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[8] RCC § 22E-2207.

Fourth, subsection (f) of the revised UCPR offense permits the Superior Court for the District of Columbia to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current commercial piracy offense does not contain a forfeiture provision. In contrast, the revised statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current[9] and revised[10] unlawful labeling of a recording statute and several other offenses[11] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Fifth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of the number of recordings based on a single scheme or systematic course of conduct to determine the gradation of the revised UCPR offense. The current commercial piracy offense is not part of the current aggregation of value provision for property offenses.[12] This revision improves the proportionality of the revised statute.

Sixth, the revised UCPR offense eliminates any statutory presumption of intent. The current commercial piracy statute states that, "A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance."[13] The legislative history does not clearly state whether the presumption is mandatory or permissive, although some language suggests a mandatory presumption.[14] There is no case law on point. In contrast, the revised UCPR statute eliminates the presumption because it may run afoul of District and Supreme Court case law requiring that even permissive (non-mandatory) inferences be "more likely than not to flow from the proved fact"[15] of possession of 5 or more copies of a recording. While possession of a large number of copies of a recording appears more likely than not to indicate an intent to distribute the copies, the number of recordings alone indicates nothing regarding the purpose of distribution. Without other evidence, such possession also is consistent with a desire to gift or share for purposes

[9] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").
[10] RCC § 22E-2207.
[11] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).
[12] D.C. Code § 22-3202. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").
[13] D.C. Code § 22-3214(b) ("A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.").
[14] *Extension of Comments on Bill No. 4-193* at 29 ("If such a fact is established, the offender will be presumed to have acted with the requisite intent.").
[15] Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969)).

other than commercial gain or advantage. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

Beyond these six changes to current District law, four other aspects of the revised statute may constitute substantive changes of law.

First, the revised UCPR offense explicitly applies to audiovisual recordings for live performances. The current commercial piracy statute, through its definition of "phonorecords,"[16] excludes sound recordings of audiovisual works. However, the current commercial piracy statute separately criminalizes obtaining a copy of "proprietary information"[17] without consent, which may cover illicit audiovisual recordings. State protection of live musical performances is not limited by federal copyright law[18] and the current deceptive labeling statute[19] and the revised deceptive labeling statute[20] extend to audiovisual recordings. RCC § 22E-701 defines "live performance" as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." Including audiovisual recordings for live performances in the revised UCPR statute potentially fills a gap in existing law or, to the extent there is liability in current law, improves the clarity and consistency of the offense.[21]

Second, the revised statute requires a culpable mental state of "knowingly" as to the elements "makes, obtains, or possesses" and to the requirements for the unlawful sound recording (subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B)). No mental state is provided in the current statute regarding these elements, and there is no clear case law on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[22] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect

[16] D.C. Code § 22-3214(a)(3) ("'Phonorecords" means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.").
[17] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").
[18] 17 USC 1101(d).
[19] D.C. Code § 22-3214.01.
[20] RCC § 22E-2206.
[21] It should be noted that nothing about expanding the unlawful creation or possession of a recording statute to included audiovisual recordings of live performances changes the offense's limited protection of sound recordings. As under the current commercial piracy statute, D.C. Code § 22-3214(e), the unlawful creation or possession of a recording statute is limited to sound recordings fixed prior to February 15, 1972. This limitation exists to avoid preemption by federal copyright law. 17 U.S.C. § 301(c).
[22] *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)").

to the elements of the offense.[23] This change improves the clarity, consistency, and proportionality of the revised statutes.

Third, the revised UCPR offense uses a new definition of "owner," the same definition consistently applied to other RCC property offenses.[24] The current D.C. Code commercial piracy offense's definition of "owner"[25] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. No case law exists construing this definition. However, the definition's rigid categories may lead to unintuitive outcomes in some fact patterns.[26] The revised UCPR statute is intended to more broadly identify the relevant person whose consent must be obtained. Ordinarily, it is expected that the parties specified under the current statute would be the relevant owners, but the revised definition provides flexibility where property rights are not arranged in the manner anticipated by the current statute. The revised UCPR is intended to reduce potential gaps in the offense and improve the consistency of definitions across property offenses.

Fourth, the revised UCPR offense, by use of the phrase "in fact," codifies that no culpable mental state is required as to the number of recordings made, obtained, or possessed. The current statute is silent as to what culpable mental state applies to these circumstances. There is no District case law on what mental state, if any, applies to the current gradations based on the number of recordings. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[27] Clarifying that the number of unlawful recordings is a matter of strict liability in the revised UCPR gradations clarifies District law.

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

First, the revised UCPR statute requires that the defendant "makes, obtains, or possesses." This language, particularly "possesses," is intended to include all the conduct prohibited by "reproduces or otherwise copies, possesses, buys or otherwise obtains" in

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[23] *See, e.g.*, RCC § 22E-2101.

[24] RCC § 22E-701 ("'Owner' means a person holding an interest in property with which the actor is not privileged to interfere without consent.").

[25] D.C. Code § 22-3214(a)(1):

> (1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

[26] E.g., a person who has reproduction but not distribution rights (the current statute refers to a licensee with rights to "reproduce and distribute"), or a person who by contractual agreement with someone other than the performer has the rights to reproduce recordings of a live performance, may not be considered an "owner" under the current definition.

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

the current commercial piracy statute. "Possesses" is defined in RCC § 22E-701 and discussed further in the commentary to that statute.

Second, the revised UCPR statute requires that the defendant act without the "effective consent of an owner." The current commercial piracy statute simply requires that the defendant act "without the consent of the owner."[28] There is no legislative history or District case law discussing the scope of "consent" in the current commercial piracy statute, or how the statute operates when there is more than one owner. The revised statute uses standardized definitions, discussed more fully in RCC § 22E-701, that exclude UCPR liability where consent is improperly gained and extend UCPR liability for unlawful conduct with respect to any owner where there are several. Using "effective consent" and "an owner" in the revised UCPR statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The change in language improves the clarity and consistency of definitions throughout property offenses.

Third, the revised UCPR statute requires that the actor's conduct be "with intent to sell, rent, or otherwise use the sound recording for commercial gain or advantage." By contrast, the wording in the current commercial piracy statute is "with the intent to sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage." The revised UCPR statute's addition of "rent" clarifies a common way of gaining commercial advantage. Deletion of the current statute's intent "to allow another person to derive commercial gain or advantage" prong reflects the fact that ordinary aiding and abetting or conspiracy liability applies to the offense. Consistent with prior legislative history,[29] the revised UCPR statute's language "sell, rent, or otherwise use the recording for commercial gain or advantage" is to be broadly construed.

[28] D.C. Code § 22-3214(b).

[29] *Extension of Comments on Bill No. 4-193* at 29 ("The phrase 'derive commercial gain or advantage' is intended to encompass any transaction where the person reproducing or possessing the unauthorized phonorecord or copy of proprietary information surrenders ownership and control over it for consideration or any related form of compensation. Consequently, even an individual who does not hold himself or herself out to the public as engaging in a commercial enterprise can be subjected to criminal liability.").

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

Explanatory Note. *This section establishes the unlawful operation of a recording device in a motion picture theater offense (revised unlawful recording offense) and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes operating a recording device within a motion picture theater without the effective consent of an owner and with the intent to record a motion picture. The revised offense has a single penalty gradation. The revised unlawful recording offense replaces the unlawful operation of a recording device in a motion picture theater statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—operating a recording device within a motion picture theater. "Recording device" is a defined term in RCC § 22E-701 and and "motion picture theater" is a defined term in paragraph (e)(2). Paragraph (a)(1) specifies that the culpable mental state for this conduct is "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain this his or her conduct will operate a recording device within a motion picture theater.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was induced by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 that means a person holding an interest in property with which the accused is not privileged to interfere without consent. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires that the accused be practically certain that he or she lacks effective consent of an owner of the motion picture theater.

Paragraph (a)(3) requires "with the intent" to record a motion picture. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would record a motion picture. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that a motion picture was actually recorded, only that the defendant believed to a practical certainty that a motion picture would be recorded.

Subsection (b) specifies the penalty for the offense. [*See* Fourth Draft of Report #41.]

Subsection (c) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of unlawfully

[1] D.C. Code § 22-3214.02.

operating a recording device within a motion picture theater. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to all the requirements that follow in paragraphs (c)(1) through (c)(4), and there is no culpable mental state for these requirements.

Subsection (d) provides judicial discretion to order the forfeiture and destruction or other disposition of any recordings that might be produced in violation of the offense and all equipment used, or attempted to be used, in violation of this section.

Subsection (e) codifies definitions applicable to the offense. Paragraph (e)(1) cross-references applicable definitions located elsewhere in the RCC. Paragraph (e)(2) codifies a definition of "motion picture theater" that is specific to the revised unlawful recording offense.

Relation to Current District Law. *The revised unlawful operation of a recording device in a motion picture theater statute clearly changes current District law in two main ways.*

First, the revised unlawful recording statute requires conduct be "with the intent to record a motion picture." The current D.C. Code unlawful recording statute does not have such an intent requirement and broadly prohibits "operat[ing] a recording device" within the premises of a motion picture theater.[2] The current statute would appear to include the use of a recording device (including a cell phone's audio, photo, or video recording features) in a motion picture theater, even if someone or something other[3] than the motion picture being exhibited is recorded. In contrast, the revised unlawful recording statute requires that the defendant have the intent to record a motion picture. This change improves the clarity and proportionality of the revised statute.

Second, subsection (d) of the revised unlawful recording statute permits the Superior Court for the District of Columbia to order the forfeiture and destruction or other disposition of any recordings and all equipment used, or attempted to be used, in violation of this section. The current D.C. Code unlawful recording offense does not contain a forfeiture provision. In contrast, the revised unlawful recording statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current[4] and revised[5] unlawful labeling of a recording statutes and several other offenses[6] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

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[2] D.C. Code § 22-3214.02(b).

[3] For example, taking a photo or video chatting with someone while within a movie theater waiting for a movie to start would appear to satisfy the plain language of the current offense.

[4] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").

[5] RCC § 22E-2207.

[6] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

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

First, the revised unlawful recording statute requires that the defendant operate the recording device "within a motion picture theater." The current D.C. Code unlawful recording statute requires that the defendant operate a recording device "within *the premises* of a motion picture theater."[7] It is unclear if "within the premises" is meant to include areas of a motion picture theater where a motion picture is not being exhibited—for example, a lobby or a restroom of a motion picture theater. Resolving this ambiguity, the revised unlawful recording statute requires that the defendant operate the recording device within the motion picture theater. This change improves the clarity and consistency of the revised statute.

Second, through the revised definition of "motion picture theater" in paragraph (e)(2), the revised unlawful recording statute includes venues they may not qualify as a "theater" or "other auditorium" under the current definition. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[8] It is unclear whether this definition extends to other venues where a movie may be exhibited, such as a drive-in theater or a concert hall. Resolving this ambiguity, the revised definition of "motion picture" in paragraph (e)(2) includes "other venue[s]" that are "being utilized primarily for the exhibition of a motion picture to the public." This change improves the clarity and completeness of the revised statute.

Third, through the revised definition of "motion picture theater" in paragraph (e)(2), the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is exhibited, but such an exhibition is not the primary purpose of the venue. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[9] Due to this definition, it is unclear whether the current D.C. Code unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, incidental to the primary purpose of the venue—such as a salesperson at an electronics store who records portions of a movie being shown to demonstrate the capabilities of a widescreen television. The revised definition of "motion picture theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[10] and a comparable federal offense.[11] This change improves the clarity and proportionality of the revised offense.

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[7] D.C. Code § 22-3214.02(b) (emphasis added).
[8] D.C. Code § 22-3214.02(a)(1).
[9] D.C. Code § 22-3214.02(a)(1).
[10] The legislative history for the current unlawful recording statute indicates that the statute was part of an effort to combat "film and video piracy" on a "local level." Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[11] A substantively similar federal offense exists in 18 U.S.C. § 2319B, enacted after the District's current statute. The legislative history for the federal statute notes that "the bill is not intended to permit a prosecution of . . . a salesperson at a store who uses a camcorder to record portions of a movie playing to demonstrate the capabilities of a widescreen television" or "a university student who records a short

Fourth, through the revised definition of "motion picture theater" in RCC § 22E-701, the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is being exhibited, but the exhibition is not open to the public. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[12] Due to this definition, it is unclear whether the current D.C. Code unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, but the exhibition is not open to the public—such as a person who records movies off the television screen in his or her home. The revised definition of "motion picture theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[13] and a comparable federal offense.[14] This change improves the clarity and proportionality of the revised offense.

Fifth, the revised unlawful recording statute requires a "knowingly" culpable mental state for "operating a recording device in a motion picture theater." The current unlawful recording statute does not have a mental state for these elements, and there is no case law on point. The current D.C. Code statute would appear to criminalize a person with a recording device that is "on" even if the person does not know the device is "on." Resolving this ambiguity, the revised unlawful recording statute requires a "knowingly" culpable mental state for "operating a recording device in a motion picture theater." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring a knowing culpable mental state also makes the revised unlawful recording offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[16]

Sixth, the revised unlawful recording statute requires that the defendant act without the "effective consent" of an owner of a motion picture theater and requires a "knowingly" culpable mental state for this element. The current D.C. Code unlawful

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segment of a film being show in film class." Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3. In these instances, the venue is not being used "primarily" to exhibit a motion picture. *Id.* The legislative history for the federal statute notes that it "deals with the very specific problem of illicit 'camcording' of motion pictures in motion picture exhibition facilities. Typically, an offender attends a pre-opening 'screening' or a first-weekend theatric release, and uses sophisticated digital equipment to record the movie. A camcorded version is then sold to a local production factory or to an overseas producer where it is converted into DVDs or similar products and sold on the street for a few dollars per copy." *Id*. at 2.

[12] D.C. Code § 22-3214.02(a)(1).

[13] Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.

[14] Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3

[15] *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)").

[16] *See, e.g.*, RCC § 22E-2101.

recording statute requires that the defendant act "without authority or permission" of the owner.[17] There is no case law interpreting the meaning of "without authority or permission" in the current statute. The revised unlawful recording statute instead requires that the defendant lack the "effective consent" of an owner. "Effective consent" is defined in RCC § 22E-701 and is consistently used in the RCC property offenses. Using "effective consent" in the revised statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. This change improves the clarity and consistency of definitions throughout property offenses.

Seventh, the revised unlawful recording statute deletes from the qualified immunity provision in paragraph (c)(1) the requirement that the offense be "committed in that person's presence." The current qualified immunity provision requires that the owner had at the time, probable cause to believe that the person detained or arrested had committed "in [the owner's] presence, an offense described in this section."[18] There is no case law interpreting the scope of "committed in [the owner's] presence," and it is unclear if it includes the use of technology such as surveillance equipment. Resolving this ambiguity, the revised qualified immunity provision deletes the requirement "committed in [the owner's] presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Eighth, the revised unlawful recording statute replaces "within a reasonable time" with "as soon as practicable" in paragraph (c)(3) and paragraph (c)(4) of the qualified immunity provision. The current qualified immunity provision requires that "[l]aw enforcement authorities were notified within a reasonable time"[19] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[20] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Instead of this ambiguity, the revised qualified immunity provision requires "as soon as practicable." This revision improves the clarity of the revised statute.

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

First, the revised unlawful recording statute uses the definition of "owner" in RCC § 22E-701, the same definition that is consistently applied to other RCC property offenses. The current recording statute does not define the term "owner"[21] and there is no DCCA case law on the issue. "Owner" is defined in RCC § 22E-701 as a person holding an interest in property with which the actor is not privileged to interfere without consent. The definition establishes that there may be multiple owners of property, in this case, a movie theater. This change clarifies the revised statute.

[17] D.C. Code § 22-3214.02(b).
[18] D.C. Code § 22-3214.02(d)(1).
[19] D.C. Code § 22-3213(d)(3).
[20] D.C. Code § 22-3214.02(d)(4).
[21] D.C. Code § 22-3214.02(b).

Second, the revised unlawful recording statute deletes the reference to "or his or her agent" in the offense definition.[22] The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. This change improves the clarity of the revised statute.

[22] D.C. Code § 22-3213(b).

RCC § 22E-2201. Fraud.

Explanatory Note. *This section establishes the fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes a broad range of conduct in which a person obtains property of another by means of deception. The penalty gradations are based on the value of the property involved in the crime. The revised fraud offense is closely related to the revised theft and extortion offenses.*[1] *It differs from theft because theft requires the lack of the owner's consent to take, obtain, transfer or exercise control over the property. It differs from extortion because extortion requires obtaining the owner's consent by use of a coercive threat, instead of deception. The revised fraud offense replaces both the general fraud statute*[2] *and, to the extent it criminalizes deceptive forms of theft, the theft statute,*[3] *as well as the statute specifying penalties for fraud*[4] *in the current D.C. Code.*

Subsection (a) specifies the elements of first degree fraud. Paragraph (a)(1) specifies alternative elements that a person must engage in—conduct that takes, obtains, transfers, or exercises control over property of another.[5] "Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the proscribed conduct must be done with "consent" of an owner. The term consent requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[6] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(2) also codifies the element that distinguishes fraud from the revised theft and extortion offenses—that the consent of an owner be obtained by deception, a term defined in RCC § 22E-701. Deception includes a variety of ways of creating or reinforcing false impressions as to material information. Per the rule of

[1] RCC § 22E-2101 and RCC § 22E-2301, respectively.
[2] D.C. Code § 22-3221. The statute also replaces the jurisdictional provision under D.C. Code § 22-3224.01.
[3] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[4] D.C. Code §22-3222.
[5] This conduct includes "causing" the taking, obtaining, transfer, etc. of property by indirect means, that meets the RCC § 22E-204 provisions regarding causation.
[6] The determination of who an owner is depends on civil law, including agency law regarding which persons are authorized to act on behalf of another. Thus, for example, a store employee who is authorized to sell merchandise may be an "owner" for purposes of the statute although the merchandise is in fact owned by the store company itself.

interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element, which here requires that the accused was practically certain that the misimpression was actually false. In addition, fraud requires reliance; the deception must have caused the owner to provide consent, and the accused must have known that the deception caused the owner to provide consent. If the deception does not cause the owner to provide consent, there is no fraud.[7]

Paragraph (a)(3) requires that the defendant act "with intent to" deprive an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that the property other than labor or services was, in fact, valued at $500,000 or more; or that the property, in fact, was more than 2080 hours of labor or services. When fraud involves taking labor or services, the market value of the labor or services is not used to determine the property penalty grade. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property, or the number of hours of labor or services.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree fraud. The elements of each grade of fraud are identical to the elements of first degree fraud, except for the value of the property. Each subsection specifies a minimum required property value or number of hours of labor or services, except for fifth degree fraud, which has no specific minimum value.[8] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies penalties for each grade of the fraud offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised fraud statute changes current District law in five main ways.*

First, the revised fraud statute requires that the accused "takes, obtains, transfers, or exercises control over" the property of another. The current D.C. Code fraud statute requires proof that the accused "obtains property of another or causes another to lose

[7] For example, if a person sells a watch falsely claiming that the watch is made of gold, but the buyer did not care at all what the watch was made of, and would have purchased it regardless, the seller has not committed fraud.

[8] However, as defined in RCC § 22E-701, "property" means "anything of value" and includes services. Therefore, although fifth degree fraud does not specify any minimum value or number of hours of labor or services, as defined in the RCC, the "property" (including labor or services) must have *some* value.

property"[9] and the current theft statute refers to "obtaining property by trick, false pretense, false token . . . or deception[.]"[10] These terms are not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised statute lists conduct that is consistent with the revised theft and extortion offenses. The revised statute is broader insofar as the accused is liable for many actions besides actually gaining the property himself, the typical meaning of "obtain."[11] The phrase "takes, obtains, transfers, or exercises control over" is identical to language in the revised theft statute, which is to be construed broadly to include any unauthorized use or disposition of property.[12] Less clear is whether the revised statute's various alternate elements cover all the possibilities covered by the current "causes another to lose property." For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the accused or received by the accused.[13] The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language. This change improves the clarity and consistency of the revised statute.

Second, the revised offense defines and punishes attempted fraud consistent with attempt liability and penalties in other revised offenses. The current D.C. Code first degree fraud statute requires that the accused either obtains property or causes another to lose property, but second degree fraud, identical in every other element, requires neither.[14] In other words, second degree fraud in the current D.C. Code is akin to an attempt to commit first degree fraud. In contrast, under the revised fraud statute, if a person fails to obtain property, that person cannot be convicted of the completed offense but still may be convicted of an attempt under the RCC general attempt statute.[15] The elimination of the inchoate version of fraud does not decriminalize any behavior. Rather the change makes the revised fraud offense consistent with other property offenses in how attempt liability affects the scope and punishment for the offense. This change improves the completeness, consistency, and proportionality of the revised statute.

Third, the revised offense provides liability for a single fraudulent act. The current D.C. Code statute refers to a "scheme or systematic course of conduct,"[16] but does not define these terms. Construing this language, the D.C. Court of Appeals (DCCA) has held that a scheme or systematic course of conduct requires "at least two acts calculated to deceive, cheat or falsely obtain property."[17] There is no case law as to what minimal conduct would satisfy the current "two acts" requirement. In contrast, the

[9] D.C. Code § 22-3221.
[10] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[11] https://www.merriam-webster.com/dictionary/obtain.
[12] As described in the commentary to the revised theft statute, language such as "unauthorized use" or "disposition" were not used in the current theft statute as duplicative and unnecessary, not to substantively change the broad scope of the offense.
[13] For example, a door-to-door salesman who uses deception to induce a customer to purchase items from the company the salesman works for not only has caused a loss to the homeowner, but has knowingly engaged in conduct that causes the transfer of funds from the homeowner to the company.
[14] D.C. Code § 22-3221.
[15] RCC § 22E-301.
[16] D.C. Code § 22-3221.
[17] *Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011).

revised fraud statute does not require proof of two or more acts constituting a scheme or systematic course of conduct. The practical effect of this change is unclear given the possibility that the two acts referred to in the current statute might be robustly construed to require what would amount to two separate instances of theft by deception,[18] or could be minimally construed so as to constitute separate acts only in the most technical sense.[19] In either case, because the revised fraud statute is replacing theft by deception, the revised offense preserves the theft offense's requirement that only one act is sufficient to establish liability for fraud. This is not to say that each act that satisfies the requirements for fraud liability, however slight in distinction, must be charged separately, but they may be so charged if the harms are distinct.[20] This change improves the clarity and consistency of the revised statute.

Fourth, the revised fraud statute increases the number and type of gradations based on the value of the property or number of hours of labor or services lost. The current D.C. Code fraud offense is divided into two grades, with first degree fraud requiring that the accused actually obtained property or caused another to lose property.[21] Each grade of fraud is then divided into felony and misdemeanor versions. Felony first degree fraud requires that the accused obtained property, or caused another to lose property, valued at $1,000 or more. Felony second degree fraud requires that the object of the fraud is $1,000 or more, and there is no requirement that the accused actually obtained the property, or caused anyone to lose property. Misdemeanor versions of first and second degree fraud require that the property gained, property lost, or the object of

[18] Notably, in *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) the DCCA held that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." The implication is that every fraud charge could, in the alternative, be charged as theft by deception. Lending support to this notion that fraud may be viewed as two instances of theft by deception, the legislative history of the current fraud statute states that, "[t]he gravamen of the offense of fraud which distinguishes it from theft, is that fraud involves a scheme or systematic course of conduct to defraud or obtain property of another." Committee Report to the Theft and White Collar Crime Act of 1982 at 40.

[19] Under a longstanding fork-in-the-road test, a defendant's momentary, entirely subjective consideration of another matter may be sufficient to break the defendant's conduct into two acts, cognizable as fraud. For example, a defendant convincing a victim to purchase unneeded home repair services (based on defendant's lie about the condition of the home) who pauses momentarily to mention the hot weather before resuming the conversation may be deemed to have engaged in a fresh, second act by continuing the conversation, thereby incurring liability for a "scheme."

[20] The holding in *Youssef v. United States*, to the extent it relied on the requirement of a scheme to determine the relevant unit of prosecution, is no longer compelled under the revised fraud statute. In *Youssef,* the defendant deposited several checks into his Chevy Chase bank account at several locations throughout the city. The accounts he drew on had insufficient funds to cover the checks. However, before the checks cleared, Chevy Chase still allowed him to draw funds from his Chevy Chase account. The defendant ultimately made twenty-nine withdrawals from his Chevy Chase account over a one week period. This scheme was prosecuted as a single count of first degree fraud, as it constituted a single scheme or systematic course of conduct. Under the revised fraud statute, it is possible that these distinct withdrawals could be prosecuted as separate counts. However, if these incidents were prosecuted as separate counts, the *Youssef* holding as to a special unanimity instruction would also no longer apply. On appeal, the defendant argued that because the single count of fraud was premised on allegations of several withdrawals, the trial judge should have instructed the jury that in order to convict, it must be unanimous as to which particular fraudulent transactions it believed occurred. The DCCA rejected this argument, holding that he jury need not be unanimous as to which facts satisfy the elements of the offense. *Youssef*, 27 A.3d at 1207.

[21] D.C. Code § 22-3221.

fraud had any value, and have identical maximum allowable sentences.[22] In contrast, the revised fraud offense has a total of five gradations which span a much greater range in value or loss of labor or services, with a value of $250,000 or more, or 2080 hours of labor, required for the most serious grade. In addition, by eliminating the inchoate version of fraud criminalized currently in the D.C. Code as second degree fraud, the penalty gradations for the revised offense will penalize attempted fraud more consistently under the general attempt penalty provision,[23] the same as in other offenses. The change improves the proportionality of the revised offense.

Fifth, the revised fraud statute's grades conduct that involves taking labor or services by the number of hours of labor or services taken. The current D.C. Code fraud offense is graded on the market value of property, not on the number of hours of labor or services. In contrast, the revised statute's separate calculation for the fraudulent taking of labor or services does not distinguish between the harm to persons with different hourly income levels.[24] Grading fraud based on market value risks disproportionately severe penalties in cases involving the fraudulent taking of high cost labor, and disproportionately lenient penalties in cases involving the fraudulent taking of minimum wage or near minimum wage labor. This change improves the proportionality of the revised criminal code.

Beyond these five main changes to current District law, five other aspects of the revised fraud statute may constitute substantive changes to current District law.

First, the revised fraud offense eliminates the "intent to defraud" means of proving fraud, and therefore requires that the accused obtain property of another for liability as a completed[25] fraud offense. The current D.C. Code fraud statute criminalizes engaging in a scheme "with intent to defraud *or* to obtain property of another[.]"[26] The use of the word "or" suggests that "intent to defraud" could include conduct other than obtaining property by deception. However, neither District statutory nor case law provides a definition of "defraud" and the DCCA has not determined whether the current fraud statute criminalizes conduct beyond obtaining property by deception.[27] Federal courts and courts in other jurisdictions have interpreted fraud statutes with "intent to defraud" elements to include conduct that arguably goes beyond the scope of the revised fraud offense.[28] However, it is unclear if these types of cases would be covered under

[22] D.C. Code § 22-3222.
[23] RCC § 22E-301(c).
[24] For example, if a person defrauds a person of 10 hours of labor, this constitutes fourth degree fraud, even if the market value of the labor would be sufficient for a higher grade of fraud.
[25] Attempted fraud liability may exist, per RCC § 22E-301, where the actor does not succeed in obtaining property of another.
[26] D.C. Code § 22-3221.
[27] *But see, United States v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983) (affirming convictions under prior version of D.C. Code § 22-1805a for conspiracy to defraud the District of Columbia, on theory that the defendants deprived the District of Columbia of right to "faithful services").
[28] So-called "honest services frauds" do not involve deceptive taking of property, but involve a public official, executive, or other person with a fiduciary duty, depriving another person of a right to honest services. For example, if a public official awards a government contract to a bidder, in exchange for a kickback, the official would have deprived the public to its right to honest services, but did not obtain property by deception. *See Skilling v. United States*, 561 U.S. 358 (2010) (holding that honest services

current District law. Moreover, some DCCA fraud case law indicates that the current fraud offense should be construed to cover only deceptive thefts.[29] To resolve these ambiguities, the revised fraud statute eliminates separate liability for "intent to defraud," focusing the statute on conduct to obtain property of another by deception. This change improves the clarity of the revised statute.

Second, the revised fraud statute defines "deception" to specify the particular means of committing fraud. The current D.C. Code fraud statute generally refers to conduct that obtains property "by means of a false or fraudulent pretense, representation, or promise" in the current fraud statute. The phrase is undefined in current District statutory or case law, however there is scant District case law applying the phrase.[30] To resolve these ambiguities, the revised statute uses a standardized statutory definition of "deception"[31] that broadly provides fraud liability to cover conduct that historically was criminalized at common law as "larceny by trick . . . , and false pretenses."[32] The revised definition of deception is consistent with the limited case law applying the fraud statute's requirement that conduct be "by means of a false or fraudulent pretense, representation, or promise," and is consistent with numerous other revised statutes.[33] This change improves the clarity and consistency of the revised statute.

Third, the revised fraud statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1)-(a)(2), (b)(1)-(b)(2), (c)(1)-(c)(2), (d)(1)-(d)(2), and (e)(1)-(e)(2). The current D.C. Code fraud statute requires the conduct be committed "with intent to defraud or to obtain property of another" and explicitly

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frauds are limited to kick back or bribery schemes); *see generally* Judge Pamela Mathy, *Honest Services Fraud After Skilling*, 42 St. Mary's L.J. 645, 704 (2011). Second, obtaining property by means that do not involve deception as defined under the statute would also not constitute fraud. *See e.g., People v. Reynolds*, 667 N.Y.S.2d 591 (Sup. Ct. 1997) (defendants convicted of fraud had engaged in a scheme in which plaintiffs' attorneys who had won personal injury judgments paid kickbacks to expedite payment of the judgments by an insurance adjustor).

[29] See *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) holding that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." Although the DCCA was not considering the outer bounds of the current fraud statute, the *Warner* holding implies that schemes to deprive others of honest services or to obtain property by wrongful, but not deceptive conduct, are not covered by the current fraud statute.

[30] For example *Youssef v. United States*, 27 A.3d 1202, 1207 (D.C. 2011) (noting that fraud requires acts "calculated to deceive, cheat, or falsely obtain property"; *Cf. Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (holding that elements of common law civil fraud are "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation"); *see also*, Committee Report for the Theft and White Collar Crime Act of 1982 at 40 (The language 'intent to defraud' expresses the concept of an intent to deceive or cheat someone.").

[31] For a detailed description of the definition of "deception," see the commentary entry to RCC § 22E-701.

[32] Conduct previously known as larceny by trust or embezzlement remains part of theft, except insofar as such conduct operates by means of deception and is therefore part of the revised fraud statute (22E-2201).

[33] *See, e.g.*, RCC § 22E-1401 (kidnapping, including as one form an interference with another's freedom of movement by deception, under specified circumstances) and the many revised offenses that use a definition of "effective consent" in RCC § 22E-701, which in relevant part refers to consent other than consent obtained by deception.

references knowledge or intent in a separate provision in the fraud statute explaining liability for a false promise as to future performance.[34]

However, the fraud statute is silent as to the applicable culpable mental state requirements for other elements of the offense. The DCCA has recognized a knowledge requirement in the context of a false promise,[35] but there is no other case law on point. Current practice in the District may apply a less stringent culpable mental state of recklessness, based on case law in other jurisdictions.[36] To resolve these ambiguities, the revised statute requires knowing culpable mental states as to the elements of "takes, obtains, transfers, or exercises control over property of another" and acting "with the consent of an owner obtained by deception." Requiring knowing culpable mental states for these fraud elements is consistent with the current theft statute, which requires that the accused knew he or she lacked consent to take property of another,[37] and the revised theft and other property offenses. This change improves the clarity, consistency, and completeness of the revised statute.

Fourth, the gradations of the revised statute use the term "in fact," to specify that no culpable mental state is required as to the value of the property or number of hours of labor or services. The current statute is silent as to what culpable mental state, if any, applies to the value of property. There is no DCCA case law on point, although District practice does not appear to require a culpable mental state as to the monetary values in the current gradations.[38] To resolve these ambiguities, the revised statute specifies that strict liability applies to the elements regarding the value of the property or the number of hours of labor or services. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[39] This change improves the clarity, consistency, and completeness of the revised statute.

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[34] D.C. Code 22-3221(c) ("Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed").

[35] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]"

[36] *See*, D.C. Crim. Jur. Instr. § 5-200 ("A showing of reckless indifference for the truth will support a charge of fraud. *See U.S. v. Frick*, 588 F.2d 531 (5th Cir. 1979); *U.S. v. Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977); *U.S. v. Love*, 535 F.2d 1152 (9th Cir. 1976).").

[37] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

[38] D.C. Crim. Jur. Instr. § 5.200.

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

Fifth, the revised statute extends jurisdiction for fraud only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3224.01 states that jurisdiction extends to cases in which "[t]he person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud;" or "[t]he loss occurred in the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time of the fraud.[40] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[41] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[42] and such an extension, if intended, may be unconstitutional.[43] This change improves the clarity and perhaps the constitutionality of the revised statutes.

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

The revised fraud statute eliminates the special fine enhancement which provides an alternative fine of "twice the value of the property obtained or lost, whichever is greater" for first and second degree fraud of property worth $1,000 or more does not affect available punishments. An equivalent provision in RCC § 22E-604(c) provides an alternate maximum fine of not more than twice the pecuniary gain or loss caused.

[40] For example, a District resident while on vacation in Florida is deceived into buying a fake gold watch. Under the revised statute, District courts would not have jurisdiction in this case since the relevant conduct occurred entirely outside the District.
[41] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[42] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[43] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

RCC § 22E-2202. Payment Card Fraud.

Explanatory Note. *This section establishes the payment card fraud offense and penalty gradations for the Revised Criminal Code (RCC). This offense criminalizes the use of a payment card, typically a credit card, to pay for or obtain property without the consent of the person to whom the card was issued, or the use of a payment card with knowledge that the card has already been canceled or revoked, or that the card had never actually been issued. It is also payment card fraud if the person uses for his or her own purposes a card that was issued to that person by an employer or contractor for the employer's purposes. The penalty gradations are determined by the value of the property obtained or amount paid using the payment card. The revised offense replaces the current credit card fraud[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements for first degree payment card fraud. Paragraph (a)(1) specifies the element that a person must obtain or pay for property by using a payment card. The term "property" is a defined in RCC § 22E-701 to mean "something of value," including goods and services. "Payment card" is a defined in § 22E-701 as an instrument of any kind issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card.[2] Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would obtain or pay for property by using a payment card.

Paragraph (a)(1) also specifies four additional alternate elements, at least one of which must be proven beyond a reasonable doubt. Subparagraph (a)(1)(A) states that the accused must use the payment card "without the effective consent of the owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is defined in § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with, without consent. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(A), here requiring the accused to be aware to a practical certainty that he or she lacked effective consent of the owner to use the payment card.

Subparagraph (a)(1)(B) states that the accused must use the payment card after the card was revoked or canceled. The term "revoked or canceled" is defined in RCC § 22E-701, to means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also

[1] D.C. Code § 22-3223. The statute also replaces the jurisdictional provision under D.C. Code § 22-3224.01.

[2] The definition includes not only credit and debit cards, but common items such as gift cards, membership cards, and metro cards used to obtain or pay for goods, services, or any kind of property.

applies to subsection (a)(2)(B), here requiring the accused to be aware to a practical certainty that the card had been revoked or canceled.

Subparagraph (a)(1)(C) states that the accused must use a payment card that had never actually been issued. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(C), here requiring the accused to be aware to a practical certainty that the card had never actually been issued.

Subparagraph (a)(1)(D) states that the accused must use the payment card for his or her own purposes, when the person is an employee or contractor, and the payment card was issued to the person for the employer's purposes.[3] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subparagraph (a)(1)(D), here requiring the accused to be aware to a practical certainty that the card had been issued to or provided for the employer's purposes, and that the accused was using the card for his or her own purposes.

Paragraph (a)(2) specifies that the property a person pays for or obtains was, in fact, valued at $500,000 or more. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree payment card fraud. The elements of each grade of fraud are identical to the elements of first degree payment card fraud, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree fraud, which has no specific minimum value.[4] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies relevant penalties for each grade of payment card fraud. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised payment card fraud statute changes current District law in one main way.*

The revised payment card fraud statute increases the number of grade distinctions and dollar value cutoffs. Under the current D.C. Code statute, first degree payment card fraud involves property with a value of $1,000 or more and is punished as a serious felony; second degree payment card fraud involves property valued at less than $1,000 and is a misdemeanor.[5] By contrast, the revised payment card fraud offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade. The revised offense's gradations are consistent with

[3] For example, if a payment card is issued to an employee and that employee is authorized to use the card for the employer's purposes, if that employee uses the card to purchase goods or services for his own personal use, that employee may be found guilty of payment card fraud.

[4] However, as defined in RCC § 22E-701, "property" means "anything of value."

[5] D.C. Code § 22-3223(d) ("(1) Except as provided in paragraph (2) of this subsection, any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (2) Any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, if the value of the property or services obtained or paid for is $1,000 or more.").

other revised property offense gradations. This change improves the consistency and proportionality of the revised offense.

Beyond this one main change to current District law, five other aspects of the revised payment card fraud statute may constitute substantive changes to current District law.

First, the revised statute eliminates the current statute's requirement that the accused act "with intent to defraud."[6] The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in the credit card fraud statute. Current District practice does not appear to include an "intent to defraud" element.[7] To resolve this ambiguity, the revised statute eliminates the term. An additional "intent to defraud" element is not necessary to distinguish innocent from criminal conduct in the revised offense because the revised statute requires the accused actually pay for the property, and the accused must know one of the elements in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs were satisfied. This change clarifies the revised statute.

Second, the revised statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1), (b)(1), (c)(1), (d)(1), and (e)(1). The current statute itself is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] Requiring a knowing culpable mental state also makes the elements of payment card fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[9] This change clarifies the revised statute.

Third, the revised statute does not expressly criminalize using a "falsified, mutilated or altered" card as provided in the current D.C. Code statute.[10] The current statute does not define these terms, and there is no case law interpreting the provision. To clarify the revised statute, specific reference to use of a "falsified, mutilated or altered" card is removed. The other provisions of the revised offense in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs cover many instances apparently criminalized under the eliminated "falsified, mutilated or altered" provision. Knowing uses of a "falsified mutilated or altered" card may also be criminalized under the revised forgery offense, RCC § 22E-2204. This change clarifies and reduces unnecessary overlap between revised offenses.

Fourth, subsections (a)-(e), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property obtained or paid for by using the payment card. The current D.C. Code statute is silent as to what culpable mental state

[6] D.C. Code § 22-3223 ("A person commits the offense of credit card fraud if, with intent to defraud, that person.").
[7] D.C. Crim. Jur. Instr. § 5.201.
[8] *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)").
[9] *See, e.g.*, RCC § 22E-2201.
[10] D.C. Code § 22-3223 (3).

applies to these elements. There is no District case law on what mental state, if any, applies to the current payment card fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[11] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[12] This change improves the clarity and completeness of the revised statute.

Fifth, the revised statute extends jurisdiction for payment card fraud only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3224.01 states that jurisdiction extends to cases in which "1) The person to whom a credit card was issued or in whose name the credit card was issued is a resident of, or located in, the District of Columbia; (2) The person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud; (3) The loss occurred in the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time of the fraud.[13] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[14] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[15] and such an extension, if intended, may be unconstitutional.[16] This change improves the clarity and perhaps the constitutionality of the revised statutes.

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

[11] D.C. Crim. Jur. Instr. § 5.201.
[12] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").
[13] For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A's credit card to fraudulently purchase items from a store in Florida without A's permission. Under the revised statute, District courts would not have jurisdiction in this case.
[14] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[15] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[16] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

RCC § 22E-2203. Check Fraud.

Explanatory Note. *This section establishes the check fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes using a check to obtain or pay for property, with intent that the check will not be honored in full. The penalty gradations are determined by the value of the loss to the check holder. The revised offense replaces the current making, drawing, or uttering check, draft, or order with intent to defraud*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree check fraud. Paragraph (a)(1) specifies that a person must obtain or pay for "property," a defined term in RCC § 22E-701 meaning anything of value.[2] The accused must obtain or pay for the property by using a check. "Check" is a defined term in RCC § 22E-701, and includes any written instrument for payment of money by a financial institution. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she obtains or pays for property by a check.

Paragraph (a)(2) specifies that the use of the check must be "with intent that" the check not be honored in full upon presentation to the bank or depository institution. "Intent" is a defined term in RCC § 22E-206 meaning here that the defendant was practically certain that a bank or depository institution would not honor the check in full. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the bank or financial institution did not actually honor the check in full, just that the defendant believed to a practical certainty, or desired, that the check would not be honored in full. The specific basis for why a person believes the bank or depository institution will not honor the check is not specified in the offense, and all that must be proven is the actor's belief at the time that the check will not be honored, whatever the basis.[3] This element requires that the accused believe to a practical certainty that the bank or depository institution will not honor the check *when it is presented* to the bank or depository institution, which may occur after the check is actually used to pay for property.[4]

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[1] D.C. Code § 22-1510.

[2] E.g., the property received may be cash, goods, or services.

[3] For example, a person may believe that their check will not be honored because they have insufficient funds or credit, but other bases for expecting a check will not be honored may include having a hold on an account.

[4] For example a person who knowingly tries to cash a check at his bank that draws upon his overdrawn account would be simultaneously "presenting" the check at the same time as he uses it to obtain property (cash). However, perhaps more typically, the accused would use the check to obtain property (goods) at a business which only later would present the check to the bank for deposit. The possibility of a time lapse between the time of using the check and it being presented to the financial institution may be important to proving the offense, because it may indicate the defendant did not have a culpable mental state. For example, a person would not be liable when that person presents a check to a business owner that draws upon his overdrawn account, but lacks knowledge that the check will not be honored upon presentation to the financial institution because he or she plans to immediately go make a deposit in the account to cover the check. Similarly, a person who spoke with a merchant and was told her check wouldn't be deposited for two weeks would not be liable for check fraud if she then used a check that she knew would not be

Paragraph (a)(3) specifies that there must be a loss to the check holder that is, in fact, $5,000 or more. Paragraph (a)(3) uses the term "in fact," which is defined in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the amount of loss to the check holder. The amount of the loss to the check holder may differ from the face value of the check.[5] A person who pays for or obtains property with the necessary intent need not be aware that the check holder actually experienced a loss, or the amount of the loss. Practically, very high value checks are unlikely to be accepted by a person without bank verification, resulting in few or no completed instances of very high value check fraud.[6]

Subsection (b) specifies the elements of second degree check fraud. The elements of second degree check fraud are identical to the elements of first degree check fraud, except that that there must be a loss to the check holder that is, in fact, $500 or more.

Subsection (c) specifies the elements of third degree check fraud. The elements of third degree check fraud are identical to the elements of first degree check fraud, except that that there is no minimum required amount of loss to the check holder. Any amount of loss to a check holder is sufficient for third degree check fraud.

Subsection (d) specifies penalties for each grade of the check fraud offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised check fraud statute changes current District law in five main ways*.

First, the revised statute requires that the accused obtain or pay for property or services with a check. Under the current D.C. Code statute, merely making, drawing, uttering, or delivering a bad check is sufficient.[7] Such language is not defined by the current statute,[8] and case law provides no precise definition either. However, the plain language of the current statute appears to include a broad range of conduct that ordinarily would be considered inchoate in most property offenses because no actual harm to anyone is required.[9] In contrast, the revised check fraud statute requires that the accused actually obtains or pays for property by using a check. By requiring that the accused

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honored by the financial institution if presented that day, but she planned to take action to ensure the check would be honored in two weeks.

[5] *E.g.*, if a person writes a check to a merchant for $2500 dollars, but upon presentation to the financial institution the bank honors the check for a value of $1000 and there is a $20 fee by the bank on the check holder based on the fact that the account drawn upon was insufficient, the loss for purposes of grading would be $1520.

[6] However, a person may be liable for attempt check fraud per RCC § 22E-301 even when there is no loss to the check holder.

[7] D.C. Code § 22-1510 ("Any person within the District of Columbia who…shall make, draw, utter, or deliver…").

[8] However, "utter" is statutorily defined in the District's forgery statute. See D.C. CODE § 22-1510 ("Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.").

[9] *E.g.*, the ordinary meaning of "drawing" a check is to "create and sign" a check. Black's Law Dictionary (10th ed. 2014). Such conduct, when done with intent to defraud, knowing that insufficient funds are available to cover the check would complete the existing offense—even if the accused did it while at home alone one evening, communicating the drawn check to no one.

actually obtain or pay for property or services, the revised offense significantly narrows liability for the completed offense to situations where the harm has been completed (i.e. the bad check has been used to obtain something of value) or is very nearly completed (i.e. payment is made, whether or not the property is obtained). Additional liability for *attempted* check fraud would continue to exist, potentially covering much of the conduct criminalized under the current statute.[10] This change improves the consistency and proportionality of the revised statute.

Second, the revised check fraud statute does not provide an evidentiary inference regarding the check user's bad intent based on their failure to timely repay a bounced check. The current D.C. Code statute specifies that, "it shall be prima facie evidence of the intent to defraud . . . [if the accused] shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid."[11] There is no DCCA case law interpreting this provision.[12] In contrast, the RCC omits this statutory inference of intent because it appears to be unconstitutional.[13] However, even with this language omitted, the government may still present evidence of the accused's failure to pay the check holder after receiving notice that the check was not honored, and a fact finder may consider this evidence in determining whether the accused knew at the time the check was used that it would not be honored in full. This change improves the proportionality of the revised statute.

Third, the revised check fraud statute increases the number of penalty gradations, changes the dollar value cutoffs, and specifies that it is the value of the loss to the check holder that should be used to determine gradations. The current D.C. Code check fraud offense is divided into two penalty grades, and turns on the amount of the check, being a

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[10] *E.g.*, Drawing a check, with intent to defraud, knowing that insufficient funds are available to cover the check may well constitute attempted check fraud if the accused did so at the counter of a check cashing business while waiting for the clerk. *See*, generally, RCC § 22E-301 Criminal Attempt.

[11] D.C. Code § 22-1510.

[12] However, the D.C. Court of Municipal Appeals, the pre-cursor to the DCCA, has held that the "the presumption of fraudulent intent created by the statute" may still apply even when the check was used to "in payment of an antecedent debt." *Clarke v. United States*, 140 A.2d 181, 182 (D.C. 1958), *aff'd*, 263 F.2d 269 (D.C. Cir. 1959).

[13] In *Reid v. United States*, 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases 'must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it appears that the portion of the current uttering statute which allows an inference of "intent to defraud" would similarly fail. It does not seem that it can be said "with substantial assurance" that it is "more likely than not" that a person who fails to pay back the check holder within 5 days of learning that the check was not honored had "intent to defraud" at the time the check was used. For example, a person may use a check to pay for property, genuinely believing that the check would be honored, and simply not have enough money to pay the check holder in full within 5 days of learning that the check was not honored.

three-year felony if the offense is $1,000 or more, otherwise a misdemeanor.[14] The current statute's grading based on the amount of the check may lead to counterintuitive liability in instances where there are nearly, but not fully, sufficient funds to cover a large value check.[15] By contrast, the revised check fraud offense is divided into three penalty grades based on the actual loss to the check holder, and the threshold values are set at $500 and $5,000. The $5.000 threshold for first degree check fraud is consistent with other revised property offenses, which generally adopt a $5,000 threshold for property offenses to be subject to felony penalties. This change improves the consistency and proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised check fraud offense based on a single scheme or systematic course of conduct. In the current D.C. Code, the statutory provision that allows for aggregation of value across many property offenses[16] does not include the current check fraud offense, which is located in another chapter of the D.C. Code. In contrast, the revised check fraud statute permits aggregation for determining the appropriate grade of check fraud to ensure penalties are proportional to the accused's actual conduct. This change improves the consistency, and proportionality of the revised offense.

Fifth, the revised statute makes liability turn on a person's belief that his or her check will not be honored by the bank or depository institution. The current D.C. Code statute requires, more narrowly, that the accused know that he or she has insufficient funds or credit to cover the check.[17] There is no case law interpreting the scope of this element. In contrast, the revised statute provides liability in instances where the accused knows of other reasons[18]—besides insufficient funds or credit—why the bank or depository institution will deny payment and cause a loss to the check holder. This change may fill a gap in existing law.

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[14] D.C. Code § 22-1510 ("Any person…shall, if the amount of such check, draft, order, or other instrument is $1,000 or more, be guilty of a felony and fined not more than the amount set forth in § 22-3571.01 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft, order, or other instrument has some value, be guilty of a misdemeanor and fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[15] E.g., a person who writes a check for $1,001, knowing there is only $1,000 available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a three year felony under current law. By contrast, a person who writes a check for $999, knowing there is no money available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a 180-day misdemeanor under current law.

[16] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[17] D.C. Code § 22-1510 ("…knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument….").

[18] E.g., if an account is frozen for legal or investigatory reasons, or the accused has closed the type of account the check purports to draw upon.

Beyond these five main changes to current District law, three other aspects of the revised check fraud statute may constitute substantive changes to current District law.

First, the revised statute requires that the accused act knowingly with respect to obtaining or paying for property by using a check. The current statute is silent as to the culpable mental state requirements applicable to the clause "make, draw, utter, or deliver any check, draft, order, of other instrument for the payment of money upon any bank or other depository,"[19] and no case law exists on point.[20] To resolve this ambiguity, the revised statute applies a knowledge culpable mental state requirement. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] Requiring a knowing culpable mental state also makes check fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[22] The change improves the clarity and completeness of the revised offense.

Second, the revised statute requires that the accused acted with intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon. The current statute requires that the actor "with intent to defraud,"[23] and that the person act "knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation."[24] The current statute does not define the terms "defraud" or "knowing" and the DCCA has never defined the meaning of the language in the uttering a check, draft, or order with intent to defraud statute. To resolve these ambiguities, the revised statute applies a "with intent" culpable mental state requirement to the element that the check not be honored in full. A person who believes to that the check they are using to gain property will not be honored in full has an intent to deceive the recipient, and belief to a practical certainty appears to be equivalent to the level of certainty ordinarily associated with knowledge. The revised statute's "with intent" requirement is consistent with the revised fraud[25] statute and other property offenses, using the RCC's standardized definition. This change improves the clarity and consistency of the revised statute.

Third, first degree check fraud uses the phrase "in fact," to codify that no culpable mental state is required as to the value of the loss to the check holder. The current statute is silent as to what culpable mental state, if any, applies to this element. There is no District case law on what mental state, if any, applies to the current check fraud value gradations, although District practice does not appear to apply a mental state to the

[19] D.C. Code § 22-1510.
[20] There is a DCCA case suggesting that the culpable mental state of the current uttering offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565–66 (D.C. 1996). However, in that case, the DCCA quoted the Redbook Jury Instructions, and did not make a ruling based on the offense being a specific intent crime.
[21] *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)").
[22] *See, e.g.*, RCC § 22E-2201.
[23] D.C. Code § 22-1510.
[24] D.C. Code § 22-1510.
[25] RCC § 22E-2201.

monetary values in the current gradations.[26] To resolve this ambiguity, the revised statute applies strict liability as to the amount of loss. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[27] This change clarifies and potentially fills a gap in the revised statute.

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

[26] D.C. Crim. Jur. Instr. § 5.211.

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

RCC § 22E-2204. Forgery.

Explanatory Note. *This section establishes the forgery offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes making, completing, altering, using, or transmitting falsified written instruments, when the accused has intent to use the written instrument to obtain property by deception, or to otherwise harm another person. The revised offense replaces the current forgery[1] statutes and the recordation of deed, contract, or conveyance with intent to extort money[2] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree forgery. First degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (a)(2)(A)-(E). These subparagraphs describe various public records or documents of legal import, such as wills and contracts, as well as any written instrument with a value of more than $50,000. Paragraph (a)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicate that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (b) specifies the elements of second degree forgery. Second degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (b)(2)(A)-(C). These subparagraphs describe various prescriptions and tokens, fair cards, public transportation transfer certificates, or other articles intended as symbols of value for use as payment for goods and services, as well as any written instrument with a value of more than $5,000. Paragraph (b)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicates that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (c) specifies three alternate means of committing third degree forgery. Paragraph (c)(1) specifies that the accused knowingly does any of the acts described in subparagraphs (c)(1)(A)-(C). Subparagraph (c)(1)(A) provides that the accused alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine. Subsection (c)(1) specifies that a knowingly culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she altered was a written instrument, that he or she lacked authority to do so, and that the alteration was reasonably adapted to deceive a person into believing it is genuine. This subsection covers unauthorized alterations to written instruments even if they were originally genuine.

Subparagraph (c)(1)(B) requires that that the accused make or complete a written instrument. In addition, when making or completing the item, the written instrument must appear: to be the act of someone who did not authorize the making or creating; to have been made or completed at a time or place or in a numbered sequence other than was in fact the case; or to be a copy of an original when no such original existed. Further, under subparagraph (c)(1)(B)(ii), the written instrument must be reasonably adapted to deceive a person into believing the written instrument is genuine. Per the rule

[1] D.C. Code §§ 22-3241 - 22-3242.
[2] D.C. Code §22-1402.

of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (c)(1) also applies to all of the elements in subparagraph (c)(1)(B).

Subparagraph (c)(1)(C) requires that that the accused transmits or uses a written instrument that was made, signed, or altered as described in subparagraphs (c)(1)(A) or (c)(1)(B). The accused must have known he was transmitting or using the instrument, and known that the instrument was altered, made, or completed in a manner listed under subparagraphs (c)(1)(A) or (c)(1)(B). Subparagraph (c)(1)(C) codifies conduct previously known as "uttering."[3]

Paragraph (c)(2) further requires that, whichever alternative means of committing forgery occurs, the accused also must act "with intent to" obtain property of another by deception, or to otherwise harm another person. "Intent" is a defined term in RCC § 22E-206 that here means the accused was practically certain he or she would obtain property by deception or harm another person. The word harm does not require bodily injury and should be construed more broadly to include causing an array of adverse outcomes.[4] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually obtained property or harmed another, only that the accused believed to a practical certainty that he or she would do so. In a forgery prosecution predicated on intent to obtain property by deception, the deception must relate to the *genuineness* of the written instrument, not false information contained within the instrument.[5]

Subsection (d) specifies penalties for each grade of the forgery offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised forgery statute changes current District law in four main ways.*

First, the revised offense makes forgery, by any means, one offense. Despite the fact that its text makes no indication of the matter, the current forgery statute has been recognized by the D.C. Court of Appeals (DCCA) as codifying two separate legal offenses—forgery and uttering a forged document.[6] Under current law, a person can be convicted of both forgery and uttering, based on forging and then using a single written

[3] D.C. Code § 22-3241(a)(2).

[4] For example, forging business documents with intent to harm the business reputation of a business rival would constitute forgery.

[5] *See* Lafave, Wayne, 3 Subst. Crim. L. § 19.7 (2d ed.) ("Though forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document."); Commentary to MPC § 224.1 at 289 ("Where the falsity lies in the representation of facts, not in the genuineness of the execution, it is not forgery.)

[6] *White v. United States*, 582 A.2d 774, 778 (D.C. 1990) ("it should be noted that forgery and uttering constitute two distinct offenses, albeit contained in a single statutory provision") *aff'd* 613 A.2d 869, 872 (D.C. 1992) (en banc). The DCCA ruling on this point follows apparent legislative intent. See COMMENTARY TO THEFT AND WHITE COLLAR CRIME ACT of 1982 at 60.

instrument.[7] In contrast, although multiple forgery convictions with respect to a single written instrument may still occur under the revised statute,[8] the revised statute would change current law by barring convictions for both creating and using a forged document as part of the same act or course of conduct. The combined, revised offense eliminates unnecessary overlap in the revised statute.

Second, the revised statute replaces the "intent to defraud" element in the current statute with "intent to obtain property of another by deception." The current statute does not define the term "defraud," and DCCA has never defined the meaning of the language in forgery.[9] Consequently, the precise effect of the revision is unclear. In contrast, the revised statute requires that the accused act with intent to obtain property by deception. This revised language is intended to be broad enough to cover all, or nearly all, [10] the wrongful intentions that currently fall under the "intent to defraud" language in the current statute. Moreover, there remains the alternative element of committing the offense "with intent to harm another person," which broadly criminalizes forgery with ill-intent. The revised offense improves the clarity and consistency of the revised statute.

Third, the revised statute no longer grades forgery of payroll checks as first degree forgery. Under current law, forging payroll checks is subject to the highest maximum penalties allowed for forgery.[11] By contrast, under the revised statute, if a person commits forgery involving a payroll check, or an instrument that appears to be a payroll check, the gradation would be determined by the value of that instrument. This revision treats the forgery of payroll checks the same as forgeries of any other kinds of checks. This change improves the consistency and proportionality of the revised offense.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised forgery offense based on a single scheme or systematic course of conduct. The current forgery offense is not part of the current D.C. Code aggregation of value provision for property offenses.[12] In contrast,

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[7] *Id. at* 872 n.4 (D.C. 1992) (rejecting claim that uttering and forgery convictions should merge); *see also, Driver v. United States*, 521 A.2d 254, 256 (D.C. 1987) (defendant convicted of both forgery and uttering based on forging, and attempting to cash a single check).

[8] *E.g.*, If a person forges a written instrument, and uses it to obtain property from another, then as part of a different act or course of conduct, uses the same forged written instrument to obtain different property, then multiple convictions might be warranted. Multiple convictions with respect to a single forged instrument may or may not be appropriate depending on the facts of a particular case.

[9] Note though that other jurisdictions have held that intent to defraud includes "the purpose of causing financial loss to another," and to "prejudice . . . the rights of another[.]" People v. Lawson, 28 N.E.3d 210, 215–16 (Ill. Ct. App. 2015); *State v. Bourgeois*, 113 So. 3d 225, 230 (La. Ct. App. 2013).

[10] For example, a person could conceivably commit an "honest services fraud" by using forged documents. "Honest services fraud" does not involve obtaining property by deception, but instead involves depriving another of a right to honest or fair services. For example, if a public official used a forged document in an act of nepotism, this could constitute an honest services fraud, but would not involve obtaining property by deception. It is unclear if this type of conduct is covered by the current statute, but it would be excluded under the revised statute, except to the extent that it constituted an "intent to harm" another person.

[11] D.C. Code § 22-3242 (5).

[12] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

the revised forgery statute permits aggregation for determining the appropriate grade of forgery. This change improves the proportionality of the revised statute.

Beyond these four main changes to current District law, two other aspects of the revised forgery statute may constitute substantive changes to current District law.

First, the revised statute requires that the accused act knowingly with respect to the elements in subparagraphs (c)(1)(A)-(C).[13] The current D.C. Code forgery statute is silent as to the applicable culpable mental state requirements, and no case law exists on point.[14] To resolve this ambiguity, the revised statute applies a culpable mental state requirement of knowledge. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring knowing culpable mental states also makes forgery consistent with the fraud statute, which requires that the accused knew that he or she used deception to obtain consent to take property.[16]

Second, the revised statute clarifies that a person is strictly liable as to the type or value of written instrument for purposes of grading forgery. Under the current D.C. Code statute and case law it is unclear what culpable mental state, if any, is required as to the type or value of written instrument involved in the forgery, and no case law exists on point. To resolve this ambiguity, the revised statute specifies that there is no culpable mental state required as to the type or value of written instrument. While applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[17] the presumption that the accused must have a subjective intent has not typically been applied to facts that merely distinguish the degree of wrongdoing.[18] The particular type of written instrument that has been forged does not distinguish innocent from criminal conduct, so no culpable mental state is assumed to apply to that fact.

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[13] There is some DCCA case law suggesting that the culpable mental state of the current forgery offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565 (D.C. 1996). However, in this case, the DCCA was quoting the Redbook Jury Instructions, and not making an actual holding.

[14] There is one possible exception. In *Ashby v. United States*, 363 A.2d 685 (D.C. 1976), the defendant was convicted of forgery for signing a false name to a check. On appeal, the defendant argued that there was insufficient to find that he had the requisite "intent to defraud." Although the D.C. Court of Appeals did not specifically define what is required for "intent to defraud," it noted that the defendant's "*awareness* that the name he affixed to the check for the purpose of cashing it was not his own" served as evidence of his "intent to defraud." *Ashby*, 363 A.2d at 687. At least in regards to the element under subsection (a)(1)(B)(i), there is some case law suggesting that a culpable mental state of "knowing" is appropriate.

[15] *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)").

[16] RCC § 22E-2201.

[17] *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)").

[18] *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 325 (2012) ("State and federal courts frequently cite the U.S. Supreme Court for this point. Relying on United States v. X-Citement Video, Inc., courts emphasize 'the presumption in favor of a scienter requirement should apply to each of the statutory elements [of an offense] that criminalize otherwise innocent conduct'--but no elements beyond those.").

Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[19]

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

First, the revised forgery statute deletes the definition of "forged written instrument" and instead separately specifies conditions in which altering, making, completing, transmitting, or using a written instrument constitutes forgery. The current statute defines "forged written instrument" to include written instruments that have "been *falsely* made, altered, signed, or endorsed[.]"[20] The DCCA has clarified however that an instrument is falsely made, altered, or signed, when the person making, altering, or signing the instrument lacked authority to do so.[21] The revised statute includes this requirement; when a forgery prosecution is premised on altering an instrument, the accused must have lacked authority to do so. The current definition of "forged written instrument" also includes instruments that "contain[] a false addition or insertion."[22] Again, the revised statute's reference to altering a written instrument without authorization is intended to cover all instruments that "contain a false addition or insertion" under the current statute. Finally, the current definition of "forged written instrument" also includes instruments that are a "combination of parts of 2 or more genuine written instruments."[23] Correspondingly, the revised statute's reference to making or completing a written instrument that appears to have been made or completed at a time or place or in a numbered sequence other than was in fact the case, is intended to cover cases in which two otherwise genuine instruments are combined. The DCCA has not precisely defined when an instrument has been falsely made, altered, signed, or endorsed, or when an addition or insertion is false. The direct integration into the revised offense of elements in the current definition of "forged written instrument," and the clarification of those requirements, is not intended to substantively alter the scope of the offense.

Second, the revised statute requires that the accused "alters," "makes," "completes," "transmits," or "uses" a written instrument. These verbs are intended to encompass the words "makes, draws," or "utters"—the last being a term defined to mean, "to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or

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

[20] D.C. Code § 22-3241 (a)(1)(A) (emphasis added).

[21] *See, Martin v. United States*, 435 A.2d 395, 398 (D.C. 1981) (noting that "It is the unauthorized completion of the stolen money orders which renders the instruments "falsely made or altered"); *Hall v. United States*, 383 A.2d 1086, 1089–90 (D.C. 1978) ("to establish falsity in a forgery charge it must be made to appear not only that the person whose name is signed to the instrument did not sign it, but also it must be established by competent evidence that the name was signed by defendant without authority") (quoting Owen v. People, 195 P.2d 953 (Colo. 1948)).

[22] D.C. Code § 22-3241 (a)(1)(B).

[23] D.C. Code § 22-3241 (a)(1)(C).

certify."[24] The verbs "draws," and "issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, [], or certify," appear to be duplicative[25] and their elimination is intended only to clarify, not change, current law.

Third, the revised statute requires that the forged instruments be "reasonably adapted to deceive a person into believing it is genuine." Although the current forgery statute does not include this language, the requirement is based on current DCCA case law. The DCCA has held that forgery requires that the forged written instrument "must be apparently capable of effecting a fraud."[26] The "reasonably adapted" language in the revised statute is intended to codify this element recognized in case law.

Fourth, the revised statute eliminates as a separate offense the current offense of recordation of deed, contract, or conveyance with intent to extort money under D.C. Code § 22-1402.[27] Under that statute, it is a crime for a person to cause any instrument purporting to convey or relate to land in the District to be recorded in the office of the Recorder of Deeds, when that person has no title or color of title to the land, and with intent to extort money or anything of value from the true owner. Insofar as it involves use of a forged instrument with intent to harm another, the conduct constituting an offense under D.C. Code § 22-1402 would necessarily satisfy the elements under the revised forgery statute. Due to the complete overlap between D.C. Code § 22-1402 and the revised forgery statute, D.C. Code § 22-1402 is deleted as redundant.

[24] D.C. Code § 22-3241.
[25] *E.g.*, anytime a person "endorses," a written instrument, that person would also have necessarily either altered, made, completed, transmitted, or otherwise used the written instrument.
[26] *Martin*, 435 A.2d at 398 (D.C. 1981); *Hall*, 383 A.2dat 1089–90 (D.C. 1978). *See also*, Commentary to 1982 Theft and White Collar Crime Act. ("The final element which must be proven is that the falsely made or altered writing was apparently capable of effecting a fraud.").
[27] D.C. Code §22-1402.

RCC § 22E-2205. Identity Theft.

Explanatory Note. *This section establishes the identity theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing, using, or creating a wide array of personal identifying information, without consent of the owner, for specified wrongful ends. The penalty gradations are based on the value of property obtained, payment avoided, or the financial loss caused, by the identity theft. The revised identity theft offense replaces the criminal identity theft*[1] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree identity theft. First degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $500,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree identity theft. Second degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $50,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (b) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree identity theft. Third degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $5,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (c) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree identity theft. Fourth degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $500 or

[1] D.C. Code §§ 22-3227.01 - § 22-3227.04; D.C. Code §§ 22-3227.06 - § 22-3227.08. Provisions relating to record corrections due to identity theft are codified in RCC § 22E-2006 (Identity Theft Civil Provisions).
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[5] Subsection (d) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree identity theft. Paragraph (e)(1) requires that the accused knowingly created, possessed, or used "personal identifying information" belonging to or pertaining to another person. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "personal identifying information" is defined in RCC § 22E-701. This subsection specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would create, possess, or use personal identifying information belonging or pertaining to another person.

Paragraph (e)(2) requires that the accused must have created, possessed, or used personal identifying information belonging to or pertaining to another person without that person's effective consent. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. Per the rule of interpretation in § 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to paragraph (e)(2), here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of the other person.

Paragraph (e)(3) requires that the accused acted "with intent to" use the identifying information accomplish one of three goals: obtain property of another by deception; avoid payment due for any property, fines, or fees by deception; or give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception and without that victim's consent. "Intent" is a defined term in RCC § 22E-206 meaning the accused was practically certain that he or she would achieve one of the goals listed in (e)(3)(A)-(C). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually achieved any of the goals listed in (e)(3)(A)-(C), just that the accused consciously desired, or was practical certain, that he or she would achieve one of them.

Subsection (f) clarifies jurisdictional rules for prosecution of identity theft.

Subsection (g) clarifies that obtaining, creating, or possessing a single person's identifying information constitutes a single violation of this statute. A person who possesses multiple pieces of identifying information pertaining to a single person, with a required criminal purpose, is still only liable for one count of identity theft. Subsection (g) also specifies for purposes of the statute of limitations under D.C. Code § 23-113 that

[5] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

an identity theft offense is deemed to have been committed after the course of conduct has been completed or terminated.

Subsection (h) specifies penalties for each grade of the identity theft statute. [*See* Fourth Draft of Report #41.]

Subsection (i) specifically requires the Metropolitan Police Department to report each complaint of identity theft and provide copies of such reports.

Subsection (j) cross references other terms defined elsewhere in the RCC.

Relation to Current District Law. *The revised identity theft statute changes current District law in three main ways.*

First, the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime—conduct included in the current identity theft statute.[6] The current identity theft statute includes using identifying information to avoid detection, apprehension or prosecution for a crime. In contrast, the revised identity theft statute does not criminalize this conduct. Most such conduct already is criminalized under other offenses, including the obstructing justice,[7] false or fictitious reports to Metropolitan Police,[8] and false statements.[9] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[10] and revised false statements offenses.[11] This change eliminates unnecessary overlap, and improves the proportionality of the revised statute.

Second, the revised statute criminalizes creating, possessing, or using another person's identifying information, without effective consent, with intent to avoid payment due for any property, fines, or fees by deception. The current D.C. Code identity theft statute does not criminalize use of identifying information with intent to avoid payments. In contrast, the revised statute explicitly criminalizes possessing, creating, possessing, or using identifying information with intent to avoid payments. This change improves the proportionality of the revised statute and fills a possible gap in offense liability.

Third, the revised statute increases the number of penalty grades. The current identity theft offense is limited to two gradations based solely on value of the property obtained, attempted to be obtained, or amount of the financial injury. The current first degree identity theft offense involves property with a value, or a financial injury, of $1,000 or more and is punished as a serious felony; second degree identity theft offense involves property with a value, or a financial injury, of less than $1,000 and is a misdemeanor. In contrast, the revised identity theft offense has a total of five gradations which span a much greater range in value, with a value or financial injury of $500,000 or

[6] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person.
[7] D.C. Code § 22-722(6).
[8] D.C. Code § 5-117.05.
[9] D.C. Code § 22-2405. Further supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.
[10] RCC § 22E-XXXX.
[11] RCC § 22E-XXXX.

more being the most serious grade. This change improves the proportionality of the revised offense.

Beyond these three main changes to current District law, three other aspect of the revised identity theft statute may constitute substantive changes to current District law.

First, the revised identity theft offense specifies that there is no culpable mental state required as to the value of property obtained or sought to be obtained, amount of payment intended to be avoided, or the amount of financial injury. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the value of property of financial injury caused, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[12] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[13] This change improves the clarity and completeness of the revised statute.

Second, by referencing the RCC's "financial injury" definition, the revised identity theft may change how the offense is graded. Under current law, "financial injury" is defined as "*all* monetary costs, debts, or obligations incurred by a person [as a result of violation of the identity theft statute.]"[14] It is unclear if the current definition of financial injury would include truly unreasonable costs incurred, or costs incurred by a non-natural person. To resolve this ambiguity, the revised statute defines financial injury as the "*reasonable* monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"[15] The RCC's definition improves the clarity and proportionality of the revised offense.

Third, the revised statute extends jurisdiction for identity theft only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3227.06 states that jurisdiction extends to cases in which "The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time the identity theft occurred.[16] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[17] There is no clear precedent

[12] D.C. Crim. Jur. Instr. § 5.220.
[13] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X–Citement Video*, 513 U.S. 64 at 72 (1994)).
[14] D.C. Code § 22-3227.01.
[15] RCC § 22E-701.
[16] For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A's personal identifying information to fraudulently purchase items from a store in Florida without A's permission. Under the revised statute, District courts would not have jurisdiction in this case.
[17] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

for states to extend jurisdiction based solely on the residency of the alleged victim,[18] and such an extension, if intended, may be unconstitutional.[19] This change improves the clarity and perhaps the constitutionality of the revised statutes.

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

First, the revised statute no longer explicitly refers to "obtaining" identifying information of another. "Obtaining" is not defined in the current statute or case law. Instead the revised statute requires that the accused "creates, possesses, or uses" identifying information. "Obtaining" appears to be superfluous,[20] and no change in the scope of the statute is intended by omitting the word from the revised statute.

Second, the revised statute no longer explicitly refers to using identifying information to obtain property "fraudulently." "Fraudulently" is not defined in the statute or, for this offense, in case law. Instead the revised statute refers only to intent to obtain property by deception, avoid payment due fine by deception, or facilitate another person in obtaining property by deception. "Fraudulently" appears to be unnecessarily ambiguous and superfluous. No change in the scope of the statute is intended by that word's elimination from the revised statute.

Third, the revised statute does not explicitly criminalize using identifying information to obtain property of another.[21] The current statute criminalizes using identifying information to "obtain, or attempt to obtain, property[.]"[22] This provision of the current statute is duplicative given that it provides as an alternative basis of liability merely using identifying information to attempt to obtain property of another. There is no penalty difference in the current statute between actually obtaining or attempting to obtain property of another in this manner.

Fourth, the revised statute eliminates references in the current identity theft statutes to restitution[23] and fines at twice the amount of the financial injury.[24] Both provisions are superfluous under both current law[25] and the RCC.[26] No change in the scope of the statute is intended by elimination of these provisions.

[18] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[19] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[20] E.g., person who obtains information would, at least temporarily, possess such information.
[21] D.C. Code § 22-3227.02(1).
[22] D.C. Code § 22-3227.02 (2).
[23] D.C. Code § 22-3227.04.
[24] D.C. Code § 22-3227.03(a).
[25] D.C. Code § 16-711 (Restitution or reparation); § 22–3571.02(b). (Applicability of fine proportionality provision).
[26] RCC § 22E-604(c).

RCC § 22E-2206. Identity Theft Civil Provisions.

Explanatory Note. *This section establishes the identity theft offense civil provisions concerning record correction for the Revised Criminal Code (RCC). The revised identity theft civil provisions are nearly identical to the identity theft corrections of police records[1] statute in the current D.C. Code. The only change to the statute is to refer to the mental disability affirmative defense, instead of being found not guilty "by reason of insanity."*

[1] D.C. Code § 22-3227.05.

RCC §22E-2207. Unlawful Labeling of a Recording.

Explanatory Note. *This section establishes the unlawful labeling of a recording (ULR) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of a recording with a label that fails to identify the true manufacturer, with intent to sell or rent the recording. The penalty gradations are based on the number of recordings that the accused possessed. The revised unlawful labeling of a recording offense replaces the deceptive labeling offense in the current D.C. Code.*[1]

Subsection (a) specifies the elements of first degree ULR. Paragraph (a)(1) requires that the accused knowingly possesses 100 or more sound recordings or audiovisual recordings that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. This subsection specifies that a "knowingly" culpable mental state applies to most elements, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she possessed sound recordings or audiovisual recordings, and that those recordings did not conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The terms "sound recording" and "audiovisual recording" are defined in RCC § 22E-701. Sound and audiovisual recordings are discrete physical objects upon which sounds or images are fixed. The term "manufacturer" is defined for the purposes of this section to mean the person or entity who actually affixed the sounds or images to the sound or audiovisual recording. The term "manufacturer" does not refer to the original artist, or person who holds the copyrights to the sound or audiovisual work. This paragraph uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state required as to the total number of sound or audiovisual recordings being 100 or more.

Paragraph (a)(2) requires that the accused possessed the recordings "with intent to" sell or rent the recordings. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that he would sell or rent the recordings. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually sold or rented the recordings, only that the accused was practically certain that he or she would sell or rent them.

Subsection (b) specifies the elements of second degree ULR. The elements of second degree ULR are identical to the elements of first degree ULR, except that there is no requirement as to the number of sound or audiovisual recordings. Possession of just a single sound or audiovisual recording is sufficient for second degree ULR.

[1] D.C. Code § 22-3214.01.

Subsection (c) provides an exception from liability if a person transfers a recording as part of a broadcast transmission or for the purposes of archival preservation, or transfers recordings at home for personal use.[2]

Subsection (d) specifies penalties for both grades of ULR. [*See* Fourth Draft of Report #41.]

Subsection (e) provides that courts may order forfeiture of certain assets related to violation of this statute in addition to penalties otherwise authorized.

Subsection (f) cross reference definitions found elsewhere in the RCC, and defines the term "manufacturer" as used in this section.

Relation to Current District Law. *The unlawful labeling of a recording statute changes current District law in five main ways.*

First, ULR requires that the accused had intent to rent or sell the recordings. Any other intended uses of the recordings do not constitute ULR. The current statute uses broader language, covering conduct committed for "commercial advantage or private financial gain[.]"[3] The statute does not define these terms and there is no relevant D.C. Court of Appeals (DCCA) case law. However, the current statute's language could arguably include possessing a sound recording for commercial advantage or financial gain by means that do not involve selling or renting the recording.[4] In contrast, the revised statute requires intent to sell or rent the recordings, and intent to use the recordings for other purposes are not covered. To the extent that the current statute is broad enough to cover these uses of recordings, the revised statute is narrower than the current statute. The revision improves the proportionality of the revised offense.

Second, the revised ULR statute changes the penalty structure to equate penalties for ULR with respect to sound or audiovisual recordings. Under the current statute, a person commits a felony if he or she possessed 1,000 or more sound recordings, or 100 or more audiovisual recordings; and the person commits a misdemeanor if he or she possessed fewer than 1,000 sound recordings, or fewer than 100 audiovisual recordings. In contrast, under the revised statute, sound recordings and audiovisual recordings are no longer treated differently, either for determining the unit of prosecution or for the penalty. A person who possesses 100 improperly labeled sound recordings is subject the same penalties as a person who possesses 100 improperly labeled audiovisual recordings. In addition, the revised statute does not permit multiple convictions simply because the accused possessed two different types of recordings, contrary to the DCCA's holding in *Plummer v. United States,* [5] which allowed for two convictions based on the accused's possession of both sound and audiovisual recordings. Also, penalties are the same

[2] The exclusion regarding a person at home acting for personal use improves the notice of the statute, but is not otherwise necessary. As described below, any person who acts for his or her personal use rather than with intent to sell or rent the recording, would not satisfy the offense's elements.

[3] D.C. Code § 22-3214.01(b).

[4] *E.g.*, conduct covered under the current statute might include possession of improperly labeled recordings with intent to play them in a store to entertain customers.

[5] 43 A.3d 260 (D.C. 2012). In *Plummer*, the DCCA reasoned that two convictions were warranted because the statute "explicitly treats audiovisual works as different from sound recordings" for sentencing purposes. *Id.* at 274.

whether the recordings are sound or audiovisual recordings. The revision improves the consistency and proportionality of the revised statute.

Third, the penalty provisions of the revised ULR do not allow the number of recordings to be aggregated across a 180 day period. Under the current statute, the penalty gradations are based on the number of sound or audiovisual recordings possessed "during any 180 day period."[6] There is no case law regarding how the 180 day period is to be determined, and there is no legislative history on the provision. In contrast, under the revised statute, the penalty gradations are based solely on the number of recordings possessed at a single point in time, or as described immediately below, where the government aggregates the number of recordings involved in a single scheme or systematic course of conduct per RCC § 22E-2002, Aggregation To Determine Property Offense Grades. This revision improves the proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised ULR offense based on a single scheme or systematic course of conduct. The current ULR offense is not part of the current aggregation of value provision for property offenses,[7] however, as discussed immediately above, the current ULR statute has a special provision allowing the number of recordings to be aggregated across a 180 day period. In contrast, the revised ULR statute permits aggregation for determining the appropriate grade of ULR to ensure penalties are proportional to the accused's actual conduct. This change improves the proportionality of the revised statute.

Fifth, subsection (e) of the revised ULR offense permits a court to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current D.C. Code deceptive labeling offense contains a forfeiture provision that is mandatory.[8] In contrast, the revised statute allows, but does not require, judges to order forfeiture in order to destroy illegally labeled copies and potentially deter large-scale prohibited copying. The revised unlawful creation or possession of a recording statute[9] and several other offenses[10] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Beyond these five main changes to current District law, one other aspect of the revised ULR statute may constitute a substantive change of law.

The revised statute eliminates the phrase "that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports" a sound or audiovisual recording. The verbs in this phrase are not statutorily defined and there is no

[6] D.C. Code § 22-3214.01.

[7] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[8] D.C. Code § 22-3214.01.

[9] RCC § 22E-2105.

[10] *See, e.g.,* D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

relevant DCCA case law. Nonetheless, this language appears to be redundant, given that the revised statute requires that the accused possesses a recording, with intent to sell or rent it. However, insofar as the current language creates liability for knowingly advertising or offering recordings for sale, but without actually possessing them, a person engaged in such conduct could likely be prosecuted for ULR as an accomplice or for attempted ULR. It is also possible that a person who advertises or offers for sale such recordings will have committed a conspiracy to commit ULR. Practically, there appears to be little or no change to current law in relying solely on conduct that results in possession of an improperly labeled recording. This revision improves the clarity of the revised offense.

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

The revised statute simplifies the definition of manufacturer to refer to "the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording." The current statute refers to "the person who authorizes or causes the copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section."[11] The elimination of "copying" and "transfer" is not intended to change the definition. Since a recording, as defined in the statute, is a material object, any copying or transfer that is relevant to the statute is necessarily a form of affixation.

[11] D.C. Code § 22-3214.01(a)(2).

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

Explanatory Note. *This section establishes the financial exploitation of vulnerable adults or elderly person offense (FEVA) and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes acquisition or use of the property of a vulnerable adult by means of undue influence and with intent to deprive the person of the property, with recklessness as to the complainant being a vulnerable adult or elderly person. The offense also includes committing theft, extortion, forgery, fraud, or identity theft with recklessness as to the complainant being a vulnerable adult or elderly person. The penalty gradations are based on the value of the property involved in the crime, or by the amount of financial injury inflicted. The revised FEVA offense replaces the financial exploitation of a vulnerable adult offense in the current D.C. Code.*[1]

Subsection (a) specifies the elements of first degree FEVA. First degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $500,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree FEVA. Second degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $50,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree FEVA. Third degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $5,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree FEVA. Fourth degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $500 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety

[1] D.C. Code § 22-933.01.
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

of monetary costs, debts, or obligations incurred as a result of a criminal act.[5] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree FEVA. Paragraph (e)(1) requires that the accused knowingly takes, obtains, transfers, or exercises control over property of another. The term "property" is defined in RCC § 22E-701, and means anything of value. Further, the property must be "property of another," a term defined in in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon. Paragraph (e)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would take, obtain, transfer, or exercise control over property of another.

Subparagraph (e)(1)(A) requires that the accused act with consent of an owner. The term "consent" is defined in RCC § 22E-791, and requires some indication (by words or actions) of an owner's agreement to allow the accused to take the property. The term "owner" is also defined in RCC § 22E-701, and means a person holding an interest in property that the accused is not privileged to interfere with, and it specifically includes those persons who are authorized to act on behalf of another.[6] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (e)(1)(A), which requires that the accused be practical certain that he or she had the consent of an owner.

Subparagraph (e)(1)(A) also requires that the consent of the owner was obtained by "undue influence." "Undue influence" is defined subsection (h) to mean "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (a)(1)(A), which here requires that the accused was practically certainty or owner's consent is obtained by undue influence.

Subparagraph (e)(1)(B) specifies that the owner must be to a "vulnerable adult or elderly person", terms defined in RCC § 22E-701 to mean a person who is either 18 years of age or older and has one or more substantial physical or mental impairments, or 65 years of age or older. This subparagraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-206, which here requires the accused consciously disregarded a substantial risk that the owner was a "vulnerable adult or elderly person."

Subparagraph (e)(1)(C) requires that the accused act "with intent to" deprive an owner of the property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive"

[5] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

[6] The definition of "owner" specifically includes specifically includes those persons who are authorized to act on behalf of another. For example, a store employee who is authorized to sell merchandise is an "owner," although the merchandise is in fact owned by the store company itself.

the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (e)(2) defines FEVA to include committing theft, extortion, forgery, fraud, payment card fraud, check fraud, or identity theft, reckless as to the fact that the complainant is a vulnerable adult or elderly person. This paragraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-207, which here requires the accused consciously disregarded a substantial risk that the complainant was a "vulnerable adult or elderly person."

Subsection (f) specifies penalties for each grade of FEVA. [*See* Fourth Draft of Report #41.]

Subsection (g) specifies that if any restitution is ordered, the accused must pay the restitution before paying any criminal or civil fines imposed for violation of this section.

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

Relation to Current District Law. *The revised FEVA statute changes current District law in six main ways.*

First, the revised FEVA statute applies a "reckless" culpable mental state as to the complainant being a vulnerable adult or elderly person. The current statute does not specify any required mental state as to whether the person was an elderly or vulnerable adult, and there is no case law on point. However, the current statute provides an affirmative defense if the accused "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed."[7] Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence."[8] In contrast, under the revised statute, the government would bear the burden of proving that the accused was reckless as to the complainant being a vulnerable adult or elderly person. This requires that the accused consciously disregarded a substantial risk that the complainant was 65 years or older, or was at least 18 years of age, and had one or more physical or mental limitations that substantially impair his or her ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] However, a reckless culpable mental state requirement is consistent with other circumstances regarding victims that are aggravators in the RCC.[10] This change improves the clarity and completeness of the revised statute.

[7] D.C. Code § 22-933.01 (b).
[8] *Id.*
[9] *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)").
[10] *See, e.g.*, RCC § 22E-1202 Assault.

Second, the revised FEVA statute increases the number of penalty grade distinctions. The current FEVA statute is limited to two gradations based on the value of the property or legal obligation.[11] In contrast, the revised FEVA offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. In addition, the revised FEVA statute also grades penalties based on the value of the property involved, or the amount of financial injury caused, whichever is greater. This change improves the proportionality of the revised offense.

Third, the revised FEVA statute includes committing payment card fraud and check fraud, with recklessness that the complainant is a vulnerable adult or elderly person. The current FEVA statute includes committing other property and fraud-related offenses, but does not include payment card fraud or check fraud. In contrast, the revised FEVA statute includes these offenses as vulnerable adults and elderly persons may be particularly vulnerable to these types of fraudulent offenses. This change improves the proportionality of the revised offense.

Fourth, the revised FEVA statute eliminates the special recidivist penalty authorized under current law.[12] Under current law, if a person with two prior FEVA convictions is convicted of FEVA, the maximum allowable sentence is 15 years, regardless of the value of property involved in either of the convictions. In contrast, the revised FEVA statute no longer authorizes this increased penalty. This special enhancement is highly unusual in current District law, and there is no clear basis for singling out recidivist FEVA violations as compared to other offenses of equal seriousness. The general repeat offender enhancement in RCC § 22E-606 will provide enhanced punishment for recidivist FEVA violations, consistent with the treatment of recidivism in other offenses. This change reduces unnecessary overlap with other criminal provisions.

Fifth, by referencing the RCC's "financial injury" definition, the revised FEVA statute changes how the offense is graded. Under current law, FEVA is graded based on the value of the property obtained, or the legal obligation incurred by the complainant. In contrast, by referencing the RCC's "financial injury" definition,[13] FEVA may be graded based on *reasonable* costs incurred as a result of the offense.[14] The RCC's definition improves the proportionality of the revised offense by excluding unreasonable costs incurred from affecting penalty gradations.

Sixth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised FEVA offense based on a single scheme or systematic course of conduct. The current FEVA offense is not part of

[11] D.C. Code § 22-936.01. Felony FEVA involves property or legal obligations with a value of $1,000 or more and is punished as a serious felony; misdemeanor FEVA involves property or legal obligations valued at less than $1,000 and subject to a 180 day maximum sentence

[12] D.C. Code § 22-936.01

[13] RCC § 22E-701. The RCC defines financial injury as the "reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"

[14] For example, if a complainant incurred reasonable legal expenses as a result of a violation of this section, those costs could be used to determine the appropriate penalty gradation.

the current aggregation of value provision for property offenses.[15] In contrast, the revised FEVA statute permits aggregation for determining the appropriate grade of FEVA to ensure penalties are proportional to the accused's actual conduct.

Beyond these six substantive changes to current District law, five other aspects of the revised FEVA statute may constitute substantive changes to current District law.

First, paragraph (e)(1) specifies a culpable mental state of "knowingly" for all offense elements other than value of the property involved or the amount of financial loss, or the complainant's status as an elderly person or vulnerable adult. The current statute requires that the accused acted "intentionally and knowingly[.]"[16] The current statute does not define "intentionally" or "knowingly," and there is no case law on point. By applying a culpable mental state of "knowingly," the revised FEVA statute requires that the accused was practically certain that he or she would take, obtain, or exercise control over property of another, with consent obtained by undue influence. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[17] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud and extortion statutes, and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[18] This change improves the clarity and completeness of the revised offense.

Second, the revised statute provides liability only for conduct with intent to deprive the vulnerable adult or elderly person of property. The current D.C. Code statute provides liability for conduct with intent to use the property "for the advantage of anyone other than the vulnerable adult or elderly person[.]"[19] There is no case law regarding this phrase. However, the revised statute refers to an intent to deprive where the term "deprive" is defined in the RCC to include withholding property permanently for "so extended a period or under such circumstances that a substantial portion of its value or a substantial portion of its benefit is lost" or "to dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it."[20] Consequently, taking property with intent to benefit another person is already within the scope of the RCC's definition of "deprive" if doing so would deny the owner a substantial benefit of the property. The primary effect of the revised FEVA offense eliminating liability for acting with intent to use property "for the advantage of anyone other than the vulnerable adult or elderly person" is to bar prosecution for temporary unauthorized uses of the

[15] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")
[16] D.C. Code § 22-933.01.
[17] *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)").
[18] See, e.g., RCC § 22E-2201.
[19] D.C. Code § 22-933.01.
[20] RCC § 22E-701.

property. However, the revised unauthorized use of property[21] criminalizes even temporary uses of a person's property without effective consent. This change clarifies the revised statute and reduces unnecessary overlap among offenses.

Third, the revised offense no longer specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation. The current D.C. Code statute specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation on behalf of, or for the benefit of, anyone other than the vulnerable adult or elderly person.[22] However, the revised FEVA statute already provides liability for engaging in conduct (with consent obtained by undue influence) that causes a transfer of property or involves exercising control over property with intent to deprive the owner. And the term "property" as defined in RCC § 22E-701 includes anything of value, including real property and interests in real property, as well as credit.[23] Consequently, it appears that most, if not all, instances of causing a vulnerable adult or elderly person to assume a detrimental legal obligation (with consent obtained by undue influence) are criminalized under the currents statute are also covered by the revised FEVA statute.[24] This change clarifies and reduces unnecessary overlap in provisions of the revised offense.

Fourth, subsections (a)-(d) of the revised offense, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the amount of financial loss. The current statute is silent as to what culpable mental state applies to these elements, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity the revised statute makes the amount of loss or value of property a matter of strict liability. Requiring no culpable mental state to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[25] This change clarifies the revised offense.

Fifth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other

[21] RCC § 22E-2102.
[22] D.C. Code § 22-933.01.
[23] Commentary to definition of "property" in RCC § 22E-701.
[24] For example, a person who knowingly uses undue influence to cause an elderly person to take out a second mortgage and give over the proceeds may well be guilty under the revised FEVA statute. Such a defendant would have caused the transfer (subsection (a)(1)) of an interest in real property (subsection (a)(2)) with the consent of the owner (subsection (a)(3)), who is elderly (subsection (a)(4)), using undue influence (subsection (a)(5)), believing that in doing so he or she will cause the owner to lose a substantial portion of the property's value (subsection (a)(6)).
[25] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[26] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised statute requires that the accused use "undue influence" to obtain, take, transfer, or exercise control over property, but does not separately include use of "deception" or "intimidation" as does the current statute.[27] However, omitting these words is not intended to change current law. Obtaining property of a vulnerable adult or elderly person by use of deception or intimidation will still be covered by the revised FEVA statute. First, the definition of "undue influence" includes "mental, emotional, or physical coercion[.]"[28] This definition is broad enough to cover any use of "intimidation." Second, FEVA is also defined as committing theft, extortion, forgery, fraud, or identity theft, with recklessness that the complainant is a vulnerable adult or elderly person. Under the RCC, fraud is defined as taking, obtaining, transferring, or exercising control over property, with consent of the owner obtained by deception.[29] Taking property of a vulnerable adult or elderly person by deception is therefore still criminalized under the revised FEVA statute.

Second, the term "undue influence," which is defined under RCC § 22E-701 does not require that the other person be a vulnerable adult or elderly person. This change to the definition of undue influence does not alter the scope of the FEVA statute, which still requires that the complainant was a vulnerable adult or elderly person.

[26] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[27] D.C. Code § 22-933.01.

[28] RCC § 22E-2208 (h).

[29] RCC § 22E-2201.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions

Explanatory Note. *RCC § 22E-2209 is a combination of two current statutes, D.C. Code §§ 22-937 and 22-938. The text from the two current D.C. Code statutes has been copied verbatim, with the exception of technical changes to update cross-references, and to add headings to some subsections. RCC § 22E-2209 also omits a requirement that restitution under RCC § 22E-2208 shall be paid before payment of any fines or civil penalties. This requirement is separately included in § 22E-2208, and is unnecessary in § 22E-2209. These changes are purely technical, and do not substantively alter current District law.*

RCC § 22E-2210. Trademark Counterfeiting.

Explanatory Note. *The section establishes the trademark counterfeiting offense for the Revised Criminal Code (RCC). The offense criminalizes manufacturing, possessing with intent to sell, or offering for sale property bearing or identified by a counterfeit mark. The term "counterfeit mark" is defined in the statute. The revised trademark counterfeiting statute replaces the trademark counterfeiting statute,[1] definitions for the trademark counterfeiting statute[2], and forging or imitating brands or packaging of goods[3] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree trademark counterfeiting. Paragraph (a)(1) specifies that first degree trademark counterfeiting requires that the accused knowingly manufactures for sale, possesses with intent to sell, or offers for sale, property. "Sell" is an undefined term, intended to include any exchange of property for anything of value. "Knowingly" is a defined term[4] and applied here means that the person must be practically certain that he or she is manufacturing, possessing with intent to sell, or offering for sale. The term "property" is defined in RCC § 22E-701, to mean "anything of value" and can include tangible or intangible property, and services. Paragraph (a)(1) also requires that the property bears, or is identified by, a counterfeit mark. The term "counterfeit mark" is defined in RCC § 22E-701. It is not necessary that the counterfeit mark is on the property, as long as the property is identified by the counterfeit mark.[5] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that what is being manufactured, sold, etc. is something of value and that it bears a counterfeit mark.

Paragraph (a)(2) requires that the property, in fact, consists of 100 or more items, or has a total retail value of $5,000 or more.[6] The term "retail value" is defined in RCC § 22E-701. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the number of items or value of the property involved in the offense.

Subsection (b) specifies the elements of second degree trademark counterfeiting. The elements of second degree trademark counterfeiting are identical to the elements of first degree trademark counterfeiting, except that there is no quantity or value requirement as to the property involved in the offense.

Subsection (c) provides an exclusion to liability under this section if the use of the counterfeit mark would be legal under civil law.[7] There are numerous uses of valid trademarks without the permission of the owner of the trademark, service mark, trade

[1] D.C. Code § 22-902.
[2] D.C. Code § 22-901.
[3] D.C. Code § 22-1502.
[4] "Knowingly" is defined in RCC § 22E-206.
[5] For example, if a person places a counterfeit mark on a storefront and sells goods within that do not bear the counterfeit mark, the person may still be guilty of trademark counterfeiting if the goods are identified by the counterfeit mark on the storefront.
[6] The relevant value is of the property *bearing* the counterfeit mark. For example, if an item is contained in packaging that includes a counterfeit mark, the value of the item shall be used to determine the appropriate penalty grade, not the value of the packaging.
[7] *See generally*, 74 Am. Jur. 2d Trademarks and Tradenames § 134; William McGeveran, *Rethinking Trademark Fair Use*, 94 Iowa L. Rev. 49 (2008).

name, label, term, picture, seal, word, or advertisement that meet the definition of a "counterfeit mark" but do not constitute trademark infringement.[8] Any use of a valid trademark that does not constitute trademark infringement is not criminalized under this section.[9]

Subsection (d) specifies rules for seizure and disposal of items seized that bear counterfeit marks, and property used in conjunction with violation of this section. Under this provision, items that bear counterfeit marks must be seized, and must be released to the owner of the trademark upon request. If the trademark owner does not request that the items be destroyed, the items must be destroyed or disposed of in a manner requested by the owner. Seizure of other items employed or used in conjunction with violation of this section is discretionary. These items may be seized in accordance with the rules set forth in D.C. Code § 48-905.02.

Subsection (e) specifies that any state or federal certificate of registration of any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement shall be prima facie evidence of the facts stated therein.

Subsection (f) specifies penalties for each grade of the trademark counterfeiting offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised trademark counterfeiting statute changes current District law in six main ways.*

First, the revised statute only includes two penalty gradations based on whether the property, in fact, has a total retail value of $5,000 or more. The current D.C. Code statute includes three penalty grades, with each penalty grade applicable depending on the number of items, the aggregate value of the items, and the number of prior convictions for trademark counterfeiting.[10] By contrast, the revised statute only includes two penalty gradations, eliminating the top gradation and making a $5,000 value the threshold for first degree liability. This change distinguishes between low and high volume conduct and aligns the number of gradations with other current D.C. Code and

[8] For example, using a trademark for satirical purposes constitutes fair use. *E.g.*, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 807 (9th Cir. 2003) (affirming grant of summary judgment denying trademark infringement claim against photographer who produced and sold images of Barbie dolls in absurd positions and situations).

[9] In addition to non-infringing uses recognized under trademark law, this exclusion to liability applies to any uses of trademarks that are legal under civil law. For example, if a trademark owner authorizes another party to use the trademark under terms of a contract, but the owner disputes the validity of the contract, if the contract is upheld, use of the trademark would not constitute an offense under this section.

[10] Under the current statute, the lowest penalty grade has no minimum number or value of items or services bearing or identified by a counterfeit mark. The second penalty grade requires that the offense involved at least 100, but fewer than 1,000, items bearing a counterfeit mark; items with a total retail value of more than $1,000, but less than $10,000; or that the defendant has one prior conviction for trademark counterfeiting. The highest penalty grade requires that the offense involved at least 1,000 or more items bearing a counterfeit mark; items with a retail value of $10,000 or more; or that the defendant has two or more prior convictions for trademark counterfeiting.

RCC offenses criminalizing the creation and possession of illicit copies of an item.[11] A $5,000 threshold is consistent with other RCC property offense gradations. This change improves the clarity, consistency, and proportionality of the revised criminal code.

Second, the revised statute does not codify an evidentiary presumption regarding intent to sell or distribute. The current D.C. Code statute contains a "rebuttable presumption" in subsection (a) that a person having possession, custody, or control of more than fifteen items bearing a counterfeit mark had intent to sell or distribute the items. There is no D.C. Court of Appeals (DCCA) case law on point. By contrast, the RCC omits this statutory inference of intent because it is of questionable constitutionality.[12] However, even with this language omitted, the government may still present evidence of the accused's intent to sell or distribute where there are more than fifteen items and, depending on the nature of the items at issue and other circumstances, an inference of an intent to sell or distribute may well be warranted. This change improves the clarity and proportionality of the revised statute.

Third, the revised statute eliminates the special recidivist penalty for the offense. The current D.C. Code statute is divided into three penalty grades determined, in part, by the total number of items, or the aggregate value of the property. However, regardless of the number or value of the items, a person may be liable under the second highest penalty grade if the actor has one prior conviction for trademark counterfeiting, and the highest penalty grade if the actor has two or more prior convictions for trademark counterfeiting.[13] By contrast, the revised statute treats repeat offenders in a manner consistent with other offenses. The general repeat offender provisions under RCC § 22E-606 may apply to the revised offense. This change improves the consistency and proportionality of the revised criminal code.

Fourth the revised statute does not specify a minimum fine for this offense. The current D.C. Code statute requires that criminal fines imposed "shall be no less than twice the value of the retail value of the items bearing, or services identified by, a counterfeit mark, unless extenuating circumstances are shown by the defendant."[14] The meaning of "extenuating circumstances" in this provision is unclear, and there is no DCCA case law

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[11] RCC § 22E-2105, Unlawful Creation or Possession of a Recording; RCC § 22E-220. Unlawful Labeling of a Recording.

[12] In *Reid v. United States*, 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases 'must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it may be that the portion of the current trademark counterfeiting statute which allows an inference of "intent to sell or distribute" would similarly fail. It is questionable whether it can be said "with substantial assurance" that it is "more likely than not" that a person who possesses more than 15 items had "intent to sell or distribute" them. For example, a person may have a box of more than 15 superhero toy figurines, a set of dinnerware, or t-shirts bearing the counterfeit marking of a brand name for their own personal use.

[13] D.C. Code § 22-902 (b).

[14] D.C. Code §22-902 (d).

on point. By contrast, the revised statute provides for possible fines in a manner consistent with other offenses, using the standard RCC penalty classifications. This change improves the clarity, consistency, and proportionality of the revised criminal code.

Fifth, the revised statute does not include a mandatory seizure and forfeiture provision regarding all personal property used in conjunction with violation of this section. The current D.C. Code statute states that any items bearing a counterfeit mark and all personal property used in connection with a violation of this chapter shall be seized and be subject to forfeiture.[15] There is no DCCA case law on point. By contrast, the revised statute does not mandate that personal property used in connection with violations of this section be seized or subject to forfeiture.[16] However, omitting this language does not preclude such items from being seized or subject to forfeiture. Omitting this language improves the proportionality of the revised criminal code.[17]

Sixth, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, eliminates liability for mere use of a counterfeit mark. The forging or imitating brands offense makes it a crime to "forge[], or counterfeit[], or make[] use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such[.]"[18] There is no DCCA case law interpreting the current forging or imitating brands or packaging of goods statute. By contrast, under the RCC, conduct constituting forging or imitating brands or packaging is only criminalized if it falls under the revised trademark counterfeiting statute. By contrast, the revised statute clarifies that merely using a counterfeit mark, without intent to sell property bearing or identified by a

[15] D.C. Code §22-902 (e) ("Any items bearing a counterfeit mark and all personal property, including any items, objects, tools, machines, equipment, instrumentalities, or vehicles of any kind, employed or used in connection with a violation of this chapter shall be seized by any law enforcement officer, including any designated civilian employee of the Metropolitan Police Department, in accordance with the procedures established by § 48-905.02. (1) All seized personal property shall be subject to forfeiture pursuant to the standards and procedures set forth in D.C. Law 20-278.").

[16] In the revised offense items bearing a counterfeit mark still must be seized.

[17] The DCCA has recognized that under the excessive fines clause of the 8th Amendment, asset forfeiture must be proportional. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-561 (D.C. 1998) (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)). The DCCA noted that under the proportionality requires that "the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 565. Given that many offenses more serious than trademark counterfeiting do not have mandatory forfeiture provisions, it is unnecessary to include one in this statute.

[18] The statute reads in its entirety: "Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

counterfeit mark, is not criminalized. Omitting this conduct from the revised statute improves the clarity and proportionality of the revised criminal code.

Beyond these six substantive changes to current District law, six other aspects of the revised trademark counterfeiting statute may constitute substantive changes to current District law.

First, the revised trademark counterfeiting statute specifies that the actor must "knowingly" manufacture, possess, or offer property for sale. Both the current trademark counterfeiting and forging or imitating brands statutes require that the actor must act "willfully."[19] The term "willfully" is not defined in either statute, and there is no DCCA case law on point with respect to either statute. To resolve this ambiguity, the revised statute requires the actor engage in conduct "knowingly," a defined term in the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[20] This change improves the clarity and consistency of the revised criminal code.

Second, under the revised trademark counterfeiting statute, prosecutions based on manufacturing property bearing or identified with a counterfeit mark require that the property be for commercial sale. The current D.C. Code statutory language clearly covers manufacturing property bearing or identified by a counterfeit mark, but it is unclear whether manufacturing property not for commercial sale constitutes a violation of the statute.[21] There is no relevant DCCA case law. To resolve this ambiguity, the revised statute clarifies that manufacturing that is not for commercial sale is not prohibited. The property loss to the rightful holder of a trademark appears to be extremely low or negligible for an actor's misuse of the trademark in making property not offered for sale. This change improves the proportionality of the revised criminal code.

Third, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, does not specifically include reference to imitations of a "wrapper," "bottle," or "package." The current forging or imitating brands or packaging of goods statute refers to the use of a wrapper, bottle, or package,[22] although it is unclear whether the current forging or imitating brands or packaging of goods covers the use of wrappers, bottles, or packages that do not include any trademarks, trade names, labels, or other information that would constitute a "counterfeit mark." There is no relevant DCCA case law. To

[19] D.C. Code §§ 22-902, 22-1502.

[20] *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)").

[21] For example, if a person makes a handbag or t-shirt with a counterfeit trademark drawn on it, for his or her own personal use, it is unclear if that constitutes a violation of the current statute.

[22] The statute reads in its entirety: "Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

resolve this ambiguity, the definition of "counterfeit mark" does not specifically include wrappers, bottles or packages. Use of wrappers, bottles, or packaging may be covered by the revised statute only if they constitute a "counterfeit mark."[23] Omitting reference to wrappers, bottles, or packages improves the clarity, consistency, and proportionality of the revised criminal code.

Fourth, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, does not specify that it includes counterfeits with "colorable difference or deviation" from the original. The forging or imitating brands or packaging of goods statute specifies that it covers "any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package…." It is unclear what constitutes a "colorable difference or deviation," and whether it is possible that use of a mark that significantly differs from a valid trademark is covered by the forging or imitating brands statute. There is no DCCA case law on point. To resolve this ambiguity, the revised statute extends liability only for a "counterfeit mark" and does not define "counterfeit mark" as including (or excluding) items with a colorable difference or deviation from the original. Omitting this language improves the clarity and proportionality of the revised criminal code.

Fifth, the revised statute codifies an exclusion from liability if the use of a trademark does not constitute infringement under civil law. The current statute does not include any reference to non-infringing uses of trademarks. However, under current civil law, in certain circumstances a person may copy or use a valid trademark without permission, even for commercial purposes.[24] There is no DCCA case law on point. To resolve this ambiguity, the revised statute clarifies that uses of trademarks that are legal under civil law are not criminalized. This change improves the clarity and proportionality of the revised criminal code.

Sixth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[25] Resolving this

[23] Many wrappers, bottles or packages have trademarks, trade names, or labels affixed to them. Use of such wrappers, bottles, or packages could constitute trademark counterfeiting.

[24] *E.g.*, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 807 (9th Cir. 2003) (affirming grant of summary judgment denying trademark infringement claim against photographer who produced and sold images of a Barbie doll in absurd positions and situations).

[25] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the

ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, under the revised statute, the definition of the term "counterfeit mark" replaces the current definitions for both "counterfeit mark" and "intellectual property." However, the revised definition is not intended to substantively change current District law. The current definition of "counterfeit mark" includes "any *unauthorized* reproduction or copy of intellectual property" or "intellectual property affixed to any item knowingly sold, offered for sale, manufactured, or distributed, or identifying services offered or rendered *without the authority* of the owner of the intellectual property[.]"[26] In turn, "intellectual property" is defined as "any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia."[27] The revised definition of "counterfeit mark" incorporates the current definition of "intellectual property," and requires that the mark be used "without the permission of the owner[.]" The term "without the permission" is intended to have the same meaning as "without authority" or "unauthorized." The revised definition of "counterfeit mark" is not intended to substantively change current District law.

Second, the revised statute does not specify that the value of the items involved in the offense be determined by the aggregate value of the items or services bearing or identified by a counterfeit mark. This change is not intended to change current District law. The general aggregation of value statute[28] will apply to the revised trademark counterfeiting statute.

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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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[26] D.C. Code § 22-901 (emphasis added).

[27] D.C. Code § 22-901.

[28] RCC § 22E-2001.

RCC § 22E-2301. Extortion.

Explanatory Note. *This section establishes the extortion offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes taking another person's property by inducing their consent by means of coercive threat. The penalty gradations are based on the value of the property involved in the crime. The revised extortion offense is closely related to the revised theft and fraud offenses.*[1] *It differs from theft because in extortion the defendant has the owner's consent obtained by using a coercive threat. It differs from fraud because in fraud the defendant uses deception, rather than a coercive threat, to obtain the owner's consent. The revised extortion offense replaces the extortion*[2] *and, to the extent that it involves conduct with intent to obtain property, blackmail*[3] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree extortion. Paragraph (a)(1) requires that the defendant takes, obtains, transfers, or exercises control over property of another. "Property," a term defined in RCC § 22E-701, means something of value and includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the must take, obtain, transfer, or exercise control over property with "consent" of an owner. The term consent is defined in RCC § 22E-701, and chiefly requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[9] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(3) codifies the element that distinguishes extortion from the revised theft and fraud offenses—that the consent in paragraph (a)(2) be obtained by an explicit or implicit coercive threat, a term defined in RCC § 22E-701.[4] Coercive threats a variety of threats that pressure a person to agree to give the defendant the property.[5] Per the rule of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1)

[1] RCC § 22E-2101 and RCC § 22E-2201, respectively.
[2] D.C. Code § 22-3251.
[3] D.C. Code § 22-3252.
[4] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.
[5] *See*, Commentary to definition of "coercive threat" accompanying RCC § 22E-701.

also applies to paragraph (a)(3), requiring the defendant to be aware to a practical certainty that victim's consent is obtained by coercive threat.

Paragraph (a)(4) requires that the defendant acted "with intent to" deprive an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" an owner of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(5) requires that the property, in fact, has a value of more than $500,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree extortion. The elements of each grade of extortion are identical to the elements of first degree extortion, except for the value of the property. Each subsection specifies a minimum value required for the property, except for fifth degree extortion, which has no specific minimum value.[6] As with first degree extortion, strict liability applies to value of the property in each grade of extortion.

Subsection (f) specifies penalties for each grade of the extortion offense. [*See* Fourth Draft of Report #41.]

Subsection (g) cross references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised extortion statute changes current District law in five main ways.*

First, the revised extortion statute no longer specially punishes attempts to commit the offense the same as the completed offense. The current extortion statute[7] states that it is an offense if the person "obtains or *attempts* to obtain" property, and the current blackmail statute[8] is an inchoate offense that does not require the defendant to actually obtain property. There is no clear rationale for such a special attempt provision for extortion as compared to other offenses. Under the revised extortion statute, the General Part's attempt provisions[9] will establish liability for attempted extortion consistent with other offenses. Differentiating conduct that does and does not result in depriving someone of property improves the proportionality of the offense.

Second, by its use of the new definition of coercive threat in RCC § 22E-701 the revised extortion statute makes several changes to the means by which the defendant

[6] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree extortion does not specify any minimum value, as defined in the RCC, "property" must have *some* value.
[7] D.C. Code § 22-3251.
[8] *Id.* ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens….").
[9] RCC § 22E-301.

induces the owner's consent. The current extortion statute prohibits four means of obtaining consent: (1) the use of actual force or violence, (2) the threatened use of force or violence, (3) a wrongful threat of economic injury, and (4) under color or pretense of official right.[10] The current blackmail offense[11] prohibits additional means of obtaining consent, including threats "to accuse any person of a crime; to expose a secret or publicize an asserted fact, whether or true or false, tending to subject any person to hatred, contempt, or ridicule; or to impair the reputation of any person, including a deceased person."[12] In contrast, the revised extortion statute is somewhat narrower than the current extortion and blackmail offenses insofar as actual use of force has been eliminated from the statute as a means of obtaining property to reduce overlap with robbery.[13] However, the revised extortion offense also is broader than either the current extortion or blackmail statutes by including new conduct—threatening to "[n]otify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status" or to "[c]ause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."[14] Otherwise, the means by which the defendant induces the victim's consent in revised extortion offense is generally the same as the current extortion and blackmail offenses. The current "threatened use of force or violence" prong is covered by the revised offense's inclusion of threats to engage in conduct constituting an "offense against persons" or a "property offense."[15] And the final alternative in the current statute, involving obtaining property under color or pretense of right, also remains in the revised statute.[16] The revised extortion includes each of these forms of conduct via the definition of coercive threat. These changes reduce unnecessary gaps and overlap among revised offenses.

Third, the revised extortion statute requires that the defendant has intent to deprive an owner of the property. Neither the current extortion statute nor the current blackmail statute has comparable provisions;[17] and there is no relevant D.C. Court of Appeals (DCCA) case law. Instances where the defendant extorts property for temporary use or causes the owner to lose a slight benefit are covered by the revised unauthorized use of property offense,[18] which is a lesser-included offense of extortion. Inclusion of the "intent to deprive" element reduces unnecessary overlap between offenses, creates

[10] D.C. Code § 22-3251. It is unclear what difference, if any, exists between "force" and "violence;" neither term is defined in the statute, and no DCCA case law has provided definitions.
[11] D.C. Code § 22-3252.
[12] *Id.*
[13] RCC § 22E-1201.
[14] RCC § 22E-701.
[15] RCC § 22E-701. *See also* Committee on the Judiciary, Report on Bill 4-193 at 69 ("The threat of force or violence may be against any person and is intended to cover threats that anyone will cause physical injury to or kidnapping of any person. The threat of force or violence also covers a threat of property damage or destruction.").
[16] RCC § 22E-701. A "coercive threat" includes threatening to "take or withhold action as a government official, or cause a government official to take or withhold action."
[17] D.C. Code § 22-3251; D.C. Code § 22-3252.
[18] RCC § 22E-2102.

consistent offense definitions across extortion, theft,[19] and fraud,[20] and improves the proportionality of the revised offense.

Fourth, the revised extortion statute increases the number and type of grade distinctions, grading based on the value of the property extorted. The current extortion and blackmail offenses are not graded at all, and give a flat penalty that does not vary based on whether the offender obtains expensive property or merely attempts to obtain or intends to obtain an item of trivial value.[21] By contrast, the revised extortion offense has a total of five gradations based on the value of the property involved, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.[22] The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft[23] and fraud[24] offenses.

Fifth, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised extortion offense based on a single scheme or systematic course of conduct. The current extortion and blackmail offenses are not part of the current aggregation of value provision for property offenses.[25] As noted above, the current extortion and blackmail offenses are not graded based on value of the property involved. The revised extortion statute permits aggregation for determining the appropriate grade of extortion to ensure penalties are proportional.

Beyond these five main changes to current District law, four other aspects of the revised extortion statute may constitute substantive changes to current District law.

First, the revised extortion offense requires a culpable mental state of knowledge for paragraphs (a)(1)-(a)(3), (b)(1)-(b)(3), etc. The current extortion statute does not specify a culpable mental state and the blackmail statute only refers to an "intent to obtain property of another or to cause another to do or refrain from doing any act."[26] No case law exists on point, although legislative history suggests that the Council expected some mental state would apply via the use of the term "wrongful" in the current extortion

[19] RCC § 22E-2101.
[20] RCC § 22E-2201.
[21] D.C. Code § 22-3251(b) ("Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.); D.C. Code § 22-3252(b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.")
[22] Under the revised extortion statute and both the current extortion and blackmail statutes, a wide range of behavior is punished equally. E.g., threats of both a trivial amount of property damage and threats of serious bodily harm equally satisfy the current and revised extortion statutes. However, grading based on the value of property involved may not only improve proportionality with respect to the property loss, but, indirectly, the seriousness of the coercion. Relatively minor forms of coercion would seem inherently unlikely to be successful in causing a person to consent to giving up very high value property.
[23] RCC § 22E-2101.
[24] RCC § 22E-2201.
[25] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")
[26] D.C. Code § 22-3252(a).

statute's text.[27] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[28] Requiring a knowing culpable mental state also makes the revised extortion offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[29]

Second, the revised extortion offense uses the phrase "takes, obtains, transfers, or exercises control over property of another[.]"[30] The current extortion[31] and blackmail[32] statutes require proof of an attempt to, or intent to, "obtain" the property of another. The term "obtain" is not statutorily defined, nor is there any relevant DCCA case law. It is possible that the current term "obtain" does not include all conduct that constitutes transferring or exercising control over property.[33] Using the revised language of "takes, obtains, transfers, or exercises control over" improves the clarity of the statute, reduces possible unnecessary gaps, and makes the revised extortion offense consistent with the revised fraud statute and other property offenses.

Third, the revised extortion statute does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[34] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[35] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[36] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised extortion statute is not intended to criminalize threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision in the "coercive threat" definition.[37] However, because it is not clear exactly

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[27] The Judiciary Committee's report, which accompanied the bill creating the current extortion offense, states that the threat in extortion "must be 'wrongful,'" and that "the term 'wrongful' when used in criminal statutes implies an evil state of mind." Committee on the Judiciary, Report on Bill 4-164 at 69 citing *Masters v. United States*, 42 App. D.C. 350, 358 (D.C. Cir. 1914).

[28] *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)").

[29] *See, e.g.*, RCC § 22E-2201.

[30] RCC § 22E-2301(a)(1).

[31] D.C. Code § 22-3251.

[32] D.C. Code § 22-3252.

[33] For example, if a defendant uses a coercive threat to compel another person to transfer funds to a bank account that the defendant does not control, under the current statute it is unclear whether the defendant has "obtained" those funds.

[34] D.C. Code § 22-3251.

[35] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").

[36] *Id.* at 70.

[37] RCC § 22E-701 (A "coercive threat" includes threatening to "[c]ause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."

what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

Fourth, by reference to the RCC's definition of coercive threat, the revised extortion statute includes threats to "distribute a photograph, video or audio recording . . . that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; [or] significant injury to credit or business reputation."[38] The current blackmail statute covers threatening to "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, ridicule, embarrassment, or other injury to reputation[.]"[39] The current blackmail statute does not specify whether distributing photographs, videos, or audio recordings, constitutes "expos[ing] a secret or publiciz[ing] an asserted fact[.]"[40] The current blackmail statute also does not specify whether threatening to expose secrets or assert facts that *perpetuate* hatred, contempt, or ridicule[41] are covered. There is no relevant DCCA case law addressing either issue. By contrast, through reference to the definition of "coercive threat," the revised extortion statute clarifies that the revised offense includes threats to distribute photographs, videos, or audio recordings, and to expose or publicize information that would subject a person to, or *perpetuate,* hatred, contempt, ridicule, or other significant injury to personal reputation, or significant injury to credit or business reputation. This change improves the clarity of the revised offense and may close gaps in current law.

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

The revised extortion offense uses the phrase "consent of an owner". The phrase "the other's consent" is used in the current extortion statute,[42] and is implicit in the blackmail statute insofar as it supposes the threat will cause a person to engage in conduct that results in the defendant obtaining property.[43] The term "consent" is not defined in the current statute. Per RCC § 22E-701, "consent" is a defined term, here chiefly meaning that the owner of the property gives words or actions that indicate a preference for particular conduct. Reference to this definition is not intended to change current District law.

[38] RCC § 22E-701.
[39] D.C. Code § 22-3252. The words "embarrassment, or other injury to reputation" were added as part of the Sexual Blackmail Elimination and Immigration Protection Amendment Act of 2018.
[40] For example, a nude photo arguably does not necessarily expose secrets or expose facts.
[41] For example, if it is already publicly known that a person is habitually unfaithful to his spouse, it is unclear if the current blackmail statute covers threats to expose an additional act of infidelity.
[42] D.C. Code § 22-3251(a).
[43] D.C. Code § 22-3252(a).

RCC § 22E-2401. Possession of Stolen Property.

Explanatory Note. *This section establishes the possession of stolen property (PSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly buying or possessing property, believing the property to be stolen, with intent to deprive an owner of the property. The five penalty gradations vary based on the value of the property. The revised PSP offense replaces the receiving stolen property*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree PSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property is a term defined in RCC § 22E-701, to mean something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused was practically certain that he or she would buy or possess property.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused acted with intent to deprive an owner of property. "Deprive" is a defined term in RCC § 22E-701 meaning an owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22E-701 meaning the accused was practically certain he or she would "deprive" an owner of the property. It is not necessary to prove that such a deprivation actually occurred, just that the accused was practically certain that a deprivation would result. If a person only intends to temporarily possess the stolen property, or to return it to its rightful owner or to law enforcement, he has not committed PSP.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $500,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree PSP. The elements of each grade of PSP are identical to the elements of first degree PSP, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree PSP, which has no specific minimum value.[2] As with first degree PSP, strict liability applies to value in each grade of PSP.

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[1] D.C. Code § 22-3232.

[2] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree PSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

Subsection (f) specifies penalties for each grade of the PSP offense. [*See* Fourth Draft of Report #41.]

Subsection (g) cross references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised PSP statute changes current District law in two main ways.*

First, the revised PSP statute requires that the defendant have "intent to deprive" an owner of the property. The current D.C. Code statute does not require intent to deprive.[3] Consequently, appears that a person commits a crime even if he or she only intends to temporarily possess the stolen property, or intends to return the stolen property to its rightful owner. Case law has not directly addressed the matter.[4] In contrast, by including intent to deprive as a statutory element, the revised offense ensures that a person who possesses stolen property with intent to return it to its rightful owner is not liable for PSP and places the burden of proof as to the element of intent on the government.[5] Under the RCC definition of "deprive,"[6] the PSP offense's intent to deprive element requires that the accused possessed or bought the property intending to permanently deprive an owner of the property or of a substantial benefit of the property. This change clarifies and improves the proportionality of the revised offense.

Second, the revised statute increases the number of penalty gradations. The current D.C. Code receiving stolen property offense is limited to two gradations based solely on value—first degree receiving stolen property involves property with a value of $1,000 or more and is punished as a felony; second degree receiving stolen property involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised PSP offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade. The increase in

[3] Although requiring intent to deprive is a departure from current District law, it is worth noting that up until 2012, the District's receiving stolen property offense included an intent to deprive element. RECEIVING STOLEN PROPERTY AND PUBLIC SAFETY AMENDMENT ACT of 2011. D.C. Law 19-120. D.C. Act 19-262.

[4] The D.C. Court of Appeals, in interpreting the prior version of the statute, had held that receiving stolen property is a "specific intent" crime. *Lihlakha v. United States*, 89 A.3d 479, 489 n.26 (D.C. 2014). In *Lihlakha*, the DCCA discussed whether there was sufficient evidence for "finding that, at the time appellant acted in receiving the stolen property, she intended to deprive Banks of the right to her computer or a related benefit." 89 A.3d at 484. The Court noted that although the "intent to deprive" element had been deleted from the receiving stolen property statute after the defendant's alleged conduct at issue, under the Ex Post Facto Clause, the prior statute's "intent to deprive" element was still required. This suggests that under the current statute, which does not include an intent to deprive element, a person could be convicted of receiving stolen property, even if he possesses the stolen property with intent to return it. However, the DCCA has never squarely addressed this issue for the current statute, since its holding in *Lihlakha*.

[5] Including an intent to deprive element is also intended to codify the return-for-reward defense recognized by the DCCA in *Lihlakha v. United States*, 89 A.3d 479, 786-87 (D.C. 2014) (Four conditions must be satisfied for the accused to have a valid defense that he or she intended to return the property for a reward: (1) The reward had been announced, or was believed to have been announced, before the property was possessed or agreed to be possessed; (2) the person claiming the reward had nothing to do with the theft; (3) the possessor returned the property without unreasonable delay to the rightful owner or to a law enforcement officer; and (4) the possessor imposed no condition on return of the property.).

[6] RCC § 22E-701.

gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

Beyond these two main changes to current District law, one other aspect of the revised PSP statute may constitute a substantive change of law.

The revised PSP offense requires that the accused knowingly buys or possesses property. The current receiving stolen property statute does not specify a culpable mental state for these elements and there is no D.C. Court of Appeals (DCCA) case law on point. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised PSP offense consistent with the revised trafficking stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

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

First, the revised statute criminalizes buying or possessing stolen property, but omits the words "receives" or "obtains control over." Omission of these words is not intended to change the scope of the offense. The words "buys" and "possesses" are intended to be broad enough to cover every instance in which a person receives or obtains control over property.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[8] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation. Instead, the DCCA has held that this language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[9] Using the "with intent" inchoate mental state is consistent with this case law. The current statute's subsection (b) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[10] The elimination of the current offense's subsection (b) is consistent with the revised definition's use of "intent" to indicate that the property need not actually be stolen so long as the accused was practically certain that it was stolen.

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[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3232.
[9] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[10] D.C. Code § 22-3231(b).

RCC § 22E-2402. Trafficking of Stolen Property.

Explanatory Note. *This section establishes the trafficking in stolen property (TSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly buying or possessing stolen property, on two or more occasions, with intent to sell, trade, or pledge the property in exchange for anything of value. The five penalty gradations are based on the aggregate value of the property involved in the crime. The revised TSP offense replaces the trafficking stolen property[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree TSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean "to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would buy or possess property.

Paragraph (a)(1) also specifies that the accused must have bought or possessed property on two or more occasions, an element that distinguishes TSP from the possession of stolen property (PSP) revised offense. TSP is directed at the conduct of habitual fences, who provide a market for stolen goods and thereby create further incentive for theft. An isolated incident of possessing stolen property with intent to sell, trade, or pledge it does not constitute a violation of this section. Even if a person sells multiple pieces of stolen property in a single transaction, this does not constitute two separate occasions required under the revised statute. The two occasions must be based on possession of different pieces of property at different points in time.[2] The "knowingly" mental state also applies to the "two or more separate occasions" element.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused possessed the property with intent to sell, pledge as consideration, or trade the property. It is not required that the accused actually sells, pledges, or trades the property, but he or she must have consciously desired, or been practically certain that he or she would do so. If the accused possesses or buys stolen property on two separate occasions, but in only one of those occasions had intent to sell, pledge, or trade the property, that is insufficient for a TSP conviction.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $250,000. "Value" is a defined in RCC § 22E-701. "In fact" is a defined term in RCC §

[1] D.C. Code § 22-3231.
[2] *See also* D.C. Crim. Jur. Instr. § 5-305.

22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree TSP. The elements of each grade of TSP are identical to the elements of first degree TSP, expect for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree TSP, which has no specific minimum value.[3] As with first degree TSP, strict liability applies to value in each grade of TSP.

Subsection (f) grades TSP according to the value of the total property trafficked.[4] The value of the property that the defendant bought or possessed with intent to sell or trade may be aggregated to determine the appropriate grade of the offense.[5] The words "in fact" are a defined term in the RCC, and are used in every penalty gradation to specify that there is no culpable mental state as to the aggregated value of the property. The defendant is strictly liable as to the aggregated value of the property.

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

Relation to Current District Law. *The revised TSP statute changes current District law in one main way.*

The revised statute increases the number and type of grade distinctions. The current TSP offense is limited to one penalty grade, irrespective of the value of the property involved.[6] In contrast, the revised TSP offense has a total of five gradations which span the same range in value as the possession of stolen property offense and other property offenses, with a value of $500,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

[3] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree TSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

[4] For example, if the value of the property is less than $250, it is fifth degree TSP; if the value of the property is $250,000 or more, it is first degree TSP.

[5] RCC § 22E-2001. The revised TSP statute allows for considerable prosecutorial discretion in determining how many counts to charge if the defendant has trafficked in stolen property on several occasions. For example, if a person traffics in stolen property on four separate occasions, and the value of the stolen property in each occasion is $525, the defendant could be charged with a single count of fourth degree TSP, since the aggregate value of the property is $2100, which falls within the value threshold for fourth degree TSP. This person at most could be convicted of a single count with a maximum [] sentence. However, the defendant could also be charged with *two* counts of fourth degree TSP, with each count relying on two occasions of trafficking stolen property with an aggregate value of $1050, which also falls within the value threshold for fourth degree TSP. Due to charging decisions, the person could face two convictions, and a maximum allowable sentence of six years. In these cases, even if the government could prove each occasion of trafficking and obtain two convictions, the sentencing judge would still retain discretion to merge the convictions if a single conviction were sufficient given the severity of the defendant's conduct. Alternatively, even if the defendant were convicted and sentenced on multiple counts, the sentencing judge could also order that the sentences be served concurrently.

[6] D.C. Code § 22-3231(d). Whether a person traffics in $1 stolen pens, or $1000 stolen watches, the current statute authorizes a ten year maximum sentence.

Beyond this main change to current District law, one other aspect of the revised TSP statute may constitute a substantive change of law.

The revised TSP offense requires that the accused knowingly buys or possesses property on two or more separate occasions. The current statute does not specify a culpable mental state for these elements and there is no relevant D.C. Court of Appeals (DCCA) case law. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised TSP offense consistent with the revised possession of stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

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

First, the revised statute requires that the accused either possess or buy property, with intent to sell, pledge as consideration, or trade the property. This is in contrast to the current statute, which, in part, defines "traffics" as "to buy, receive, possess, or obtain control of property with intent to [sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another]."[8] The revised offense eliminates redundant wording. The words "sell, pledge as consideration, or trade" in the revised statute are intended to be broad enough to cover conduct covered by "transfer, distribute, dispense, or otherwise dispose of property" as used in the current statute. Similarly, "buys" and "possesses" in the revised offense are intended to be broad enough to cover every instance in which a person receives or obtains control over property. The RCC's definition of possession requires that the person exercises control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property. However, reference to this definition does not change the scope of the offense. Any time a person engages in conduct to "transfer, distribute, dispense, or otherwise dispose of property" that person necessarily exercises control over property for a period of time sufficient to allow the actor to terminate his or her control of the property.[9] The revised offense makes no change to the statute's scope by only requiring proof the accused buys or possesses property with intent to sell, pledge as consideration, or trade it.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[10] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation for

[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3231.
[9] RCC § 22E-202.
[10] D.C. Code § 22-3231.

identical language in the current receiving stolen property statute.[11] The DCCA held that such language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[12] Using the "with intent" inchoate mental state is consistent with this case law. The current TSP statute's subsection (c) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[13] The elimination of the current statute's subsection (c) is consistent with the revised statute's use of "intent" to indicate that the property need not actually be stolen so long as the accused believed it was stolen.

[11] D.C. Code § 22-3232.
[12] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[13] D.C. Code § 22-3231(c).

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

Explanatory Note. *This section establishes the alteration of a vehicle identification number (AVIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a vehicle identification number (VIN) with intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. The revised AVIN offense replaces the existing offense of altering or removing motor vehicle identification numbers[1] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree AVIN. Paragraph (a)(1) requires that the accused knowingly alters an identification number of a motor vehicle or motor vehicle part. "Alters" is an undefined term, intended to be broadly construed. "Motor vehicle" is a defined term in RCC § 22E-701, and includes any vehicle designed to be propelled only by an internal-combustion engine or electricity.[2] The term "identification number" is also a defined term in RCC § 22E-701, and means "a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would alter an identification number of a motor vehicle or motor vehicle part.

Paragraph (a)(2) further specifies that the accused must alter a VIN "with intent to" conceal or misrepresent the identity of the motor vehicle or motor vehicle part. "Intent" is a defined term in RCC § 22E-206, which here means the accused was practically certain that he or she would conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not required that the accused actually conceals or misrepresents the identity of the motor vehicle or motor vehicle part, only that the accused was practically certain that he or she would do so.

Paragraph (a)(3) requires that the value of such motor vehicle or motor vehicle part, in fact, is $5,000 or more. The reference in paragraph (a)(3) to "such" motor vehicle or motor vehicle part refers to paragraph (a)(2) and the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. When the accused acts with intent to conceal or misrepresent the identity of a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine if this element is satisfied.[3] The term "in fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the motor vehicle or part.

Subsection (b) specifies the elements of second degree AVIN. The elements of second degree AVIN are identical to the elements of first degree AVIN, expect that there is no value requirement for the motor vehicle or motor vehicle part.

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[1] D.C. Code § 22-3233.

[2] RCC § 22E-701. For example, an electric bicycle that is designed to be propelled both by electricity and human effort does not constitute a "motor vehicle."

[3] For example, if a person alters a VIN, with intent to conceal the identity of that part, the value of the motor vehicle is irrelevant—it is the value of the part that determines whether the conduct can be charged as first degree AVIN.

Subsection (c) specifies penalties for each grade of the AVIN offense. [*See* Fourth Draft of Report #41.]

Subsection (d) cross references penalties found elsewhere in the RCC.

Relation to Current District Law. *The revised AVIN statute changes current District law in four main ways.*

First, the revised AVIN statute requires that the accused have intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Under the current D.C. Code statute, it appears that a person commits an offense by knowingly altering a VIN, regardless of the purpose for doing so.[4] No case law exists as to whether a person would be guilty under the current statute for altering a VIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[5] a VIN for purposes besides concealing or misrepresenting identity. The change improves the proportionality of the revised offense.

Second, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised AVIN offense based on a single scheme or systematic course of conduct. The current AVIN offense is not part of the current aggregation of value provision for property offenses.[6] The revised AVIN statute permits aggregation for determining the appropriate grade of AVIN to ensure penalties are proportional to the accused's actual conduct.[7]

Third, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute changes the scope of the offense. The term "motor vehicle" as used in the current AVIN statute is defined to include a "vehicle propelled by an internal-combustion engine, electricity, or steam[.]"[8] In contrast, the RCC's definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity."[9] This language excludes vehicles like mopeds that are designed to be propelled, in part, by human exertion, as well as steam powered vehicles. Vehicles that are designed to be propelled in part by human exertion are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Steam powered vehicles have fallen out of use, and it is unnecessary to include them in the definition of "motor vehicle." This change improves the clarity and proportionality of the revised statute.

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[4] D.C. Code § 22-3233.

[5] *E.g.*, knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

[6] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[7] Inclusion of AVIN in RCC § 22E-2001 does not suggest however that multiple convictions are categorically barred when the accused alters multiple VINs, on multiple motor vehicles or motor vehicles parts, even when the alterations occur as part of a single act or course of conduct.

[8] D.C. Code § 22-3233.

[9] RCC § 22E-701.

Fourth, the threshold value of the motor vehicle or motor vehicle part that determines liability for first degree AVIN is $2,500. The current statute sets the value threshold for the higher grade of AVIN at $1,000.[10] In contrast, the revised statute's $2,500 aligns with the grading differences in value in the RCC theft,[11] criminal damage to property,[12] possession of stolen property,[13] and other comparable offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these four changes to current District law, two other aspects of the revised AVIN statute may constitute substantive changes to current District law.

First, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute may change the scope of the offense as compared to current law. The current statute defines "motor vehicle" to include "any non-operational vehicle that is being restored or repaired." The RCC's "motor vehicle" definition omits this language, and is intended to include non-operational vehicles regardless of whether they are being restored or repaired, if they meet the other requirements of the definition. It is unclear whether the current definition of motor vehicle excludes non-operational vehicles that are *not* being restored or repaired, and there is no relevant DCCA case law. This change clarifies the revised statute.

Second, determination of value for the revised first degree AVIN statute depends on the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. The current D.C. Code statute says a person is subject to the higher gradation "if the value of the motor vehicle or motor vehicle part is $1,000 or more…."[14] There is no case law interpreting this provision. To resolve ambiguities about the relevant value when a car contains a part with an obliterated identification number, paragraph (a)(3) of the first degree AVIN statute refers to "such" motor vehicle or motor vehicle (in paragraph (a)(2)) that the actor intended to conceal or misrepresent. Consequently, when the accused acts with intent to conceal or misrepresent the identity of just a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine valuation. This change clarifies the revised statute.

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

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a VIN.[15] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a VIN. The change is not intended to narrow the scope of the offense.

[10] D.C. Code § 22-3233(b)(2).
[11] RCC § 22E-2101.
[12] RCC § 22E-2503.
[13] RCC § 22E-2401.
[14] D.C. Code § 22-3233(b)(2).
[15] D.C. Code § 22-3233.

RCC § 22E-2404. Alteration of Bicycle Identification Number.

Explanatory Note. *This section establishes the alteration of a bicycle identification number (ABIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a bicycle identification number (BIN), with the intent to conceal or misrepresent the identity of the bicycle or bicycle part. The revised ABIN offense replaces the current altering or removing bicycle identification numbers[1] statute in the current D.C. Code.*

Paragraph (a)(1) requires that the accused knowingly alters an identification number of a bicycle or bicycle part. "Alters" is an undefined term, intended to be broadly construed. The terms "identification number" and "bicycle" are defined in D.C. Code § 50-1609. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be practically certainty that he or she would alter an identification number of a bicycle or bicycle part.

Paragraph (a)(2) further specifies that the accused must alter a BIN "with intent to" conceal or misrepresent the identity of the bicycle or bicycle part. "Intent" is a defined term in RCC § 22E-206, here meaning the accused was practically certain that he or she would conceal or misrepresent the identity of the bicycle or bicycle part. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually concealed or misrepresented the identity of the bicycle or bicycle part, only that the accused was practically certain that he or she would do so.

Subsection (b) specifies the penalty for this offense. There is only one grade of ABIN, and the value of the bicycle or bicycle part is irrelevant.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and the current D.C. Code.

Relation to Current District Law. *The revised ABIN statute changes current District law in one main way.*

The revised ABIN statute requires that the accused act with intent to conceal or misrepresent the identity of the bicycle or bicycle part. Under the current statute, it appears that a person commits an offense by merely knowingly altering a BIN, regardless of the purpose for doing so.[2] No case law exists as to whether a person would be guilty under the current statute for altering a BIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[3] a BIN for purposes besides concealment or misrepresentation of identity. The change improves the proportionality of the revised offense.

[1] D.C. Code § 22-3234.
[2] D.C. Code § 22-3234.
[3] *E.g.*, knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

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

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a BIN.[4] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a BIN. The change is not intended to narrow the scope of the offense.

[4] D.C. Code § 22-3234.

RCC § 22E-2501. Arson.

Explanatory Note. *This section establishes the revised arson offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire, or causing an explosion, that damages or destroys a dwelling or building. The penalty gradations are based on the harm or risk of harm to human life. The revised arson offense, in conjunction with the RCC reckless burning offense, replaces the current arson offense,[1] and the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Paragraph (a)(1) states the prohibited conduct for first degree arson—starting a fire, or causing an explosion, that damages or destroys a dwelling or building. "Dwelling" and "building" are defined terms in RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be aware to a practical certainty that his or her conduct starts a fire or causes an explosion that damages or destroys a "dwelling" or "building."

Paragraph (a)(2) and paragraph (a)(3) specify two additional requirements for first degree arson. Paragraph (a)(2) requires that the accused is "reckless" as to the fact that a person who is not a participant in the crime is present in the dwelling or building. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the dwelling or building is occupied by someone not a participant in the crime. Paragraph (a)(3) requires that the fire or explosion "in fact" cause death or serious bodily injury to another person who is not a participant in the crime. "Serious bodily injury" is a defined term in RCC § 22E-701. Subject to causation limitations, paragraph (a)(3) may also include harm to first responders. "In fact," a term defined in RCC § 22E-207, is used to indicate here that there is no culpable mental state requirement as to whether the fire or explosion caused death or serious bodily injury to another person who is not a participant in the crime.

Subsection (b) specifies the requirements for second degree arson. The requirements in paragraph (b)(1) and sub paragraph section (b)(2) are the same as the requirements in paragraph (a)(1) and paragraph (a)(2) for first degree arson. There are no additional requirements for second degree arson.

Subsection (c) specifies the requirements for third degree arson. The requirements in third degree arson are the same as the requirements in paragraph (a)(1) for first degree arson. There are no additional requirements for third degree arson.

Subsection (d) establishes an affirmative defense that applies only to third degree arson. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. It is an affirmative defense that the defendant, in fact, had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. "In

[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.

fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (d), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised arson statute clearly changes current District law in nine main ways.*

First, the revised arson statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current D.C. Code arson statute,[4] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The DCCA has stated that the malice culpable mental state in the current D.C. Code arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[5] Beyond this, District case law holds that the meaning of malice in the current D.C. Code arson and current malicious destruction of property (MDP) offenses is the same.[6] And, in the context of MDP, the DCCA has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[7] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[8]

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[4] D.C. Code § 22-301.

[5] *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 at 163-64. "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[6] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[7] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[8] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e. a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e. defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

In contrast, the revised arson statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire, or causing an explosion, that damages or destroys a dwelling or building, recklessness as to occupancy, and strict liability as to causing death or serious bodily injury. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] The "reckless" culpable mental state that the revised statute applies to whether the building or dwelling is occupied also approximates, but is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[10] and provides liability for reckless behavior that may result in serious property damage. Finally, the strict liability requirement reflects the fact that the accused has already engaged in serious criminal conduct and no further mental state appears necessary for liability as to the consequences based on his or her recklessness at placing a person risk. In fact, if the defendant had a culpable mental state as to such harm, it may also constitute assault or murder. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[11] Eliminating malice from the revised arson statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised arson statute requires, in part, that the defendant "causes an explosion." The current D.C. Code arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the revised arson statute requires, in part, that the defendant

[9] *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)").

[10] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

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

[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[13] D.C. Code § 22-301.

[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to

"causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current D.C. Code arson statute was enacted in 1901 and specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current D.C. Code arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the revised arson offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the revised arson statute eliminates the requirement that the dwelling or building be another person's property. The current D.C. Code arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the revised arson statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of arson to avoid liability because another person owned all or part of the property. Under the revised arson statute, ownership of the property is irrelevant. This change clarifies the revised arson statute and eliminates a gap in liability under current law.

Fifth, the revised arson statute provides a new affirmative defense, in subsection (d), to third degree arson where a government permit has been issued regarding the actor's conduct and the actor complied with all the rules and regulations governing the use of such a permit. No comparable statute or case law exists in current District law

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burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[17] *Id.*

[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling.

[19] D.C. Code § 22-301.

[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

regarding such a defense. As there is less potential risk to human life in third degree arson, it is appropriate to permit a defendant to avoid liability when acting with property authority. This revision improves the proportionality of the revised offense.

Sixth, the revised arson statute punishes attempted arson differently than a completed arson. The current arson statute includes both an "attempt to burn" and "burn"[21] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[22] In contrast, under the revised arson statute, the General Part's attempt provisions[23] establish liability for attempted arson consistent with other offenses. There is no clear rationale for such a special attempt provision in arson as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, the revised arson statute creates three gradations of arson based primarily upon the actual harm or risk of harm to human life. The current D.C. Code arson statute does not have any gradations and makes no provision for instances where a person suffers serious injury or death as a result of the arson. Case law requires arson to endanger human life to some degree.[24] However, case law also suggests that liability for firefighters and first responders who are seriously injured or killed while responding to the fire or explosion is not covered in current District law.[25] In contrast, the revised arson statute has three gradations that differ on the seriousness of risk to human life. First degree arson provides liability when a defendant, in fact, caused serious bodily injury or death to any person that is not a participant in the crime. Subject to causation limitations, this would also include harm experienced by first responders.[26] No culpable mental state is required for this element because the defendant has already engaged in serious criminal conduct.[27] The revised arson statute excludes participants in the crime because their presence is unrelated to the risk the fire or explosion poses to the occupants or residents

[21] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").
[22] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).
[23] RCC § 22E-301.
[24] *See, e.g.*, *Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).
[25] In *Lewis v. United States*, the government argued that "by setting a fire which he knew would require the intervention of firefighters to extinguish, [the appellant] consciously disregarded a substantial risk to the lives of the firefighters." *Lewis v. United States*, 10 A.3d 646, 661 n.8 (D.C. 2010). The DCCA acknowledged that "there is some merit to this argument," but noted that in states in which "a risk to a firefighter safety satisfies an element of arson, this decision has been made by the legislature." *Id.* The court stated "[i]n light of these statutes applicable in other states, we refrain from extending the 'risk of harm to human life' element to include a risk to responding emergency personnel since we believe the legislature is more apt to make such a change in our arson law." *Id.*
[26] Where the harm to a first responder is by an unrelated or in no way a foreseeable event, for example an airplane crash landing at the location where the fire occurred, the causal connection between setting a fire to an occupied dwelling and the harm may be too tenuous to sustain liability. See commentary to RCC § 22E-204 Causation, for further explanation of causation requirements in the RCC.
[27] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence. *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

of the dwelling or building. In addition, the RCC provides liability under the RCC assault and homicide statutes if a defendant starts a fire or causes an explosion that injures or kills a participant in the crime. Second degree arson requires that the defendant is reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building. Third degree arson applies to dwellings or buildings with no additional requirements and recognizes the heightened risk to human life at these properties even if they happen to be unoccupied at the time of the offense.[28] This revision improves the proportionality of the revised offense by distinguishing more and less culpable conduct.

Eighth, the RCC arson statute replaces two D.C. Code statutes that are closely related to the current arson statute: burning one's own property with intent to defraud or injure another person,[29] and placing explosives with intent to destroy or injure property.[30] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[31] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[32] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Ninth, under the revised arson statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current arson statute is a

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[28] All buildings, as enclosed spaces, pose greater risks of harm from a fire than open areas or business yards.

[29] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[30] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[31] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[32] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

general intent crime,[33] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[34] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[35]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for arson. By contrast, per the revised arson offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of arson. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in arson.[36] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these nine main changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised arson statute requires a defendant, in relevant part, to "start[] a fire." The current D.C. Code arson statute requires that the defendant "burn" the specified property.[37] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[38] but no decision is directly on point. Resolving this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Second, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in

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[33] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) (citing *Barrett v. United States*, 377 A.2d 62 (D.C. 1977); *Charles v. United States*, 371 A.2d 404 (D.C. 1977)).

[34] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[35] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[36] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[37] D.C. Code § 22-301.

[38] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[39] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

The revised arson statute requires that the fire or explosion "damage[] or destroy[]" the specified property. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[40] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

[39] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[40] D.C. Code § 22-301.

RCC § 22E-2502. Reckless Burning.

Explanatory Note. *This section establishes the reckless burning offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion with recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. Reckless burning is a lesser included offense of all the gradations of the revised arson offense (RCC § 22E-2401). It differs from the revised arson offense because it is limited to recklessly damaging or destroying the property at issue, whereas the revised arson statute requires knowingly damaging or destroying the property at issue. Along with the revised arson offense, the reckless burning offense replaces the current arson statute,[1] as well as the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Paragraph (a)(1) states the prohibited conduct—starting a fire or causing an explosion. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be at least aware to a practical certainty that his or her conduct starts a fire or causes an explosion.

Paragraph (a)(2) states that the fire or explosion must damage or destroy a "dwelling" or a "building" as those terms are defined in RCC § 22E-701. Paragraph (a)(2) specifies a culpable mental state of "reckless," a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the fire or explosion damages or destroys a "dwelling" or "building." It must be proven both that the fire or explosion damaged or destroyed the building and that the actor had a reckless culpable mental state as to that result.[4]

Subsection (b) establishes an affirmative defense to the reckless burning offense. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. It is an affirmative defense that the defendant, in fact, had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (b), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (c) specifies the penalty for the offense. [*See* Fourth Draft of Report #41.]

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[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.
[4] If the actor knowingly starts a fire or causes an explosion with recklessness that the fire or explosion would damage or destroy a building or dwelling, but there is no such damage or destruction, then the defendant would be guilty of attempted reckless burning.

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

Relation to Current District Law. *The revised reckless burning statute clearly changes current District law in seven main ways.*

First, the RCC reckless burning statute specifies culpable mental states of knowledge and recklessness with respect to various elements. "Maliciously" is the only culpable mental state specified in the current D.C. Code arson statute,[5] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The DCCA has stated that the malice culpable mental state in the current D.C. Code arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[6] Beyond this, District case law holds that the meaning of malice in the current D.C. Code arson and current malicious destruction of property (MDP) offenses is the same.[7] And, in the context of MDP, has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[8] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[9]

In contrast, the RCC reckless burning statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire or causing an explosion and recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] The "reckless" culpable mental

[5] D.C. Code § 22-301.

[6] *Phenis*, 909 A.2d at 164. (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 A.2d 138, 163-64 (D.C. 2006). "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128,1132 (D.C. 1984).

[7] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[8] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[9] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e. a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e. defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[10] *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)").

state that applies to the fact that the fire or explosion damages or destroys and that the property is a dwelling or building approximates, but is somewhat lower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[11] and provides liability for reckless behavior that may result in serious property damage. As a lesser included offense of arson, penalized at a lower level, the lower culpable mental state in the RCC reckless burning offense creates a wider range of conduct and punishments for arson-type behavior. Eliminating malice from the RCC reckless burning statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the RCC reckless burning statute requires, in part, that the defendant "cause an explosion." The current D.C. Code arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the RCC reckless burning statute requires, in part, that the defendant "causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current D.C. Code arson statute was enacted in 1901 and specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current D.C. Code arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the RCC reckless burning offense includes a railroad car or watercraft only

[11] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[13] D.C. Code § 22-301.

[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[17] *Id*.

when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the RCC reckless burning statute eliminates the requirement that the dwelling, or building be another person's property. The current D.C. Code arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the RCC reckless burning statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of reckless burning to avoid liability because another person owned all or part of the property. Under the RCC reckless burning statute, ownership of the property is irrelevant. This change clarifies the RCC reckless burning statute and eliminates a gap in liability under current law.

Fifth, the revised reckless burning statute provides a new affirmative defense in subsection (b) where a government permit has been issued regarding the actor's conduct and the actor complied with all the rules and regulations governing the use of such a permit. No comparable statute or case law exists in current District law regarding such a defense. As there is less risk to human life in reckless burning, in these circumstances it is appropriate to permit a defendant to avoid liability when acting with property authority. This change improves the proportionality of the RCC reckless burning offense.

Sixth, the revised reckless burning statute punishes attempted reckless burning differently than a completed reckless burning. The current D.C. Code arson statute includes both an "attempt to burn" and "burn"[21] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[22] In contrast, under the RCC reckless burning statute, the General Part's attempt provisions[23] will establish liability for attempted reckless burning consistent with other offenses. There is no clear rationale for such a special attempt provision in arson or reckless burning as compared to other offenses. This revision improves the proportionality of the revised offense.

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[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling.

[19] D.C. Code § 22-301.

[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

[21] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").

[22] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).

[23] RCC § 22E-301.

Seventh, in codifying a reckless burning offense, the RCC replaces two D.C. Code statutes that are closely related to the current arson statute: burning one's own property with intent to injure or defraud another person,[24] and placing explosives with intent to destroy or injure property.[25] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[26] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[27] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

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

First, the RCC reckless burning statute requires a defendant, in relevant part, to "start[]a fire." The current D.C. Code arson statute requires that the defendant "burn" the specified property.[28] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[29] but no decision is directly on point. Instead of this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

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[24] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[25] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[26] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[27] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

[28] D.C. Code § 22-301.

[29] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

Second, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[30] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

The revised reckless burning statute requires that the fire or explosion damage or destroy a dwelling or building. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[31] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

[30] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[31] D.C. Code § 22-301.

RCC § 22E-2503. Criminal Damage to Property.

Explanatory Note. *This section establishes the criminal damage to property (CDP) offense and penalty gradations for the Revised Criminal Code (RCC). The CDP offense proscribes damaging or destroying property without the effective consent of an owner. The penalty gradations are based on the amount of damage to the property, as well as the type of property and the defendant's culpable mental state in causing the damage or destruction. The CDP offense is closely related to the revised arson,[1] revised reckless burning,[2] and revised criminal graffiti offenses.[3] The CDP offense replaces the current malicious destruction of property (MPD) offense and multiple statutes[4] in the current D.C. Code that concern damage to particular types of property.*

Paragraph (a)(1) specifies the prohibited conduct for first degree CDP—damaging or destroying the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon without consent, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in subsection (a)(1)—damages or destroys the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct damages or destroys the "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Paragraph (a)(3) requires that the amount of damage to the property for first degree CDP "in fact" be $500,000 or more. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

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[1] RCC § 22E-2501.
[2] RCC § 22E-2502.
[3] RCC § 22E-2504.
[4] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

Paragraph (b)(1) and paragraph (b)(2) specify the prohibited conduct for second degree CDP. The requirements in paragraph (b)(1) and paragraph (b)(2) are the same as those in paragraph (a)(1) and paragraph (a)(2) for first degree CDP. Paragraph (b)(3) requires that the amount of damage to the property for second degree CDP "in fact" be $50,000 or more. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

There are two alternative means of committing third degree CDP in subsection (c). Paragraph (c)(1) specifies one type of prohibited conduct for third degree CDP. The requirements in paragraph (c)(1) and subparagraph (c)(1)(A) are the same as those in paragraph (a)(1) and paragraph (a)(2) for first degree CDP. Sub-subparagraph (c)(1)(B)(i), sub-subparagraph (c)(1)(B)(ii), and sub-subparagraph (c)(1)(B)(iii) specify the gradation requirements for this type of third degree CDP. Per the rules of interpretation in RCC § 22E-207, "in fact" in subparagraph (c)(1)(B) applies to the elements in sub-subparagraph (c)(1)(B)(i), sub-subparagraph (c)(1)(B)(ii), and sub-subparagraph (c)(1)(B)(iii). "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state as to the amount of damage ($5,000 or more in sub-subparagraph (c)(1)(B)(i)) or the type of property that is damaged or destroyed (cemetery, grave, other place for the internment of human remains, place of worship, or public monument in sub-subparagraphs (c)(1)(B)(ii) and (c)(1)(B)(iii)).[5] "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged.

Paragraph (c)(2) establishes an alternative set of requirements for third degree CDP that requires only recklessness as to the damage or destruction, but requires a higher amount of damage than the first alternative set of requirements under paragraph (c)(1). Paragraph (c)(2) specifies the prohibited conduct for this type of third degree CDP—damages or destroys property. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Recklessly" is a defined term in RCC § 22E-206 that here requires that the defendant consciously disregard a substantial risk that his or her conduct damages or destroys "property."[6] Subparagraph (c)(2)(A) further requires that the property be "property of another." "Property of another" is a defined term in RCC § 22E-701 which

[5] Harm to the specific types of property described gradations in third degree CDP—a "cemetery, grave, or other place for the internment of human remains" (sub-subparagraph (c)(1)(B)(ii)) and a "place of worship or a public monument" (sub-subparagraph (c)(1)(B)(iii))—may be charged at least as third degree CDP. However, depending on the amount of damage, damage or destruction of these types of property may also be charged as a higher gradation of CDP. Prosecutors are also able to charge conduct involving these types of property under a lower, lesser gradation than third degree CDP.

[6] Although paragraph (c)(2) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," subparagraph (c)(2)(A) requires a culpable mental state of "knowingly" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for this type of third degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subparagraph (c)(2)(A) specifies a culpable mental state of "knowing." "Knowing" is a defined term in RCC § 22E-206 that here requires that the defendant is practically certain that the property is "property of another." Subparagraph (c)(2)(B) requires that the prohibited conduct be "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowing" mental state in subparagraph (c)(2)(A) also applies to subparagraph (c)(2)(B). "Knowing" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner. Finally, subparagraph (c)(2)(C) requires that the amount of damage "in fact" be $50,000 or more for this type of third degree CDP. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (d)(1), paragraph (d)(2), and paragraph (d)(3) specify the prohibited conduct for fourth degree CDP. These requirements are the same as the same requirements for third degree CDP in paragraph (c)(2), subparagraph (c)(2)(A), and subparagraph (c)(2)(C).[7] Paragraph (d)(4) requires that the amount of damage to the property for fourth degree CDP "in fact" be $500 or more. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (e)(1), paragraph (e)(2), and paragraph (e)(3) specify the prohibited conduct for fifth degree CDP. These requirements are the same as the requirements for third degree CDP in paragraph (c)(2), subparagraph (c)(2)(A), and subparagraph (c)(2)(C).[8] Paragraph (e)(4) requires that the amount of damage to the property for fifth

[7] Although paragraph (d)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," paragraph (d)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fourth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

[8] Although paragraph (e)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," paragraph (e)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fifth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

degree CDP is "any amount." "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (f) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised CDP statute clearly changes current District law in eight main ways.*

First, the revised CDP statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current D.C. Code MDP statute,[9] and it is unclear whether all or just some of the current MDP statute elements are modified by the term. The DCCA has defined malice to mean: "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result."[10] Per the first part of this holding, MDP is subject to various defenses more typically recognized in the context of murder.[11] Per the second part of this holding, the DCCA has further clarified that, as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice in MDP either requires the defendant act "purposely" (corresponding to an "actual intent to cause the particular harm") or with a blend of "knowingly" and "recklessly" culpable mental states (corresponding to a mental state of "wanton and willful…with awareness of a plain and strong likelihood").[12]

In contrast, the RCC provides standardized definitions for each culpable mental state and specifies the relevant culpable mental states for the revised CDP offense: knowledge or recklessness as to damaging or destroying property, knowledge for the fact that the item at issue is "property" and "property of another," as those terms are defined

[9] D.C. Code § 22-303.

[10] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015) (quoting Guzman v. United States, 821 A.2d 895, 898 (D.C.2003)). The DCCA has further stated that the culpable mental state of the current MDP offense is one of "general intent." *Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987). "General intent" is not used in or defined in the current MDP statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[11] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e. a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e. defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[12] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

in RCC § 22E-701,[13] and knowledge for lacking the effective consent of an owner. In addition, the RCC specifies strict liability as to the amount of damage required, as well as to the type of property specified in some of the alternative requirements for third degree CDP. The "knowingly" culpable mental state is consistent with, but somewhat narrower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[14] The "reckless" culpable mental state that the revised CDP statute applies to lower grades of the statute is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, the recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[15] and provides liability for reckless behavior that may result in serious property damage. The strict liability requirement as to the amount of damage or type of property reflects the fact that the accused has already engaged in serious criminal conduct, and no further mental state appears necessary for liability as to the consequences based on his or her recklessly (or knowingly) damaging property. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[16] Finally, eliminating malice from the revised CDP

[13] The CDP statute consistently requires a culpable mental state of knowledge for the fact that the item at issue satisfies the RCC definitions of "property" and "property of another" in RCC § 22E-701, but the drafting varies. Paragraph (a)(1) of first degree CDP, paragraph (b)(1) of second degree CBP, and paragraph (c)(1) of third degree CDP each specify a "knowingly" culpable mental state for the element "property of another." Since the definition of "property of another" in RCC § 22E-701 incorporates the term "property," also defined in RCC § 22E-701, the "knowingly" culpable mental state also applies to the fact that the item is "property."

Paragraph (c)(2) of third degree CDP, paragraph (d)(1) of fourth degree CDP, and paragraph (e)(1) of fifth degree CDP require that the defendant "recklessly" damage or destroy "property." Although the "recklessly" culpable mental state applies to the element that the item at issue is "property," subparagraph (c)(2)(A) of third degree CDP, paragraph (d)(2) of fourth degree CDP, and paragraph (e)(2) of fifth degree CDP require that the defendant know that the item is "property of another," as that term is defined in RCC § 22E-701. Thus, given that the definition of "property of another" incorporates the definition of "property," these gradations ultimately require a "knowing" culpable mental state for the fact the item at issue is "property."

[14] *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)").

[15] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

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

statute also eliminates the special mitigation defenses applicable to MDP.[17] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised CDP statute grades the offense, in part, based upon the "amount of damage" done to the property, a defined term in RCC § 22E-701. The current MDP statute states that it is the "value" of the property that determines the gradation. DCCA case law has interpreted "value" for MDP to mean the fair market value of the object when the object is completely destroyed, or the "reasonable cost of the repairs necessitated" where an item is only partly damaged.[18] The DCCA further noted that where the cost of repair exceeds the fair market value of the item as a whole, the value would simply be the fair market value of the whole before the damage occurred.[19] In contrast, the revised CDP statute is graded simply on the "amount of damage"—not the value of the property as in the current MDP statute. The RCC definition of "amount of damage" is intended to be consistent with existing case law and is discussed in the commentary to RCC § 22E-701. This revision improves the proportionality of the revised statute.

Third, the revised CDP statute punishes an attempted offense the same as most other criminal attempts. The current D.C. Code MDP statute includes "attempts to injure or break or destroy" as well as "injur[es] or break[s] or destroy[s]"[20] and there is no District case law construing this "attempt" language. The current D.C. Code MDP statute penalizes an attempted offense the same as a completed offense. In contrast, under the revised CDP statute, the general attempt provision in RCC § 22E-301 will establish liability and penalties for attempted CDP consistent with other RCC offenses. Under RCC § 22E-301, the penalty for an attempted offense is one-half the maximum penalty of the completed offense, consistent with several of the more recently revised D.C. Code offenses.[21] There is no clear rationale for attempts to be treated differently in MDP as compared to other offenses, or for penalizing attempted MDP the same as the completed offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the CDP statute increases the number and type of gradations for the offense. The current D.C. Code MDP offense is limited to two gradations based solely

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[17] *Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case."); *see also* D.C. Crim. Jur. Instr. § 5.400 (requiring as an element of MDP that the defendant "acted without mitigation" and defining mitigation, in part, as "when a person acts in the heat of passion caused by adequate provocation" and "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

[18] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[19] That is, in the instance that the value of the entire item or property is less than $200 (the then-current threshold for MDP) but the cost of repair is $200 or more, it would be "unjust to measure the value of the damaged portion by the cost of restoration." *Id.* at n.3.

[20] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy…").

[21] *See, e.g.*, D.C. Code § 22–3018, Attempts to commit sexual offenses.

on the value of the property.[22] First degree MDP is for property that has a "value" of $1,000 or more, and is punished as a serious felony. Second degree MDP involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised CDP offense has a total of five gradations, which span a much greater range of loss in value to the property, including distinctions for destruction of property that is of special significance and distinctions based upon the defendant's mental state as to the damage or destruction. The dollar value cutoffs in the revised CDP are consistent with other revised offenses and the increase in gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

Fifth, the revised CDP offense consolidates most prohibited conduct in the D.C. Code that involves damage or destruction of property, and deletes multiple statutes that are closely related to the current MDP statute.[23] The revised CDP and RCC criminal graffiti offense (RCC § 22E-2404) will cover the vast majority of conduct these deleted statutes prohibit pertaining to damaging property.[24] The only apparent exceptions are causing damage to boundary markers that are on one's property[25] and placing excrement or filth on property in a manner that does not damage it.[26] Notably, attempted CDP, the revised arson offense,[27] and the reckless burning offense[28] cover the conduct prohibited

[22] The DCCA has interpreted "value" in the MDP statute as meaning "fair market value." *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[23] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

[24] D.C. Code §§ 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys . . . the whole or any part of" specified public records or papers); 22-3309 ("Whoever maliciously cuts down, destroys . . . any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever . . . ."); 22-3310 ("It shall be unlawful for any person willfully to top, cut down . . . girdle, break, wound, destroy, or in any manner injure" trees, specified vegetation, or any boxes or protection thereof of another person); 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip . . . to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon" property"); 22-3313 ("It shall not be lawful for any person or persons to destroy, break, cut, disfigure, deface, burn, or otherwise injure" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or "to cut, destroy, or injure any scaffolding, ladder, or other thing used in or about such building or improvement . . . ."; and 22-3314 ("If any person shall maliciously cut down, demolish, or otherwise injure any railing, fence, or inclosure around or upon any cemetery, or shall injure or deface any tomb or inscription thereon . . . .").

[25] D.C. Code § 22-3309 ("Whoever maliciously cuts down, destroys, or removes any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than the amount set forth in § 22-3571.01 and imprisoned not exceeding 180 days."). The statute appears to include boundary markers regardless of ownership, unlike the revised CDP offense requirement that the property be "property of another."

[26] D.C. Code § 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to … cover, rub with, or otherwise place filth or excrement of any kind…."). Other conduct in D.C. Code § 22-3312.01 appears to be covered by the revised CDP statute or revised criminal graffiti statute in 22E-2404.

[27] RCC § 22E-2401.

[28] RCC § 22E-2402.

in the current District offense pertaining to placing explosive substances near property.[29] Several of the statutes pertaining to removing or concealing property[30] are also addressed by the revised theft,[31] unauthorized use of property,[32] and fraud[33] offenses. This change removes unnecessary overlap among criminal statutes and improves the proportionality of the revised statutes.

Sixth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of value for the revised CDP offense based on a single scheme or systematic course of conduct. The current MDP offense is not part of the current aggregation of value provision for property offenses.[34] In contrast, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," applies to the revised CDP statute. This change improves the proportionality of the revised statute.

Seventh, under the revised CDP statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication.[35] The current D.C. Code MDP statute is silent as to the effect of intoxication. However, the DCCA has held that the current MDP statute is a general intent crime,[36] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[37] This DCCA

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[29] D.C. Code § 22-3305.

[30] D.C. Code § 22-3303 ("Whoever, without legal authority or without the consent of the nearest surviving relative, shall disturb or remove any dead body from a grave" for specified purposes); D.C. Code § 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person . . . abstracts, or conceals the whole or any part of" specified public records or papers); D.C. Code § 22-3309 ("Whoever maliciously . . . removes any boundary tree, stone, or other mark or monument . . . either of his or her own lands or of the lands of any other person whatsoever . . . ."); D.C. Code § 22-3310 ("It shall be unlawful for any person willfully to . . . remove" trees, specified vegetation, or any boxes or protection thereof of another person); D.C. Code § 22-3313 ("It shall not be lawful for any person or persons to . . . remove" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or any scaffolding, ladder, or other similar object).

[31] RCC § 22E-2101.

[32] RCC § 22E-2102.

[33] RCC § 22E-2201.

[34] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[35] With respect to those elements of CDP subject to a culpable mental state of recklessness, the Revised Criminal Code effectively precludes an intoxication defense where the intoxication is self-induced. *See* RCC § 209(c)("Imputation of Recklessness for Self-Induced Intoxication. When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.").

[36] *See Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987).

[37] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[38]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for MDP. By contrast, per the revised CDP offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of CDP. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in CDP.[39] This change improves the clarity, consistency, and proportionality of the offense.

Eighth, the revised CDP statute requires a result element of "damages or destroys." The current MDP statute refers to "injures or breaks,"[40] but does not define these terms. The DCCA has twice made rulings that depended on the definition of "injury," and in doing so referred to a dictionary definition of the term as meaning: "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing."[41] In one of these rulings the DCCA suggested that temporary disassembly of an object which does not involve loss or destruction of a part of the object constitutes injury so long as the immediate, ordinary purpose of the object is substantially affected.[42] In contrast, under the revised statute, damage does not include mere temporary disassembly of an object which does not involve loss or destruction of a part.[43] Instead, such a temporary disassembly would be a violation of the revised unauthorized use of property (UUP) offense in RCC § 22E-2102. This change clarifies and improves the proportionality of the revised offense.

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[38] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[39] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[40] D.C. Code § 22-303.

[41] *Baker v. United States*, 891 A.2d 208, 215 (D.C. 2006) ("Second, using black spray paint to inscribe obscenities on walls and on an automobile causes damage sufficient under the statute. "Injury" is defined as "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.1947). Applying this definition to the facts here demonstrates that the graffiti, although temporary, caused sufficient "injury." In order to repair Boggs' vehicle, the paint had to be removed and then replaced with a new layer of paint, otherwise, the vehicle would have been significantly devalued."); *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[42] *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009) ("As with, for example, most broken human arms, the effect is temporary, but nevertheless substantial and sufficient to defeat the immediate purpose of its ordinary or intended use.").

[43] This meaning of "damage" may affect the rulings in *Baker v. United States*, 891 A.2d 208 (D.C. 2006) and *Thomas v. United States*, 985 A.2d 409 (D.C. 2009) which relied upon a dictionary definition of "injury" to decide the case.

Beyond these eight changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised CDP statute requires the property be "property of another," defined in RCC § 22E-701, in part, as any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The current D.C. Code MDP statute refers to the affected property as being "not his or her own," and does not further define the meaning of this phrase. The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned."[44] However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property.[45] The use of the RCC defined term "property of another" in the revised CDP offense is consistent with case law holding that a person may be liable for destroying jointly-owned property without consent of the other where the joint owner has an interest the other joint owner is not privileged to infringe upon.[46] However, the revised CDP offense, by use of "property of another," excludes liability for damaging or destroying property in which the only sense in which the property belongs to another is that another has a security interest in the property. This is because the revised definition of "property of another" specifically excludes "property in the possession of the accused that the other person has only a security interest in." No case law has interpreted whether the current MDP statute's reference to "not his or her own" would include property in the possession of, and owned by, the accused except for a security interest held by another. This change in the revised CDP statute clarifies the offense and applies a consistent definition across theft and theft-related offenses in Chapter 20 of Subtitle III of the RCC through the definition of "property of another."

Second, by use of the phrase "in fact," the revised CDP statute codifies that no culpable mental state is required as to the amount of damage in all gradations of the offense or as to the type of property required in some of the alternative variations of third degree CDP. The current D.C. Code MDP statute is silent as to what culpable mental state, if any, applies to the current MDP value gradations. There is no District case law on what mental state, if any, applies to the current MDP value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[47] Resolving this ambiguity, the revised CDP statute applies strict liability to the amount of damage in all gradations of the offense and to the type of property required in some of the alternative variations of third degree CDP. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[48] Clarifying

[44] *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003).
[45] *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.
[46] Note that, under the revised definition of "property of another," joint owners are not categorically liable under CDP for destroying property of another.
[47] D.C. Crim. Jur. Instr. § 5.300.
[48] D.C. Crim. Jur. Instr. § 5.400.

that the amount of the loss in value is a matter of strict liability in the revised CDP gradations clarifies and potentially fills a gap in District law.

Third, the revised CDP statute requires that the defendant act without the "effective consent of an owner" and applies a culpable mental state of "knowingly" to this element. The current D.C. Code MDP statute does not reference the defendant's lack of consent, although it does require that the property be "not his or her own," which may suggest that the defendant lack consent. DCCA case law interpreting the phrase "not his or her own" is limited to determining issues of joint ownership.[49] More broadly, it seems as though consent would negate the malice requirement in the current MDP statute, given that malice generally requires the absence of "justification, excuse, or mitigation."[50] Resolving this ambiguity, the revised CDP statute requires that the defendant lack the "effective consent of an owner" and applies a "knowingly" culpable mental state to this element. This revision improves the clarity and proportionality of the revised statute and improves its consistency with other RCC property offenses that require that the defendant know that he or she lack the consent or effective consent of an owner, such as the criminal graffiti statute (RCC § 22E-2504).

Fourth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[51] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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[49] The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned." *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003). However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property. *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

[50] *See, e.g., Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[51] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

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

For example, the revised CDP statute deletes "by fire or otherwise" and "any public or private property, whether real or personal" that are in the current MDP statute.[52] The language is surplusage and deleting it will not change the scope of the offense.

[52] D.C. Code § 22-303.

RCC § 22E-2504. Criminal Graffiti.

Explanatory Note. *This section establishes the revised criminal graffiti offense and penalty for the Revised Criminal Code (RCC). The revised criminal graffiti offense prohibits placing any inscription, writing, drawing, marking, or design on the property of another without the effective consent of an owner. There is a single penalty gradation for the offense. The revised criminal graffiti offense is closely related to the revised criminal damage to property offense (CDP).*[1] *The two offenses share several elements, but the revised criminal graffiti offense addresses a specific type of damage to property. The revised criminal graffiti offense replaces the current graffiti offense,*[2] *the current possessing graffiti material offense,*[3] *and the current defacing public or private property offense.*[4]

Paragraph (a)(1) states the proscribed conduct—placing any inscription, writing, drawing, marking, or design on the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in paragraph (a)(1)—placing any inscription, writing, drawing, marking, or design on the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct places any inscription, writing, drawing, marking or design on the "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) specifies the penalty for the offense. [*See* Fourth Draft of Report #41.]

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

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[1] RCC § 22E-2403.
[2] D.C. Code § 22-3312.04(d).
[3] D.C. Code § 22-3312.04(e).
[4] D.C. Code § 22-3312.01. See commentary to criminal damage to property, RCC § 22E-2503.

Relation to Current District Law. *The revised criminal graffiti statute clearly changes current District law in four main ways.*

First, the revised criminal graffiti punishes attempted criminal graffiti differently than a completed criminal graffiti offense. District law currently codifies a separate, attempt-type offense for graffiti that prohibits, in part, possessing graffiti material with the intent to place graffiti,[5] in addition to providing liability under the current general attempt statute.[6] In contrast, the revised criminal graffiti statute relies solely on the General Part's attempt provisions[7] to establish liability for attempts to place graffiti, consistent with other offenses. The General Part's attempt provisions differ from the current attempt-type offense for graffiti chiefly by requiring the person to be "dangerously close" to committing the offense for there to be liability. Such a requirement reflects longstanding District case law regarding criminal attempts generally.[8] There is no clear rationale for such a special attempt-type offense for graffiti as compared to other offenses. This revision improves the clarity and proportionality of the revised offense.

Second, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. The current D.C. Code graffiti offense[9] specifies a culpable mental state of "willfully." The current D.C. Code graffiti offense does not define the term "willfully" and there is no generally applicable definition in the District's current criminal code. No case law exists interpreting the culpable mental state of the graffiti statute. In contrast, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] Requiring a knowing culpable mental state also makes the revised criminal graffiti offense consistent with the elements of higher gradations of the revised CDP statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[11] This revision improves the clarity and consistency of the revised statute.

Third, the revised criminal graffiti statute does not require that the graffiti be visible from a public right-of-way. The current D.C. Code statute defines "graffiti," in part, as requiring that the inscription, etc., be visible from a "public right-of-way."[12]

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[5] D.C. Code §§ 22-3312.05(5) (defining "graffiti material"), 22-3312.04(e) ("Any person who willfully possesses graffiti material with the intent to place graffiti on property without the consent of the owner shall be fined not less than $100 or more than $1,000.").

[6] D.C. Code §§ 22-1803.

[7] RCC § 22E-301.

[8] See commentary to RCC § 22E-301.

[9] D.C. Code § 22-3312.04(e).

[10] *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)").

[11] *See, e.g.*, RCC § 22E-2503.

[12] D.C. Code § 22-3312.05(4) ("'Graffiti' means an inscription, writing, drawing, marking, or design that is painted, sprayed, etched, scratched, or otherwise placed on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials that are on public or private property without the

There is no DCCA case law interpreting this requirement and it appears to have been included for an abatement of graffiti provision that has since been repealed.[13] In contrast, the revised criminal graffiti offense does not require that the graffiti be visible from a public right-of-way. This requirement unnecessarily restricts the scope of the offense to places visible to the public, even though the harm to a property owner is the same whether or not the location is visible to the public. The requirement also is inconsistent with the revised criminal damage to property offense (RCC § 22E-2504), which applies to "property of another." This revision improves the proportionality and consistency of the revised statute.

Fourth, the revised criminal graffiti statute does not provide for mandatory restitution provision or have a specific parental liability provision. The current D.C. Code graffiti statute mandates restitution in addition to any fine or imprisonment,[14] and makes parents and guardians civilly liable for fines and abatement fees that their minor cannot pay.[15] However, there also is a substantially similar provision in D.C. Code § 16-2320.01 that states the court "may" enter a judgment of restitution in any case in which the court finds a child has committed a specified delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such

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consent of the owner, manager, or agent in charge of the property, and the graffiti is visible from a public right-of-way.").

[13] Subsection (c) of D.C. Code § 22-3312.04 establishes the current graffiti offense. Subsection (c) was added to D.C. Code § 22-3312.04 by the Anti-Graffiti Amendment Act of 2000 (Act 13-560). The Anti-Graffiti Amendment Act of 2000 also codified the definitions in D.C. Code § 22-3312.05, including the current definition of "graffiti," as well as an abatement of graffiti provision in former D.C. Code § 22-3312.03a. The abatement provisions in former D.C. Code § 22-3312.03a appear to depend, in part, on whether the graffiti is visible from a public right-of-way, as required in the definition of "graffiti" and as specified in the abatement provision. D.C. Code § 22-3312.03a(a), (b) ("(a) Any person applying graffiti on public or private property shall have the duty to abate the graffiti within 24 hours after notice by the Director, the Chief of Police, or the private owner of the property involved. Abatement shall be done in a manner prescribed by the Director. Any person applying the graffiti shall be responsible for the abatement or payment for the abatement. When graffiti is applied by a minor, the parents or legal guardian shall also be responsible for the abatement or payment for the abatement if the minor is unable to pay. (b) Subject to the availability of annual appropriations for that purpose, the Mayor shall provide graffiti removal services to abate graffiti on public property. The Mayor shall provide, subject to appropriations, graffiti removal services for the abatement of graffiti on private property that is visible from the public right-of-way without charge to the property owner if the property owner first executes a waiver of liability in the form prescribed by the Mayor."). (repl.).

The Anti-Graffiti Act of 2010 repealed the abatement provision in D.C. Code § 22-3312.03a and codified in Title 42 a new abatement provision and definition of "graffiti" that requires visibility from a public right-of-way. Anti-Graffiti Act of 2010 (Law 18-219). Despite the repeal of the abatement provision in D.C. Code § 22-3312.03a, the definition of "graffiti" in D.C. Code § 22-3312.05 was not repealed. The legislative history for the Anti-Graffiti Act of 2010 does not discuss whether the Council intentionally kept the visibility requirement in the definition of "graffiti" in D.C. Code § 22-3312.05.

[14] D.C. Code § 22-3312.04(f) ("In addition to any fine or sentence imposed under this section, the court shall order the person convicted to make restitution to the owner of the property, or to the party responsible for the property upon which the graffiti has been placed, for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.").

[15] D.C. Code § 22-3312.04(g) ("The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.").

restitution.[16] With respect to adults, D.C. Code § 16-711 provides judicial authority for (but does not require) ordering restitution. In contrast, the revised criminal graffiti statute deletes both the mandatory restitution provision and parental liability provision that apply to the current graffiti offense. Instead, matters of adult restitution are left to judicial discretion per D.C. Code § 16-711[17] and juvenile restitution and parental liability to judicial discretion per D.C. Code § 16-2320.01. This change improves the consistency and proportionality of the revised statute, and removes unnecessary overlap with other penalty provisions in the D.C. Code.

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

First, the revised criminal damage to property statute requires that the "inscription, writing, drawing, marking, or design" be placed on the "property of another" and applies the definition of "property of another" in RCC § 22E-701. The current D.C. Code graffiti offense does not specify any ownership requirements for the property, although it does require the defendant to act "without consent of the owner." The definition of "property of another" in RCC § 22E-701 specifies that "property of another" is any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The definition of "property of another" also excludes from the revised criminal graffiti offense property that is in the possession of the accused in which the other person has only a security interest. This narrow exclusion for security interests is the same exclusion that applies to the revised criminal damage to property offense (RCC § 22E-2504) and other property offenses in Chapter 20 of Subtitle III of the RCC. As with the other offenses, the exclusion is justified because civil remedies such as contract liability, rather than criminal liability, address the situation when a debtor damages property and the other party has only a security interest in that property. However, under RCC the definition of "property of another," a third party could be criminally liable for damaging property that is in the possession of the debtor because the debtor has a possessory interest in that property. Given the nature of the revised criminal graffiti offense, it is unlikely that the security interest exclusion will often apply. However, the consistency of the RCC improves if the criminal damage to property and the revised criminal graffiti offenses cover the same range of property interests.

Second, the revised criminal graffiti statute requires a person to act "without the effective consent of an owner." "Consent," "effective consent," and "owner" are defined terms in RCC § 22E-701 that together generally require a person to lack some indication of an owner's agreement to the placement of graffiti from a person holding an interest in

[16] D.C. Code § 16-2320.01(a) ("(a)(1) Upon request of the Corporation Counsel, the victim, or on its own motion, the Division may enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and during or as a result of the commission of that delinquent act has: (A) Stolen, damaged, destroyed, converted, unlawfully obtained, or substantially decreased the value of the property of another . . . (2) The Division may order the parent or guardian of a child, a child, or both to make restitution to: (A) The victim; (B) Any governmental entity; (C) A third-party payor, including an insurer, that has made payment to the victim to compensate the victim for a property loss under paragraph (1)(A) of this subsection or pecuniary loss under paragraph (1)(B) or (C) of this subsection.").

[17] RCC § 22E-602 generally authorizes courts to order restitution in accordance with D.C. Code § 16-711.

the property. The current D.C. Code graffiti offense requires that the defendant act "without the consent of the owner," but there is no statutory definition of these terms, and no District case law addresses the meaning of "without the consent" or "owner" in the graffiti statute. Requiring a person to act "without the effective consent of an owner" and using the definitions in RCC § 22E-701 that apply to other property offenses in Chapter 20 of Subtitle III of the RCC improves the clarity and consistency of the revised offense.

Third, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[18] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised criminal graffiti statute eliminates the "on public or private property" requirement that is in the current D.C. Code definition of "graffiti."[19] Similarly, the revised criminal graffiti offense deletes "on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials" that is in the current definition of "graffiti."[20] Such language is surplusage and deletion will not change District law.

Second, the revised criminal graffiti statute deletes the language in the current D.C. Code definition of "graffiti"[21] that refers to a "manager, or agent in charge of the property" because the RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person. Deleting the language will not change District law.

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[18] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[19] D.C. Code § 22-3312.05(4).

[20] D.C. Code § 22-3312.05(4).

[21] D.C. Code § 22-3312.05(4).

Finally, the revised criminal graffiti offense deletes specific reference to the methods of making graffiti that are in the current definition of "graffiti:"[22] "is painted, sprayed, etched, scratched, or otherwise placed." Instead, the revised criminal graffiti statute requires the defendant to "place[]" "any inscription, writing, drawing, marking, or design." "Any inscription, writing, drawing, marking, or design" is taken from the current definition of "graffiti" without change. "Places" and the types of graffiti specified in the revised statute render "is painted, sprayed, etched, scratched, or otherwise placed" are surplusage. Deletion will not change District law.

[22] D.C. Code § 22-3312.05(4).

RCC § 22E-2601. Trespass.

Explanatory Note. *This section establishes the trespass offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly entering or remaining in certain locations without a privilege or license to do so under civil law. The offense is graded based on the location at issue. The revised trespass offense is closely related to burglary,[1] with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised trespass offense replaces the forcible entry and detainer,[2] unlawful entry on property[3] and unlawful entry of a motor vehicle[4] statutes in the current D.C. Code.[5]*

Paragraphs (a)(1), (b)(1), and (c)(1) require that the defendant "enters or remains in" a given place. The "enters" element does not require complete or full entry of the body, and evidence of partial entry is sufficient proof for a completed trespass.[6] The alternate phrase "remains in" creates liability for a person who remains on property with knowledge that he or she has no right or permission to be there.[7] A person who commits a trespass by remaining after being asked to leave must have a reasonable opportunity to do so.[8] Where a person is uncertain as to whether they can safely comply with a notice to quit, a justification defense may apply. Paragraphs (a)(1), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC §

[1] RCC § 22E-2701.
[2] D.C. Code § 22-3301.
[3] D.C. Code § 22-3302.
[4] D.C. Code § 22-1341.
[5] To the extent that the District's current unlawful entry statute also protects "other property," besides dwellings, buildings, land, watercrafts, and motor vehicles, the RCC punishes exercising control over any property of another as unauthorized use of property in RCC § 22E-2102.
[6] Evidence of unlawful entry of a body part or a camera, microphone, or other instrument held by an actor is sufficient proof for a completed trespass.
[7] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).
[8] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty); *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977); *Rahman v. United States*, 208 A.3d 734, 741 (D.C. 2019).

22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.[9]

Paragraphs (a)(1), (b)(1), and (c)(1) also describe the places where a trespass can occur. Trespass into a dwelling is punished more severely per paragraph (a)(1) than trespass into a building per paragraph (b)(1), which is punished more severely than trespass on land or into a watercraft or motor vehicle per paragraph (c)(1). The terms "dwelling," "building," and "motor vehicle" are defined in RCC § 22E-701. The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a parcel, building, or vehicle, that person may not have a right to enter another area in the same location.[10] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, land, watercraft, or motor vehicle.

Paragraphs (a)(2), (b)(2), and (c)(2) state that the proscribed conduct must be done "[w]ithout a privilege or license to do so under civil law."[11] Determining criminal liability for trespass depends on a wide array of non-criminal laws[12] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[13] In some instances, it may be obvious that a person has a right to be present.[14] However, particularly where there are competing rights,[15] or where there is public access[16] to a

[9] *See, e.g., Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (reversing a conviction where the government failed to prove that the defendant knew that he was barred from a sidewalk appeared to be a public walkway).

[10] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[11] A license may be specific or general and need not be communicated directly to the accused. For example, a private homeowner may be indifferent to children using her yard as a shortcut to and from school. A child who uses the yard for that purpose does not commit a trespass.

[12] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[13] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[14] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[15] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[16] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a

given parcel, building, or vehicle, it may be less clear whether an individual is legally licensed to enter or remain. Even if a person apparently has obtained permission to enter or remain, the means by which the person obtained permission may render an entry unlawful.[17] Or, a person may commit a trespass by unlawfully exceeding the scope of a permission that is limited in time, place, or purpose.[18] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state also applies to paragraphs (a)(2), (b)(2), and (c)(2), requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.[19]

Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a District of Columbia Housing Authority ("DCHA") barring notice,[20] it must prove that the barring notice was issued for a reason described in DCHA regulations.[21] Additionally, the government must offer evidence that the DCHA official who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied.[22] Even if sufficient cause for barring in fact exists, the issuance of a DCHA barring notice without objectively reasonable cause will render the notice invalid.[23]

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regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)); *see also Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (D.C. App. Apr. 30, 2020).

[17] For example, a person who obtained permission by making a coercive threat may nevertheless commit a trespass.

[18] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a trespass by instead (or additionally) entering another part of the home unrelated to the repair.

[19] For example, an investigative journalist who gains entry by going undercover does not commit a trespass unless she is practically certain that she does not have a privilege or license to do so under civil law. Consider also, a person who walks into the lobby of a residential building to leave menus, fliers, or business cards inside. *See also Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (D.C. App. Apr. 30, 2020) (reversing a conviction where the government failed to prove that the defendant knew that he was barred from a sidewalk appeared to be a public walkway).

[20] This means any temporary, extended, or permanent notice barring a person from a location that is owned, operated, developed, administered, or financially assisted by the Department of Housing and Urban Development or District of Columbia Housing Authority. It includes notices issued by parties other than DCHA officials, including property managers and law enforcement officers.

[21] *See* 14 DCMR § 9600, et seq.

[22] *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015) (reversing a conviction where the defendant was barred from public housing for being an unauthorized person without first verifying whether the defendant was the guest of a resident); *Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

[23] Consider, for example, the facts in *Winston v. United States*, 106 A.3d 1087 (D.C. 2015). A security guard observed a non-resident on the grounds of a public housing complex unaccompanied by a resident and, based on this information alone, barred Mr. Winston as unauthorized, pursuant to 14 DCMR § 9600.4. The officer's actions were found to be objectively unreasonable because no steps were taken to verify that Mr. Winston was not a guest of a resident, permitted to enter pursuant to 14 DCMR § 9600.2. Accordingly, the barring notice was ruled invalid and the violation of the barring notice did not amount to an unlawful entry. It was deemed of no consequence whether Mr. Winston was, in fact, a guest or an unauthorized person.

Paragraph (d)(2) excludes from trespass liability the failure to pay an established transit fare to the Washington Metropolitan Area Transit Authority. Such conduct is punished exclusively under D.C. Code § 35-252.

Subsection (e) specifically provides that a factfinder may infer that a person lacks a privilege or license to enter or remain in an otherwise vacant[24] location when there are at least two indicia of unlawful entry. The premises must show signs of forced entry[25] and either be secured in a manner that reasonably conveys that it is not to be entered[26] or display signage that is reasonably visible prior to or outside the location's points of entry that says "no trespassing" or similarly indicates that a person may not enter.

Subsection (f) provides the penalties for each grade of the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised trespass statute clearly changes current District law in five main ways.*

First, the revised offense includes three penalty gradations. Current law separately criminalizes, with three different penalties, unlawful entry into a dwelling, building, or other property,[27] and unlawful entry of a motor vehicle.[28] In contrast, the revised trespass offense includes both real property and vehicles, but grades intrusions into dwellings more severely than intrusions into other buildings, which in turn are graded more severely than intrusions on land and vehicles. This change logically reorganizes the revised offenses and improves the consistency and proportionality of the revised offenses.

Second, the revised statute punishes an attempt to trespass differently from a completed trespass. Current D.C. Code § 22-3302 punishes an attempt to trespass the same as a completed trespass. In contrast, the revised offense punishes attempted trespass in a manner consistent with other revised offenses, relying on the general part's common definition of attempt[29] and penalty for an attempt.[30] This change improves the consistency and proportionality of the revised offenses.

Third, under the revised trespass statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim they did not act "knowingly" or with "intent" due to their self-induced intoxication. The current unlawful entry statutes are silent as to the availability of an intoxication defense, however, the DCCA has characterized the current statute is a general intent crime.[31] Under the RCC trespass statute, a defendant will be able to raise and present relevant and admissible

[24] Here, "vacant" means that the property is uninhabited, not merely unoccupied at a particular moment in time.
[25] Signs of forced entry are not limited to broken doors or windows.
[26] For example, boarding up the property or locking a gate or entryway to the property may be means of reasonably conveying that the public is not free to enter.
[27] D.C. Code § 22-3302 (providing a 180-day penalty for trespass of private buildings and a 6-month penalty for trespass of public buildings); *see also Broome v. United States*, 240 A.3d 35 (D.C. 2020).
[28] D.C. Code § 22-1341 (providing a 90-day penalty).
[29] RCC § 22E-301(a).
[30] RCC § 22E-301(c)(1).
[31] *See Ortberg*, 81 A.3d at 305.

evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a trespass. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[32]

Fourth, the permissive inference in the revised offense requires that the affected property be vacant and shows signs of forced entry. Current D.C. Code § 22-3302 provides, "The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie[33] evidence that any person found in such property has entered against the will of the person in legal possession of the property." This language is unclear as to whether the location must be vacant if it displays a no trespassing sign, and there is no case law on point. The current D.C. Code statute, however, clearly does not require evidence of forced entry as part of the permissive inherence. Legislative history indicates that the permissive inference was added to "make it easier to arrest unlawful occupants on vacant property."[34] In contrast, the inference in the revised offense requires signs of forced entry, to ensure that the inference meets the legal standard of being an indicator that it is "more likely than not" that the accused is acting without a privilege or license to do so.[35] A homeowner, real estate agent, or repair person who enters a vacant location that displays a "no trespassing" sign should not be able to be found guilty without further evidence of wrongdoing. This change improves the proportionality and may improve the constitutionality of the revised offense.

Fifth, the RCC repeals D.C. Code § 22-3301, Forcible Entry and Detainer, which is archaic, unused, and duplicative of conduct in the revised Trespass and Burglary statutes.[36] This change reduces unnecessary overlap between the revised statutes.

Beyond these five changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised trespass statute specifies knowledge as the culpable mental state required for all offense elements. The current District statutes do not specify a culpable mental state for any element of the unlawful entry on property or unlawful entry of a

[32] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[33] The phrase "prima facie" is not defined by statute or in case law interpreting the current unlawful entry statutes. However, the same phrase, in the context of the bail reform act (D.C. Code § 22-1327), has been construed as "a permissive inference, not a presumption." *Trice v. United States*, 525 A.2d 176, 182 (D.C. 1987); see also *Raymond v. United States*, 396 A.2d 975, 976-77 ("although the wording…may be read to imply that the inference of willfulness is mandatory…the trier of fact has merely been permitted and not required to infer willfulness. We conclude that this instruction, incorporating a permissive inference, properly construes the statute."). As the phrase may be unnecessarily confusing to lawyers and lay people alike, the revised offense uses more straightforward language to convey that the inference is optional. This approach appears to be in line with current District practice. *See* D.C. Crim. Jur. Instr. § 5.401 ("You may, but you are not required to, presume that [name of defendant] entered the property against the will" of the lawful occupant.).

[34] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 11.

[35] *See Leary v. United States*, 395 U.S. 6 (1969); *Reid v. United States*, 466 A.2d 433, 435-36 (D.C. 1983).

[36] RCC §§ 22E-2601 and 22E-2701.

motor vehicle offenses. The District of Columbia Court of Appeals ("DCCA") has generally said that trespass is a general intent crime,[37] while also stating that it must be proven that the actor "knew or should have known" that entry was unwanted,[38] and also upholding a requirement that the actor "entered, or attempted to enter the property voluntarily, on purpose, and not by mistake or accident."[39] In addition, the court also has consistently recognized that a person who holds a bona fide belief that she has a right to remain does not commit a trespass.[40] To resolve these ambiguities, the revised statute requires a culpable mental state of knowingly, using the RCC standard definition. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[41] This change improves the consistency of the revised offense and the proportionality of penalties.

Second, under the revised trespass offense, criminal liability turns on whether the accused acted without privilege or license to do so under civil law. Current D.C. Code § 22-3302 prohibits entering property "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit…" An array of DCCA cases have construed, in light of specific fact patterns, the meaning of, and exceptions to, the terms "against the will,"[42] "the lawful occupant,"[43] "the person lawfully in charge thereof,"[44]

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[37] *Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013); *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984) (requiring "general intent" and "the absence of an exculpatory state of mind").

[38] *See Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013); *Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (D.C. App. Apr. 30, 2020); *see also Ronkin v. Vihn*, 71 F. Supp. 3d 124, 133 (D.D.C. 2014).

[39] *See Ortberg v. United States*, 81 A.3d 303, 309 (D.C. 2013).

[40] *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967); *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979); *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993).

[41] *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.)).

[42] *Compare Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) ("the entry must be against the expressed will, that is, after a warning to keep off") *with McGloin v. United States*, 232 A.2d 90, 90 (D.C. 1967) ("*Bowman* must be read in the light of the facts of that case. It concerned an unlawful entry into a restricted area of the Union Station, a semi-public building. In such a building the public generally is permitted to enter and if there are portions which are not obviously private or restricted, it is only reasonable that warning of some kind be given the public to stay out. Even in a semi-public or public building there are portions obviously not open to the public; and surely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.").

[43] *See Smith v. Unite States*, 445 A.2d 961, 964 (D.C. 1982) (finding a secret service agent is a lawful occupant of the White House); *Moore v. United States*, 136 A.2d 868, 869 (D.C. 1957) (explaining that whether the complainant is a lawful occupant is a question for the jury); *see also Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[44] *See Whittlesey v. U. S.*, 221 A.2d 86, 91 (D.C. 1966) ("[A] person may be lawfully in charge even though there are other persons who could, if they chose to do so, countermand or override his authority."); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("[T]he person in charge may act through an agent in ordering someone to leave.") (citing *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C.1981)); *Woll v. United States*, 570 A.2d 819, 822 (D.C. 1990) (finding a lessee's right to the use of a corridor is sufficient to bring her within the meaning of "person lawfully in charge thereof.").

and "without lawful authority."[45] Current D.C. Code § 22-1341 prohibits entering or being inside a motor vehicle "without the permission of the owner or person lawfully in charge," and lists a few statutory exceptions where permission is not needed.[46] The revised statute more broadly refers to whether an actor has a "privilege or license"[47] for entry (or remaining) under civil law.[48] This standard more plainly alludes to the many instances in which a person is entitled to occupy a particular space or vehicle over the express objection of an owner, occupant, manager, or security guard.[49] Unlike theft[50] (requiring unlawful taking) and burglary[51] (requiring intent to commit a crime), trespass criminalizes mere presence. Considerations of freedom of expression, assembly, movement, and association are, therefore, of paramount concern. Accordingly, criminality turns entirely on the entitlements of accused and not merely on the express objection of others. This change improves the clarity and consistency of the revised statute.

Third, the revised statute's permissive inference provision includes an explicit reasonableness requirement. The current trespass statute's evidentiary inference applies to a "property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign…" There is no case law on what manner of securing conveys a location is vacant or what standards may apply to the display of a no trespassing sign. To resolve these ambiguities, the revised permissive inference requires the manner in which the premises are secured to "reasonably convey" that it is not to be entered, or that the "no trespassing" signage be "reasonably visible" prior to or outside the property's points of entry. The reasonableness requirements provide courts with a degree of flexibility in assessing

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[45] *See, e.g., Dent v. United States*, 271 A.2d 699, 700 (D.C. 1970) (affirming a conviction where defendant was told "never to come back to the apartment, since he didn't know how to act.").

[46] D.C. Code § 22-1341(b) ("Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle.").

[47] The phrasing "license or privilege" follows the Model Penal Code and many other jurisdictions' use. *See* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.). The RCC does not intend to limit construction of these terms to that of any other particular jurisdiction, but the basic distinction held by some jurisdictions seems appropriate that "licensed" refers to a consensual entry while "privileged" refers to a nonconsensual entry. *Id.*

[48] The term "civil law" is intended to refer broadly to non-criminal law. Black's Law Dictionary (10th ed. 2014).

[49] For example, current D.C. Code § 22-1341 includes several exclusions from liability for the government, tow truck operators, and re-possessors to enter a motor vehicle without the owner's permission. Similarly, there are many legitimate reasons for a person to occupy real property without permission from the titleholder. For example, a person may have rights in contract or landlord-tenant law (D.C. Code § 42-3505.01); under local or federal housing regulations (14 DCMR § 9600 et seq.; *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015)); by private necessity (*Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015)), or as protected by the First Amendment or the District's protections of traditional public forums (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982); D.C. Code § 5-331.01 et seq.; D.C. Code § 2-575). *See also Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[50] *See* RCC § 22E-2101.

[51] *See* RCC § 22E-2701.

whether the manner of securing or signage is sufficient to infer that the defendant was on notice that the entry was unlawful.[52] The reasonableness requirements are an objective matter, to be determined from the perspective of an ordinary person entering or remaining in the location. Of course, even if the reasonableness requirements are not met, the government may prove the defendant's guilt without the benefit of the permissive inference.[53] This change clarifies the revised statute.

Fourth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[54] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

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[52] Depending on the particular facts of the case, the reasonableness requirement may narrow the applicability of the permissive inference as compared to current law. *E.g.*, a single "No trespassing" sign that is obscured or at one entrance of a building with multiple entrances accessible to the public may not "reasonably" indicate that the building is not to be entered, but arguably may provide adequate notice under the current statute. On the other hand, the reasonableness requirement in the revised offense also may expand the applicability of the permissive inference, as compared to the current statute. For example, sign that read, "Employees Only," "Keep Out," or "Authorized Personnel Only" would all be included within the ambit of the RCC permissive inference, while they might not be included within the current statute.

[53] *See, e.g., Culp v. United States*, 486 A.2d 1174 (D.C. 1985) (Where police officers observed defendant inside a vacant building, and had reason to believe that defendant did not belong there, and the property itself revealed indications of a continued claim of possession by the owner or manager, police had probable cause to arrest defendant for unlawful entry); *Smith v. United States*, 281 A.2d 438 (D.C. 1971) (Where a construction company, the occupant of lot, had posted signs indicating its rightful control of the site, it had never authorized defendant to use the site at night when no one was present, and where site was protected at night by locked gates and a mesh chain link fence topped by barbed wire, there was no need that an explicit "keep out" sign be posted to establish that defendant was acting against the will of the construction company when he entered the site).

[54] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

First, the revised offense replaces the reference to "other property" in the current unlawful entry on property statute with a specific list of locations where trespass may occur. The current statute[55] protects "any private dwelling, building, or other property" as well as "any public building, or other property," and parts thereof. The DCCA has not provided clear or comprehensive guidance, however, on how broadly "or other property" should be read.[56] The revised trespass offense clarifies that the protected locations are dwellings, buildings, land, watercraft, and motor vehicles. Use of other property[57] without a privilege or license under civil law may be punishable in the RCC as unauthorized use of property.[58]

Second, the revised statute replaces the phrase "refuses to quit" with the more modern "remains in." This does not appear to be a substantive change, merely a stylistic one supported by modern usage.[59]

Third, the revised statute codifies an exclusionary rule for violations of DCHA barring notices. In *Winston v. United States,*[60] the DCCA required an objectively reasonable basis for believing that valid grounds exist to bar a person from public housing pursuant the regulations in 14 DCMR § 9600 et seq. Where a barring notice is issued incorrectly or arbitrarily—in that case, without first verifying that the person was not a guest[61]—violation of the notice does not amount to a criminal unlawful entry.

Fourth, the revised trespass offense clarifies that fare evasion may not be prosecuted as a trespass. The Fare Evasion Decriminalization Amendment Act of 2018 provides that fare evasion may be prosecuted as a civil infraction only, not as trespass or theft.[62]

Fifth, the statutory text of the revised offense does not list the exclusions from liability that are enumerated in current D.C. Code § 22-1341(b).[63] The revised offense's

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[55] D.C. Code § 22-3302.

[56] The DCCA has affirmed convictions for intrusions into places other than buildings or dwellings, including a Home Depot parking lot (*Gray v. United States,* 100 A.3d 129 (D.C. 2014)), the steps of the United States Capitol (*Abney v. United States,* 616 A.2d 856 (D.C. 1992)), the area immediately surrounding the Farragut West Metro station *(United States v. Powell,* 536 A.2d 1086 (D.C. 1989)), and the White House grounds (*Leiss v. United States,* 364 A.2d 803 (D.C. 1976)).

[57] For example, a bicycle.

[58] RCC § 22E-2102.

[59] The DCCA has used the term "remaining" in construing the elements of the offense. *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976) (the offense prohibits "the act of entering or *remaining* upon any property when such conduct is both without legal authority and against the expressed will of the person lawfully in charge of the premises.") (emphasis added). *See also* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.) ("The 'enters or remains' language of the Model Penal Code is used in the great majority of the state criminal trespass statutes…").

[60] 106 A.3d 1087 (D.C. 2015).

[61] *See also Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

[62] Prior to this legislation being enacted, fare evasion may have been prosecuted as a trespass. *See Bowman v. U.S., 212 A.2d 610* (D.C. 1965) (finding defendants were properly convicted under statute for unlawful entry where they, without a ticket and intent to board a train, had entered restricted area despite sign and public announcements whereby only persons having tickets were permitted through the gate to the restricted area.)

[63] "Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or

requirement that the accused know that they are acting without privilege or license under civil law renders this language superfluous.

(3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle."

RCC § 22E-2701. Burglary.

Explanatory Note. *This section establishes the burglary offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly and fully entering or surreptitiously remaining in certain locations without a privilege or license to do so under civil law, with intent to commit a crime inside. The offense is graded based on location. The revised burglary offense is closely related to trespass,[1] with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised burglary offense replaces the burglary statute in the current D.C. Code.[2]*

Paragraphs (a)(2), (b)(1), and (c)(1) require that the defendant "fully enters or surreptitiously remains in" a given place. The "fully enters" element requires complete entry of the body, and evidence of partial entry of the body is insufficient proof for a completed burglary.[3] The alternate phrase "surreptitiously remains in" creates liability for a person who hides[4] on property with knowledge that he or she has no permission to be there.[5] Paragraphs (a)(2), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.

Paragraphs (a)(2), (b)(1), and (c)(1) also describe the places where a burglary can occur. Burglary into an occupied dwelling is punished more severely than burglary into an unoccupied dwelling[6] or into an occupied building, which are punished more severely than burglary into an unoccupied building[7] or a business yard. The terms "dwelling," "building," and "business yard" are defined in RCC § 22E-701.[8] The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a dwelling, building, or business yard, that person may not have a right to enter another area in the

[1] RCC § 22E-2601.
[2] D.C. Code § 22-801.
[3] Fact patterns involving a person's nonconsensual reaching—but not full body entry—into a dwelling, building, or business yard with intent to commit a crime inside may constitute attempted burglary (e.g., a person caught on top of a fence to a business yard) or an attempted or completed form of the predicate crime (e.g., theft, where a person reaches through a window to take an object from a building).
[4] A person who remains without hiding may commit a trespass, in violation of RCC § 22E-2601, but not a burglary. Consider, for example, a person who enters a store open to the public, makes a scene and is asked to leave by a manager, and who thereafter refuses and makes a criminal threat against the manager—such a person may be liable for trespass and criminal threats, but not burglary.
[5] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).
[6] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.
[7] Or, an occupied building, when the defendant is not reckless as to occupancy.
[8] The term "dwelling" may include houseboats and other structures that are not buildings.

same location.[9] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, or business yard.

Paragraph (a)(3), subparagraphs (b)(1)(A) and (b)(1)(B), and paragraph (c)(2) state that the entering or remaining must be done "[w]ithout a privilege or license to do so under civil law."[10] Determining criminal liability for burglary depends on a wide array of non-criminal laws[11] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[12] In some instances, it may be obvious that a person has a right to be present.[13] However, particularly where there are competing rights,[14] or where there is public access[15] to a given building or business yard, it may be less clear whether an individual is legally licensed to enter or remain. Even if a person apparently has obtained permission to enter, the means by which the person obtained permission may render an entry unlawful.[16] Or, a person may commit a burglary by unlawfully exceeding the scope

[9] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[10] A license may be specific or general and need not be communicated directly to the accused.

[11] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[12] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[13] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[14] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[15] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

[16] For example, a person who obtained permission by deceit may nevertheless commit a burglary. *See, e.g., McKinnon v. United States*, 644 A.2d 438, 440 (D.C. 1994).

of a permission that is limited in time, place, or purpose.[17] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraphs (a)(2), (b)(1) and (c)(1) also apply to the element "without a privilege or license," requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.

Paragraphs (a)(4), (b)(3), and (c)(3) require the defendant act "with intent to" commit one or more District crimes inside that is either an offense against persons under Subtitle II or a "predicate property offense," as defined in paragraph (e)(2). "Intent" is a defined term in RCC § 22E-206 that here means here means the accused was practically certainty that his or her conduct constitutes a criminal offense under District of Columbia law. The defendant must have the intent to commit the crime at the moment he or she enters or begins to surreptitiously hide inside.[18] And, the Defendant must intend to commit the crime in that location. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the accused attempted or completed the predicate offense, only that the accused believed to a practical certainty that he or she would attempt or complete the predicate offense.

Sub-subparagraph (b)(1)(B)(i) and subparagraph (c)(1)(B) specify that buildings and business yards must not be open to the general public at the time of the offense.[19] "Open to the general public" is defined in RCC § 22E-701 to mean no payment, membership, affiliation, appointment, or special permission is required to enter. A person does not commit a burglary by entering a public space with intent to commit a crime.[20]

Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) provide heightened liability where a defendant is reckless as to a dwelling or building being occupied. "Recklessly" is defined in RCC § 22E-206 and here requires that the accused consciously disregard a substantial risk that the location is occupied by someone other than a participant in the burglary at the moment he or she enters or begins to surreptitiously hide inside.[21]

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[17] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a burglary by instead (or additionally) entering another part of the home unrelated to the repair with intent to commit a crime.

[18] For example, a person who decides to steal an item after noticing it inside may commit a theft but not a burglary. *See* RCC § 22E-2101.

[19] There are instances in which a person is unauthorized to enter a space that is open to the general public. In those cases, other liability may attach but burglary liability will not. Consider, for example, a person is barred from a grocery store for shoplifting and returns to the same grocery store, in violation of the bar notice, with intent to commit theft, during business hours. That person may have committed a trespass, but not a burglary. Consider also, a person is ordered to stay 100 yards away from a former intimate partner, sees the former partner at the grocery store, approaches her, and assaults her. That person may have committed contempt, but not a burglary.

[20] For example, a person who enters a store during business hours with intent to steal and does steal may commit theft, but not burglary. *See* RCC § 22E-2101. A person who enters a tavern with intent to fight and does fight may commit an assault but not a burglary. *See* RCC § 22E-1202.

[21] Where an occupant returns home after the burglary commences and the burglary is immediately discovered, the offense is punished as second degree burglary only, not first degree. However, where an occupant returns home after the burglary commences and the burglar remains surreptitiously on the premises, the offense is punished as first degree burglary.

Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) further require that a non-participant directly perceive the actor, by sight or sound or touch.[22] Entering a building undetected is punished as third degree burglary but not as second degree.[23]

Subsection (d) provides the penalties for each grade of the offense. [*See* Fourth Draft of Report #41.] Paragraph (d)(4) authorizes a penalty enhancement where the actor carries a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location.

Subsection (e) cross-references applicable definitions in the RCC and defines the term "predicate property offense" to include specified offenses in Subtitle III of the RCC.

Relation to Current District Law. *The revised burglary statute clearly changes current District law in seven main ways.*

First, the revised burglary statute prohibits surreptitiously remaining in a specified location. Current D.C. Code § 22-801 punishes unlawfully entering but not unlawfully remaining. In contrast, the revised statute provides liability in instances where a person lawfully enters a location and then hides to facilitate commission of a crime at a later time.[24] This change eliminates an unnecessary gap in liability.

Second, the revised burglary statute requires fully entering or remaining. Although current D.C. Code § 22-801 does not define the term "enter," District case law that previously has held that the term includes entering with "any part of a person's body."[25] In contrast, the RCC punishes partial entry of the body or a camera, microphone, or other instrument held by an actor as trespass[26] but reserves the revised burglary statute's more severe penalties for instances in which the potential for harm to another person or property is greater. This change improves the organization and proportionality of the revised offenses.

Third, the revised burglary offense requires proof that the defendant's presence in the location is "without a privilege or license…under civil law"—i.e. trespassory. The current burglary statute does not require that the defendant's presence is otherwise unlawful.[27] The lack of a trespassory element in burglary leads to some counterintuitive outcomes. For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who

[22] Where a building occupant observes a burglar remotely, through a camera system, the burglar commits a third degree burglary only, not second degree.

[23] Consider, for example, a person who enters the lobby and mailroom of a large building, undetected by an employee on the fifth floor.

[24] Consider, for example, a person enters a store during business hours and hides away, intending to steal from the store once it is closed.

[25] *Edelen v. United States*, 560 A.2d 527, 529 (D.C. 1989); *Davis v. United States*, 712 A.2d 482, 485 (D.C. 1998).

[26] RCC § 22E-2601.

[27] *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("It is thus apparent that since the District of Columbia first degree burglary statute makes it an offense to enter an occupied dwelling with intent to commit a crime therein and that such offense can be committed without a violation of the unlawful entry statute, the entry need not necessarily be against the will of the occupants."); *see also Spriggs v. United States*, 52 A.3d 878 (D.C. 2012) (affirming a conviction for burglary of an apartment where the defendant was himself staying); *Bodrick v. United States*, 892 A.2d 1116, 1120 (D.C. 2006) (affirming a conviction for burglary of a marital home after a separation and court order to stay away).

enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited. In contrast, the revised burglary statute requires that the defendant's presence in the location amount to a trespass. This change improves the clarity and proportionality of the revised offenses.

Fourth, the revised burglary offense includes three penalty gradations. The current burglary statute contains two gradations: first degree burglary, which punishes those who burgle a dwelling where another person is present;[28] and second degree burglary which punishes other invasions such as dwellings where no one is present, all other buildings, and the miscellaneous watercraft and railroad cars discussed below.[29] The revised burglary offense includes an intermediate gradation that applies in two circumstances: burglary of an unoccupied dwelling[30] and burglary of an occupied building. This change improves the proportionality of the revised offense.

Fifth, the first and second degrees of the revised burglary statute require recklessness as to a location being occupied at the time of the burglary[31] while knowledge is the required culpable mental state for all other elements of the offense besides an intent to commit a crime. Current D.C. Code § 22-801 is silent as to applicable the culpable mental states required, other than "intent" (undefined) to commit another crime at the time of the entry.[32] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[33] A reckless culpable mental state is consistent with a wide range of penalty enhancements in the RCC related to the complainant's characteristics,[34] and has been recognized by some authorities as an appropriate minimal basis for liability.[35] This change improves the clarity and completeness of the revised offense.

Sixth, the revised burglary offense only protects a stable, watercraft, or railroad car if it is being used as a dwelling[36] or is affixed to land. The current second degree burglary statute expressly protects any "stable…steamboat, canalboat, vessel, or other watercraft, [or] railroad car."[37] In contrast, although the RCC punishes a trespass onto any land, watercraft, or motor vehicle,[38] it punishes only burglary of dwellings, buildings, or business yards. "Building" is broadly defined to include any "structure affixed to land

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[28] D.C. Code § 22-801(a).
[29] D.C. Code § 22-801(b).
[30] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.
[31] A person who is not at least reckless as to the presence of others in a location remains liable for burglary but is subject to a lower penalty. This change improves the consistency and proportionality of the revised offenses.
[32] *See also* D.C. Crim. Jur. Instr. § 5.101.
[33] *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.)).
[34] *See, e.g.*, RCC § 22E-1202. Assault.
[35] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring in part and dissenting in part) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").
[36] E.g., a berth in an Amtrak sleeping car.
[37] D.C. Code § 22-801(b).
[38] RCC § 22E-2601(c).

that is designed to contain one or more natural persons."[39] Unlike trespass, burglary is an inchoate offense that, in practice, provides a location enhancement for confined places where a person may be surprised by a burglar and where a person there is a special expectation of privacy. This change improves the organization and proportionality of the revised offenses.

Seventh, the revised burglary offense requires an intent to commit one of several specific offenses in the revised code. Current D.C. Code § 22-801 refers broadly to "intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit *any* criminal offense" (emphasis added). However, a least one District Court opinion has interpreted this statutory language to be narrower,[40] requiring that the nature of the intended criminal offense be reasonably related to the sanctity of the place entered—usually a crime of violence against persons or a crime involving the taking or destruction of property.[41] The same court has declined to state that the District's burglary statute reaches an intent to commit *any* misdemeanor[42] and specifically held that trespass may not itself be the basis for a burglary conviction.[43] In contrast, the revised statute limits burglary to specified crimes. The terms "bodily injury," "sexual act," "sexual contact," and "property" are defined in RCC § 22E-701, consistent with the use of these terms in other parts of the revised code. This change improves the clarity, consistency, and proportionality of the revised offense.

Beyond these seven changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current

[39] RCC § 22E-701.
[40] *United States v. Frank*, 225 F. Supp. 573 (D.D.C 1964) (dismissing a burglary charge premised on intent to operate a radio apparatus without a station license, in violation of the Federal Communications Act).
[41] *United States v. Frank*, 225 F. Supp. 573, 576 (D.D.C 1964) (rejecting a broader reading of "any criminal offense" that would criminalize as housebreaking entry of any room with an intent to violate the anti-trust laws or the regulations of the Securities & Exchange Commission, for instance).
[42] *See United States v. Fox*, 433 F.2d 1235, 1236-37 (D.C. Cir. 1970).
[43] *See United States v. Melton*, 491 F.2d 45, 47 (D.C. Cir. 1973) ("The element that distinguishes burglary from unlawful entry is the intent to commit a crime once unlawful entry has been accomplished. To allow proof of unlawful entry, ipso facto, to support a burglary charge is, in effect, to increase sixty-fold the statutory penalty for unlawful entry."); *Lee v. United States*, 37 App. D.C. 442, 445 (D.C. Cir. 1911) ("To constitute the crime of housebreaking, it is necessary to show an unlawful entry, with the intent to commit *some other* offense") (emphasis added).

Chapter 32 of Title 22 despite a similar scope of conduct.[44] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, by use of the word "inside," the revised burglary statute clarifies that the defendant must intend to commit the offense within the trespassed location. Although this requirement does not appear in the statutory text, the DCCA has included this requirement in some of its recitations of burglary's elements.[45] The purpose is to exclude from liability instances where a person passes through one property *en route* to the property where he or she intends to commit the crime.[46]

Second, the revised burglary statute specifies that participants in the crime cannot be the "other person" required in first degree and second degree burglary. The current statute is silent on this matter. The basis for treating burglaries of occupied places more seriously is the added danger and terror those occupants may experience. Such danger and terror are far less likely to occur if the other person present during the crime is an accomplice, co-conspirator, or aider and abettor.

Third, the revised burglary statute updates and modernizes the language of the offense in various other ways that do not change the scope of the offense. For instance, the revised offense simply eliminates a number of contradictory and redundant phrases.[47]

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[44] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[45] *Shelton v. United States*, 505 A.2d 767, 769 (D.C. 1986) ("A conviction for burglary requires a finding that the defendant entered the premises having already formed the intent to commit a criminal offense inside."); *Marshall v. United States*, 623 A.2d 551, 557 (D.C. 1992) ("In order to prove armed first degree burglary, the government must establish beyond a reasonable doubt, an armed entry (by appellant or by a principal aided and abetted by appellant) into an occupied dwelling with the intent to commit a crime therein. The intent to commit the crime inside the premises must have been formed by the time of the entry.") (internal citations omitted); *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997) ("To prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein.") (internal quotations and citations omitted).

[46] For example, imagine adjacent houses A and B. A burglar plans to enter House B to steal property; but to do so, she knows she must cross over the backyard of House A to get to House B. She does so. Absent the requirement that the burglar must intend to commit an offense "therein," it appears that the burglar has actually committed burglary twice, once as to House A and once as to House B. Although counterintuitive, the burglar did trespass with intent to commit an offense when she entered the backyard of House A. Under the revised statute, the burglar would only be guilty of a trespass as to House A, and a burglary as to House B.

[47] The phrases are, "in the nighttime or in the daytime," which is pure surplusage; "break and enter, or enter without breaking," which is also surplusage; "room used as a sleeping apartment in any building," which is covered by the RCC's definition of dwelling; and "with intent to break and carry away any part thereof, or

any fixture or other thing attached to or connected thereto," which is surplusage to the phrase "with intent to commit any criminal offense therein." D.C. Code § 22-801. In the case of second-degree burglary, "bank, store, warehouse, shop, stable," are redundant because each is covered by the broader term "building."

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

Explanatory Note. *This section establishes the possession of tools to commit property crime offense for the Revised Criminal Code (RCC). The offense criminalizes possession of a tool designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door, with intent to use the tool to commit a property offense. The revised possession of tools to commit property crime statute replaces the possession of implements of crime[1] statute and a sentencing provision related to the statute[2] in the current D.C. Code.*

Paragraph (a)(1) specifies that the defendant must "possess" the prohibited item, a term defined at RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) of the offense to be knowledge, a term defined at RCC § 22E-206 to mean the defendant must be aware to a practical certainty that he possesses an item or items[3] that is a property crime tool. Paragraph (a)(1) specifies that the types of tools that are covered by the offense are limited to tools for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door.[4] The tools must be designed or specifically adapted for such use, and do not include unmodified, common, general use objects.[5]

Paragraph (a)(2) clarifies that the person must act "with intent to" use the tool to commit a District crime and that the crime must be Theft,[6] Unauthorized Use of Property,[7] Unauthorized Use of a Motor Vehicle,[8] Shoplifting,[9] Alteration of Motor Vehicle Identification Number,[10] Alteration of Bicycle Identification Number,[11] Arson,[12] Criminal Damage to Property,[13] Criminal Graffiti,[14] Trespass,[15] or Burglary.[16] "Intent" is a term defined at RCC § 22E-206 that here means the defendant was practically certain that he or she would use the tool to commit one of the specified crimes. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant actually used the tool

[1] D.C. Code § 22-2501.
[2] D.C. Code § 24-403.01(f)(3).
[3] Possession of multiple tools at a given time amounts to only one count of the possession of tools to commit property crime offense.
[4] *E.g.*, lock picks, lock shims, bolt-cutters, computer software to deactivate security systems, and specialty tools to slide under locked doors to open them from the inside.
[5] *E.g.*, an unmodified small (jeweler's) screwdriver would not be designed or specifically adapted for picking locks.
[6] RCC § 22E-2101.
[7] RCC § 22E-2102.
[8] RCC § 22E-2103.
[9] RCC § 22E-2301.
[10] RCC § 22E-2403.
[11] RCC § 22E-2404.
[12] RCC § 22E-2501.
[13] RCC § 22E-2503.
[14] RCC § 22E-2504.
[15] RCC § 22E-2601.
[16] RCC § 22E-2701.

to commit a crime, only that the defendant was practically certain that he or she would do so.

Subsection (b) specifies that attempted possession of tools to commit property crime is not an offense.

Subsection (c) establishes the penalty for this offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised possession of tools to commit property crime statute clearly changes current District law in five main ways.*

First, the revised statute changes the range of prohibited items by including tools that are designed or specifically adapted for "picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door" and by eliminating tools for picking pockets. The current statute only covers tools "for picking locks or pockets."[17] District case law has explicitly held that bolt-cutters, for example, are not tools covered by the current statute because they would destroy, not pick, a lock.[18] In contrast, the revised statute broadens the scope of the statute to include tools designed or specifically adapted for other purposes, including "cutting chains," which likely would include bolt-cutters. Such tools may commonly be used in gaining access to an object or location to commit a property crime. The revised statute reduces unnecessary gaps in the existing offense

Second, the revised offense limits the offense to tools "designed or specifically adapted for" the specified purposes. The current statute is silent as to whether the tool must be fashioned in a manner suited for the specified purposes of picking locks, etc. In contrast, the revised statute no longer covers objects that are not designed or specifically adapted for one of the stated purposes. This change eliminates liability for many common items carried by citizens that could be used for—but are not designed or specifically adapted for—picking locks or pockets.[19] This change clarifies and improves the proportionality of the revised offense.

Third, the revised statute eliminates the repeat offender penalty provision in the current statutes. In current law, the offense ordinarily is punishable by a maximum term of imprisonment of 180 days and a maximum fine of $1,000.[20] However, if the defendant has ever been previously convicted of the offense, or of any felony, the offense is punishable by a minimum term of imprisonment of one year, a maximum term of imprisonment of five years, and a maximum fine of $12,500.[21] By contrast, the revised offense is subject to a single, standard penalty classification, unless the RCC's general repeat offender penalty enhancement applies for having two or more prior convictions for a comparable offense.[22] This change improves the consistency and proportionality of revised statutes.

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[17] D.C. Code § 22-2501.

[18] *In re J.W.*, 100 A.3d 1091, 1092-94 (D.C. 2014) (holding that bolt-cutters do not constitute tools for "picking" locks or pockets).

[19] *E.g.*, nail files, nail clippers, or pocket knives.

[20] D.C. Code § 22-2501.

[21] D.C. Code §§ 22-2501; 24-403.01(f)(3).

[22] RCC §§ 22E-606(a) and (b).

Fourth, the revised offense bars any attempt liability. Under current law, possession of implements of crime is subject to the general attempt statute.[23] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to revised possession of tools to commit property crime, that person has committed no offense under the revised code. Completed possession of tools to commit property crime is already an inchoate crime, closely related to an attempted form of theft or burglary, for which the RCC provides liability. This change improves the proportionality of the revised statute.

Fifth, the revised offense limits the target crimes within the scope of the revised statute to District crimes involving the trespass, misuse, taking, or damage of property. The District's current possession of implements of a crime statute refers broadly to "a crime."[24] In contrast, the revised offense requires an intent to commit a broad range of specified District property crimes. The revised statute consequently excludes the use of such tools to commit assault or drug crimes, or exclusively federal[25] crimes. By requiring intent to commit a property crime, the revised offense punishes only intended conduct that, by its nature, is logically related to the use of the tools that are within the scope of the statute. Possession[26] and use[27] of such tools as dangerous weapons to commit offenses against persons are addressed in other sections of the RCC. This change clarifies and improves the proportionality of the revised offense.

Beyond these five changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[28] Resolving this ambiguity, the

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

[24] D.C. Code § 22-2501.

[25] *See, e.g., U.S. v. Frank*, 225 F. Supp. 573 (D.D.C. 1964) (Construing "intent…to commit any criminal offense" in the District's burglary statute to not include an intent to violate the Federal Communications Act insufficient to support burglary prosecution.).

[26] See offenses under Chapter 41 of Title 22E in the RCC.

[27] RCC § 22E-1202.

[28] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the

revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

The revised offense requires a culpable mental state of knowledge for paragraph (a)(1). The current statute does not specify a culpable mental state for these elements and no case law exists on point. However, given the current and revised offenses' requirements that the defendant have an intent to commit a crime with the tool,[29] a knowing culpable mental state as to the facts that the defendant possessed a relevant kind of tool appears appropriate. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[30] Requiring a knowing culpable mental state also makes the revised possession of tools to commit property crime offense consistent with the revised burglary statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[31] This change improves the clarity and consistency of the revised statute.

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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."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[29] D.C. Code § 22-2501 ("No person shall have in his or her possession [an implement of crime] with the intent to use [the implement] to commit a crime.").

[30] *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 citations omitted.)).

[31] *See, e.g.*, RCC § 22E-2702.

COMMENTARY
SUBTITLE IV. OFFENSES AGAINST GOVERNMENT OPERATION

RCC § 22E-3201. Impersonation of an Official.

Explanatory Note. *This section establishes the impersonation of an official offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-1404-1406 (Falsely impersonating public officer or minister, false personation of inspector of departments of District, and false personation of police officer, respectively). The revised statute also replaces D.C. Code § 22-1409 (Use of official insignia; penalty for unauthorized use) decriminalizing under District law conduct associated with the misuse of official insignia that does not satisfy the requirements for impersonation of an official or a more general property crime.*

Paragraph (a)(1) specifies that the actor must engage in conduct with intent to deceive another as to the actor's lawful authority and with intent to cause harm to another or that any person receive a personal benefit.

In subparagraph (a)(1)(A), "deceive" is a defined term that means: "[c]reating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions; [p]reventing another person from acquiring material information; [and], failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship."[1] "Intent" is a defined term in RCC § 22E-206 that here means the actor is practically certain that another person would be deceived as to the actor's authority. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor successfully deceives another person, only that the actor believes to a practical certainty that another person will be deceived as to the actor's lawful authority.

In subparagraph (a)(1)(B), per the rules of interpretation in RCC § 22E-207, the culpable mental state "with intent" also applies to whether the actor intends to cause harm to another or believes that any person will receive a personal benefit. It is not necessary to prove that the actor or another actually receives a benefit or causes harm to another, only that the actor believes to a practical certainty that they will harm another person or any person will receive such a personal benefit. The personal benefit need not be monetary or material in nature. [2]

Paragraph (a)(2) specifies that to be criminally liable for impersonation of an official, the actor must knowingly represent themselves to currently hold lawful authority as a person in a specialized role, and they must know that such a representation is false. The term "knowingly" is defined in RCC § 22E-206, and applied here means that the actor must be practically certain that he or she is representing him- or herself to hold lawful authority as a person in one or more of the enumerated roles listed in subparagraphs (a)(2)(A)-(H) and must be practically certain that such a representation is false.

Subparagraphs (a)(2)(A)-(a)(2)(H) list eight roles that an actor may be liable for falsely claiming the lawful authority of under the revised offense. Subparagraph

[1] RCC § 22E-701.
[2] *Gary v. United States*, 955 A.2d 152, 155 (D.C. 2008).

(a)(2)(A) refers to a judge of a federal or local court in the District of Columbia, subparagraph (a)(2)(B) refers to a prosecutor for the United States Attorney for the District of Columbia or the Attorney General for the District of Columbia, and subparagraph (a)(2)(C) refers to a notary public. Subparagraph (a)(2)(D) refers to a "law enforcement officer,"[3] subparagraph (a)(2)(E) refers to a "public safety employee,"[4] and subparagraph (a)(2)(F) refers to a "District official."[5] Subparagraph (a)(2)(G) refers to a "District employee with power to enforce District laws or regulations." This language includes the role of a District of Columbia inspector for any department of government.[6] Subparagraph (a)(2)(H) refers to a "person authorized to solemnize marriage."[7]

Paragraph (a)(3) specifies that, in addition to the requirements outlined in paragraphs (a)(1) and (a)(2), the actor must perform the duty, exercise the authority, or attempt to perform the duty or exercise the authority associated with the role listed in subparagraphs (a)(2)(A)-(H). Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "knowingly" also applies to whether the actor performs the duty, exercises the authority, or attempts to do so related to a role listed in subparagraphs (a)(2)(A)-(H).

Subsection (b) specifies the requirements of impersonation of an official in the second degree. Paragraphs (b)(1) and (b)(2) are identical to paragraphs (a)(1) and (a)(2). The second degree differs from the first degree of the offense only in its omission of the

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[3] RCC § 22E-701 ("'Law enforcement officer' means:

(A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;
(B) A sworn member or officer of the District of Columbia Protective Services;
(C) A licensed special police officer;
(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District;
(F) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Department of Youth Rehabilitation Services, the Family Court Social Services Division of the Superior Court, the Court Services and Offender Supervision Agency, or the Pretrial Services Agency;
(G) Metro Transit police officers; and
(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A)-(G) of this paragraph, including state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").

[4] RCC § 22E-701 ("'Public safety employee' means: (A) a District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; (B) any investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector, employed by the government of the District of Columbia; and, (C) any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in paragraph (A) and paragraph (B).")

[5] RCC § 22E-701 ("'District official' has the same meaning as 'public official' in D.C. Code § 1-1161.01(47)(A) - (H).").

[6] See D.C. Code § 22-1405 (referring to "an inspector of any department of the District government").

[7] See D.C. Code § 46-406.

requirements in paragraph (a)(3); to commit the offense in the second degree, the actor need not perform the duty, exercise the authority, or attempt to do so related to a role listed in subparagraph (b)(2)(A)-(H).

Subsection (c) specifies that the Metropolitan Police Department and the Fire and Emergency Medical Services Department have the sole ownership of their official uniform insignia. This subsection is a civil provision and does not itself specify a criminal offense, although a violation of these ownership rights may constitute another crime under District or federal law.[8]

Subsection (d) specifies the penalties for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised impersonation of an official statute clearly changes current District law in four main ways.*

First, the revised statute has two gradations distinguished by whether or not the actor performed the duty or exercised the authority of a specified official, or attempted to do so. Current D.C. Code § 22-1404 (falsely impersonating public officer or minister) requires that the actor "attempt[] to perform the duty or exercise the authority pertaining to any such office or character," but the offense has no other gradation for when an actor does not make such an attempt. Other current false personation statutes (D.C. Code § 22-1405, § 22-1406) only require false representation as being an official, no actual or attempted use official powers, and have just one gradation. In contrast, the revised statute codifies a first degree gradation where there is actual or attempted performance or exercise of the duty or authority of the impersonated official, and a second degree gradation for false representation where there is merely impersonation but no attempt to perform or exercise the duty or authority of the impersonated official. This change improves the consistency and proportionality of the revised statute.

Second, the revised statute prohibits and penalizes impersonation of a District inspector the same as impersonation of other specified officials. Current D.C. Code § 22–1405 provides that falsely representing oneself as an "inspector of any department of the District government" is a crime punishable by a specified fine (with a first offense differing from the standard schedule of fines in the D.C. Code), 6 months imprisonment, or both.[9] Current D.C. Code § 22–1404 provides in relevant part that falsely representing oneself as a "public officer" and attempting to perform the duty or exercise the authority of such a position is a crime punishable by a fine, one to three years imprisonment, or

[8] For example, such a violation may constitute a federal crime for copyright or trademark infringement.

[9] D.C. Code § 22–1405 ("It shall be unlawful for any person in the District of Columbia to falsely represent himself or herself as being an inspector of the Department of Human Services of said District, or an inspector of any department of the District government; and any person so offending shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court of the District of Columbia shall be punished by a fine of not less than $10 nor more than $50 for the 1st offense, and for each subsequent offense by a fine of not less than $50 and not more than the amount set forth in § 22-3571.01, or imprisonment in the Jail of the District not exceeding 6 months, or both, in the discretion of the court.").

both.[10] There is no case law on the scope of the phrase "inspector of any department of the District government" under D.C. Code § 22–1405 or the scope of the phrase "public officer"[11] under D.C. Code § 22–1404. Per the current general attempt statute in D.C. Code § 22–1803, an attempt to commit a crime under D.C. Code § 22–1404 by impersonating a "public official" and attempting to exercise that authority is punishable by a maximum 180 days imprisonment. In contrast, the revised statute specifies that impersonation of a District employee with power to enforce District laws or regulations is punishable the same as other specified officials. First degree impersonation of an official provides higher penalties where there is not only a false representation but an attempt to exercise the authority or duty to enforce District laws or regulations, consistent with an interpretation that the current D.C. Code § 22–1404 term "public officer" includes District inspectors.[12] Second degree impersonation of an official punishes false representation as a District employee with power to enforce District laws or regulations the same as inchoate violations of D.C. Code § 22–1404 for impersonating other officials.[13] This change clarifies and improves the consistency and proportionality of the revised statutes.

Third, the revised statute codifies as an element of the offense that the actor engaged in the conduct either with intent to harm another person or that anyone gain a personal benefit. Current D.C. Code § 22-1404, § 22-1405, and § 22-1409 make no mention of a personal benefit. D.C. Code § 22-1406 requires that an actor impersonating a police officer do so "with a fraudulent design," and case law has construed this phrase to broadly mean gaining any advantage over another.[14] In contrast, the RCC provides

[10] D.C. Code § 22–1404 ("Whoever falsely represents himself or herself to be a judge of the Superior Court of the District of Columbia, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than 1 year nor more than 3 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[11] The reference to "public officer" appears in the 1901 codification of this offense. *See* An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321) ("SEC. 860. Whoever falsely represents himself to be a justice of the peace, notary public, police officer, constable, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any of such officers after his appointment or commission has expired or he has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than one year nor more than three years.").

[12] Notably federal law does not differentiate punishment for an "officer" and other employees attempting to exercise official authority. *See* 18 U.S. Code § 912 ("Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.").

[13] Compare the 180-day (non-jury demandable) penalty for an attempted violation of D.C. Code § 22–1404 (requiring not only a false representation but an attempt to exercise the authority of the false role) with the 6-month (jury demandable) penalty for a violation of D.C. Code § 22–1405.

[14] *See Gary v. United States*, 955 A.2d 152, 155 (D.C. 2008) ("As to the second element, we have said that "'fraud' is a 'generic term which embraces all the multifarious means ... resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth.' " Thus, to prove the

liability for falsely impersonating an official to cause harm to another or that anyone receive a personal benefit. Deliberately harming another through the impersonation of an official appears to be at least as blameworthy as gaining a benefit, and captures instances of impersonation not within the scope of the current statutes. This change improves the clarity and consistency of the revised statutes and may reduce an unnecessary gap in liability.

Fourth, the revised statute eliminates as a separate criminal offense with a distinct penalty the misuse of official uniform insignia of the Metropolitan Police Department and the Fire and Emergency Medical Services Department. Current D.C. Code § 22–1409(b) criminalizes a person who "for any reason, makes or attempts to make unauthorized use of" an "official insignia" of the Metropolitan Police Department (MPD) or the Fire and Emergency Medical Services Department (FEMS)."[15] The term "official insignia" is not defined and there is no case law regarding that term or the scope of the phrase, "for any reason, makes or attempts to make unauthorized use of." Legislative history, however, indicates that the offense was intended to proscribe people misrepresenting themselves (or being an accomplice to another person misrepresenting themselves) as an MPD or FEMS employee through the use of official badges.[16] In contrast, the revised statute does not separately criminalize misuse of MPD and FEMS insignia. For misuses of insignia to impersonate MPD or FEMS, the revised statute provides liability, consistent with the apparent legislative intent for the offense.[17] For other misuses of insignia that involve mere property crime rather than impersonation, federal copyright[18] and trademark[19] laws may preempt part or all of current D.C. Code § 22–1409(b) or other RCC provisions concerning theft[20] and unauthorized use of property[21] may be applicable. This change

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defendant's fraudulent design, there must be evidence that the defendant impersonated a police officer to deceive another in order to gain some advantage thereby. But the advantage need not be monetary or even material in nature.").

[15] D.C. Code § 22–1409(b) ("Any person who, for any reason, makes or attempts to make unauthorized use of, or aids or attempts to aid another person in the unauthorized use or attempted unauthorized use of the official badges, patches, emblems, copyrights, descriptive or designated marks, or other official insignia of the Metropolitan Police Department or the Fire and Emergency Medical Services Department shall, upon conviction, be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than one year, or both.").

[16] *See* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002" (April 4, 2002) at 23-24 ("Title VII, the 'Badge Protection Act of 2002,' gives the MPD and FEMS Department the sole and exclusive rights to have and use, in carrying out their respective missions, their official badges, patches, emblems, copyrights, descriptive or designating marks, or other insignia and makes it a misdemeanor offense for persons to misuse such insignia in any way. This title is intended to deter and penalize individuals from misrepresenting themselves as an MPD or FEMS employee through the use of official badges. This language implicates, but is not limited to, potential uses to carry out terrorist acts, such as using insignia to gain access to an area or to avoid going through security screenings.").

[17] Unlike the current D.C. Code § 22-1404 and § 22-1406 which do not clearly cover FEMS, the revised statute broadly provides liability for any means of falsely representing oneself as possessing lawful authority as MPD or FEMS personnel, whether through use of insignia, oral communications, or other conduct.

[18] *See* 17 U.S.C. § 301(c).

[19] *See* 15 U.S.C. 1127.

[20] RCC § 22E-2101.

[21] RCC § 22E-2102.

improves the clarity, consistency, and possibly the constitutionality[22] of the revised statutes.

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

First, the revised statute codifies a culpable mental state requirement of "with intent to" for the elements of deceiving and receiving a benefit or causing harm to another, and a culpable mental state requirement of "knowingly" as to the elements of falsely representing themselves to currently hold a specified type of lawful authority. Current D.C. Code § 22-1404 (falsely impersonating public officer or minister) specifies a "knowingly" element for one phrase in that offense about attempting to use official power after expiration of an appointment[23] and current D.C. Code § 22-1405 (false impersonation of a police officer) requires proof that the false representation be conducted "with a fraudulent design," although case law[24] appears to treat this element as a kind of motive (personal gain) rather than a culpable mental state. However, the current D.C. Code false impersonation statutes are otherwise silent as to culpable mental state requirements, and no DCCA case law exists on point. Resolving this ambiguity, the revised impersonation of an official statute requires "with intent to" for the elements of deceiving and receiving a benefit or causing harm to another, and a culpable mental state requirement of "knowingly" as to the elements of falsely representing themselves to currently hold a specified type of lawful authority. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[25] The "with intent" requirement substantively matches a knowledge requirement except that the object of the

[22] Federal preemption is ultimately based on the Supremacy Clause of the U.S. Constitution, Article VI, cl.2. In addition, however, broadly criminalizing "misuse" of insignia without time, place, and manner restrictions may violate First Amendment protections (and fair use exceptions to trademark and copyright based on the First Amendment). The legislative history indicates that potential First Amendment concerns with the legislation were known to the Council. *See* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002" (April 4, 2002) at 24 ("The Committee inserted the word "official" into the language contained in Title VII to avoid encompassing the recreational use of the name or insignia of the agencies for the purpose of showing support for those agencies. For example, the intent of the law is not to penalize an individual wearing a tee shirt or baseball cap with the initials 'MPDC' emblazoned on them. The Committee believes that the language 'Any person who makes unauthorized use of or attempts to make unauthorized use of or attempts to aid another person in the unauthorized use or attempted unauthorized use' also insures that the law is only applicable to individuals who actively use the badges or insignia for an unauthorized purpose.").

[23] D.C. Code 22-1404 ("…or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office, shall suffer imprisonment…").

[24] *See Gary v. United States*, 955 A.2d 152, 155 (D.C. 2008) ("As to the second element, we have said that " 'fraud' is a 'generic term which embraces all the multifarious means ... resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth.'" Thus, to prove the defendant's fraudulent design, there must be evidence that the defendant impersonated a police officer to deceive another in order to gain some advantage thereby. But the advantage need not be monetary or even material in nature.").

[25] *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.)").

phrase need not be separately proven.[26] This change improves the clarity and consistency of the revised statutes.

Second, the revised statute specifically includes within the scope of the offense impersonation of a judge in a federal or local court in the District, District prosecutors, a wide array of persons exercising law enforcement authority besides a "police officer," fire fighters, and paramedics. Current D.C. Code §22-1404 specifically refers only to "a judge of the Superior Court of the District of Columbia, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage," without definitions of these terms. There is no case law defining the scope of "public officer" or other terms in the statute. Current § 22-1405 refers only to an "inspector of the Department of Human Services of said District, or an inspector of any department of the District government," and § 22-1406 specifically refers to a "member of the police force." Again, none of these terms, including are defined in case law. Resolving this ambiguity around the scope of the terms "police officer," "public officer," and "inspector of any department of the District government," the revised statute specifies that the covered roles include all local and federal judges in courts in the District, District prosecutors, an array of persons besides Metropolitan Police Department (MPD) officers who exercise law enforcement authority, fire fighters, and paramedics. There is no apparent reason for excluding impersonation of a sworn member or officer of the District of Columbia Protective Services or other law enforcement agency, or other persons such as firefighters and paramedics who exercise extraordinary powers under color of law from the scope of the statute. This change improves the clarity and consistency of the revised statutes and may reduce an unnecessary gap in liability.

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

To clarify the applicability of the revised statute to persons who previously, but no longer, hold authority, the revised statute replaces the phrase in D.C. Code 22-1404 "or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office," with "currently hold lawful authority as." It may not be necessary to specifically refer to a person who knowingly seeks to exercise lawful authority after the expiration of their authority, as that special instance appears to be already included in the plain language of both the current D.C. Code 22-1404 and the revised statute referring to false representation. However, for clarity, the revised statute continues to specify the requirement that the actor falsely represent themselves to *currently* hold lawful authority.

[26] RCC § 22E-205.

RCC § 22E-3202. Misrepresentation as a District of Columbia Entity.

Explanatory Note. *The RCC misrepresentation as a District of Columbia entity offense prohibits engaging in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services and using the name of the District of Columbia in a business communication with intent to deceive another as to the actor's lawful authority. The RCC misrepresentation as a District of Columbia entity offense replaces the current D.C. Code statutory provisions concerning the crime of Use of "District of Columbia" by Certain Persons.*[1]

Subsection (a) specifies the prohibited conduct for the revised misrepresentation as a District of Columbia entity statute. Paragraph (a)(1) specifies that the actor must knowingly engage in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services, and knowingly use the words "District of Columbia", "District", or "D.C." in the business name or in a business communication, written or oral. "Knowingly" is a defined term in RCC § 22E-206, and here means the actor must be practically certain that the actor is engaging in business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services, and is also practically certain that the actor is using the words "District of Columbia", "District", or "D.C.". The actor's use of the words "District of Columbia", "District", or "D.C." may be oral or in writing.

Paragraph (a)(2) requires that the conduct outlined in paragraph (a)(1) be committed with intent to deceive any other person as to the actor's lawful authority as a District of Columbia entity, and the actor must intend to receive a personal or business benefit of any kind. "Intent" is a defined term in RCC § 22E-206, and here means that the actor was practically certain that his or her conduct as outlined in subsections (a)(1)(A) and (a)(1)(B) would cause someone to be deceived as to the actor's authority as a District of Columbia entity and result in a personal or business benefit for the actor. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that deception or a personal or business benefit, in fact, occurred, just that the actor believed to a practical certainty that the deception or personal or business benefit would result from his or her conduct.

Paragraph (a)(3) specifies that misrepresentation as a District of Columbia entity requires that, in fact, the name or communication would cause a reasonable person in the complainant's circumstances to believe that the actor is a District of Columbia government entity or representative. The use of "in fact" indicates that no culpable mental state is required as to whether the misrepresentation would cause a reasonable person in the complainant's circumstances to believe that the actor is a District of Columbia government entity or representative. However, it must be proven that the communication would cause a reasonable person in the complainant's circumstances to believe the misrepresentation that the actor is a representative of a District of Columbia government entity.

[1] D.C. Code §§ 22-3401-3403.

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

Subsection (c) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (d) cross-references applicable definitions in the RCC and specifies that in this section the term "actor" includes a legal entity that is not a natural person. This definition of "actor" differs from the RCC general definition of an "actor" which, through its use of the defined term "person," does not specify whether or not non-natural persons are included for this or other offenses in Subtitle IV.[2]

Relation to Current District Law. *The revised misrepresentation as a District of Columbia entity statute changes current District law in two main ways.*

First, the revised misrepresentation as a District of Columbia entity offense requires that the actor's use of the words "District of Columbia", "District", or "D.C." be done with the intent to deceive another as to the actor's lawful authority as a District of Columbia entity and receive a personal or business benefit. The current Use of "District of Columbia" by Certain Persons statute does not require an intent to deceive or to receive a personal or business benefit, and only requires that the use be "in such manner as reasonably to convey the impression or belief that such business is a department, agency, bureau, or instrumentality of the municipal government of the District of Columbia or in any manner represents the District of Columbia."[3] There is no case law on point. In contrast, the revised statute requires that the actor's use of "District of Columbia", "District", or "D.C." be with intent to deceive another as to the actor's lawful authority as a District of Columbia entity and receive a personal or business benefit. The revised statute eliminates criminal liability for actors whose communications are unintentionally misleading and there is no intent to deceive or receive a benefit. Requiring that the actor be practically certain that the use of the District's name will deceive another person and provide a benefit is similar to a knowledge requirement except that deception or benefit need not be proven. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[4] Commercial speech is protected under the

[2] D.C. Code § 45-604 broadly states that, in interpreting the D.C. Code: "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." The definition of "actor" in this section more clearly specifies that the crime of misrepresentation as a District of Columbia entity may be committed by non-natural Second, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of intent, requiring that the actor use of the words "District of Columbia", "District", or "D.C." with the intent to deceive and receive a benefit. This is in contrast to the current Use of "District of Columbia" by Certain Persons statute does not specify a culpable mental state current Use of "District of Columbia" by Certain Persons statute does not specify a culpable mental state, which allows for criminal culpability for actors whose communications may be inadvertently misleading but where there is no intent to deceive or receive a benefit.

[3] D.C. Code § 22–3401.

[4] *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)").

First Amendment unless there is a recognized exception to such rights.[5] However, requiring as an element of the offense an intent to deceive another by the commercial speech, for a personal or business benefit, makes the revised statute similar to fraud and other deceptive practices crimes that are not subject to First Amendment protections.[6] The revised statute's language regarding deception and benefit is also consistent with language RCC § 22E-2201, fraud, and RCC § 22E-3201, impersonation of an official offenses. This change improves the clarity, consistency, and completeness of the revised offenses, and may improve the constitutionality of the statute.

Second, the revised statute applies to actors engaged in the collection of non-private debts or obligations. The current Use of "District of Columbia" by Certain Persons statute only applies to actors engaged in the collection of "private debts or obligations."[7] In contrast, the misrepresentation as a District of Columbia entity offense expands criminal liability to include actors engaged in the collection of debts or obligations, both private and non-private.[8] When undertaken with intent to deceive as to the actor's lawful authority, it is not clear why the collection of private debt should be treated differently than public debt. This change may reduce an unnecessary gap in liability in the revised statutes.

Beyond these two substantive changes to current District law, three other aspects of the revised misrepresentation as a District of Columbia entity offense may be viewed as substantive changes of District law.

First, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of knowingly as to the nature of the actor's conduct and the use of the words "District of Columbia", "District", or "D.C." in the business name or in a business communication. The current Use of "District of Columbia" by Certain Persons statute does not specify a culpable mental state as to the elements of the offense, and there is no case law on point. To resolve this ambiguity, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of "knowingly," using the RCC definition of that term. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[9] This change improves the clarity, consistency, and completeness of the revised offenses.

Second, the revised misrepresentation as a District of Columbia entity offense does not limit the type of communication that can fall under the statute to writings. The current Use of "District of Columbia" by Certain Persons statute refers to "use as part of the name of such business, or employ in any communication, correspondence, notice, advertisement, circular, or other writing or publication, the words "District of Columbia"…" in which it is unclear whether the phrase "or other writing or publication"

[5] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).
[6] *Id.* at 638.
[7] D.C. Code § 22–3401.
[8] For example, a private collection agency engaged in the collection of federal student loan payments may be liable under the revised statute if other elements of the offense are satisfied.
[9] *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)").

is a limitation on the prior list of nouns such as "communication." There is no case law on point. To resolve this ambiguity, the revised statute refers broadly to any reference to the District in a business name or business communication, without limit to written or published communications. It is not clear that the harm addressed by the offense differs significantly depending on whether the misrepresentation is oral or written or published. This change improves the clarity of the revised statute and may reduce an unnecessary gap in liability.

Third, the revised statute eliminates specific reference to an actor who is "aiding" in debt collection. The current statute specifically includes liability for a person "aiding in the collection of private debts or obligations." [10] The meaning of "aiding" is unclear, however, and there is no case law on point. To resolve this ambiguity, the revised statute does not refer to "aiding," and instead relies on the RCC § 22E-210 provisions specifying the requirements and penalty for accomplice liability when a person purposely assists in the planning or commission of conduct constituting an offense. This change improves the clarity and consistency of the revised statutes.

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

The revised statute eliminates specific reference to the offense covering "any emblem or insignia utilizing any of the said terms as part of its design."[11] Such conduct is already covered by the current and revised statutes' reference to any use of the terms in a business name or business communication, whether in an emblem or otherwise.

[10] D.C. Code § 22–3401.
[11] D.C. Code § 22–3401.

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

Explanatory Note. *This section establishes the escape from a correctional facility or officer offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits knowingly absconding from the lawful custody of a government actor or agency. It replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a,[1] Escape from juvenile facilities.*

Subsection (a) establishes the first degree gradation of escape, which prohibits leaving confinement in a correctional facility, secure juvenile detention facility, or cellblock operated by the United States Marshals Service without effective consent. "Correctional facility" is defined in RCC § 22E-701 to mean any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense.[2] The word "secure" makes clear that placements in an unsecured inpatient drug treatment program or independent living program are excluded. "Secure juvenile detention facility" is defined in RCC § 22E-701 to mean any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.[3] The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[4] These definitions do not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. Nor do they include buildings used by private businesses to detain suspected criminals.[5] The term "building" is also defined in RCC § 22E-701 and means "a structure affixed to land that is designed to contain one or more natural persons." "Building grounds" refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter.[6]

The phrase "in fact" in paragraph (a)(1) indicates that the accused is strictly liable[7] with respect to whether he or she was under a court order at the time the elements of the escape offense were completed.[8] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a

[1] The penalty for this offense appears in D.C. Code § 10-509.03.
[2] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF"). The term does not include locations operated by the Metropolitan Police Department or the United States Marshals Service. However, escaping from the lawful custody of such an agency may be punished as second degree escape.
[3] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).
[4] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.
[5] For example, a person who runs from the booking room of a retail store does not commit an escape under RCC § 22E-3401(a)(1)(A).
[6] *See, e.g.*, D.C. Code § 22-2603.01.
[7] RCC § 22E-207.
[8] A good faith belief that the order was expired or vacated is not a defense.

custodial agency[9] to choose either a secured or unsecured residential placement is sufficient.[10]

Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that they do not have the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service to leave.[11] A person leaves a facility when they depart from the building grounds.[12] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[13] "Consent" is also defined in RCC § 22E-701.

Subsection (b) establishes the second degree gradation of escape, which prohibits escaping the lawful custody of a law enforcement officer. "Custody" is defined in paragraph (f)(2) to mean full submission after an arrest or substantial physical restraint after an arrest.[14] For example, custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[15]

The phrase "in fact" in paragraph (b)(1) indicates that the accused is strictly liable[16] with respect to whether they were in lawful custody at the time the elements of the escape offense were completed. For liability to attach, the custody must, in fact, be lawful. Where a law enforcement officer has detained a person without requisite cause or authority, in violation of any federal or District law, the person is not in lawful custody. The term "law enforcement officer" is defined in RCC § 22E-701 and includes persons with limited arrest powers, such as special police officers[17] and community supervision officers acting in their official capacity,[18] but excludes private actors who are performing a citizen's arrest.[19] The officer must be employed by the District or federal government.

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[9] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[10] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[11] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the warden or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[12] A person who leaves the building but is apprehended on building grounds does not commit a completed escape from a correctional facility but may have committed an attempted escape.

[13] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.

[14] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.

[15] *See* D.C. Code §§ 22-3001(6)(A) and (B).

[16] RCC § 22E-207.

[17] D.C. Code § 23-582(a).

[18] 18 U.S.C. § 3606; *see also* 2017 H.R. 1039, the Probation Officer Protection Act of 2017 (a proposal to extend federal probation officers' arrest authority beyond supervisees to third parties who physically obstruct an officer or cause an officer physical harm).

[19] See D.C. Code § 23-582(b).

Paragraph (b)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the person detaining him or her is a law enforcement officer[20] and that they do not have the effective consent of the law enforcement officer to leave custody.[21] A person leaves custody when they distance themselves from the officer in an effort to avoid apprehension.[22] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception. "Consent" is also defined in RCC § 22E-701.

Subsection (c) establishes the third degree gradation of escape, which punishes unlawful absences from correctional facilities and halfway houses.

The phrase "in fact" in paragraph (c)(1) indicates that the actor is strictly liable[23] with respect to whether the actor was under a court order at the time the elements of the escape offense were completed.[24] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a custodial agency[25] to choose either a secured or unsecured residential placement is sufficient.[26]

Paragraph (c)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the person does not have the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service to leave or remain away.[27] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[28] "Consent" is also defined in RCC § 22E-701.

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[20] Consider, for example, a person who is tackled by an undercover officer and cannot understand the officer identifying himself as a policeman.

[21] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[22] For example, a person who maneuvers her way out of handcuffs but stays seated in a police car has not committed a completed escape. On the other hand, a person who remains handcuffed and runs three blocks may have committed an escape.

[23] RCC § 22E-207.

[24] A good faith belief that the order was expired or vacated is not a defense.

[25] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[26] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[27] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[28] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.

Under subparagraphs (c)(2)(A) and (c)(2)(B), a person may commit a third degree escape by omission. Failing to return to custody after a lawful absence[29] or failing to report to custody as ordered[30] amounts to a third degree escape. Under subparagraph (c)(2)(C), leaving a halfway house without permission also amounts to third degree escape. A person leaves a facility when they depart from the building grounds.

Subsection (d) excludes prosecution for second degree escape for a person who is within a correctional facility (i.e. inside the building or on the building grounds). A person who is lawfully confined to a facility may be subject to first or third degree liability, depending on the facility, but not second degree liability.[31]

Subsection (e) specifies the penalties for each grade of the revised offense. [*See* Fourth Draft of Report #41.]

Paragraph (f)(1) cross-references applicable definitions in the RCC. Paragraph (f)(2) defines "custody," for RCC § 22E-3401(f) only, to mean full submission after an arrest or substantial physical restraint after an arrest.[32] For example, custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[33]

Relation to Current District Law. *The revised escape from a correctional facility or officer statute clearly changes current District law in six main ways.*

First, the revised escape offense has three gradations. The current statute provides only one penalty for all escape offenses.[34] Thus, under current law, a person who returns late to a work release program faces the same maximum penalty as a person who tunnels out of D.C. Jail.[35] Notably, a failure to return to a halfway house may, alternatively, be prosecuted as a misdemeanor by the Attorney General for the District of Columbia,[36] whereas there is no alternative charge in District law for a conventional prison break. In contrast, the revised offense distinguishes between escaping the confinement of an institution, escaping the lawful custody of a police officer, and failing to return or report to an institution.[37] This change improves the proportionality of the revised offense.

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[29] E.g., work release, unsupervised furlough.

[30] *See Williams v. United States*, 832 A.2d 158 (D.C. 2003) (where the defendant failed to serve all required consecutive weekends at D.C. Jail); *Mundine v. United States*, 431 A.2d 16 (D.C. 1981) (where the defendant failed to report to DC halfway house after being released in Virginia).

[31] For example, a person who is *confined* within a correctional facility does not commit an escape from the lawful *custody* of a law enforcement officer by wriggling out of an officer's grasp and returning to their designated cell.

[32] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.

[33] *See* D.C. Code §§ 22-3001(6)(A) and (B).

[34] D.C. Code § 22-2601.

[35] Although the verb "escape" is not defined in the statute, District case law has held that escape is "knowingly or deliberately leaving physical confinement, *or failing to return to it*, without permission." *Hines v. United States*, 890 A.2d 686 (D.C. 2006) (emphasis added); *see also Days v. United States*, 407 A.2d 702, 704 (D.C. 1979) (finding the extension of leave beyond that which is granted is the legal equivalent of an escape).

[36] D.C. Code § 24-241.05(b).

[37] Escaping the lawful custody of a police officer is graded more severely than failing to report or return because it is more likely to provoke a hot pursuit, which may endanger the arresting officers, the defendant, and bystanders.

Second, the revised statute punishes an attempt to escape as less serious than a completed escape. Current D.C. Code §§ 22-2601[38] and 10-509.01a[39] punish an attempt to escape the same as a completed escape. In contrast, the revised statute relies on the general part's common definition of attempt[40] and penalty for an attempt[41] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of the revised offense.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 10-509.01a, Escape from juvenile facilities, prohibits aiding or abetting an escape from a juvenile facility. In contrast, the revised escape statute relies on the definition of accomplice liability in the revised code's general part,[42] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[43] and carves out exceptions to accomplice liability.[44] This change improves the clarity, consistency, completeness, and the proportionality of the revised offense.

Fourth, the revised statute requires the person whose personal custody is escaped be a law enforcement officer and defines the term "law enforcement officer"[45] consistently with other revised offenses. Current D.C. Code § 22-2601(a)(2) prohibits escaping the lawful custody of "an officer or employee of the District of Columbia or of the United States." In contrast, the revised code clarifies that the person must be a law enforcement officer, as defined, who is acting within their lawful authority. While the revised definition of "law enforcement officer" is broad and includes individuals such as probation officers, the revised definition is narrower than the current statute's reference to any person employed by the District or federal government. This change improves the clarity and consistency of the revised offenses.

Fifth, the scope of the revised statute is more precisely defined so as to only include secure locations. Current D.C. Code § 22-2601(a)(1) prohibits escape from "any penal or correctional institution or facility" or from "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), the statute also includes the District's halfway houses.[46] Case law is silent as to which, if any, other locations qualify. The revised offense defines "correctional facility" to include any jails and prisons that are or may be erected in the District[47] and "secure juvenile detention facility" so as to include

[38] The statute begins: "No person shall escape or attempt to escape…".
[39] The statute begins: "No child who has been committed to a juvenile facility shall escape or attempt to escape from…"
[40] RCC § 22E-301(a).
[41] RCC § 22E-301(c)(1).
[42] RCC § 22E-210.
[43] RCC § 22E-211.
[44] RCC § 22E-212.
[45] RCC § 22E-701.
[46] *See Demus v. United States*, 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States*, 498 A.2d 1172, 1174 (D.C. 1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).
[47] E.g., Central Detention Facility ("D.C. Jail") and Central Treatment Facility ("CTF").

any physically secure juvenile placement.[48] The revised statute may broaden current law by including escapes from the Youth Services Center, pre-adjudication[49] or pre-commitment.[50] The revised statute may narrow current law by excluding escapes from unsecured congregate care placements such as group homes.[51] This change clarifies and may eliminate a gap in liability and improve the proportionality of the revised offense.

Sixth, the revised statute eliminates the consecutive sentencing provision in current law. Current D.C. Code § 22-2601(b) states in pertinent part, that the "…sentence [is] to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape." The DCCA has interpreted the phrase "original sentence" to mean the sentence being served at the time of the escape.[52] In contrast, the revised statute does not require judges to issue consecutive sentences, but continues to allow such consecutive sentencing where the judge finds it appropriate. The RCC does not include mandatory sentencing provisions. Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.[53] This change improves the proportionality of the revised statute.

Beyond these six changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised statute specifies that whether a person is subject to a court order or in lawful custody of a law enforcement officer is a matter of strict liability. The current escape statute does not specify any culpable mental state for this offense element, nor has the DCCA directly addressed the matter. The revised statute resolves this ambiguity by not requiring any culpable mental state as to being subject to a court order or as to the lawfulness of the custody. For example, a person who mistakenly believes an arrest warrant is invalid, nevertheless commits an escape if all of the offense elements are satisfied, including the fact that the person knew they lacked effective consent of the institution or officer. It is generally recognized that a person may be held strictly liable

[48] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).

[49] The DCCA has not considered or decided whether the Youth Services Center qualifies as a "penal or correctional institution or facility," under D.C. Code § 22-2601(a)(1). However, the Center is not described as penal or correctional in nature in Title 16. *See, e.g.,* D.C. Code § 16-2310 (authorizing shelter care placement if a child has no parent, guardian, custodian, or other person or agency able to provide supervision). Notably, all references to "penal" and "correctional" institutions in Title 16 are followed by the phrase "for adult offenders" or a reference to Title 22.

[50] Persons held at the Youth Services Center post-commitment currently are subject to escape liability, under D.C. Code § 22-2601(a)(3).

[51] The DCCA has not considered or decided whether any location other than New Beginnings Youth Development Center qualify as "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed," under D.C. Code § 22-2601(a)(3).

[52] *Veney v. United States*, 738 A.2d 1185, 1199 (D.C. 1999) (requiring resentencing for a person who escaped during a street encounter).

[53] For further discussion, see CCRC Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.

for elements of an offense that do not distinguish innocent from guilty conduct.[54] This change clarifies the revised statutes.

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

First, the revised statute specifies that a "knowing" culpable mental state is required for leaving custody or failure to return or report to custody, and for lacking effective consent to do so. The current escape statute does not specify any culpable mental state. However, the DCCA has explained that escaping is "knowingly or deliberately leaving physical confinement, or failing to return to it, without permission."[55] The revised statute clarifies that the accused must be practically certain that he or she is acting without permission. Consequently, a mistake of fact is an available defense in some, but not all, cases.[56] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[57] This change clarifies the revised statute.

Second, the revised statute requires the accused to leave or fail to return without "effective consent." The current escape statute is silent as to whether lack of effective consent to the person's behavior, or a similar element, must be proven. District case law requires the accused escape without "permission," but does not specify whose permission is required or further define that term.[58] The revised statute requires a lack of "effective consent," of the person in charge of the facility, a defined term which means consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.[59] This change improves the revised offenses by describing all elements that must be proven and applying consistent definitions throughout the revised code.

Third, the RCC provides for a general duress defense[60] that is consistent with other revised offenses. The current statute is silent as to whether any duress offense exists to escape. However, District case law has recognized a duress defense to escape in limited circumstances.[61] The revised statute does not separately codify a duress defense to escape, but instead relies on the duress defense in the general part of the RCC. This change clarifies and improves the consistency of the revised statutes.

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[54] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'").

[55] *Hines v. United States*, 890 A.2d 686 (D.C. 2006). This is also consistent with federal escape case law. "Although § 751(a) does not define the term 'escape,' courts and commentators are in general agreement that it means absenting oneself from custody without permission." *United States v. Bailey*, 444 U.S. 394, 407 (1980).

[56] For example, a person who mistakenly appears at the wrong halfway house is not liable for escape.

[57] *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.)).

[58] *United States v. Bailey*, 444 U.S. 394, 407 (1980); *Hines v. United States*, 890 A.2d 686 (D.C. 2006).

[59] RCC § 22E-701.

[60] RCC § 22E-501.

[61] *Stewart v. United States*, 370 A.2d 1374 (D.C. 1977).

RCC § 22E-3402. Tampering with a Detection Device.

Explanatory Note. *This section establishes the tampering with a detection device offense for the Revised Criminal Code (RCC). The offense prohibits purposely removing or interfering with a wearable monitoring device, such as a GPS ankle bracelet. It replaces D.C. Code § 22-1211, Tampering with a detection device.*

Paragraph (a)(1) specifies that for criminal liability to attach, the person must know that the person is legally required to wear a detection device at the time the elements of the tampering offense were completed. The term "detection device" is defined in RCC § 22E-701 and is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts.[1] The term refers to the physical device itself and does not include the records or reports that it generates.[2] The term "knowingly" is defined in the general part of the revised code[3] and here means the person must be practically certain that compliance with electronic monitoring was required. The monitoring may be required as a condition of release or as a sanction for noncompliance with other release conditions.[4] The requirement must be valid at the time of the offense.[5]

Subparagraphs (a)(1)(A)-(E) establish five categories of people who are prohibited from tampering with a detection device. Namely, the revised statute applies to persons who must wear the device while subject to a final civil protection order; while on pretrial release; while on presentence or predisposition release;[6] while committed to the Department of Youth Rehabilitation Services or incarcerated; or while on supervised release, probation, or parole. The revised statute does not apply to persons who are required to wear a monitoring device before a court proceeding is initiated or after a sentence is completed. Nor does it apply to people who are required to wear a monitoring device as a result of a judgment issued outside of the Superior Court of District of Columbia.

Paragraph (a)(2) specifies that the person must intentionally tamper with the detection device. The term "intentionally" is defined in the general part of the revised

[1] Examples include mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the global position systems ("GPS") that are currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the radio frequency identification technology ("RFID") that is currently used by the Department of Corrections.

[2] A person does not commit tampering with a detection device by destroying or manipulating the data generated by the device after it has been transmitted. Consider, for example, a person who hacks into his supervision officer's computer and deletes or alters the monitoring records. Such conduct may, however, constitute tampering with physical evidence, in violation of D.C. Code § 22-723.

[3] RCC § 22E-206.

[4] D.C. Code § 22-1211 was amended in 2016 to include sanctions, following the D.C. Court of Appeals decision in *Hunt v. United States*, 109 A.3d 620, 621 (D.C. 2014).

[5] Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). Accordingly, if a supervision officer employed by the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Court Social Services were to require electronic monitoring without authorization from the court or USPC, the requirement would be invalid. Additionally, if the period of release specified by the court expires before the tampering occurs, criminal liability does not attach.

[6] "Predisposition" refers to minors who have been adjudicated delinquent and are awaiting the juvenile equivalent of sentencing.

code[7] and here means the person must be practically certain that their conduct will cause the device to be removed or the device's capability to be compromised.[8]

Subparagraph (a)(2)(A) prohibits purposely removing the wearable monitor or allowing another to remove it.[9] An unauthorized person refers to a person other than someone that the court or parole commission authorized to remove the device.[10]

Subparagraph (a)(2)(B) prohibits interfering with the operation of the device,[11] and allowing an unauthorized person to do so.[12] Interfering with the emission or detection of the device includes failing to charge the power for the device or allowing the device to lose the power required to operate,[13] when done intentionally, to interfere with its operation. An unauthorized person refers to a person other than someone that the court or parole commission authorized to interfere with the device.[14]

Subsection (b) authorizes an exception to the confidentiality provision in D.C. Code § 23-1303(d) for detection device information from the Pretrial Services Agency for the District of Columbia. Subject to other rules of evidence, pretrial detection device information may be divulged in a trial determining whether a person has committed tampering with a detection device. It may not be introduced on the issue of guilt for other charges, even if those charges are tried concurrently.[15]

Subsection (c) specifies that the District may exercise long-arm jurisdiction over an offense that occurs outside the boundaries of the District of Columbia.

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[7] RCC § 22E-206.

[8] Where a person is practically certain that their conduct will only minimally interfere with the operation of the device, a de minimis defense may be available under RCC § 22E-215. Consider, for example, a person who needs to wear construction boots to work and knows that the device's signal is marginally weaker inside the boots.

[9] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[10] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g., a paramedic providing care) may have a justification defense for removing a bracelet. *See* RCC §§ 22E-401 and 408.

[11] Unless one has a purpose to interfere with the operation of the device, and does so, a person does not violate the revised statute merely by decorating the device, applying a case to make it waterproof, or applying a substance to make it more comfortable to wear.

[12] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[13] *See* D.C. Code § 22-1211(a)(1)(C).

[14] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g., a paramedic providing care) may have a justification defense for removing a bracelet. *See* RCC §§ 22E-401 and 408.

[15] Consider, for example, a person who is charged with one count of tampering with a detection device and one count of possession of a controlled substance. Pretrial information about location tracking may be admissible as to the tampering count, however, it remains inadmissible for the controlled substances count. Other information such as drug testing results and interview statements are not excepted.

Subsection (d) provides the penalties for the revised offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised tampering with a detection device clearly changes current District law in four main ways*

First, the revised statute punishes an attempt to tamper with a detection device as less serious than a completed tampering. Current D.C. Code § 22-1211 punishes an attempt to interfere with the operation of the device the same as a completed tampering.[16] In contrast, the revised statute relies on the general part's common definition of attempt[17] and penalty for an attempt[18] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of revised offense.

Second, the revised statute limits the offense to tampering with detection devices that are required in connection with a District of Columbia court case. The plain language of the current statute appears to provide liability for interference with detection devices worn by a person under any jurisdiction's court order. However, it is not clear that this was intended by the Council or that the statute has been applied in such circumstances. There is no case law on point. In contrast, the revised statute excludes violations of court orders imposed by other jurisdictions, where the District has no control over the underlying statutes and procedures that allowed for the placement of a detection device. This revision clarifies the revised statute.

Third, the revised statute includes an exception to the confidentiality provision in D.C. Code § 23-1303(d). Under current law, information from the Pretrial Services Agency for the District of Columbia is inadmissible on the issue of guilt in any judicial proceeding. The revised statute permits the introduction of detection device information in a trial determining a violation, subject to other rules of evidence. This change improves the consistency of the revised statute.

Fourth, the revised statute specifies that the District of Columbia may exercise jurisdiction over a tampering with a detection device offense that occurs across state lines. Current D.C. Code § 22-1211 does not specify whether a person who tampers with a device outside of the District commits an offense. In contrast, the revised statute includes a provision makes clear that a tampering committed out of state violates the statute. This change clarifies the revised statute and may eliminate a gap in liability.

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

The revised statute requires knowing and intentional conduct. The current tampering statute does not specify a culpable mental state for the circumstance of being under court-ordered detention or supervision that requires electronic monitoring, and there is no case law on point. Current D.C. Code § 22-1211 requires that the defendant "intentionally" remove, alter, mask, or interfere with a device. However, the term "intentionally" is not defined in the statute or in case law. By contrast, the revised statute

[16] D.C. Code § 22-1211(a)(1)(B).
[17] RCC § 22E-301(a).
[18] RCC § 22E-301(c)(1).

requires that the person know that they are required to wear a detection device and intend to remove it or interfere with its operation. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[19] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

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

First, the revised statute amends the word "committed" in paragraph (a)(1) of the current statute to the phrase "committed to the Department of Youth Rehabilitation Services." This clarifies that the statute refers to minors who have been adjudicated delinquent and not to adults who are civilly committed to the Department of Behavioral Health for psychiatric services. This change clarifies the revised statute.

Second, the revised statute strikes the terms "alter" and "mask" as superfluous. The word "interferes" broadly encompasses all interference with the emission and detection of the device's signal. The revised statute does not capture "altering" or "masking" a device in a way that does not affect its functionality, such as decorating a device or covering it with clothing, unless such conduct is also done with a purpose of interfering with the device's monitoring functions. This change clarifies the revised statute.

Third, the revised statute strikes language in D.C. Code § 22-1211(a)(1)(C)[20] as unnecessary and potentially confusing. This meaning of this provision is unclear in light of the possibility of changing technology, the lack of any standard for measuring a "failure to charge," and differing responsibilities of a person to maintain charges for different devices. Moreover, failing to adequately charge a device's battery may be one means of interfering with the operability of the device, in violation of RCC § 22E-3402(a)(2)(B). This change clarifies the revised statute.

Fourth, the revised statute clarifies that the term "protection order" refers to the final civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code. This change clarifies the revised statute.

[19] *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.)).

[20] "Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power."

RCC § 22E-3403. Correctional Facility Contraband.

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

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that one way of committing correctional facility contraband is by bringing[1] a prohibited item to a correctional facility[2] or secure juvenile detention facility[3] with intent that it reach someone who is confined there. It is not an element that the prohibited item actually was received by someone confined. "With intent" is a defined culpable mental state[4] that here requires the person believe their conduct is practically certain to cause the prohibited item to be received by someone who is confined to the facility.[5] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the person intend that the item reach a particular resident of the facility.[6] The terms "correctional facility" and "secured juvenile detention facility" are defined in RCC § 22E-701 to include buildings and building grounds.

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that the person must act knowingly, a culpable mental state that is defined in the general part of the revised code.[7] Applied here, it means the person must be practically certain that they have the item[8] and be practically certain that they brought the item to correctional facility grounds.[9] However, causing an innocent third party, such as a mail delivery person, to

[1] The word "bringing" has its ordinary meaning, "to convey, lead, carry, or cause to come along with one toward the place from which the action is being regarded." Merriam-Webster.com, 2020, available at https://www.merriam-webster.com/dictionary/bring. For example, where a person lobs a tennis ball filled with contraband over the wall of a facility, the person can be said to have brought the contraband there, without having entered the building.

[2] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF").

[3] E.g., Youth Services Center, New Beginnings Youth Development Center.

[4] RCC § 22E-206.

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

[6] Consider, for example, a person who places a weapon on the outer wall of a correctional facility's recreation yard, hopeful that any resident might retrieve it. The government is not required to prove which resident was the intended recipient.

[7] RCC § 22E-206.

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

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

bring a prohibited item to a facility may be sufficient for liability if the other elements of the offense are satisfied.[10]

Subparagraphs (a)(1)(B), (a)(2)(B), (b)(1)(B), and (b)(2)(B) require that the person bring the item to the facility without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services. "Effective consent" is a defined term and means consent that was not obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[11] "Consent" is also defined in RCC § 22E-701. Where a person has the effective consent of the facility to bring the otherwise-prohibited item to the location, that item does not subject the person to correctional facility contraband liability.[12] Per the rules of interpretation in RCC § 22E-207(a), the culpable mental state of knowingly specified in subparagraphs (a)(1)(A) and (b)(2)(A) apply to this element of the offense. The person must be practically certain that they lack effective consent to bring the item to the facility.[13]

Subparagraphs (a)(1)(C) and (a)(2)(C) require that the item constitute Class A contraband.[14] Subparagraphs (b)(1)(C) and (b)(2)(C) require that the item constitute Class B contraband.[15] The term "in fact" is defined in the revised code to indicate that the actor is strictly liable with respect to this element of the revised offense.[16] Accordingly, it is of no consequence that the person does not know that the item is classified as Class A or Class B contraband.

Paragraphs (a)(2) and (b)(2) state that the second type of person subject to liability for correctional facility contraband is someone who is confined to a correctional facility or secure juvenile detention facility. The word "confined" here refers to the person's legal custodial status and not to the physical strictures of the building. For instance, a corrections officer may, as a practical matter, be securely confined inside D.C. Jail during a shift in a physical sense, but the officer not legally "confined" to the custody of the correctional facility.

Subsection (c) establishes three exclusions from liability for the correctional facility contraband offense.

Paragraph (c)(1) excludes from liability the use of a portable electronic communication device by any person during a legal visit.[17] Paragraph (c)(2) excludes from liability a person's possession of their prescription medication when there is a medical necessity to access the item immediately or to be constantly accessible. Paragraph (c)(3) excludes from liability a person's possession of a syringe, needle, or

[10] See RCC § 22E-211, Liability for causing crime by an innocent or irresponsible person.
[11] RCC § 22E-701.
[12] For example, the department may allow a barber to bring a razor blade to use for cutting and shaving hair.
[13] Consider, for example, a person who gives papers fastened with a binder clip to a resident at D.C. Jail, without knowing that binder clips are disallowed. That person has not committed a contraband offense.
[14] The term "Class A contraband" is defined in RCC § 22E-701.
[15] The term "Class B contraband" is defined in RCC § 22E-701.
[16] RCC § 22E-207.
[17] Prohibiting contraband in this context may offend the right to effective assistance of counsel under the Sixth Amendment.

other medical device when there is a medical necessity to access the item immediately or to be constantly accessible.[18]

Subsection (d) limits the correctional facility's authority to detain a person on suspicion of bringing contraband to a facility under paragraphs (a)(1) and (b)(1) to a period of two hours, pending surrender to the Metropolitan Police Department or, for facilities outside the District of Columbia, to a law enforcement agency designated by the Mayor. Probable cause is both sufficient and required.[19]

Subsection (e) specifies the penalties for each grade of the revised offense. [*See* Second Draft of Report #41.] The revised statute punishes contraband that may be used to cause an injury or facilitate an escape more severely than other contraband.

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

Relation to Current District Law. *The revised correctional facility contraband statute clearly changes current District law in five main ways.*

First, the revised offense reclassifies contraband according to the danger presented. Current statutory law roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs;[20] (B) alcohol, drug paraphernalia, and cellular phones;[21] and (C) any item prohibited by rule.[22] The current statute penalizes possession of class C contraband as a criminal offense, even though only administrative sanctions are authorized.[23] In contrast, the revised statute classifies contraband into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. The revised statute does not otherwise criminalize violations of other facility rules regarding what items that can be possessed. In the RCC, such matters are subject to only administrative processing and sanctions. This reclassification of what constitutes contraband reorders and limits criminal sanctions to items posing significant dangers. This change improves the proportionality of the revised statutes.

Second, the revised statute narrows the list of Class A contraband in two ways. First, the current statute includes as Class A contraband the possession of any civilian clothing[24] and "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[25] There is no District case law interpreting this phrase, but the language would seem to include not only weapons and controlled substances listed separately as Class A contraband, but items that pose no apparent threat to the safety or order of a correctional facility.[26] In contrast, the revised statute criminalizes as Class A contraband only the possession of a uniform, and punishes possession of any weapon or

[18] These exceptions apply to medicines and medical devices necessary to treat chronic, persistent, or acute conditions that require constant or immediate medical response such as diabetes, severe allergies, or seizures. Depending on the facts of the case, criminalizing the possession of contraband in this context may offend the prohibition of cruel and unusual punishment in the Eighth Amendment.
[19] *See* D.C. Code § 23-582.
[20] D.C. Code § 22-2603.01(2)(A).
[21] D.C. Code § 22-2603.01(3)(A).
[22] D.C. Code § 22-2603.01(4)(A).
[23] D.C. Code § 22-2603.03(e).
[24] D.C. Code § 22-2603.01(2)(A)(viii).
[25] D.C. Code § 22-2603.01(2)(A)(i).
[26] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).

drug that is prohibited by the District's criminal code, without including any (unspecified) item prohibited by federal or District law. Second, the current statute includes as Class A contraband, "Any object designed or intended to facilitate an escape."[27] In contrast, the revised statute refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door."[28] The revised language creates a more objective basis for identifying contraband—rather than intent to facilitate escape—and is consistent with language in the revised possession of tools to commit property crime offense.[29] These changes improve the clarity and consistency of the revised offense and improve the proportionality of penalties.

Third, the revised statute does not criminalize a failure to report contraband except to the extent such conduct meets the requirements for accomplice liability. The current contraband statute compels District employees to report contraband and criminally punishes a failure to do so.[30] In contrast, the revised contraband statute relies on the definition of accomplice liability in the revised code's general part,[31] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[32] and carves out exceptions to accomplice liability.[33] Offenses relating to public corruption and obstructing justice may also punish employee accomplices in this context.[34] This change improves the consistency and the proportionality of the revised offenses.

Fourth, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the sentencing court. The current contraband statute requires that a sentence for unlawful possession of contraband run consecutive to any term of imprisonment imposed in the case in which the person was being detained at the time this offense was committed.[35] This provision has two notable features that distinguish it from any other sentencing provision in the D.C. Code. First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.[36] Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.[37] Legislative history does not clarify why such an infringement on the court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape. In contrast, the revised statute does not require

[27] D.C. Code § 22-2603.01(2)(A)(iv).
[28] RCC § 22E-701.
[29] RCC § 22E-2702.
[30] D.C. Code § 22-2603.02(c).
[31] RCC § 22E-210.
[32] RCC § 22E-211.
[33] RCC § 22E-212.
[34] [The Commission has not yet issued recommendations for reformed public corruption and obstructing justice offenses.]
[35] D.C. Code § 22-2603.03(d).
[36] By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the. D.C. Code § 22-2601(b).
[37] The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).

consecutive sentencing, leaving such a decision to the sentencing court. This change improves the consistency and the proportionality of revised offenses.

Fifth, the revised statute adds an exception to liability for possession of a syringe, needle, or other medical device when that person has a medical necessity to have the substance immediately or constantly accessible. The current D.C. Code contraband statute only provides an exception for possession of a prescribed controlled substance that is medically necessary to carry. [38] In contrast, the revised statute excepts liability for syringes, needles, or other medical devices where there is a medical necessity or immediate access. The offense's exclusion of liability does not create an affirmative right for a confined person to possess such items, and administrative sanctions may be imposed for such possession. There may also be criminal liability for misuse of a needle, syringe, or medical device under another statute,[39] and possession of a needle, etc. with intent to give the item to a confined person may be liable as an attempt or give rise to accomplice liability. However, a person's mere possession of such a medically necessary item is not grounds for a contraband conviction. This change improves the proportionality of the revised offense.

Beyond these five changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies that a knowing culpable mental state is required for confined persons as to their possession of contraband, just as it is for persons who deliver it. Current D.C. Code § 22-2603.02(b) merely states, "It is unlawful for an inmate, or securely detained juvenile, to possess Class A, Class B, or Class C contraband, regardless of the intent with which he or she possesses it." This language is ambiguous as to whether a person is strictly liable as to whether the item possessed is contraband, or whether a person's intent to use contraband for a non-harmful purpose is irrelevant to liability but they must be aware that they possess contraband.[40] There is no case law on point. District practice appears to treat as a matter of strict liability the fact that an item possessed by a confined person is contraband, while the possession itself must be purposeful.[41] In contrast, the revised statute requires a confined person to knowingly possess an item, similar to the requirements for someone bringing contraband into a correctional facility. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established

[38] D.C. Code § 22-2603.03(f).

[39] For example, an inmate who uses a syringe or other device to assault another inmate may face more severe criminal liability for using a dangerous weapon in the assault. See RCC § 22E-1202.

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

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

practice in American jurisprudence.[42] This change improves the proportionality of the revised statutes.

Second, the detainment authority provision in the revised offense authorizes and limits detention pending surrender to certain law enforcement authorities to investigate and arrest a person for commission correctional facility contraband. Current D.C. Code § 22-2603.04 refers only to the Metropolitan Police Department as an authorized authority. However, under a separate D.C. Code provision, other officials, may be granted specific authority by the Mayor to make arrests on the District's behalf for offenses occurring out of the District, including at New Beginnings Youth Development Center in Laurel, Maryland under D.C. Code § 10-509.01. There is no case law on whether or how to resolve the potential conflict between these provisions of law. To resolve this ambiguity, the revised statute includes in the detainment provision a reference to an agency designated per D.C. Code § 10-509.01. This change improves the clarity and consistency of the revised statute.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 22-2603.02(a)(2) makes it unlawful to "cause another" to bring contraband to a secured facility. By contrast, the revised statute relies on the definitions of accomplice liability,[43] solicitation,[44] and criminal conspiracy[45] in the revised code's general part. This change improves the consistency and the proportionality of revised offenses.

Fourth, the revised statute requires a person to know that their possession or introduction of the contraband item is without the effective consent of the person in charge of the facility, and eliminates the exclusions from liability enumerated in D.C. Code § 22-2603.02(d) for items "issued" to a facility employee or law enforcement officer. The current D.C. Code excludes from liability for a contraband offense any item "issued" to a facility employee or a law enforcement officer that is being used in the performance of her official duties.[46] Case law has not addressed the scope or meaning of this provision. The RCC's requirement that the person knowingly act without the facility's effective consent renders this statutory exception to liability unnecessary.[47] It also ensures the revised offense does not reach possession of items that the facility authorized but did not "issue," such as personal medication. This change improves the proportionality of the revised offenses.

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

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[42] *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)").
[43] RCC § 22E-210.
[44] RCC § 22E-302.
[45] RCC § 22E-303.
[46] D.C. Code § 22-2603.02(d).
[47] For example, where a facility has permitted an employee to carry a billy or a law enforcement officer to use tear gas, correctional facility contraband liability does not attach.

First, the phrase "brings…to a correctional facility or secured juvenile detention facility" replaces the phrases "bring…into or upon the grounds of"[48] and "place in such proximity to."[49] Current D.C. Code § 22-2603.02(a) is grammatically difficult to understand. Presumably, paragraph (a)(3) intends to say either, "place in close proximity with intent to give access" or "place in such proximity as to give access." Because the revised statute defines the terms "correctional facility" and "secured juvenile detention facility" to include the building grounds, the word "to" adequately captures all trafficking scenarios targeted by the current law.[50]

Second, the revised code defines "possession" in RCC § 22E-701. The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[51] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Third, the revised offense simplifies the defined term "Cellular telephone or other portable communication device and accessories thereto."[52] Current law defines this term with references to specific technology, several of which are already rare or obsolete.[53] The revised statute uses a simpler reference to portable electronic communication devices and accessories thereto.[54]

Fourth, the revised statute clarifies the correctional facilities' detention authority. D.C. Code § 22-2603.04 states that a person who "introduces or attempts to introduce" contraband to a facility may be detained for no more than two hours until police arrive. The statute does not include a standard of proof and the District of Columbia Court of Appeals has not interpreted the statute. The revised statute clarifies that probable cause is required, just as it is for any other warrantless detention.[55]

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[48] D.C. Code § 22-2603.02(a)(1).

[49] D.C. Code § 22-2603.02(a)(3).

[50] For example, if a person places contraband on the outer wall of the correctional facility's secured yard, that person has brought contraband to the correctional facility.

[51] *See* D.C. Crim. Jur. Instr. 3.104.

[52] D.C. Code § 22-2603.01(a)(3)(c).

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

[54] RCC § 22E-701.

[55] *See* D.C. Code § 23-582.

COMMENTARY
SUBTITLE V. PUBLIC ORDER AND SAFETY OFFENSES

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

Explanatory Note. *This section establishes the possession of a prohibited weapon or accessory offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of particular weapons that are so highly suspect and devoid of lawful use that their mere possession is forbidden, without requiring any proof of intent to use the weapon for an unlawful purpose.*[1] *The revised offense replaces D.C. Code §§ 22-4514(a) (Possession of certain dangerous weapons prohibited),* [2] *22-4515a(a) and (c) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes),*[3] *7-2506.01(a)(3) (regarding restricted pistol bullets), and 7-2506.01(b) (regarding large capacity ammunition feeding devices).*

Subsection (a) specifies the elements of first degree possession of a prohibited weapon or accessory. Paragraph (a)(1) specifies that to commit first degree possession of a prohibited weapon or accessory, a person must act at least knowingly.[4] That is, the person must be practically certain that they possess an item[5] and must be practically certain that the item they possess is a firearm or an explosive.[6] "Firearm" is a defined term,[7] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[8] but excludes antiques.[9] "Possesses" is a defined term and includes both actual and constructive possession.[10] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[11] With respect to firearms, the person must know they possess a firearm[12] or that they

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

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

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

[4] "Knowingly" is defined in RCC § 22E-206.

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

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

[7] RCC § 22E-701.

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

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

[10] RCC § 22E-701.

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

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

possess component parts that could be arranged to make a whole firearm.[13] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[14] No intent to use the firearm, accessory, or ammunition is required for this possessory offense.[15]

Paragraph (a)(2) specifies that a person must be at least reckless as to whether the weapon or accessory is of the prohibited variety.[16] "Reckless" is a defined term,[17] which, applied here, means the person must consciously disregard a substantial risk that the item is an assault weapon, machine gun, sawed-off shotgun, or restricted explosive. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[18] The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (a)(2)(A) – (D) criminalize possession of four classes of prohibited objects.

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

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

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

Subparagraph (a)(2)(D) makes it unlawful to possess a restricted explosive. The term "restricted explosive" is defined to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.[19]

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

[14] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

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

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

[17] RCC § 22E-206.

[18] RCC § 22E-206.

[19] A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-

Subsection (b) specifies the elements of second degree possession of a prohibited weapon or accessory. Paragraph (b)(1) specifies that to commit second degree possession of a prohibited weapon or accessory, a person must act at least knowingly.[20] That is, the person must be practically certain that they possess an item[21] and must be practically certain that the item they possess is a firearm accessory or ammunition.[22] "Ammunition" is a defined term, which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. "Possesses" is a defined term and includes both actual and constructive possession.[23] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[24] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[25]

Paragraph (b)(2) specifies that a person must be at least reckless as to whether the accessory or ammunition is of the prohibited variety.[26] "Reckless" is a defined term,[27] which, applied here, means the person must consciously disregard a substantial risk that the item is a firearm silencer, bump stock, or large capacity ammunition feeding device. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[28] The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (b)(2)(A) – (C) categorically criminalize possession of three classes of prohibited objects.

4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

[20] "Knowingly" is defined in RCC § 22E-206.

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

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

[23] RCC § 22E-701.

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

[25] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[26] RCC § 22E-207.

[27] RCC § 22E-206.

[28] RCC § 22E-206.

Subparagraph (b)(2)(A) makes it unlawful to possess a firearm silencer. A silencer is a device that is designed[29] to reduce the sound of gunfire.

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

Subparagraph (b)(2)(C) makes it unlawful to possess a large capacity ammunition feeding device. The term "large capacity ammunition feeding device" is defined[30] to include extended clips or drums that hold more than 10 rounds at a time.

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

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[31] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (e)(3) specifies that a conviction for possession of a prohibited weapon or accessory does not merge with any other offense arising from the same course of conduct.

Subsection (f) cross-references applicable definitions in the RCC and the D.C. Code.

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

First, the RCC limits prohibited items to restricted explosives, firearms, and firearm accessories, grading possession of firearm accessories lower than possession of restricted explosives and firearms. D.C. Code § 22-4514(a) provides a single penalty gradation for possession of "any machine gun, sawed-off shotgun, bump stock, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms…" In contrast, the revised offense punishes only possession of specified items that are likely to cause or facilitate multiple fatalities in a single event. Possession of blackjacks and other dangerous weapons[32] is illegal if they are carried

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

[30] *See* RCC § 22E-701.

[31] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991); *see also* RCC § 22E-502, Temporary Possession.

[32] The term "dangerous weapon" is defined in RCC § 22E-701 to include "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."

outside of the home,[33] possessed with intent to commit a crime,[34] or possessed during a crime.[35] Additionally, the RCC punishes some offenses more severely if a dangerous weapon is displayed or used, including robbery,[36] assault,[37] criminal threats,[38] sexual assault,[39] kidnapping,[40] and criminal restraint.[41] This change logically reorders and improves the proportionality of the revised offenses.

Second, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 22-4514(c) provides that a first possession of a prohibited weapon offense is punishable by a maximum of one year in jail and a second possession of a prohibited weapon offense (or a possession of a prohibited weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. Current D.C. Code § 22-4515a(d) provides that a first possession of a Molotov cocktail offense is punishable by 1-5 years in prison, a second is punishable by 3-15, and a third is punishable by 5-30. It further provides that a person convicted for a third time may not benefit from the Federal Youth Corrections Act. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of a prohibited weapon or accessory offense may be subject to a general repeat offender penalty enhancement just as other offenses.[42] The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Third, the revised statute requires that a person be at least reckless as to the weapon or accessory being of the variety that is prohibited. Current D.C. Code § 22-4514(a) does not specify a requisite mental state.[43] However, legislative history indicates that Congress intended to create a general intent crime,[44] such that the mere possession of certain enumerated weapons is prohibited, even if the person is unaware of the attributes that render the weapon unlawful.[45] In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted,

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[33] RCC § 22E-4102.
[34] RCC § 22E-4103.
[35] RCC § 22E-4104.
[36] RCC § 22E-1201.
[37] RCC § 22E-1202.
[38] RCC § 22E-1204.
[39] RCC § 22E-1301.
[40] RCC § 22E-1401.
[41] RCC § 22E-1402.
[42] RCC §§ 22E-606(a) and (b).
[43] District case law requires knowledge for the actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).
[44] "General intent" is not used in or defined in the current statute, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).
[45] *See McBride v. United States*, 441 A.2d 644, 660 n. 7 (D.C.1982); *Worthy v. United States*, 420 A.2d 1216, 1218 (1980); *United States v. Brooks*, 330 A.2d 245, 247 (D.C.1974); *In re D.S.*, 747 A.2d 1182, 1186 (D.C. 2000).

either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute.[46] The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[47] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[48] This change improves the proportionality of the revised offense.

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

First, the revised statute does not include an explicit reference to manufacturing, transferring, using, transporting, or selling a prohibited weapon. D.C. Code § 7-2506.01(b) makes it unlawful to possess, sell, or transfer any large capacity ammunition feeding device. This conduct is also prohibited by D.C. Code § 7-2504.01(b).[49] D.C. Code § 22-4515a makes it unlawful to manufacture, transfer, use, possess, or transport a Molotov cocktail. This conduct is also prohibited by D.C. Code §§ 7-2502.01[50] and 7-2505.01.[51] In contrast, the RCC's definition of possess[52] includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, transports, or sells a prohibited weapon appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[53] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

Second, the revised statute does not include an explicit exception for possession of a Molotov cocktail during a state of emergency. D.C. Code § 22-4515a(c) provides that a person may not manufacture, transfer, use, possess, or transport an explosive

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

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

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

[49] "No person or organization shall engage in the business of selling…any firearm…[or] parts therefor…without first obtaining a dealer's license."

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

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

[52] RCC § 22E-701.

[53] *See* D.C. Code § 22-1511 (Fraudulent advertising).

during a state of emergency "except at his or her residence or place of business." There is no clear rationale for why, at present, person can make and transfer explosives during a state of emergency. This conduct is prohibited by D.C. Code §§ 7-2502.01, 7-2504.01(b), and 7-2505.01, none of which contain a similar state-of-emergency exception. Where a state of emergency is occasioned by mass disorder such as rioting, the sale of Molotov cocktails may be even more dangerous than during a time of peace. This change improves the consistency of the revised statutes and reduces an unnecessary gap in liability.

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

First, the revised statute uses the undefined term "firearm silencer." Current D.C. Code § 22-4514(a) makes it unlawful to possess "any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms." It is unclear from the statute whether it is intended to include only items that are designed to silence firearms or to also include any object[54] that is actually used or could be used to muffle the sound of gunfire. Case law has not addressed the issue. In contrast, the phrase "firearm silencer," which appears twice in D.C. Code § 7-2501.01,[55] more directly refers to items that are designed to silence a firearm.

[54] For example, a plastic bottle may muffle the sound of a firearm discharging.

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

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

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

Subsection (a) punishes carrying a firearm, unlicensed pistol, or restricted explosive in a prohibited location[1] as first degree carrying a dangerous weapon.[2]

Paragraph (a)(1) specifies that a person must knowingly possess a weapon.[3] "Knowingly" is a defined term[4] and applied here means that the person must be practically certain that they possess the weapon. "Possesses" is a defined term and includes both actual and constructive possession.[5] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[6] The person must know they possess a weapon[7] or that they possess component parts that could be arranged to make a whole firearm.[8] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[9]

Subparagraphs (a)(1)(A) – (C) specify that a person commits the offense by having a firearm other than a pistol, a pistol without a license, or a restricted explosive. "Firearm," and "pistol" are defined terms,[10] which include inoperable weapons that may

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

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

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

[4] "Knowingly" is defined in RCC § 22E-206.

[5] RCC § 22E-701.

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

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

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

[9] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[10] RCC § 22E-701.

be redesigned, remade or readily converted or restored to operability[11] but exclude antiques.[12] Pistols are a subset of firearms that are either designed to be fired by a single hand or have a barrel shorter than 12 inches.[13] District law allows civilians to apply for a license to carry a pistol,[14] however, carrying a larger firearm is categorically prohibited. The term "restricted explosive" is defined[15] to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.[16]

Paragraph (a)(2) and subparagraph (a)(3)(A) explain that two elements must be proven to establish that a person "carried" a firearm or explosive. Paragraph (a)(2) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach.[17] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach. Subparagraph (a)(3)(A) requires that the person possess the weapon in a location other than their own home,[18] place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land.

Subparagraph (a)(3)(B) provides elevated liability for illegally carrying a firearm or explosive within 300 feet of a location that operates as a school, college, university, public swimming pool, public playground, public youth center, or public library, or children's day care center.[19] The 300-foot distance is calculated from the property line, not from the edge of a building.[20] Sub-subparagraph (a)(3)(B)(ii) requires that the location displays clear and conspicuous signage that indicates firearms or explosives are

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

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

[13] RCC § 22E-701.

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

[15] RCC § 22E-701.

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

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

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

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

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

prohibited.[21] Whether a sign is clear and conspicuous may depend on facts including its placement, legibility, and word choice.[22] Subparagraph (a)(3)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is in an appropriately identified school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center.

Subsection (b) punishes carrying a firearm, unlicensed pistol, or restricted explosive in any location anywhere outside the person's home, place of business, or land as second degree carrying a dangerous weapon.[23] This gradation of the offense does not require proof of a prohibited location (a "school zone") but otherwise has elements identical to first degree carrying a dangerous weapon.

Subsection (c) punishes carrying a dangerous weapon with intent to use the weapon in a manner likely to seriously injure or kill another person[24] as third degree carrying a dangerous weapon.[25] Paragraph (c)(1) specifies that a person must knowingly[26] possess a dangerous weapon.[27] "Possesses" is a defined term and includes both actual and constructive possession.[28] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[29] The person must be practically certain that the item is one of the objects that qualifies as a dangerous weapon.[30] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[31]

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[21] E.g., a sign reading, "Gun Free Zone."

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

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

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

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

[26] "Knowingly" is defined in RCC § 22E-206.

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

[28] RCC § 22E-701.

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

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

[31] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even

Paragraphs (c)(2) and (c)(3) explain that two elements must be proven to establish that a person "carried" a dangerous weapon. Paragraph (c)(2) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach. Subparagraph (c)(3) requires that the person possess the weapon in a location other than their own home, place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land.

Paragraph (c)(4) specifies that the person must possess the dangerous weapon with intent to use the weapon in a manner that is likely to cause death or serious bodily injury to another person. "Intent" is a defined term,[32] which, applied here, means the accused must be practically certain that the intended use would cause a serious bodily injury or death. The government is not required to prove intent to use the weapon unlawfully,[33] but is required to prove intent to use the item as a dangerous weapon.[34] "Serious bodily injury" is defined in the RCC to require a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ or protracted loss of consciousness.[35] The word "likely" clarifies that the danger of harm must be objectively more probable than not. Some dangerous weapons are of such limited lethality and dangerousness that they typically will not meet this standard.[36] Paragraph (c)(4) specifies that the intent to use the weapon may be conditional.[37] Although general defenses such as defense of self or another

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without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[32] RCC § 22E-206.

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

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

[35] RCC § 22E-701.

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

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

person[38] and defense of property[39] apply to this offense, carrying a dangerous weapon for purposes of non-imminent self-defense is prohibited.[40]

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

Subsection (e) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[41] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (f) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (g) cross-references applicable definitions in the RCC and the D.C. Code.

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

First, the revised offense applies only to people who are outside of their own home, place of business, or land. D.C. Code § 22-4504 distinguishes a higher penalty gradation for possession of a firearm outside of "the person's dwelling place, place of business, or on other land possessed by the person."[42] In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to inhibit the operability of a lawful firearm in the home for the purpose of immediate self-defense.[43] The Court required the District to permit the plaintiff to register his handgun and to issue him a license to carry it in the home, fully assembled, loaded, and without a trigger lock. The RCC does not separately punish carrying a lawfully registered firearm at home.[44] This change reduces unnecessary overlap between the possession and carrying offenses and may improve the constitutionality of the revised offense.

Second, the revised offense punishes carrying a firearm or a restricted explosive in a school zone. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person who carries a gun within 1000 feet of a school, playground, or public housing. The term "gun" is not defined in the statute and case law does not clarify whether it is

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[38] *See* RCC § 22E-403; *see also Williams v. United States*, 90 A.3d 1124, 1127 (D.C. 2014); *Reid v. United States*, 581 A.2d 359, 367 (D.C. 1990); *Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987); *McBride v. United States*, 441 A.2d 644, 649 (D.C. 1982); *Cooke v. United States*, 213 A.2d 508, 510 (D.C. 1965); *United States v. Christian*, 187 F.3d 663, 666 (D.C. Cir. 1999).

[39] *See* RCC § 22E-404; *see also Doby v. United States*, 550 A.2d 919 (D.C. 1988).

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

[41] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991); *see also* RCC § 22E-502, Temporary Possession.

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

[43] 554 U.S. 570 (2008).

[44] Mere possession of an unregistered firearm is punished under RCC § 7-2502.01A.

intended to include air guns, spring guns, stun guns, imitation firearms, toys, or antiques. There is no clear rationale for excluding explosives—which may be as lethal or more lethal than firearms—from the reach of the enhancement. In contrast, the revised code defines the terms "firearm" and "restricted explosive"[45] and specifies that a person who unlawfully carries either class of weapon near a school, playground, or day care center is subject to a more severe penalty than a person who carries such a weapon in another location. This change clarifies the revised offense, eliminates an unnecessary gap in liability, and improves the proportionality of the revised offenses.

Third, the first degree of the revised offense requires that the person know that they are proximate to a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center. D.C. Code § 22-4502.01 does not specify a culpable mental state as to the location. It does, however, require that the location be "appropriately identified," that is, bearing "a sign that identifies the building or area as a gun free zone." In contrast, the revised offense applies the standard culpable mental state definition of "knowingly" used throughout the RCC.[46] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] This change improves the clarity and consistency of the revised offense.

Fourth, the revised statute narrows the list of locations that elevate a carrying a dangerous weapon offense from second degree to first degree. Current D.C. Code § 22-4502.01 establishes a 1000-foot radius for gun free zones and describes them to include any "video arcade" and "in and around public housing as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by the United States Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority." Video arcades are considerably less common in modern times than when the statute became law in 1981. In fact, the District does not appear to have any arcades that are open to minor children presently advertised online. On the other hand, large sections of the District fall within a 1000-foot radius of public housing.[48] In contrast, the revised offense protects a

[45] RCC § 22E-701.
[46] RCC § 22E-206.
[47] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256-258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).
[48] At least one court has held that public housing tenants have a right to bear arms in common areas. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014); *see also* Mo. Ann. Stat. § 571.107(1)(6) (explicitly exempting any building used for public housing by private persons from any restriction on the carrying or possession of a firearm); *but see People v. Cunningham*, 1-16-0709, 2019 WL 1429072 (Ill. App. Ct. Mar.

300-foot radius around every "school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center." These locations are similarly protected from stun guns[49] and drug activity[50] under the revised code. This change improves the consistency of the revised offenses and eliminates an unnecessary gap in liability.

Fifth, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 22-4504 provides that a first carrying a dangerous weapon offense is punishable by a maximum of one year in jail and a second carrying a dangerous weapon offense (or a carrying a dangerous weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of a prohibited weapon or accessory offense may be subject to a general repeat offender penalty enhancement just as other offenses.[51] The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

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

First, the revised offense applies a heightened penalty for carrying a pistol in a school zone only if the pistol is carried without a license. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carrying a gun illegally in a prohibited location. The term "illegally" is not defined in the statute and District case law has not addressed its meaning.[52] The revised code attaches a location enhancement to the offense of carrying a firearm or explosive without permission only when a person carries a pistol without a license.[53] This change improves the clarity of the revised offenses.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses that are incorporated into the revised carrying a dangerous weapon offense by reference.[54] Current D.C. Code § 22-4504 does not include any exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who carry a dangerous weapon. In contrast, RCC § 22E-4118 provides a

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29, 2019) (holding that a ban in public housing is constitutional). The D.C. Department of Housing and Community Development, along with Urban Institute, the Coalition for Non Profit Housing and Economic Development, and Code for D.C., produced an interactive tool at HousingInsights.org. The map illustrates that large portions of some neighborhoods—and much of an entire city ward—are subject to the current enhancement penalty.

[49] RCC § 7-2502.15.

[50] *See* RCC § 48-904.01b(g)(7)(C)(i).

[51] RCC §§ 22E-606(a) and (b).

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

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

[54] RCC § 22E-4118.

comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[55] This change improves the clarity, consistency, and completeness of the revised code.

[55] RCC § 22E-402.

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

Explanatory Note. *This section establishes the possession of a dangerous weapon with intent to commit crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having an explosive, imitation firearm or other dangerous weapon with intent to commit an offense against persons or specified property crimes. The revised offense replaces D.C. Code §§ 22-4514(b) (Possession of a dangerous weapon with intent to use unlawfully against another)[1] and 22-4515a(b) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties).[2]*

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

Paragraph (a)(1) specifies that a person must at least knowingly[3] possess an object designed to explode or produce uncontained combustion. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must be practically certain that the item is explosive. Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[6]

Paragraph (a)(2) specifies that the person must possess the explosive with intent to commit a crime. "Intent" is a defined term[7] which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or an offense against property. The intended conduct must be criminal.[8] The burden of proof rests with the government and does not shift to the defense to prove innocent possession.[9] Evidence of an actual attempt to do harm is not required.[10]

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

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

[3] "Knowingly" is defined in RCC § 22E-206.

[4] RCC § 22E-701.

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

[6] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[7] RCC § 22E-206.

[8] General defenses under Chapter 4 in Subtitle I, such as defense of self or another person, are applicable to the offense.

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

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

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must intend to commit a criminal harm[11] that is either an offense against persons[12] or an offense against property.[13] Subparagraphs (a)(2)(A) and (a)(2)(B) use the term "in fact" to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or offense against property.[14] A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (a)(2)(A) and (a)(2)(B).[15]

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

Subparagraphs (b)(1)(A) and (b)(1)(B) specify that a person must at least knowingly[16] possess an imitation firearm or a dangerous weapon. The terms "imitation firearm" and "dangerous weapon" are defined in the RCC. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[17] A dangerous weapon includes restricted explosives,[18] other enumerated weapons, and "any object, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."[19] It does not include attached fixtures.[20]

Paragraph (b)(2) specifies that the person must possess the imitation firearm or dangerous weapon with intent to commit a crime. "Intent" is a defined term[21] which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or burglary.[22] The intended conduct must be criminal.[23] The burden of proof rests with the government and does not shift to the defense to prove innocent possession.[24] There is no requirement of evidence of an attempt to do harm.[25]

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[11] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.
[12] Subtitle II of Title 22E.
[13] Subtitle III of Title 22E.
[14] RCC § 22E-207.
[15] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).
[16] "Knowingly" is defined in RCC § 22E-206.
[17] RCC § 22E-701.
[18] Second degree possession of a dangerous weapon with intent to commit crime is a lesser-included offense of first degree possession of a dangerous weapon with intent to commit crime. The term "dangerous weapon" broadly includes objects designed to explode or produce uncontained combustion and other "restricted explosives." RCC § 22E-701.
[19] RCC § 22E-701.
[20] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).
[21] RCC § 22E-206.
[22] The person must intend to use the object unlawfully against another person. *See* D.C. Code § 22-4514(b); *In re M.L.*, 24 A.3d 63 (D.C. 2011); *Mihas v. United States*, 618 A.2d 197 (D.C. 1992); *Reid v. United States*, 581 A.2d 359 (D.C. 1990).
[23] General defenses such as defense of self or another person under RCC § 22E-403 are applicable to the offense.
[24] *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).
[25] *Jones v. United States*, 401 A.2d 473 (D.C. 1979).

Subparagraphs (b)(2)(A) and (b)(2)(B) specify that the person must intend to commit either an offense against persons[26] or a burglary.[27] Subparagraphs (b)(2)(A) and (b)(2)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or burglary.[28] A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (b)(2)(A) and (b)(2)(B).[29]

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.]

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

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

The revised statute specifies the intended harm required for the offense must be a particular type of District crime. D.C. Code § 22-4514(b) disallows possession of a weapon "with intent to use [it] unlawfully against another."[30] D.C. Code § 22-4515a(b) disallows possession of a weapon "with the intent that the same may be used unlawfully against any person or property." District case law has explained that the phrase "unlawfully against another" requires the accused carry the object with the purpose of using it "as a weapon."[31] However, case law has not specifically ruled whether "as a weapon" is limited to criminal infliction of bodily injury or also property damage or threatening conduct. In contrast, the revised offense cross-references all RCC offenses against persons and either offenses against property (for first degree) or burglary (for second degree). This change clarifies the revised offense and may eliminate an unnecessary gap in liability.

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

First, the revised statute requires the accused know that they possess the weapon. The current statutes[32] do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.[33] The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon. Applying a knowledge or intent requirement to statutory

[26] Subtitle II of Title 22E.
[27] RCC § 22E-2701.
[28] RCC § 22E-207.
[29] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).
[30] Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive "with the intent that the same may be used unlawfully against any person or property."
[31] *See Peay v. United States*, 597 A.2d 1318, 1321 (D.C. 1991) (explaining the test to be applied in determining whether an item is a "deadly or dangerous weapon" is whether, under the circumstances, the purpose of carrying the item was its use as a weapon) (citing *Nelson v. United States*, 280 A.2d 531, 533 (D.C.1971) (per curiam); *Clarke v. United States*, 256 A.2d 782, 786 (D.C.1969)).
[32] D.C. Code §§ 22-4514(b); 22-4515a(b).
[33] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[34] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised statute does not include an explicit reference to manufacturing, transferring, using, or transporting an explosive. D.C. Code § 22-4515a(b) makes it unlawful to manufacture, transfer, use, possess, or transport any device, instrument, or object designed to explode or produce uncontained combustion. This conduct is also prohibited by D.C. Code §§ 7-2502.01[35] and 7-2505.01.[36] In contrast, the RCC's definition of possess[37] includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, or transports an explosive appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[38] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

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

First, the revised code defines "possession" in its general part.[39] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[40] The RCC definition of "possession,"[41] with the requirement in the offense that the possession be "knowing,"[42] matches the meaning of possession in current DCCA case law.[43] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[34] *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.)).

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

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

[37] RCC § 22E-701.

[38] *See* D.C. Code § 22-1511 (Fraudulent advertising).

[39] RCC § 22E-202.

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

[41] RCC § 22E-701.

[42] RCC § 22E-206.

[43] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.,* 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in

Second, the revised statute applies the RCC's standardized definition of "with intent." D.C. Code § 22-4514(b) disallows possession of a weapon "with intent to use [it] unlawfully against another."[44] D.C. Code § 22-4515a(b) disallows possession of a weapon "with the intent that the same may be used unlawfully against any person or property." The current statutes do not define "with intent." In contrast, the RCC defines all culpable mental states in its general part.[45] This change improves the clarity and consistency of the revised statutes.

Third, the revised offense applies a standardized definition of "dangerous weapon" used throughout the RCC. D.C. Code § 22-4514(b) prohibits possession of "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon." The term "dangerous weapon" is not defined in Chapter 45.[46] However, District case law has held that an object is a dangerous weapon if it is detached[47] and "known to be 'likely to produce death or great bodily injury' in the manner it is used, intended to be used, or threatened to be used."[48] The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

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conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

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

[45] RCC § 22E-206.

[46] *See* D.C. Code § 22-4501 (Definitions).

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

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

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

Explanatory Note. *This section establishes the possession of a dangerous weapon during a crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having a firearm or other dangerous weapon in furtherance of an offense against persons. In conjunction with the revised Trafficking of a Controlled Substance statute,[1] the revised offense replaces D.C. Code § 22-4502 (Additional penalty for committing crime when armed). The revised offense also replaces D.C. Code §§ 22-4504(b) (Possession of a firearm during a crime of violence or dangerous crime).*

Subsection (a) specifies the elements of first degree possession of a dangerous weapon during a crime. Paragraph (a)(1) specifies that a person must knowingly possess a firearm.[2] "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they possess the firearm. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must know they possess a firearm[6] or that they possess component parts that could be arranged to make a whole firearm.[7] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[8] "Firearm" is a defined term,[9] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[10] but excludes antiques.[11]

Paragraph (a)(2) requires that the person possess the firearm in furtherance of and while committing a crime. The phrase "in furtherance of" has the same meaning as in 18

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[1] RCC § 48-904.01b.

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

[3] "Knowingly" is defined in RCC § 22E-206.

[4] RCC § 22E-701.

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

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

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

[8] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[9] RCC § 22E-701.

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

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

U.S.C. § 924(c)(1).[12] This requires specific evidence of a nexus between the weapon and the defendant's intent to advance or facilitate the underlying criminal activity.[13] The mere presence of a firearm near a criminal act, criminal proceeds, or contraband is insufficient.[14] The phrase "while committing" requires that the person must engage in the conduct constituting the underlying offense at the same time as they possess the firearm. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is acting in furtherance of the predicate crime.

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must commit[15] an offense against persons.[16] Some offenses against persons also provide for a heightened penalty gradation if a firearm or other dangerous weapon is displayed or used.[17] Possession of a firearm in furtherance of a drug crime is punished under RCC § 48-904.01b.

Subsection (b) punishes possession of an imitation firearm or a dangerous weapon in furtherance of a crime as second degree possession of a dangerous weapon during a crime under Subtitle II of the RCC. The terms "imitation firearm" and "dangerous weapon" are defined in RCC § 22E-701. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[18] A dangerous weapon includes firearms, other enumerated weapons, and "any object, other than a body part, that in the manner of its actual,

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

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

[14] Most circuits have identified specific factors that allow a court to distinguish guilty possession from innocent "possession at the scene," including: the accessibility of the firearm, the type of weapon, whether the possession is illegal, whether the gun is loaded, and the time and circumstances under which the gun is found. *United States v. Renteria*, 720 F.3d 1245, 1255 (10th Cir. 2013); *see also United States v. Brown*, 715 F.3d 985, 993-94 (6th Cir. 2013); *United States v. Gill*, 685 F.3d 606, 611 (6th Cir. 2012); *United States v. Johnson*, 677 F.3d 138, 143 (3d Cir. 2012); *United States v. Eller*, 670 F.3d 762, 766 (7th Cir. 2012); *United States v. London*, 568 F.3d 553, 559 (5th Cir. 2009); *United States v. Lopez-Garcia*, 565 F.3d 1306, 1322 (11th Cir. 2009); *United States v. Perry*, 560 F.3d 246, 254 (4th Cir. 2009); *see also United States v. Chavez*, 549 F.3d 119, 130 (2d Cir. 2008); *but see United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007)(internal citations omitted)("Although the Fifth Circuit has developed a non-exclusive list of factors…we have concluded that this approach is not particularly helpful in close cases…In our most recent case addressing the 'in furtherance question,' we reiterated the importance of the factual inquiry. We declined once again to adopt a checklist approach to deciding this issue and held that it is the totality of the circumstances, coupled with a healthy dose of a jury's common sense when evaluating the facts in evidence, which will determine whether the evidence suffices to support a conviction").

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

[16] Subtitle II of Title 22E.

[17] RCC §§ 22E-1201 (robbery); 22E-1202 (assault); 22E-1204 (criminal threats); 22E-1301 (sexual assault); 22E-1401 (kidnapping).

[18] RCC § 22E-701.

attempted, or threatened use is likely to cause death or serious bodily injury to a person."[19] It does not include attached fixtures.[20] This gradation of the offense does not require proof of an actual firearm but otherwise has elements identical to first degree possession of a dangerous weapon during a crime.

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.]

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

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

First, the revised offense generally expands the number of crimes that are a predicate for possession of a dangerous weapon during a crime liability. Current D.C. Code §§ 22-4502 and 22-4504 prohibit possession of a weapon only during a "crime of violence" which is defined in D.C. Code § 22-4501 to include felony offenses enumerated in D.C. Code § 23-1331(4).[21] In contrast, the revised offense punishes possession of a weapon during any offense against persons—including misdemeanor assault or misdemeanor sex offenses. It is not clear that the *potential* risk in possessing (but not displaying or using) a dangerous weapon when engaged in an offense against persons varies significantly between misdemeanor and felony level conduct. In a few instances, changes to offenses against persons in the RCC may narrow liability for possession of a dangerous weapon during a crime.[22] This change improves the proportionality of the revised statute and eliminates an unnecessary gap in liability.

Second, the revised offense does not require proof that the weapon is readily available. Current D.C. Code § 22-4502 requires evidence that a firearm was "in close proximity or easily accessible" during the commission of the underlying offense.[23] However, D.C. Code § 22-4504(b) does not include a similar proximity requirement. In contrast, liability under the revised statute turns only on the relationship between the

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[19] RCC § 22E-701.

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

[21]

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

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

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

weapon and the unlawful activity instead of ease of access.[24] That is, the revised offense requires that the weapon—wherever it is located—be possessed "in furtherance of" the underlying crime. This change improves the consistency and proportionality of the revised offenses.

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

First, the revised statute requires the accused know that they possess the weapon. The current statutes[25] do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.[26] The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon or imitation firearm. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[27] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised offense does not include possession of a firearm in furtherance of a drug crime. Current D.C. Code §§ 22-4502(a) and 22-4504(b) punish possession of a firearm during a dangerous crime. The term "dangerous crime" is defined in D.C. Code § 22-4501 to mean "distribution of or possession with intent to distribute a controlled substance." In contrast, the RCC reorganizes the controlled substances statutes to include an enhancement for drug trafficking while armed.[28] The enhancement requires that the firearm is "readily available," which is consistent with D.C. Code § 22-4502(a)[29] but possibly narrower than § 22-4504(b).[30] This change logically reorders and improves the consistency of the revised offenses.

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

[25] D.C. Code §§ 22-4502; 22-4504(b).

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

[27] *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.)).

[28] RCC § 48-904.01b(g)(7)(B).

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

[30] D.C. Code § 22-4504(b) makes it unlawful to possess any firearm or imitation firearm "while committing a crime."

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

First, the revised code defines "possession" in its general part.[31] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[32] The RCC definition of "possession,"[33] with the requirement in the offense that the possession be "knowing,"[34] matches the meaning of possession in current DCCA case law.[35] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised offense applies a standardized definition of "dangerous weapon" used throughout the RCC. D.C. Code § 22-4502 prohibits possession of "any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)." The term "dangerous weapon" is not defined in Chapter 45.[36] However, District case law has held that an object is a dangerous weapon if it is detached[37] and "known to be 'likely to produce death or great bodily injury' in the manner it is used, intended to be used, or threatened to be used."[38] The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

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[31] RCC § 22E-202.
[32] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[33] RCC § 22E-701.
[34] RCC § 22E-206.
[35] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").
[36] *See* D.C. Code § 22-4501 (Definitions).
[37] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).
[38] *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States,* 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States,* 878 A.2d 1241, 1245 (D.C. 2005);

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

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

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

Paragraph (a)(1) specifies that a person must knowingly possess a firearm.[1] "Knowingly" is a defined term[2] and applied here means that the person must be practically certain that they possess the firearm. "Possesses" is a defined term and includes both actual and constructive possession.[3] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[4] The person must know they possess a firearm[5] or that they possess component parts that could be arranged to make a whole firearm.[6] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[7] "Firearm" is a defined term,[8] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[9] but excludes antiques.[10]

Paragraph (a)(2) requires that the person has a prior conviction. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have a prior conviction. The term "prior conviction" is defined in RCC § 22E-701 to mean a finding of guilt for a criminal offense committed by an adult, with limited

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

[2] "Knowingly" is defined in RCC § 22E-206.

[3] RCC § 22E-701.

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

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

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

[7] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[8] RCC § 22E-701.

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

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

exceptions. Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether the prior conviction was for a crime of violence or comparable offense.[11] A person is strictly liable as to the prior conviction being of the variety described in paragraph (a)(2).[12] Paragraph (a)(2) requires that the prior offense is a crime of violence other than conspiracy. The term "crime of violence" is defined in the RCC's general part.[13] Whether a prior conviction is for conspiracy is based upon how the crime is charged, not based on the theory of liability that is described in the charging documents or advanced at trial.[14] The term "comparable offense" is defined in RCC § 22E-701 and means "a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime." The determination of whether a conviction in another jurisdiction is for a "comparable offense" is a matter of law.

Subsection (b) establishes six classes of persons who are subject to second degree liability for possession of a firearm by an unauthorized person. The first three classes are persons with recent prior convictions for crimes. Just as in the first degree offense, the defendant must be practically certain that they possess a firearm and practically certain that they have a prior conviction. "Prior conviction," "possess," and "firearm" are defined in RCC § 22E-701. Subparagraph (b)(2)(A) uses the term "in fact" to specify that there is no culpable mental state required as to whether the prior conviction was for one of the predicate offenses.[15] A person is strictly liable as to the prior conviction being of the variety described in sub-subparagraphs (b)(2)(A)(i) – (iii).[16] RCC § 22E-203 requires that a person commit the offense voluntarily.[17]

Sub-subparagraph (b)(2)(A)(i) generally criminalizes gun ownership by any person who has been convicted of a District felony, i.e. a crime punishable by more than a year of incarceration.[18] The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[19] The term "comparable offense" does not mean any offense in another jurisdiction that is punishable

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[11] RCC § 22E-207.

[12] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).

[13] RCC § 22E-701. [The Commission's recommendation for a definition of the term "crime of violence" is forthcoming.]

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

[15] RCC § 22E-207.

[16] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).

[17] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person is convicted of a disqualifying offense. Consider, for example, a person who is awaiting a verdict in a case alleging a disqualifying offense. The person does not commit an offense the instant the verdict is delivered.

[18] *See* RCC § 22E-601. Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. *See, e.g.*, Md. Code, Criminal Law § 3-211 (three-year misdemeanor).

[19] RCC § 22E-701.

by more than a year of incarceration. Sub-subparagraph (b)(2)(A)(i) specifies that the prior conviction must have occurred within 10 years of the firearm possession.

Sub-subparagraph (b)(2)(A)(ii) criminalizes gun ownership by any person who has been convicted of a weapon offense under Chapter 41. The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[20] Sub-subparagraph (b)(2)(A)(ii) specifies that the prior conviction must have occurred within 5 years of the firearm possession.

Sub-subparagraph (b)(2)(A)(iii) criminalizes gun ownership by any person who has been convicted of violence against a family member, i.e. an intrafamily felony or misdemeanor[21] offense involving confinement, sexual conduct,[22] bodily injury, or threats. This includes convictions for inchoate versions of such an offense (e.g., attempt, solicitation). The term "intrafamily offense" is defined in D.C. Code § 16-1001 to include interpersonal, intimate partner, or intrafamily violence. "Interpersonal violence," "intimate partner violence," and "intrafamily violence" are also defined in § 16-1001 and broadly include relationships between blood relatives,[23] current and former roommates,[24] and people who have previously shared the same romantic partner.[25] The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[26] With respect to out-of-state intrafamily offenses, it is not required that the comparable statute include an identical definition of "intrafamily offense." However, the familial relationship must be proven beyond a reasonable doubt in the prosecution of the second degree possession of a firearm by an unauthorized person offense.[27] Sub-subparagraph (b)(2)(A)(iii) specifies that the prior conviction must have occurred within 5 years of the firearm possession.

Subparagraph (b)(2)(B) criminalizes gun ownership by any person who is presently a fugitive from justice. The term "fugitive from justice" is defined in paragraph (e)(2). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are avoiding apprehension. RCC § 22E-203 requires that a person commit the offense voluntarily.[28]

Subparagraph (b)(2)(C) criminalizes gun ownership by any person who is subject to a final civil protection order, issued in D.C. Code § 16-1005. Subparagraph (b)(2)(C) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is subject to a final civil protection order.[29]

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[20] RCC § 22E-701.

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

[22] The phrase "sexual conduct" refers to both "sexual acts" or "sexual contacts," which are defined in RCC § 22E-701.

[23] D.C. Code § 16-1001(9).

[24] D.C. Code § 16-1001(6)(A).

[25] D.C. Code § 16-1001(6)(B).

[26] RCC § 22E-701.

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

[28] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person becomes a fugitive from justice.

[29] RCC § 22E-207. Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).

Subsection (c) provides that a person does not commit possession of a firearm by an unauthorized person at the moment a conviction or civil protection order occurs. Rather, a 24-hour grace period applies.

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[30] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (e)(3) disallows stacking a repeat offender penalty enhancement[31] on top of a penalty for possession of a firearm by an unauthorized person based on a prior conviction. The possession of a firearm by an unauthorized person offense account for the defendant's prior criminality, obviating the need for multiple penalties.

Subsection (f) cross-references applicable definitions in the RCC and provides definitions for the terms "fugitive from justice" and "prior conviction."

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

Subparagraph (f)(2)(A) specifies that a person is classified as a fugitive from justice if they have fled to avoid prosecution for a crime. This classification is not limited by jurisdiction.[32]

Subparagraph (f)(2)(B) specifies that a person is classified as a fugitive from justice if they have fled to avoid giving testimony in a criminal proceeding. The phrase "criminal proceeding" refers to formal hearings and presentations of evidence, such as a trial or an appearance before a grand jury. It does not include witnesses who have refused to participate in a criminal investigation or negotiation. This classification is not limited by jurisdiction.[33]

Subparagraph (f)(2)(C) specifies that a person is classified as a fugitive from justice if they have committed an escape, as defined in RCC § 22E-3401.[34]

Paragraph (f)(3) defines the term "prior conviction" to attach at the moment a court enters judgment of guilt for a criminal offense. Subparagraphs (f)(3)(A) – (D) carve out exceptions findings of guilt that have been nullified by reversal, vacatur, record sealing, 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

[30] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

[31] RCC § 22E-606.

[32] For example, a person who is subject to a non-extraditable arrest warrant from another state is a fugitive from justice.

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

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

purposes of the possession of a firearm by an unauthorized person offense.[35] A conviction that is pending appeal is a conviction for purposes of this offense.

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

First, a prior conviction for a nonviolent offense is a predicate for unauthorized possession liability only if it occurred within ten years.[36] Current D.C. Code § 22-4503 generally[37] imposes a five-year time limit for misdemeanor convictions[38] and no time limit for felonies. There is no District case law on the constitutionality of these provisions insofar as they involve non-violent offenses, however the matter has been litigated in other jurisdictions. Some courts have held that Second Amendment rights can be curtailed based on a prior conviction only if the conviction indicates a propensity for gun violence.[39] Other courts have held that a person may prove themselves "unvirtuous" of Second Amendment protections by committing any serious crime.[40] In contrast, the revised offense generally imposes a five-year time limit for misdemeanor convictions, a ten-year time limit for felonies, and no time limit for violent felonies. This change improves the proportionality and, perhaps, the constitutionality of the revised offense.

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[35] *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).

[36] In the RCC (and under the current D.C. Code, excepting drug crimes) there are few offenses other than crimes of violence that carry a 10-year or more imprisonment penalty.

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

[38] D.C. Code § 22-4504(a)(6).

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

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

Second, an intrafamily misdemeanor conviction is a predicate for unauthorized possession liability only if it required proof of confinement, sexual conduct, bodily injury, or threats. Current D.C. Code § 22-4503(6) disallows gun ownership within 5 years of any intrafamily misdemeanor conviction. As a result, a person loses their constitutionally protected right to bear arms if they commit a minor nonviolent crime against someone known to them[41] but not if they commit a violent offense against a stranger.[42] In contrast, the revised offense aligns its unauthorized person criteria with the District's firearm registration requirements, which define "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force, or the threatened use of a deadly weapon."[43] This change improves the consistency and proportionality of the revised offense and may better ensure constitutional applications.[44]

Third, an out-of-state conviction is a predicate for unauthorized possession liability if it has elements that would necessarily prove the elements of a corresponding District crime. Current D.C. Code § 22-4503(a)(1) disallows gun ownership by any person who has "been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." There are instances in which the District punishes conduct more harshly than other states[45] and vice versa.[46] There are also many instances in which

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

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

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

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

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

other states punish the same conduct differently. As a result, there are cases in which the current statute punishes constitutionally protected activity based on the location instead of the seriousness of the conduct. The revised offense applies to any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District's specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. This change reduces an unnecessary gap in liability and improves the consistency[47] and proportionality of the revised offense.

Fourth, a person's dependency on a controlled substance is not a predicate for unauthorized possession liability. Current law punishes possession of a firearm by a person who is "addicted to any controlled substance."[48] The term "addicted" is not defined in Chapter 45 and case law has not interpreted its meaning.[49] Other considerations of fitness to safely store and use gun—such as age, intellectual disabilities, psychiatric disorders—appear in the District's registration requirements[50] and not in the current unlawful possession of a firearm offense. In contrast, the revised statute eliminates a vague reference to addiction to a controlled substance. The boundaries of addiction are amorphous,[51] making the current provision nearly impossible to enforce evenhandedly and inviting challenges on due process grounds.[52] This change improves the consistency of the revised code and may ensure the constitutionality of the revised statute.

Fifth, the revised offense applies to any person who is subject to a final civil protection order, issued under D.C. Code § 16-1005. Current D.C. Code § 22-4503(a)(5) describes "a court order that: (A)(i) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or (ii) Remained in effect after the person failed to appear for a hearing of which the person received actual notice; (B) Restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order; and (C) Requires the person to relinquish possession of any firearms…" In contrast, the revised statute applies to any final civil protection order, issued under D.C. Code § 16-1005. The current D.C.

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

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

[48] D.C. Code § 22-4503(a)(4).

[49] D.C. Code § 23-1331(5) defines "addict" to mean any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare. D.C. Code § 48-902.01(24) defines "addict" to mean any individual who habitually uses any narcotic drug or abusive drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drug or abusive drug as to have lost the power of self-control with reference to his addiction.

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

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

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

Code § 22-4503(a)(5) definition is underinclusive, as some civil protection orders restrain a person from coming within close physical proximity of a petitioner, without specifying that they may not assault, harass, stalk, or threaten. It is also potentially overinclusive, insofar as it could be read to apply to court orders in criminal, civil, and family court cases, instead of only to civil protection order cases. By specifying that the protection order must be final, the statute ensures that there was actual notice and a hearing at which the person had an opportunity to participate. This change eliminates a gap in liability and clarifies the revised statute.

Sixth, the revised statute provides a 24-hour grace period between the time the person is convicted or served with a protection order. The current D.C. Code § 22-4503(a)(5) provides no exception for having a reasonable opportunity to safely dispose of a firearm after a protection order goes into effect. In contrast, the revised statute ensures that a law-abiding gun owner does not commit an offense the moment their status changes to a someone who is now unauthorized to possess a firearm. The person may retrieve and safely transport the firearm and relinquish ownership. This change improves the proportionality of the revised statute.

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

First, the revised offense requires that the accused know that they have a prior conviction or open warrant. D.C. Code § 22-4503 does not specify a culpable mental state for any element of the current unlawful possession of a firearm offense. The District of Columbia Court of Appeals ("DCCA") has held that a person must know that they possess a firearm or component parts that can be pieced together to make a firearm.[53] However, the court has not clearly held whether a person must know that they have a conviction, warrant, or civil protection order.[54] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[55] At least one federal court considering a similar federal statute has noted that it would be sensible to require the government to prove that the defendant had knowledge of the only fact (his felony status) separating criminal behavior from not just permissible, but constitutionally

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

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

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

protected, conduct.[56] The United States Supreme Court recently interpreted the penalty provision for the same federal offense[57] to require exactly that.[58] The revised statute does not require that a person know of their felony status,[59] but does require that the person know that they have a prior conviction, open warrant, or order to not possess any firearms.[60] This change improves the consistency and proportionality of the revised offense.

Second, the revised offense holds the accused strictly liable for the existence of a court order to relinquish all firearms. Current D.C. Code § 22-4503(a)(5) does not specify a culpable mental state. However, the statute specifies that it applies only if the order was issued after the person received actual notice of a hearing and either had an opportunity to participate during the hearing or failed to appear. Although applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[61] a person who fails to appear for a hearing may not have actual knowledge of the relinquishment order. The revised statute nevertheless holds a person strictly liable, provided that the person had notice of their right to appear at the hearing. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Third, the RCC defines the meaning of the term "prior conviction." Title 22 of the D.C. Code does not define the term "conviction." Other titles define it to mean a finding of guilt, an entry of judgment, or a sentence.[62] Defining "conviction" to require a

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

[57] 18 U.S.C. § 924(a)(2).

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

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

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

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

[62] In Title 2, it means "a judicial finding, jury verdict, or final administrative order, including a finding of guilt, a plea of nolo contendere, or a plea of guilty to a criminal charge…" D.C. Code § 2-1515.01(3). In Title 3, it means "a finding by a court that an individual is guilty of a criminal offense through adjudication, or entry of a plea of guilt or no contest to the charge by the offender." D.C. Code § 3-1271.02(3). In Title 4 and Title 42, it means "a verdict or plea of guilty or nolo contendere."[62] D.C. Code §§ 4-1305.01(3); 42-3541.01(4). In Title 16, it means "the judgment (sentence) on a verdict or a finding of guilty, a plea of guilty or a plea of nolo contendere, or a plea or verdict of not guilty by reason of insanity." D.C. Code §

sentencing may result in some unintuitive outcomes.[63] On the other hand, defining "conviction" to attach upon a finding of guilt may be overinclusive of pleas that will not ultimately lead to a final sentence. To resolve this ambiguity, the revised offense defines "prior conviction" to mean a finding of guilt but carves out several exceptions for circumstances in which the finding may be only temporary. This change improves the clarity and proportionality of the revised offense.

Fourth, the RCC clarifies that the term "prior conviction" does not include juvenile adjudications[64] or convictions that have been reversed or vacated[65] but does include convictions that have been set aside under the Youth Rehabilitation Act.[66] D.C. Code § 22-4503 does not define the term "conviction." This change clarifies the revised statute.

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

The revised code defines "possession" in its general part.[67] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[68] The RCC definition of "possession,"[69] with the requirement in the offense that the possession be "knowing,"[70] matches the meaning of possession in current DCCA case law.[71] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

16-801(3). In Title 24, it means "the judgment on a verdict or a finding of guilty, a plea of guilty, or a plea of no contest." D.C. Code § 24-901(2). In Title 32, it means "any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of unconditional discharge." D.C. Code § 32-1341(4).

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

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

[65] The DCCA did not resolve the question of whether pending appeals or reversals qualify as prior convictions in *Blocker v. United States*, 240 A.3d 35 (D.C. 2020).

[66] *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).

[67] RCC § 22E-202.

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

[69] RCC § 22E-701.

[70] RCC § 22E-206.

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

that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

RCC § 22E-4106. Negligent Discharge of Firearm.

Explanatory Note. *This section establishes the negligent discharge of a firearm offense for the Revised Criminal Code (RCC). The offense proscribes discharging a firearm without permission to do so.*[1] *The revised offense replaces D.C. Code § 22-4503.01 (Unlawful discharge of a firearm) and 24 DCMR §§ 2300.1 – 2300.3 (Discharge of weapons).*

Paragraph (a)(1) specifies that the person must discharge a projectile from a firearm outside of a licensed firing range.[2] Per its ordinary meaning,[3] a "discharge" does not require aiming a weapon. "Firearm" is a defined term that refers to a weapon "which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to, expel a projectile or projectiles by the action of an explosive" and excludes antiques.[4] Paragraph (a)(1) specifies that to be criminally liable for discharging a projectile firearm, a person must act at least negligently, a defined term.[5] That is, at a minimum, the person should be aware of a substantial risk that the object is a firearm and that it has discharged in a location other than a licensed firing range. Negligence also requires that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.[6]

Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has lawful authority to discharge a firearm.[7]

Subparagraph (a)(2)(A) provides that a person may discharge a firearm if the Metropolitan Police Department ("MPD") grants written permission to do so. MPD may permit the discharge of a firearm by a particular person, in a particular location, or at a specified time.

Subparagraph (a)(2)(B) provides that a person may discharge a firearm if they have any other permission to do so under District or federal law. If a discharge is permitted by law a person does not violate this section.

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

Subsection (c) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

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

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[1] RCC § 22E-1202 punishes negligently causing a bodily injury by discharging a firearm as fifth degree assault.

[2] The District of Columbia does not currently have any firing ranges or hunting grounds.

[3] *See, e.g.*, Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/discharge ("to relieve of a charge, load, or burden").

[4] RCC § 22E-701. Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

[5] RCC § 22E-206.

[6] RCC § 22E-206.

[7] RCC § 22E-207.

Relation to Current District Law. *The revised negligent discharge of a firearm statute clearly changes current District law in five main ways.*

First, the revised statute requires that the accused act at least negligently with respect to discharge of a firearm outside a firing range. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[8] even though it is highly unusual to provide criminal liability for merely negligent conduct.[9] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised statute includes only one offense and one penalty gradation for negligent discharge of a firearm. A violation of current D.C. Code § 22-4503.01 is subject to a maximum penalty of specifies a maximum penalty of 1 year of incarceration and a $2,500 fine.[10] A violation of 24 DCMR §§ 2300.1 – 2300.3 is subject to a fine of $300 and is not punishable by jail time.[11] In contrast, the revised statute provides a single offense gradation. This change logically reorders and improves the consistency proportionality of the revised statutes.

Third, the revised offense does not punish discharge of an air gun, spring gun, or torpedo. Current 24 DCMR § 2300.1 prohibits the discharge of any "gun, air gun, rifle, air rifle, pistol, revolver, or other firearm, cannon, or torpedo" without the written permission of the Chief of Police. The term "gun" is not defined in the statute or in District case law and may broadly include spring guns, paintball guns, cap guns, water guns, and other toys. The revised code defines the term "firearm" to include a rifle, pistol, revolver, and cannon,[12] however, it does not include air rifles or torpedo. Discharging an air rifle outside a building is punished as carrying an air or spring gun.[13] Releasing a torpedo—or any other restricted explosive—is punished as possession of a prohibited weapon or accessory.[14] This change improves the logical organization and proportionality of the revised offenses.

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[8] RCC § 22E-206.

[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[10] D.C. Code §§ 22-4515; 22-3571.01.

[11] 24 DCMR § 100.6.

[12] RCC § 22E-701.

[13] RCC § 7-2502.17.

[14] RCC § 22E-4101.

Fourth, the revised offense does not allow firearms to be discharged in theaters. Current 24 DCMR § 2300.3 states, "This section shall not apply to the discharge of firearms or explosives in a performance conducted in or at a regular licenses [sic.] theater or show." The statute does not specify the type of license required and District case law has not addressed the issued. Under the revised code, a person must obtain written permission to discharge a firearm in a theater or during a show. An air or spring gun may be used as part of a lawful theatrical performance or athletic contest.[15] Other common stage props such as block-barreled guns designed for movie or theatrical use, block-barreled starter guns, and percussion (cap) guns do not constitute firearms in the RCC or under current D.C. Code definitions in Title 7 or Title 22, and could be used in theaters and shows. This change eliminates an unnecessary gap in the revised offenses.

Fifth, the revised offense clarifies that a person may discharge a firearm if lawful authority to do so exists under District or federal law. Current 24 DCMR § 2300.1 requires "special" written permission from the Chief of Police to discharge a weapon. The revised offense notes that either written permission or other lawful authority is sufficient.

Beyond these five changes, two other aspects of the statute may constitute substantive changes to current District law.

First, the revised statute holds an actor strictly liable as to whether they have permission to discharge a firearm. The current statutes do not specify any culpable mental states and District case law has addressed their meaning. The revised statute nevertheless holds a person strictly liable as to whether there is permission under District or federal law to fire a gun. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[16] and legal experts[17] for any non-regulatory crimes, the negligent discharge of a firearm offense is largely regulatory in nature. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

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[15] E.g., an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene, a referee may use an air or spring gun to signal the start of a race. *See* RCC § 7-2502.17(b)(1)(A) and corresponding commentary.

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

[17] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

Second, the revised offense uses the phrase "firing range" instead of "shooting gallery." Current 24 DCMR § 2300.2 provides, "This section shall not apply to licensed shooting galleries between 6:00 a.m. and 12:00 midnight on Monday through Saturday, or between the hours of 2:00 p.m. and 11:00 p.m. on Sundays." This term "licensed shooting gallery" is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to "shooting galleries," but do refer to "firing ranges."[18] The time restriction does not correspond with any District regulations for firing ranges and are incongruent with District regulations of loud noise.[19] The revised offense uses the Title 7 terminology and deletes the time restriction.[20] This change improves the clarity of the revised statutes.

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

The revised offense does not include a self-defense provision. Current D.C. Code § 22-4503.01 provides that a person may discharge a firearm "as otherwise permitted by law, including legitimate self-defense." In contrast, under the RCC, where a person acts in defense of one's self, a third person, or property, a general defense may apply.[21] This change improves the consistency of the revised offenses.

[18] D.C. Code § 7-2507.03.
[19] Loud noise that recklessly or negligently disturbs others may be punished under 20 DCMR § 2701, depending upon the volume and location.
[20] Additionally, Merriam Webster defines "shooting gallery" to include "a building (usually abandoned) where drug addicts buy and use heroin." *See* Merriam-Webster Online Dictionary at https://www.webster-dictionary.org/definition/shooting%20gallery.
[21] RCC § 22E-403.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

Explanatory Note. *This section establishes the alteration of a firearm identification mark offense for the Revised Criminal Code (RCC). The offense proscribes knowingly altering or obscuring identifying marks on a firearm. The revised offense replaces D.C. Code §§ 22-4512 (Alteration of identifying marks of weapons prohibited) and 7-2505.03(d) (Microstamping).*

Paragraph (a)(1) requires that the accused knowingly alters or removes an identification mark. "Alters" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that their conduct will alter or remove an identification mark.

Paragraph (a)(2) further specifies that the accused must alter a mark "with intent to" conceal or misrepresent the identity of the firearm. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused must be practically certain that the alteration would conceal or misrepresent[1] the identity of the firearm. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually concealed or misrepresented the identity of the firearm, only that the accused was practically certain that he or she would do so.

Subsection (b) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised alteration of a firearm identification mark statute clearly changes current District law in three main ways.*

First, the revised alteration of a firearm identification mark statute applies to any firearm. The current D.C. Code statutes apply only to a pistol, machine gun, or sawed-off shotgun.[2] In contrast, the revised offense applies to any firearm, as defined in RCC § 22E-701, which includes other long guns, such as shotguns and rifles. There is no apparent reason to exclude liability for long guns which may be legally purchased and possessed by law enforcement officers. This change eliminates an unnecessary gap in liability.

Second, the revised statute requires that the accused have intent to conceal or misrepresent the identity of the firearm. The current D.C. Code statutes do not specify a culpable mental state,[3] and it appears that a person commits an offense by any alteration or removal of a mark, including by accident, unless the purpose is experimental work by

[1] The government is not required to prove that the accused intended to mislead a specific person, only that the markings are removed or altered.
[2] D.C. Code §§ 22-4512 and 7-2505.03(d).
[3] *But see* D.C. Code § 7-2505.03 which provides an exception for "normal wear."

a government officer or agent,[4] safety, or sporting.[5] No case law exists as to whether a person would be guilty under the current statutes for altering an identification mark for some other purpose. In contrast, the revised statute eliminates liability for a person who alters a mark by accident or for purposes other than concealing or misrepresenting the identity of the weapon. The RCC contains similar language for the revised alteration of bicycle identification number[6] and alteration of a motor vehicle identification number[7] offenses. This change clarifies and improves the consistency and proportionality of the revised offenses.

Third, the revised alteration of a firearm identification mark statute is prosecutable only by the Office of the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code § 22-4512 (Alteration of identifying marks of weapons prohibited) is prosecutable by USAO. However, current D.C. Code § 7-2505.03(d) (Microstamping) is prosecutable by the Office of the Attorney General for the District of Columbia. In contrast, the revised statute includes only a single gradation of a single offense prosecutable by USAO. This change reduces unnecessary overlap between the revised statutes.

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

First, the revised statute requires that the accused act knowingly with respect to removal or alteration of the identification mark. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. To resolve this ambiguity, the revised offense requires at least knowledge as to the conduct of removing or altering the mark. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] A knowledge culpable mental state is also consistent with similar offenses in the D.C. Code[9] and RCC. This change clarifies the revised statute.

[4] D.C. Code § 22-4512.
[5] D.C. Code § 7-2505.03(d)(2).
[6] RCC § 22E-2404.
[7] RCC § 22E-2403.
[8] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).
[9] See, e.g., § 22–3233, Altering or removing motor vehicle identification numbers ("It is unlawful for a person to knowingly remove, obliterate, tamper with, or alter any identification number on a motor vehicle or a motor vehicle part.").

Second, the revised offense does not specify exceptions for normal wear,[10] experimental work by a government officer or agent,[11] safety, or sporting.[12] These exceptions are not required because the revised offense requires knowledge and intent, as defined in RCC § 22E-206. The RCC also includes standardized general defenses, including a defense for execution of public duty.[13]

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

First, the current statutes make it a crime to "alter, remove, or obliterate" an identifying mark.[14] The revised statute only uses the words "alter" and "remove," which are intended to be broadly construed to cover removing or obliterating a mark. The change is not intended to narrow the scope of the offense.

Second, the revised offense does not include a permissive inference. Current D.C. Code § 22-4512 states, "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia." The D.C. Court of Appeals held that this inference is "irrational" or "arbitrary," and hence unconstitutional, because it cannot be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[15]

[10] D.C. Code § 72505.03(d)(1).
[11] D.C. Code § 22-4512.
[12] D.C. Code § 7-2505.03(d)(2).
[13] RCC § 22E-403.
[14] D.C. Code §§ 22-4512 and 7-2505.03(d).
[15] *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, (1969); *Turner v. United States*, 396 U.S. 398 (1970)); *see also United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (noting it would be constitutional to instead criminalize possession of a firearm with an obliterated serial number).

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for prohibits of firearms on public or private property for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4503.02, (Prohibition of firearms from public or private property). The revised civil provisions for prohibition of firearms on public or private property statute does not clearly change current District law, however two aspects of the revised statute may constitute substantive changes to current District law.*

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4503.02 does not explicitly prohibit or affirmatively require any particular conduct.[1] However, § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised code defines "law enforcement officer" and "property" in its general part.[2] D.C. Code § 22-4503.02 does not define the terms "law enforcement personnel" or "property" and District case law has not addressed their meaning. It is unclear which employees of which agencies and private businesses qualify as "law enforcement personnel." In contrast, the revised statute applies standardized definitions for "firearm," "law enforcement officer," and "property," used throughout the revised code.

[1] The statute does not explicitly require a person carrying a firearm to stay off of premises where firearms are disallowed, it merely describes when persons may disallow firearms. If the statute does create a misdemeanor offense, it largely overlaps with D.C. Code § 7-2509.07, which prohibits carrying a pistol with a license in 15 different locations. It is unclear what, if any, impact the signage requirements in 24 DCMR § 2346 have on a person's liability under either statute.

[2] RCC § 22E-202.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for lawful transportation of a firearm or ammunition for the Revised Criminal Code (RCC). These provisions establish a right to possess and transport a firearm in a specified manner.*[1] *The revised statute replaces D.C. Code § 22-4504.02 (Lawful transportation of firearms).*[2]

The revised civil provisions for lawful transportation of a firearm or ammunition statute does not clearly change current District law, however two aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute operates as a civil provision and does not, of itself, create criminal liability for non-compliance. Current D.C. Code § 22-4504.02(a) does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4504.02(b)(1) states (in the passive voice), "neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible…" and § 22-4504.02(b)(2) states (in the passive voice), "the firearm or ammunition shall be contained…" and "the firearm shall be unloaded." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The District of Columbia Court of Appeals has not published any opinion interpreting this statute. Legislative history for the current provision in D.C. Code § 22-4504.02 does not clearly indicate whether or not the provision was intended to create criminal liability by itself. However, predecessor statutes suggest that D.C. Code § 22-4504.02 may have been intended to create an exclusion from liability for carrying a concealed weapon in violation of D.C. Code § 22-4504(a) and (a-1) rather than a misdemeanor offense.[3] The

[1] *See also* 18 U.S.C. § 926A.

[2] [A conforming amendment will be required for cross-references in Title 7.]

[3] In 1932, much like current D.C. Code § 22-4504, the District's carrying a concealed weapon statute stated, "No person shall within the District of Columbia carry concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon." In addition to the exceptions that appear in current D.C. Code § 22-4505(a)(1), (3), and (5), the 1932 legislation specified that the prohibition did not apply to "any person while carrying a pistol unloaded and in a secure wrapper" to and from the locations specified in the contemporary § 22-4505(a)(6). The 1932 "unloaded and in a secure wrapper" exception language was most recently changed to a cross-reference to § 22-4504.02, which largely mirrors 18 U.S.C. § 926A (Firearm Owners Protection Act), establishing a right and not a criminal offense. Consequently, it appears that D.C. Code § 22-4504.02 may have been intended merely as an exception to the District's carrying statute.

On the contrary, if current D.C. Code § 22-4504(a) were construed to create a misdemeanor offense, it may run afoul of D.C. Code § 23–101(a) and case law on Home Rule limitations on assignment of prosecutorial authority. Prior to home rule, the only stand-alone offense regarding transportation of firearms appears to have been a police regulation delegated to the Office of the Office of the Attorney General for the District of Columbia. *See* Police Traffic and Motor Vehicle Regulations of the District of Columbia, Art. 52, Sec. 8(b), August 12, 1968 (establishing an offense prosecutable by Corporation Counsel that states, "Any pistol carried by any person not having a licensed issued under these Regulations shall be carried In a closed container or securely wrapped and while being carried shall be kept unloaded. Containers of such pistols or such securely wrapped pistols shall be carried in open view."). The District is

revised statute establishes the transportation requirements as a right instead of an offense. This change clarifies the revised statute.

Second, the revised statute clarifies that there is a lawful means of transportation whether or not the ammunition is transported at the same time. Current D.C. Code § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating "neither the firearm nor any ammunition being transported shall be readily accessible." This change clarifies the revised statute.

barred from reassigning prosecutorial authority over a crime that is a police regulation to the United States Attorney by D.C. Code § 23-101(a). *See In re Hall*, 31 A.3d 453, 458 (D.C. 2011).

RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol.

Explanatory Note and Relation to Current District Law. *This section establishes the issuance of a license to carry a pistol civil provision for the Revised Criminal Code (RCC). The provision specifies the requirements for obtaining a carry license in the District. The revised provision replaces D.C. Code § 22-4506 (Issue of a license to carry a pistol). The current statute has been copied verbatim, with the exception of applying standardized RCC definitions and striking a phrase that was held to be unconstitutional in 2016.*[1]

[1] The District's requirement that applicants for a license to carry a concealed firearm demonstrate a "good reason to fear injury to his or her person or property" or "any other proper reason for carrying a pistol," as further defined by District law and regulations (collectively "the 'good reason' requirement"), is inconsistent with the individual right to bear arms under the Second Amendment and therefore unconstitutional. *Grace v. Dist. of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016).

RCC § 22E-4111. Unlawful Sale of a Pistol.

Explanatory Note. *This section establishes the unlawful sale of a pistol offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4507 (Certain sales of pistols prohibited).*

Paragraph (a)(1) requires that the accused knowingly sells a pistol. "Sells" is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The term "pistol" has the meaning specified in D.C. Code § 7-2501.01. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that they are selling and practically certain that the item is a pistol.

Paragraph (a)(2) further specifies that the accused must sell a pistol reckless as to the fact that the purchaser is one of three types of people who are legally unfit to own a firearm. "Reckless" is a defined term in RCC § 22E-206 which, applied here, means the person must consciously disregard a substantial risk that the purchaser is not of sound mind, prohibited from possessing a firearm under RCC § 22E-4105, or under 21 years of age. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[1]

Subsection (b) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (c) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised unlawful sale of a firearm statute clearly changes current District law in one main way.*

The revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Beyond this change to current District law, three aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4507 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute clearly establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to selling a pistol. The current statute is silent as to the applicable culpable

[1] RCC § 22E-206.

mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[2] This change clarifies the revised statute.

Third, the revised statute requires that a person be at least reckless as to the status of the purchaser. Current D.C. Code § 22-4507 requires that a person have "reasonable cause to believe" that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. There is no case law construing the meaning of this language. To resolve this ambiguity, the revised statute applies the RCC's standard mental state definition for recklessness[3] which requires that a person consciously disregard a substantial risk that the purchaser is legally barred from having a weapon. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[4] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[5] This change improves the consistency of the revised offenses.

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

The revised code defines "possession" in its general part.[6] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[7] The RCC definition of "possession,"[8] with the requirement in the offense that the possession be "knowing,"[9] matches the meaning of possession in

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

[3] RCC § 22E-206.

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

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

[6] RCC § 22E-202.

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

[8] RCC § 22E-701.

[9] RCC § 22E-206.

current DCCA case law.[10] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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

RCC § 22E-4112. Unlawful Transfer of a Firearm.

Explanatory Note. *This section establishes the unlawful transfer of firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4508 (Transfers of firearms regulated).*

Paragraph (a)(1) requires that a person knowingly deliver a firearm to a purchaser. "Delivers" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are delivering an item and practically certain that the item they are delivering is a firearm.

Subparagraph (a)(1)(A) specifies that a transfer that occurs in fewer than 10 days of purchase is an unlawful transfer, unless the purchaser is a law enforcement officer. The term "law enforcement officer" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the transfer occurred within 10 days of the sale.

Subparagraph (a)(1)(B) specifies that a transfer that occurs in a manner other than the manner specified in RCC § 22E-4109 is an unlawful transfer. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is transporting it in the manner that fails to comply with RCC § 22E-4109.

Alternatively, paragraph (a)(2) requires that a person knowingly fail to deliver a written statement with certain information, when purchasing a firearm. The writing must be duplicated and include the purchaser's full name, address, occupation, date and place of birth. It must also include the date of purchase, the caliber, make, model, and manufacturer's number of the firearm. And, it must also include a statement that the purchaser is not prohibited from possessing a firearm by RCC § 22E-4105. Paragraph (a)(2) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are purchasing a firearm.

Alternatively, paragraph (a)(3) requires that a person knowingly fail to deliver a completed purchase statement to the Metropolitan Police Department, when selling a firearm. The writing must be duplicated, include the seller's signature and address, and be retrained for 6 years. Paragraph (a)(3) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are selling a firearm.

Alternatively, paragraph (a)(4) applies to a person who knowingly sells an assault weapon, machine gun, or sawed-off shotgun. A "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that the item they are selling is an assault weapon, machine gun, or sawed-off shotgun.

Subparagraph (a)(4)(A) prohibits selling an assault weapon, machine gun, or sawed-off shotgun to any person other than the persons designated in RCC § 22E-4118(b) as entitled to possess the same. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are selling an assault weapon to someone who qualifies as an unauthorized person.

Subparagraph (a)(4)(B) prohibits selling an assault weapon, machine gun, or sawed-off shotgun without prior permission to make such sale obtained from the Chief of the Metropolitan Police Department ("MPD"). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are not authorized to sell the assault weapon, machine gun, or sawed-off shotgun.

Subsection (b) excludes liability for wholesalers.

Subsection (c) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (d) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised unlawful transfer of a firearm offense clearly changes current District law in four main ways.*

First, paragraph (a)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4508 provides that "No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514…" The revised statute does not address transfers of blackjacks, but does address transfers of assault weapons,[1] the possession of which—like machine guns and sawed-off shotguns—is prohibited as contraband under RCC § 22E-4101. It is unclear why blackjacks, as compared to other non-firearm dangerous weapons, are regulated in this manner. The statute's failure to cover sales of assault weapons may be an oversight during recent legislative changes regarding the definition of a machine gun.[2] This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Second, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Third, the revised statute includes a cross-reference to the persons described in RCC § 22E-4118(b), Exclusions from Liability for Weapon Offenses. Current D.C. Code § 22-4508 cross-references "the persons designated in § 22-4514." The revised code replaces the exceptions in Chapter 45 of current D.C. Code Title 22 with a single,

[1] The term "assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

[2] Before 2009, the term "machine gun" was defined in D.C. Code § 7-2501.01 to include "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot…[s]emiautomatically, more than 12 shots without manual reloading." The District of Columbia Court of Appeals interpreted this language to include a handgun fitted with a magazine that holds more than twelve rounds of ammunition (even if the magazine is defective). *See Moore v. United States*, 927 A.2d 1040, 1054 (D.C. 2007); *United States v. Woodfolk*, 656 A.2d 1145, 1147–48 (D.C. 1995). In 2009, the D.C. Council redefined "machine gun" to include only fully automatic weapons and simultaneously criminalized possession of a large capacity ammunition feeding device under D.C. Code § 7-2506.01(b). D.C. Law 17-372, Firearms Control Amendment Act of 2008.

comprehensive list of exclusions from liability in RCC § 22E-4118 and changes current District law as described in the commentary. Each change affects the scope of the revised unlawful transfer of a firearm offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute applies a standardized definition of "law enforcement officer." Current D.C. Code § 22-4508 except sales to "sales to marshals, sheriffs, prison or jail wardens or their deputies, policemen, or other duly appointed law enforcement officers." The word "policemen" is not defined in the statute and District case law has not addressed its meaning. In contrast, the RCC defines the term "law enforcement officer" with specificity[3] and applies this definition to all revised offenses. This change improves the clarity and consistency of the revised offense.

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

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4508 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute more clearly frames the statute as establishing an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[4] This change clarifies the revised statute.

[3] RCC § 22E-701.

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

RCC § 22E-4113. Sale of Firearm Without a License.

Explanatory Note. *This section establishes the sale of a firearm without a license offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4509 (Dealers of weapons to be licensed).*

Paragraph (a)(1) applies to retail dealers. Subparagraph (a)(1)(A) requires that a retail dealer knowingly sell, expose for sale, or possess with intent to sell a firearm. "Sells" is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The terms "possess" and "firearm" are defined in RCC § 22E-701. Subsection (a) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are selling, exposing for sale, or possessing with intent to sell a firearm. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are not licensed to sell, expose for sale, or possess with intent to sell a firearm.

Paragraph (a)(2) applies to wholesalers. Paragraph (a)(2) requires that a wholesale dealer not sell, expose for sale, or possess with intent to sell a firearm to someone other than a licensed dealer licensed under RCC § 22E-4114. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are selling, exposing for sale, or possessing with intent to sell. The person must also be practically certain that the item is a firearm. The person must also be practically certain that the purchaser is not a dealer licensed under RCC § 22E-4114.

Subsection (b) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised sale of a firearm without a license offense clearly changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4509 restricts the sale of any "pistol, machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address sales of blackjacks but does address sales of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

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

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any

violation of any provision of this chapter." The revised statute more establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[1] This change clarifies the revised statute.

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

First, the revised code defines "firearm," "assault weapon," "machine gun," "sawed-off shotgun," and "possession" in its general part.[2] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[3] The RCC definition of "possession,"[4] with the requirement in the offense that the possession be "knowing,"[5] matches the meaning of possession in current DCCA case law.[6] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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

[2] RCC § 22E-202.

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

[4] RCC § 22E-701.

[5] RCC § 22E-206.

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

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4509 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for licenses of firearms dealers for the Revised Criminal Code (RCC). Together with RCC § 22E-4115, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

The revised civil provisions for licenses of firearms dealers clearly changes current District law in five main ways.

First, the revised statute regulates all firearms. Current D.C. Code § 22-4510 restricts the sale of any "pistol, machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address sales of blackjacks, but does address transfers of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Second, paragraph (b)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4510(a)(3) provides that "No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514…" The revised statute does not include address sales of blackjacks, but does address sales of assault weapons,[1] which—like machine guns and sawed-off shotguns—are prohibited as contraband under RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Third, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute replaces the word "business" with the phrase "firearm sales." Current D.C. Code § 22-4510(a)(1) states, "The business shall be carried on only in the building designated in the license." The word "business" is not defined in the statute and District case law has not addressed its meaning. Read literally, "business" may be understood to include work unrelated to firearm transactions, such as accounting, marketing, and banking. In contrast, the revised statute limits only the sales to the physical confines of the building designated in the license. This change clarifies and may improve the proportionality of the revised statute.

Fifth, the revised statute does not require a firearms dealer to record a purchaser's color. Current D.C. Code § 22-4510(a)(5) requires a firearms dealer to record this information. In contrast, the revised statute does not include "color," which is a protected

[1] The term "assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

trait under the District's Human Rights Act.[2] This change improves the consistency of the revised statute.

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

First, the revised statute defines the terms "assault weapon," "building," "firearm," "imitation firearm," "machine gun," "manufacturer," "possess," and "sawed-off shotgun," using standardized definitions in current law and the RCC. The revised statute also updates the phrase "Chief of Police for the District of Columbia" with "Chief of the Metropolitan Police Department," consistent with more recent provisions in current law and in the RCC.

Second, the revised statute uses the phrase "clearly and conspicuously displayed" instead of "displayed on the premises where it can be read," consistent with more recent provisions in current law and in the RCC.[3] These changes clarify the revised statute and improve the consistency of the revised code.

Third, the revised statute replaces the word "book" with the phrase "in a form proscribed by the Mayor," to make clear that electronic records may be used. This change clarifies the revised statute.

[2] D.C. Code § 2-1401.01 et. seq.
[3] *See* RCC §§ 7-2502.15(a)(1)(C); 22E-4102(a)(2)(C)(ii).

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

Explanatory Note. *This section establishes the unlawful sale of a firearm by a licensed dealer offense for the Revised Criminal Code (RCC). Together with RCC § 22E-4114, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

Paragraph (a)(1) specifies that the revised statute applies to anyone who is a dealer licensed under RCC § 22E-4114. Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a dealer's license.[1]

Paragraph (a)(2) requires that a dealer recklessly violate one or more of the licensure requirements in RCC § 22E-4114(b). "Reckless" is a defined term,[2] which, applied here, means the person must consciously disregard a substantial risk that their conduct violates a licensure requirement. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[3]

Subsection (b) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised unlawful sale of a firearm by a licensed dealer statute does not clearly change current District law, however two aspects of the revised statute may constitute substantive changes to current District law.*

First, the revised statute requires that the accused act at least recklessly with respect to violating a licensure requirement. Current D.C. Code § 22-4510(a)(3) requires that a person have "reasonable cause to believe" that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. Other provisions in the current statute do not specify a requisite mental state and District case law has not addressed the issue. To resolve this ambiguity, the revised statute applies the RCC's standard mental state definition of recklessness[4] which, applied here, requires that a person consciously disregard a substantial risk that they are engaging in the prohibited conduct and that the conduct violates the District's licensing rules. The revised civil provisions for licenses of firearms dealers no longer include the phrase "reasonable cause to believe."[5] This change improves the consistency of the revised offenses.

Second, the revised statute holds an actor strictly liable as to the existence of a dealer's license. Current D.C. Code § 22-4510 does not specify any culpable mental states. District case law has not interpreted the statute's meaning. The revised statute nevertheless holds a person strictly liable as to this offense element. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is

[1] RCC § 22E-207.
[2] RCC § 22E-206.
[3] RCC § 22E-206.
[4] RCC § 22E-206.
[5] RCC § 22E-4114.

strongly disfavored by courts[6] and legal experts[7] for any non-regulatory crimes, the unlawful sale of a firearm by a licensed dealer offense is largely regulatory in nature and requires recklessness as to the violation of a licensure requirement. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

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

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4510 does not itself provide a criminal penalty, however, it states that a licensee shall be "subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute does not provide liability for violations of D.C. Code § 22-4509. Current D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." The revised code replaces § 22-4509 with RCC § 22-4112. This change logically reorders and clarifies the revised statutes.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4510 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

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

[7] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

Explanatory Note. *This section establishes the use of false information for purchase or licensure of a firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4511 (False information in purchase of weapons).*

Subsection (a) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are giving false information or false evidence. Paragraph (a)(1) requires the false information or evidence be given to purchase a firearm. "Purchase" is an undefined term, intended to include any exchanging of firearm for monetary remuneration. The term "firearm" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, paragraph (a)(1) requires that the person also know—that is, be practically certain—that they are giving the information in order to purchase a firearm.

Alternatively, paragraph (a)(2) requires the false information or evidence be given to apply for a license to carry a pistol. Paragraph (a)(2) requires that a person know—that is, be practically certain—that they are giving the information in order to apply for a license to carry a pistol under RCC § 22E-4110. The term "pistol" has the meaning specified in D.C. Code § 7-2501.01.

Subsection (b) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (c) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised use of false information for purchase or licensure of a firearm offense clearly changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4511 prohibits using false information to purchase "a machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address purchases of blackjacks, but does address purchases of all firearms. There is no clear rationale for not including other firearms, such as pistols, rifles, and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

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

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the

applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[1] This change clarifies the revised statute.

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

The revised statute defines the terms "firearm" and "pistol" using standardized definitions in current law and the RCC. These changes clarify the revised statute and improve the consistency of the revised code.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4511 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

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

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for taking and destruction of dangerous articles for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4517 (Dangerous articles; definition; taking and destruction; procedure).*

The revised civil provisions for taking and destruction of dangerous articles statute does not clearly change current District law, however four aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4517 does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised statute updates the definition of "dangerous article" to align with the definitions in the revised criminal code. Current D.C. Code § 22-4517 defines the term "dangerous article" to mean "(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms." The term "weapon" is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute defines the term "dangerous article" to include a firearm,[1] a restricted explosive,[2] firearm silencer, a bump stock,[3] or a large-capacity ammunition feeding device.[4] Although bump stocks and large-capacity ammunition feeding devices do not necessarily constitute weapons, like silencers they are designed to make firearms more lethal. The phrase "any weapon such as" may be broader or narrower than the revised definition. This change clarifies and improves the consistency of the revised statutes.

Third, the revised statute authorizes both prosecutors' offices to decide when evidence is destroyed. The current statute refers only to the United States Attorney for the District of Columbia. However, the Attorney General for the District of Columbia serves a similar function in other cases. This change improves the completeness of the revised statute.

Fourth, the revised statute uses the RCC's defined term "law enforcement agency" instead of the phrase "law enforcing agency," which is undefined. This change clarifies the revised statute.

[1] Defined in RCC § 22E-701.
[2] Defined in RCC § 22E-701.
[3] Defined in RCC § 22E-701.
[4] Defined in RCC § 22E-701.

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

Explanatory Note. *This section establishes exclusions from liability for specified weapons offenses in the Revised Criminal Code (RCC). The provision excludes liability for legal duties and activities that necessarily require possessing or carrying dangerous weapons. The revised statute replaces D.C. Code §§ 22-4504.01 (Authority to carry firearm in certain places and for certain purposes) and 22-4505 (Exceptions to § 22-4504). The revised statute also effectively replaces the exclusion clauses within D.C. Code §§ 7-2502.15(c) (Possession of stun guns);*[1] *7-2506.01(a)(1), (2), and (5) (Persons permitted to possess ammunition); 22-4514(a) (Possession of certain dangerous weapons prohibited; exceptions);*[2] *and 22-4502.01(c) (Gun Free Zones).*[3]

Subsection (a) specifies that the exclusions from liability apply only to certain offenses in Chapter 41 of Title 22E. The exclusions apply to possession of an unregistered firearm, destructive device, or ammunition;[4] possession of a stun gun;[5] carrying an air or spring gun;[6] carrying a pistol in an unlawful manner;[7] possession of a prohibited weapon or accessory,[8] and carrying a dangerous weapon.[9] The exclusions do not apply to unlawful storage of a firearm;[10] possession of a dangerous weapon with intent to commit crime;[11] possession of a dangerous weapon during a crime;[12] possession of a firearm by an unauthorized person;[13] negligent discharge of firearm;[14] alteration of a

[1] "…[E]xcept a law enforcement officer as defined in § 7-2509.01."
[2] "…[M]achine guns, or sawed-off shotgun, knuckles, and blackjacks may be possessed by the members of the Army, Navy, Air Force, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law enforcement officers, including any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under § 22-4510."
[3] "The provisions of this section shall not apply to…members of the Army, Navy, Air Force, or Marine Corps of the United States; the National Guard or Organized Reserves when on duty; the Post Office Department or its employees when on duty; marshals, sheriffs, prison, or jail wardens, or their deputies; policemen or other duly-appointed law enforcement officers; officers or employees of the United States duly authorized to carry such weapons; banking institutions; public carriers who are engaged in the business of transporting mail, money, securities, or other valuables; and licensed wholesale or retail dealers."
[4] RCC § 7-2502.01A.
[5] RCC § 7-2502.15.
[6] RCC § 7-2502.17.
[7] RCC § 7-2509.06A.
[8] RCC § 22E-4101.
[9] RCC § 22E-4102.
[10] RCC § 7-2507.02A.
[11] RCC § 22E-4103.
[12] RCC § 22E-4104.
[13] RCC § 22E-4105.
[14] RCC § 22E-4106.

firearm identification mark,[15] or any other weapons offense. However, other exclusions under federal law may apply to these latter offenses.[16]

Subsection (b) excepts from liability 10 classes of professionals who handle dangerous weapons as a part of their work. Paragraph (b)(1) excludes liability for a member of the Army, Navy, Air Force, or Marine Corps of the United States.[17] Paragraph (b)(2) excludes liability for a member of the National Guard or Organized Reserves when on duty.[18] Paragraph (b)(3) excludes liability for a qualified law enforcement officer as defined in 18 U.S.C. § 926B.[19] Paragraph (b)(4) excludes liability for a qualified retired law enforcement officer as defined in 18 U.S.C. § 926C, who carries a concealed pistol that is registered under D.C. Code § 7-2502.07 in a location that is conveniently accessible and within reach.[20] Paragraph (b)(5) excludes liability for an on-duty licensed special police officer or campus police officer, who possesses or carries a firearm registered under D.C. Code § 7-2502.07 in accordance with D.C. Code § 5-129.02 and all rules promulgated under that section.[21] Paragraph (b)(6) excludes liability for an on-duty director, deputy director, officer, or employee of the District of Columbia Department of Corrections who possesses or carries a firearm registered under D.C. Code § 7-2502.07.[22] Paragraph (b)(7) excludes liability for an employee of the District or federal government, who is on duty and acting within the scope of those duties.[23] Paragraph (b)(8) excludes liability for a person who is lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense.[24] The word "lawfully" should be construed to require that the person is authorized by law to manufacture, repair, or sell weapons. Paragraph (b)(9) excludes liability for a person who is lawfully acting as a public carrier.[25] The word "lawfully" should be construed to

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[15] RCC § 22E-4107.
[16] *See, e.g.,* 18 U.S.C. §§ 926A, B, and C.
[17] D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).
[18] D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).
[19] *See* D.C. Code §§ 7-2502.15(c); 22-4514(a); 22-4502.01(c); 22-4505(a)(1) and (3) (IRS and OIG agents appear to meet the definition of a "qualified law enforcement officer" in 18 U.S.C. 926B(c)).
[20] D.C. Code § 22-4505(b).
[21] D.C. Code §§ 7-2502.15(c); 22-4514(a) ("other duly-appointed law enforcement officers"); 22-4505(a)(2).
[22] D.C. Code §§ 22-4514(a) ("prison or jail wardens, or their deputies"); 22-4502.01(c) ("prison or jail wardens, or their deputies"); 22-4505(a)(1) ("prison or jail wardens, or their deputies").
[23] *See* D.C. Code §§ 7-2506.01(a)(2) ("an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties"); 22-4514(a) ("any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons"); 22-4502.01(c) ("officers or employees of the United States duly authorized to carry such weapons"); 22-4505(a)(4) ("Officers or employees of the United States duly authorized to carry a concealed pistol"). For example, an Assistant United States Attorney may inspect or transport a weapon to court as evidence in a criminal trial.
[24] D.C. Code §§ 7-2506.01(a)(1) ("a licensed dealer pursuant to subchapter IV of this unit"); 22-4505(a)(5) ("Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business").
[25] D.C. Code §§ 22-4514(a); 22-4502.01(c) ("the Post Office Department or its employees when on duty… [or] public carriers who are engaged in the business of transporting mail, money, securities, or other valuables").

require that the person is authorized by law to ship or deliver weapons.[26] Paragraph (b)(10) excludes liability for a person who is acting within the scope of authority granted by the Metropolitan Police Department[27] or a competent court.[28]

Subsection (c) applies to registered firearm owners. Subparagraph (c)(2)(A) provides that a registered owner may carry their firearm or ammunition where the firearm is registered.[29] Subparagraph (c)(2)(B) provides that a registered owner may carry their firearm or ammunition in accordance with RCC § 22E-4109 to or from their home or business,[30] a place of sale,[31] a place of repair,[32] a training class,[33] or a recreational activity.[34] Subparagraph (c)(2)(C) provides that a registered owner may carry their firearm while transporting it for any other lawful purpose expressly authorized by a District or federal statute, provided that it is transported in accordance with the requirements of that statute.[35]

Subsection (d) applies to any person who is participating in a class taught by a firearm instructor.[36] The term "firearm instructor" has the meaning specified in D.C. Code § 7-2501.01.

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised exclusions from liability for weapons offenses provision clearly changes current District law in six main ways.*

First, the revised statute applies standardized exclusions from liability to all possessory weapons offenses. Under current law, there is considerable inconsistency between the exclusionary provisions. The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or from the class[37] and is not liable for possessing ammunition during the class,[38] however, there is no exception in current law for possessing a firearm during a firearm training and safety class. Second, a member of the military avoids prosecution for possession of an assault

[26] For example, if a particular FedEx store is out of compliance with the noise regulations in 20 DCMR § 2701, the exclusion from liability nevertheless extends to each carrier in the store.
[27] For example, MPD may authorize a defense investigator to view a weapon or authorize a fingerprint expert to inspect a weapon at its evidence control office.
[28] *See, e.g.*, Model Penal Code § 3.03(1)(c).
[29] D.C. Code § 22-4504.01(1). In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to forbid carrying a lawful firearm in the home for the purpose of immediate self-defense. 554 U.S. 570 (2008).
[30] D.C. Code §§ 22-4504.01(1) and (3); 22-4505(a)(6).
[31] *See* D.C. Code § 22-4505(a)(6) ("place of purchase"). The phrase "place of sale" includes the place where the registrant bought the firearm and the place where the registrant sells the firearm to a licensed dealer, pursuant to D.C. Code § 7-2505.02.
[32] D.C. Code § 22-4505(a)(6).
[33] D.C. Code § 22-4505(c).
[34] D.C. Code §§ 22-4504.01(2); 22-4505(a)(6).
[35] D.C. Code §§ 22-4504.01(4); 22-4504.02(a).
[36] D.C. Code § 7-2506.01(a)(5).
[37] *See, e.g.*, D.C. Code § 22-4504.02(a); 22-4505(c).
[38] D.C. Code § 7-2506.01(a)(5).

weapon, machine gun, or sawed-off shotgun,[39] however, there is no military exception for possession of a large-capacity ammunition feeding device.[40] Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon. In contrast, the revised statute applies identical exclusions to all weapons offenses that do not involve some other criminal intent or harm. This change logically reorders the revised statutes and improves the consistency and proportionality of the revised code.

Second, the revised statute excludes liability for a public carrier only if that person is acting within the scope of their professional duties. Current D.C. Code §§ 22-4515(a) (Possession of certain dangerous weapons prohibited; exceptions) and 22-4502.01(c) (Gun Free Zones) exclude from liability "the Post Office Department or its employees when on duty" as well as "public carriers who are engaged in the business of transporting mail, money, securities, or other valuables." The Post Office Department was subsequently abolished and all its functions, powers, and duties were transferred to the United States Postal Service.[41] Although a carrier should not be liable for possession of an object it has been hired to ship and deliver, there is no clear rationale for a blanket exception that allows a postal worker to carry their own assault weapon or machine gun while on duty. The revised statute specifies that the exclusion applies only if the person is lawfully engaging in the business of shipping or delivering the weapon involved in the offense. This change eliminates an unnecessary gap in liability.

Third, the revised statute narrows the exclusion from liability for the subclass of law enforcement officers who do not have arrest authority. Current D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) exclude from liability "prison or jail wardens, or their deputies." District case law has held that a Department of Corrections employee may carry a firearm whether on or off duty.[42] Current D.C. Code §§ 7-2502.15(c) (concerning possession of stun guns);[43] 22-4514(a) (concerning possession of a prohibited weapon);[44] and 22-4505(a)(2) (concerning carrying a dangerous weapon)[45] each include an exclusion for special police officers and campus police officers. D.C. Code § 22-4505(a)(2) specifies that its exclusion applies only to special police officers and campus police officers who are carrying a firearm and only if they are acting within

[39] D.C. Code § 22-4514(a).
[40] D.C. Code § 7-2506.01(b).
[41] § 4(a) of the Act of August 12, 1970, 84 Stat. 773, Pub.
[42] *See United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972).
[43] D.C. Code § 7-2502.15(c) excludes liability for "a law enforcement officer as defined in § 7-2509.01." The definition that appears in § 7-2509.01 includes "a special police officer appointed pursuant to § 5-129.02, and a campus and a university special police officer appointed pursuant to the College and University Campus Security Amendment Act of 1995, effective October 18, 1995 (D.C. Law 11-63; 6A DCMR § 1200 et seq.)." However, 6A DCMR § 1200 was repealed on September 6, 2016.
[44] D.C. Code § 22-4514(a) excludes "other duly-appointed law enforcement officers."
[45] D.C. Code § 22-4505(a)(2) excludes "Special police officers and campus police officers who carry a firearm in accordance with D.C. Official Code § 5-129.02, and rules promulgated pursuant to that section."

the scope of their deputization.[46] Although an officer should not be liable for possession of a service weapon while on duty, there is no clear rationale for a blanket exception that allows a special police officer or Department of Corrections ("DOC") employee to carry their own firearm, prohibited weapon, or dangerous weapon under other circumstances. The revised statute effectively limits special police officers, campus police officer, and DOC employees to the firearms they are authorized to use in the course of their duties. This change reduces an unnecessary gap in liability.

Fourth, the revised statute excludes from liability any person who is acting within the scope of authority granted by the Metropolitan Police Department ("MPD") or a competent court. Current D.C. Code §§ 22-4514(a) and 22-4502.01 exclude liability for "any designated civilian employee of the Metropolitan Police Department." Although an unsworn administrative staff member may be tasked with ordering weapons or organizing inventory, there is no clear rationale for fully exempting—while on duty and off duty—approximately 600 employees who serve a variety of functions including software development, policy writing, and community outreach. On the other hand, this provision appears to be underinclusive, failing to reach non-employees (e.g., firearms instructors, forensic experts, defense investigators) who are temporarily authorized to handle weapons at a firing range or through the evidence control branch. The revised provision specifies that any person who is authorized by the police chief or a court to possess or carry a weapon may not be prosecuted for any offense listed in subsection (a). This change eliminates an unnecessary gap in liability and improves the proportionality of the revised offenses.

Fifth, the exclusion for manufacturing, repairing, or dealing applies to all weapons, not only firearms. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business." There is no similar exclusion under current law for the producers and retailers of other weapons, such as stun guns or ammunition. In contrast, the revised statute provides a safe harbor for anyone who is "lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense." This change improves the consistency and proportionality of the revised offenses.

Sixth, the revised statute does not provide an exclusion for bankers. Current D.C. Code §§ 22-4514(a) and 22-4502.01 explicitly exclude "banking institutions." There is no clear rationale for the categorical exception for banks. Where a bank or other public storage provider permits a customer to keep a weapon a safe deposit box, the institution does not meet the revised definition of "possession," which requires the ability and desire to exercise control over the object and to guide its destiny.[47] The revised statute eliminates the exception for banking institutions and thereby eliminates an unnecessary gap in liability.

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[46] *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

[47] RCC § 22E-701; *see also In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

Beyond these six changes, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute uses standardized definitions of "qualified law enforcement officer" and "qualified retired law enforcement officer" in Title 18 of the United States Code. Current D.C. Code § 7-2502.15(c), by cross reference to § 7-2509.01, provides an exception for members of a law enforcement agency operating in the District of Columbia. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for "policemen," an undefined term. D.C. Code § 7-2506.01(a)2) provides an exception for "an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties." D.C. Code § 22-4505(b) provides an exception for retired MPD officers. The definitions of "qualified law enforcement officer" in 18 U.S.C. § 926B and "qualified retired law enforcement officer" in 17 U.S.C. § 926C appear to be broader than District-operating officers but narrower than "policemen." The revised statute aligns the revised statutes with federal law. This change improves the consistency and proportionality of the revised offenses.

Second, the revised statute includes an exception for DOC employees. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for "prison or jail wardens, or their deputies." The term "deputy" is not defined in the statute, however, District case law explains that it includes, not only the warden's direct supervisees, but also corrections officers.[48] Case law has not addressed whether other DOC employees, such as administrative staff, are also included. Consistent with the definition of "law enforcement officer" in RCC § 22E-701, the revised statute applies to a "Director, deputy director, officer, or employee of the District of Columbia Department of Corrections." This change improves the clarity and consistency of the revised statute.

Third, the revised statute clarifies and possibly narrows the exclusion for transporting a firearm. D.C. Code § 22-4505(a)(6) provides an exception for someone who is transporting a pistol "from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another, or to or from any lawful recreational firearm-related activity." The current statutory language does not specify that the pistol must be lawfully purchased or registered. There is no clear rationale for excluding people who purchase firearms illegally from the reach of the carrying a dangerous weapon statute. [49] The current statutory language includes transportation from "place of purchase" but does not mention transportation to a licensed firearms dealer for

[48] *United States v. Pritchett*, 470 F.2d 455, 456 (D.C. Cir. 1972).

[49] In contrast, current D.C. Code § 22-4504.01(4) permits a registrant to carry their firearm "While it is being transported for a lawful purpose as expressly authorized by District or federal statute and in accordance with the requirements of that statute." And, D.C. Code § 22-4504.02(a) more broadly permits any person to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm." Current D.C. Code § 7-2502.01(b)(3) requires that "possession or control of such firearm is lawful in the jurisdiction in which [the defendant] resides."

the purpose of reselling the firearm pursuant to D.C. Code § 7-2505.02.[50] The current statutory language does not define the phrase "moving goods from one place of abode to or business to another." The statute could be read narrowly to mean changing one's residence or business address. Or, the statute could be read broadly to include traveling from one's own residence or business to another person's residence or business. In contrast, the revised exclusion in RCC § 22E-4118(c)(2) applies only to registered owners and only to transportation to or from a place of sale, the person's home or business, a place of repair, a training and safety class, or a lawful recreational firearm-related activity. These changes improve the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.

Fourth, the revised statute clarifies that the exclusion only applies to a person who is manufacturing, repairing, or dealing in weapons if that person is doing so lawfully. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business." District case law has clarified, however, that this exception does not categorically apply to all persons engaged in manufacturing, repairing, or dealing. For this exception to apply the person's activity must be more than a hobby[51] and the conduct in question must coincide with the actual performance of a business duty.[52] To capture the limitations in District case law and ensure only legitimate business activities are excluded, the revised statute requires that the dealer—or the dealer's designee—be "lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense." There is no clear rationale for excepting illegal arms dealers from the carrying a dangerous weapon offense. This change clarifies the revised statute and may reduce an unnecessary gap in liability.

Fifth, the revised statute clarifies that a person who may carry or transport a firearm may also carry or transport ammunition for that firearm. D.C. Code § 22-4504.01 begins, "Notwithstanding any other law, a person holding a valid registration for a firearm may carry the firearm…" D.C. Code § 22-4504.02(a) begins, "Any person who is not otherwise prohibited by the law from transporting, shipping, or receiving a firearm shall be permitted to transport a firearm…" There is no clear rationale for failing to include ammunition within the scope of each exclusion. In fact, § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating "neither the firearm nor any ammunition being transported shall be readily accessible." However, there is no case law construing this provision. This change clarifies the revised statute and may improve the proportionality of the revised offenses.

Sixth, the revised statute does not contain a specific exclusion for members of an organization duly authorized to purchase or receive weapons from the United States.

[50] *But see* D.C. Code § 22-4504.02(a), which more broadly permits any person to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm."
[51] *Cormier v. United States*, 137 A.2d 212, 215 (D.C. 1957).
[52] *Bsharah v. United States*, 646 A.2d 993, 998 (D.C. 1994).

Current D.C. Code § 22-4505(a)(3) excludes "the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States; provided, that such members are at or are going to or from their places of assembly or target practice." It is not clear who would meet this classification other than members of the military,[53] qualified law enforcement officers as defined in 18 U.S.C. 926B,[54] and persons acting within the acting within the authority of the Chief of Police or a competent court,[55] each of which is excluded under the revised statute. Accordingly, this exception is removed as superfluous. This change improves the logical ordering and clarity of the revised statute and may eliminate an unnecessary gap in liability.

[53] Excepted under RCC § 22E-4118(b)(1).
[54] Excepted under RCC § 22E-4118(b)(3).
[55] Excepted under RCC § 22E-4118(b)(10).

RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapons Offenses.

Explanatory Note and Relation to Current District Law. *This section establishes a merger provision for weapons offenses in the Revised Criminal Code (RCC). The provision limits the number of convictions that can be entered for a single instance of possessing, carrying, and using a weapon.*[1] *There is no corresponding provision in current District law.*

The revised statute is consistent with the procedural aspects of the provisions in RCC § 22E-214, merger of related offenses. The offenses enumerated in subsection (a) involve similar social harms. Namely, each offense requires that a person possess or carry one or more weapons without permission to do so. The offenses enumerated in subsection (b) are also related by the social harm involved, namely, the possession or carrying of a weapon in order to perpetrate another crime.[2]

The revised statute, by omission, allows for multiple convictions and possible consecutive sentences: unlawful storage of a firearm;[3] carrying a pistol in an unlawful manner;[4] possession of a prohibited weapon or accessory;[5] possession of a firearm by an unauthorized person;[6] negligent discharge of firearm;[7] alteration of a firearm identification mark;[8] and any other offense.

The revised limitation on convictions for multiple related weapons offenses statute clearly changes current District law in two main ways.

First, under the RCC, a conviction for possession of an unregistered firearm, destructive device, or ammunition will merge with a conviction for other possessory weapons offenses arising out of the same course of conduct. The current D.C. Code does not address merger of these offenses. Under current District case law, multiple convictions for a possession of an unregistered firearm[9] merge and multiple convictions for possession of ammunition[10] merge.[11] However, possession of an unregistered

[1] The limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained. For example, the limitation prevents the court from entering judgments of conviction for possession of a dangerous weapon during a crime and for *attempted* first degree robbery.

[2] *See Hawkins v. United States*, 119 A.3d 687, 703 (D.C. 2015) (explaining that carrying a pistol without a license does not merge with possession of a firearm during a crime of violence because the latter does not require proof that the person was unlicensed to carry the weapon).

[3] RCC § 7-2507.02A.

[4] RCC § 7-2509.06A.

[5] RCC § 22E-4101.

[6] RCC § 22E-4105.

[7] RCC § 22E-4106.

[8] RCC § 22E-4107.

[9] D.C. Code § 7-2507.06.

[10] D.C. Code § 7-2506.01.

[11] Under current District law, there are different units of prosecution for possessing than for carrying multiple weapons without permission. *Hammond v. United States*, 77 A.3d 964, 968 (D.C. 2013) (the unit of prosecution for possessing an unregistered firearm is each weapon); *Cormier v. United States*, 137 A.2d 212, 217 (D.C.1957) (simultaneously carrying two pistols, each of which was unlicensed, is a single offense); *Little v. United States*, 709 A.2d 708, 715 (D.C. 1998); *see also Headspeth v. Dist. of Columbia*,

firearm[12] does not merge with carrying a pistol without a license.[13] In contrast, the revised statute merges possession of an unregistered firearm with carrying without a license as both statutes are directed at similar social harms. This change improves the proportionality of the revised statutes.

Second, under the RCC, a conviction for possession of a dangerous weapon with intent to commit crime[14] and a conviction for possession of a dangerous weapon during a crime[15] merge with any offense against persons that accounts for the display or use of a dangerous weapon in its gradation structure. Under current law, a conviction for possession of a prohibited weapon with intent to commit crime ("PPW-b")[16] and a conviction for possession of a firearm during a crime of violence or dangerous crime ("PFCV")[17] do not merge.[18] Further, under current law, a crime of violence that includes as an element possession of a firearm—e.g., armed kidnapping, armed burglary, armed robbery, assault with a dangerous weapon—does not merge with PFCV, even though a person who commits the predicate offense necessarily commits PFCV also.[19] In contrast, the RCC prevents stacking weapons-based penalty enhancements in the Subtitle II with penalties for weapons possession in Chapter 41, as these statutes are directed at similar social harms.[20] This change improves the proportionality of the revised offenses.

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53 A.3d 304, 307 (D.C. 2012); *Chapman v. United States*, 493 A.2d 1026 (1985) (permitting the government to charge one count of possession of an *unregistered* firearm for one gun and one count of carrying pistol without *license* for another gun possessed at the same time).

[12] D.C. Code § 7-2507.06.

[13] D.C. Code § 22-4504(a); *Tyree v. United States*, 629 A.2d 20 (D.C. 1993).

[14] RCC § 22E-4103.

[15] RCC § 22E-4104.

[16] D.C. Code § 22-4514(b).

[17] D.C. Code § 22-4504(b).

[18] *Bell v. United States*, 950 A.2d 56, 73 (D.C. 2008) (finding each offense requires an element that the other does not).

[19] *See, Thomas v. United States*, 602 A.2d 647 (D.C. 1992); *see also Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) (affirming convictions for armed robbery, armed burglary, and one count of PFCV for each); *Sanders v. United States*, 809 A.2d 584, 603 (same); *Hanna v. United States*, 666 A.2d 845, 855 (D.C. 1995).

[20] Consider, for example, a person who carries a concealed, licensed firearm when the person assaults and breaks a person's finger—the firearm never being used or displayed. Under current law, such a person faces a mandatory minimum of 5 years and a maximum penalty of 48 years imprisonment: 3 years for felony assault (D.C. Code § 22-404(a)(2)) based on the harm of breaking the finger, plus an additional 5-15 years for possessing a firearm during the assault (D.C. Code § 22-4504(b)), plus an additional 5-30 years for having a firearm readily available during the robbery (D.C. Code § 22-4502). The liability for committing the offense while armed but not using the firearm is 16 times the maximum penalty a person would otherwise face for the harm done to the victim under D.C. Code § 22-404(a)(2).

RCC § 22E-4120. Endangerment with a Firearm.

Explanatory Note. *This section establishes the endangerment with a firearm offense for the Revised Criminal Code (RCC). The offense prohibits knowingly discharging a projectile from a firearm without special permission to do so. The offense does not exist under current District law but is similar to conduct already punished in D.C. Code §§ 22-4503.01 (Unlawful discharge of a firearm)[1] and 22-1321 (Disorderly Conduct),[2] as well as the conduct constituting penalty enhancements for "drive-by" or "random" shootings in D.C. Code §§ 22-2104.01(b)(5) and 24-403.01 (b-1)(2)(E).*

Paragraph (a)(1) specifies that the person must discharge a projectile from a firearm outside of a licensed firing range.[3] Per its ordinary meaning,[4] a "discharge" does not require aiming a weapon. "Firearm" is a defined term that refers to a weapon "which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to, expel a projectile or projectiles by the action of an explosive" and excludes antiques.[5] Paragraph (a)(1) specifies that to be criminally liable for discharging a firearm, a person must act at least knowingly. The term "knowingly" is defined in RCC § 22E-206 and here means that the person must be practically certain that that they discharge a projectile from a firearm and that the discharge occurs in a location other than a licensed firing range.

Paragraph (a)(2) enumerates two circumstances in which knowingly discharging a projectile from a firearm is prohibited under this section.[6]

Subparagraph (a)(2)(A) punishes shooting (in any location, private or public) in a manner that creates a substantial risk of death or bodily injury to another person.[7] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that they are endangering someone else.

Subparagraph (a)(2)(B) punishes shooting in a referenced public place (irrespective of whether any person or property is endangered) without lawful authority to do so.[8] Subparagraph (a)(2)(B) uses the term "in fact" to specify that a person is strictly liable as to being in a prohibited location and as to lacking lawful authority.[9]

Sub-subparagraph (a)(2)(B)(i) specifies that the prohibited locations are: places that are open to the general public at the time of the offense, a communal area of multi-

[1] RCC § 22E-4106, Negligent Discharge of a Firearm.
[2] RCC § 22E-4201.
[3] The District of Columbia does not currently have any firing ranges or hunting grounds.
[4] *See, e.g.*, Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/discharge ("to relieve of a charge, load, or burden").
[5] RCC § 22E-701. Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[6] *See also* RCC § 22E-4106, Negligent Discharge of a Firearm.
[7] Consider, for example, a person who is shooting targets in their backyard, in a manner that creates a substantial risk that a neighbor in an adjacent yard will be struck by a bullet.
[8] Consider, for example, a person who is shooting in the air outside of an embassy to make a political statement. *See, e.g.*, Peter Hermann and Spencer S. Hsu, *Man ordered detained after police say he fired 32 rounds at Cuban Embassy*, WASHINGTON POST (May 4, 2020). Consider also a person who is hunting animals.
[9] RCC § 22E-207.

unit housing, a public conveyance, and a rail transit station. The terms "open to the general public,"[10] and "public conveyance"[11] are defined in RCC § 22E-701 and "rail transit station" has the meaning specified in D.C. Code § 35-251. Either the person or the discharged ammunition may be in a public place.[12] This includes any part of the bullet's flight path.[13]

Sub-subparagraph (a)(2)(B)(ii) provides that a person may discharge a projectile from a firearm if the Metropolitan Police Department ("MPD") grants written permission to do so. MPD may permit the discharge of a firearm by a particular person, in a particular location, or at a specified time. Sub-subparagraph (a)(2)(B)(ii) also provides that a person may discharge a projectile from a firearm if they have any other permission to do so under District or federal law.

Subsection (b) specifies the penalties for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (c) provides that a conviction for endangerment with a firearm will merge with a conviction for a crime that already accounts the use or display of a firearm in the offense definition or penalty enhancement.[14] Subsection (c) does not apply, however, to crimes involving only the possession or attempted possession of a firearm, imitation firearm, or dangerous weapon.

Subsection (d) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised endangerment with a firearm statute is a new offense and, in that sense, all aspects of the revised statute are substantive changes to District law. Compared to current District crimes, the revised endangerment with a firearm statute clearly changes current District law in two main ways.*

First, the revised statute accounts for the distinctly terrifying nature of public shootings that are not otherwise part of a crime against property or persons. The current D.C. Code provides significant liability for possessing or carrying a weapon illegally, irresponsibly, or during a crime but very little additional liability for firing a gun. Except for murders,[15] under the current D.C. Code there is just one way to prosecute a shooting that does not amount to an assault or cause property damage and goes beyond a

[10] "Open to the general public" is defined to mean no payment, membership, affiliation, appointment, or special permission is required to enter.

[11] "Public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat.

[12] For example, a person commits an offense by shooting out of a private moving motor vehicle into a public way. A person also commits an offense by shooting from a public sidewalk into a private building.

[13] For example, a person commits an offense by shooting from one private building across an alleyway into another private building.

[14] *See also* RCC § 22E-214. The fact that subsection (c) requires merger in specified circumstances is not intended to preclude the court from merging endangerment with a firearm with another conviction in other circumstances under RCC § 22E-214.

[15] This statute deters gun owners from maintaining a weapon irresponsibly, in a manner that could prove dangerous at some later time. *See also* RCC §§ 7-2507.02 (Unlawful Storage of a Firearm); 7-2509.06 (Carrying a Pistol in an Unlawful Manner); D.C. Code 7-2509.06 (Carrying a pistol while impaired).

possession or carrying charge.[16] Namely, the D.C. Code punishes "unlawful discharge of a firearm" as a misdemeanor offense.[17] However, this statute is regulatory in nature and punishes negligently mishandling a firearm. Consequently, the current D.C. Code has no crime that distinctly addresses intentional discharge of a firearm where only emotional harm to individuals or the community results. In contrast, the RCC punishes knowingly discharging a firearm as a distinct crime, even where there is no intent to harm a person or property. This change eliminates a gap in liability and improves the logical organization of the revised statutes.

Second, the RCC logically reorganizes gun offenses, drawing meaningful grading and penalty distinctions based on how a firearm is possessed, carried, or used. Under the current D.C. Code, severe penalties are available for possession or carrying a firearm, without differentiation as to whether that firearm was used or displayed in any manner. A person who is charged with a crime of unlawfully possessing a firearm (actually or constructively) under the current D.C. Code may be subject to longer incarceration than a person who is charged with a crime of unlawfully carrying, brandishing, shooting, assaulting another with, or injuring another with a firearm.[18] In contrast, the RCC generally organizes and penalizes firearm crimes progressively more seriously, from mere possessory crimes, to carrying offenses that may endanger others, to actual use or display of a firearm during a crime that harms persons or property. This graduated approach is consistent with the CCRC's public opinion research,[19] which indicates that mere possession of a firearm during an offense is less relevant to the seriousness of the offense than use or display of the firearm and the resulting harm to complainants. This change improves the logical organization and proportionality of the revised statutes.

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[16] Consider, for example, a drug turf war in which one seller drives through the contested block, shooting in the air, to send a message that no other seller may do business there. Consider also a person who is shooting in the air outside of an embassy to make a political statement. *See, e.g.*, Peter Hermann and Spencer S. Hsu, *Man ordered detained after police say he fired 32 rounds at Cuban Embassy*, WASHINGTON POST (May 4, 2020).

[17] D.C. Code § 22-4503.01; RCC § 22E-4106.

[18] *Compare* D.C. Code § 7-2502.01 (1 year or 5 years for possession of an unregistered firearm) *with* D.C. Code § 22-4503.01 (1 year for unlawful discharge). *Compare* D.C. Code § 22-4503(b)(1) (10 years or 15 years for unlawful possession) *with* D.C. Code §§ 22-4504(a)(2) (10 years for carrying), 22-402 (10 years for assault with a dangerous weapon), and 22-404.01 (10 years for assault causing serious bodily injury).

[19] Respondents agreed that causing even a minor injury by using a firearm should be punished more severely than causing a more serious injury without one. *See* Advisory Group Memo #27 Appendix A - Survey Responses at 23 (showing the presence of a gun significantly increased the perceived severity, but whether the gun is used or displayed is critical in impressions of severity). For instance, shooting someone with a gun and causing an injury requiring immediate medical treatment was perceived as being two severity levels higher (8.2) than the Level 6 milestone offense of causing the same type of injury without a gun. Similarly, threatening to kill someone face-to-face while displaying a gun was ranked as nearly two severity levels higher (7.6) than making the same threat while unarmed (5.6). In contrast, secretly carrying, but not displaying or shooting a gun, in the process of an attempted robbery was ranked as only somewhat more serious than gun-free attempted robbery (5.0 versus 4.3).

RCC § 22E-4201. Disorderly Conduct.

Explanatory Note. *This section establishes the disorderly conduct offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that disrupts or potentially disrupts a public place and is not protected by the First Amendment or District law. The RCC disorderly conduct statute addresses conduct that: causes a person reasonably to believe a specified criminal harm is likely to occur to them; directs someone present to engage in a specified criminal harm where the harm is likely to occur; directs abusive speech to a person that is likely to provoke a specified retaliatory criminal harm; or involves continued fighting after receiving a law enforcement officer's order to cease. The disorderly conduct statute uniquely addresses inchoate conduct that may not constitute an attempted criminal threat, menace, assault, destruction of property, or theft. The revised offense replaces subsection (a) and, in concert with other provisions of the RCC,[1] subsection (g) of D.C. Code § 22-1321, the District's disorderly conduct statute.[2] The revised offense also replaces the District's affrays statute in D.C. Code § 22-1301[3] and the prosecution provision in D.C. Code § 22-1809.*

Paragraph (a)(1) provides that the accused's conduct must occur in a place that is either open to the general public or the communal area of multi-unit housing. The phrase "open to the general public" is defined to mean no payment, membership, affiliation, appointment, or special permission is required to enter.[4] "In fact," a defined term,[5] is used to indicate that there is no culpable mental state requirement as to whether the location is open to the general public or a communal area of multi-unit housing.

Paragraph (a)(2) specifies four basic types of disorderly conduct: causing fear of crime, inciting crime, provoking crime, and public fighting.

Subparagraph (a)(2)(A) punishes reckless conduct other than speech that causes another person to fear that they will sustain a criminal[6] bodily injury, taking of property, or damage to property. The accused's conduct must actually cause another person to reasonably believe that one of those dangers is likely to occur immediately and that he or

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[1] *See* commentary regarding theft from a person RCC § 22E-2101(c)(4) and RCC § 22E-1205 offensive physical contact.

[2] Other subsections of D.C. Code § 22-1321, concerning nuisance and stealthily looking into a dwelling where there is an expectation of privacy, are addressed in different sections of the RCC. *See* RCC §§ 22E-4202 (Public Nuisance) and 22E-4205 (Breach of Home Privacy).

[3] D.C. Code § 22-1301 ("Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[4] RCC § 22E-701. For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. Similarly, a restaurant and bar may be open to the general public during the day but impose an age limit and require identification late at night. Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public" for the purposes of this statute.

[5] RCC § 22E-207.

[6] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

she will be the victim.[7] "Speech" is a defined term and means oral or written language, symbols, or gestures.[8] "Bodily injury" is a defined term and means physical pain, illness, or any impairment of physical condition.[9] "Property" is a defined term and means anything of value. The affected person must be placed in fear of a criminal harm.[10] The affected person must fear that the criminal harm will occur immediately, not in the future. And, the affected person's fear must be objectively reasonable.[11]

Subparagraph (a)(2)(A) also specifies the culpable mental state required is recklessness, a term defined in RCC § 22E-206. As applied here, the accused must be aware that there was a substantial risk that the conduct will cause another person to be afraid of suffering a criminal harm.[12] The conduct must also be clearly blameworthy under the circumstances. A person does not commit disorderly conduct when he or she exercises reasonable caution or where he or she deviates only slightly from the ordinary standard of care.[13]

Subparagraph (a)(2)(B) punishes publicly inciting others to violence consisting of a criminal harm involving bodily injury, taking of property, or damage to property. It also must be proven that the harm is likely[14] to occur. This provision requires two culpable mental states. First, the person must act purposely, a defined term,[15] which here means the person must consciously desire to cause another person to immediately engage in criminal harm. The person's statement must be a specific directive to act now, not merely general encouragement of violence against a particular group or in the name of a particular cause. Second, the person must be reckless as to the fact that the solicited harm is likely to occur. "Recklessness" is defined in the revised code,[16] and here means that the person must be aware of a substantial risk that the listener will follow the command and the person's conduct must be clearly blameworthy under the circumstances.

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[7] "We hold that § 22-1321 (a)(1) requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person." *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).
[8] RCC § 22E-701.
[9] RCC § 22E-701.
[10] Consider, for example, a person who becomes afraid that a repossession officer will tow away their car, due to delinquent payments. That harm (alone) is not a criminal taking of property and, without more, the officer's conduct is not disorderly.
[11] For example, a fear of theft or violence based on prejudicial beliefs about race or sex is not objectively reasonable.
[12] For example, a person who enters an area of a park that, on inspection, appears to be vacant. She then swings a stick wildly while screaming obscenities, scaring someone who walks into the area, thinking they are being attacked. She has not committed disorderly conduct because she was not aware of a substantial risk that any person could see her or hear her.
[13] For example, a person playing kickball in a public park who chases the ball near a group of uninvolved bystanders, alarming them. However agile or clumsy the athlete might be, it is unlikely that her movements will rise to the level of disorderly conduct because a person of ordinary caution would likely chase after the ball in the same manner, under the same circumstances.
[14] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.
[15] RCC § 22E-206.
[16] RCC § 22E-206.

Subparagraph (a)(2)(C) punishes directing abusive speech[17] to someone in a public place, which are likely[18] to provoke immediate, violent retaliation. To commit disorderly conduct by abusive speech, a person must act with the purpose of directing the speech to another person.[19] "Purposely" is a defined term[20] and here means that the speaker must consciously desire that the manner of the speech be seriously upsetting the listener.[21] The term "speech" is defined in RCC § 22E-701 to mean oral or written language, symbols,[22] or gestures.[23] The person must also be reckless as to the fact that the speech is likely to provoke a violent response. "Recklessness" is also defined in the revised code,[24] and here means that the person must be aware of a substantial risk that the listener will retaliate[25] and the person's conduct must be clearly blameworthy under the circumstances.

Subparagraph (a)(2)(D) prohibits public fighting after receiving a law enforcement officer order to stop. The term "fighting" is not statutorily defined, and is not restricted to the infliction of bodily injury required for assault offenses[26] or offensive touching as is required for offensive physical contact.[27] Unlike certain degrees of assault and offensive physical contact, effective consent is not an available defense to public fighting that violates subparagraph (a)(2)(D).[28] The government must prove that the accused received a law enforcement order to stop fighting and that the accused continued or resumed fighting in disregard of that directive. "Knowingly" is a defined term[29] and here means the person must be practically certain that he or she received an order from

[17] "Abusive speech" has the same meaning as "fighting words:" "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942).

[18] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

[19] The intended recipient of the speech may be a particular individual or a large and amorphous group of people near enough to see or hear the speaker.

[20] RCC § 22E-206.

[21] No particular word or image categorically qualifies as abusive speech. A word's connotation and denotation may change over time. The offensiveness of a word may depend on the identity of speaker, the audience, or the sensitivity of the moment.

[22] For example, a sign with a swastika, a car decal bearing a Redskins logo, a red hat with the initials "MAGA," or a noose as a prop, could be considered an abusive symbol, depending on the time, place, and manner of their use.

[23] Some gestures (e.g., a raised middle finger) are widely understood to carry a particular verbal meaning. Whether a gesture is abusive and whether provocation is likely depends on the time, place, and manner in which the gesture is used, not the content of the verbal translation alone.

[24] RCC § 22E-206.

[25] Whether a listener is likely to be provoked to immediate, retaliatory criminal harm is a fact-sensitive inquiry.

[26] RCC § 22E-1202.

[27] RCC § 22E-1205.

[28] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally); *see also* D.C. Code § 22-1301 (criminalizing affrays).

[29] RCC § 22E-206.

someone he or she is practically certain is a law enforcement officer.[30] "Law enforcement officer" is a defined term.[31] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order to cease. A person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop fighting.[32] Where a person is uncertain as to whether they can safely comply with the order, a justification defense also may apply.

Subsection (b) establishes two exclusions from liability for the revised disorderly conduct offense. Paragraphs (b)(1) and (b)(2) categorically exclude as a basis for disorderly conduct liability behaviors that frighten, offend, or provoke a law enforcement officer in the course of his or her official duties.

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

Subsection (d) provides the penalty for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised disorderly conduct statute clearly changes current District law[33] in three main ways.*

First, the revised statute specifies that conduct that frightens, offends, or provokes a law enforcement officer can never be the basis for disorderly conduct.[34] Subsection (a) of the current disorderly conduct statute punishes three basic types of misconduct in public: causing fear of crime,[35] inciting crime,[36] and provoking crime.[37] Only the third type of conduct, criminalized by paragraph (a)(3) of the statute, explicitly excludes from liability language or gestures directed at a law enforcement officer while acting in his or her official capacity. Conduct criminalized under subsections (a)(1) and (a)(2) of the current statute does not provide an exception for conduct directed at law enforcement officers.[38] In contrast, the RCC codifies an exception to liability for engaging in conduct

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[30] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit disorderly conduct by public fighting.

[31] RCC § 22E-701.

[32] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[33] The current disorderly conduct statute, D.C. Code § 22-1321, was revised in 2011 to significantly change the scope and language.

[34] RCC §§ 22E-4201(b)(2) and (b)(3).

[35] D.C. Code §22-1321(a)(1).

[36] D.C. Code §22-1321(a)(2).

[37] D.C. Code §22-1321(a)(3).

[38] To the extent that the current subsections (a)(1) and (a)(2) of the disorderly conduct statute, which do not explicitly exclude behavior directed at a law enforcement officer, include conduct also addressed by subsection (a)(3), the three provisions are in apparent conflict. For example, consider an actor, with a group of like-minded companions nearby, shouts racial slurs and gestures with his middle finger at an on-

other than speech that causes a law enforcement officer to reasonably believe that he or she is likely to suffer an immediate criminal harm involving bodily injury, taking of property, or damage to property. Unlike other citizens, law enforcement officers regularly confront alarming behavior, are specially trained to resist provocation and determine what behavior is criminal or an attempted crime, and have the power to arrest where they reasonably believe a crime or attempted crime is occurring. Consequently, it is not necessary to criminalize conduct that falls short of such an attempted crime, and that is merely alarming to the law enforcement officer. On the other hand, when a person's conduct indicates that they are about to assault a law enforcement officer or harm the officer's property, a more serious punishment than disorderly conduct is warranted. This revision may better reflect recent Council determinations about the proper scope of the assault on a police officer statute,[39] and the Council's rationale for the current disorderly statute's exception[40] for fighting words directed at a law enforcement officer. This change improves the clarity, consistency, and proportionality of the offense.

Second, the revised disorderly conduct statute limits liability for consensual public fighting to continuing or resuming such conduct after a law enforcement order to cease. The current D.C. Code codifies a penalty for committing an "affray,"[41] however, no elements of the offense are codified.[42] There are no published cases where an individual has been convicted under the codified 'affray' statute in the District, however, a District court opinion from the mid-1800s references the fact that a common law affray occurs when two persons fight in public.[43] Dicta in District assault case law has stated that a public assault is punishable to the extent that it breaches public peace and order,[44] perhaps indirectly referring to the crime of affrays. In contrast, the revised disorderly conduct statute specifically punishes participating in public fighting only after a law

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duty law enforcement officer. Depending on the facts, such conduct may satisfy the objective elements of subsection (a)(1) (causing the officer to be in reasonable fear he is about to be assaulted), subsection (a)(2) (provoking others to attack the officer), and (a)(3) (provoking immediate physical retaliation, although only subsection (a)(3) says that it cannot be applied to an on-duty officer).

[39] *See generally* Report on Bill 21-360, "Neighborhood Engagement Achieves Results Act of 2015," Council of the District of Columbia Committee on Public Safety and the Judiciary (January 28, 2016).

[40] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8 ("[T]he crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen." And, "it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else.").

[41] D.C. Code § 22-1301 provides, "Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

[42] The offense is an example of a "common law" offense whose elements are defined wholly by courts in past case opinions rather than in legislative acts.

[43] *Hedgpeth v. Rahim*, 213 F. Supp. 3d 211, 223 (D.D.C. 2016) (citing *United States v. Herbert*, 26 F. Cas. 287, 289, F. Cas. No. 15354a, 2 Hay. & Haz. 210 (D.C. Crim. Ct. 1856) ("In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow.")

[44] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally).

enforcement officer has ordered the fight to end. This change eliminates liability for mutually-consensual horseplay or low-level fighting that does not involve significant bodily injury. The RCC disorderly conduct statute, under subparagraph (a)(2)(A), also provides liability for public fighting whenever a person recklessly causes another to reasonably believe that there is likely to be immediate and unlawful bodily injury—covering public fighting that involves infliction of significant bodily injury and non-consensual public fighting.[45] This change clarifies and improves the clarity, consistency, and proportionality of District laws, and reduces unnecessary overlap.

Third, the revised statute repeals D.C. Code § 22-1809, which provides that a person who fails to pay a fine for a disorderly conduct offense shall be committed to a workhouse for up to six months. This change improves the consistency and proportionality of the revised statutes and eliminates an archaic provision in the D.C. Code.

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

First, the revised statute specifies a culpable mental state for all offense elements other than the location, which is specified to be a matter of strict liability. The current disorderly conduct statute[46] begins with a prefatory clause "In any place open to the general public, and in the communal areas of multi-unit housing," but does not specify a culpable mental state for that circumstance. District case law does not address the matter. In paragraph (a)(1), the current statute specifies a mental state of "intentionally or recklessly." However, the current statute does not define "recklessly" and does not make clear whether a person must be reckless as to every result and circumstance in paragraph in (a)(1), or the following paragraphs (a)(2) and (3), which do not state any culpable mental states of their own. Again, District case law to date does not address culpable mental states for these provisions. The RCC resolves these ambiguities by clearly specifying the culpable mental states for all elements of the revised offense as being either strict liability (through use of the phrase "in fact") as to the location, or recklessly, purposely, or knowingly as to all other offense elements. These culpable mental state terms are defined in RCC § 22E-206.[47] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[48] However, recklessness is required for assault liability in RCC § 22E-1202, which criminalizes conduct closely related to

[45] Some instances of mutual combat are lawful and others are not. RCC § 22E-1202 explains that a person may not consent to significant bodily injury or serious bodily injury or to use of a firearm. "Significant bodily injury" and "serious bodily injury" are defined in RCC § 22E-701. "Firearm" is defined in D.C. Code § 22-4501(2A).

[46] D.C. Code § 22-1321.

[47] The revised disorderly conduct statute makes clear that the actor must consciously disregard a substantial risk that her conduct will lead an onlooker to reasonably believe one of three harms is likely to immediately occur. The RCC also makes clear that actor must be clearly blameworthy under the circumstances. Finally, the RCC makes clear that a person is strictly liable with respect to whether she is located in a place that is open to the general public or is the communal area of multi-unit housing.

[48] *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.)).

paragraph (a)(2)(A) in the revise disorderly conduct offense. The heightened culpable mental state of purposely in paragraphs (a)(2)(B)-(a)(2)(C) distinguishes the use of speech which the actor does not know, or knows but does not wish, to be construed as provoking violence. This change improves the clarity, completeness, and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[49]

Second, the revised code defines the phrase "open to the general public."[50] The current disorderly conduct statute uses this phrase but does not define it, and there are no District of Columbia Court of Appeals ("DCCA") published opinions construing the phrase. The legislative intent behind the phrase is unclear,[51] and case law does not directly address its meaning.[52] To resolve any ambiguity, the RCC states that "open to the general public" means no payment or permission is required to enter. The revised definition effectively excludes public conveyances, private event arenas, schools, and detention facilities from the purview of the disorderly conduct statute. What amounts to disorderly conduct in any of these locations may result in other criminal liability under current law and the RCC,[53] giving law enforcement officers authority to immediately intervene and arrest when necessary to restore public order.[54] This change clarifies and

[49] Were a person strictly liable for conduct that causes a breach of peace per D.C. Code § 22-1321(a)(2) and (a)(3), even mistakes or accidents by a defendant could be the basis of criminal liability for disorderly conduct. For example, a person who reasonably believes themselves to be alone in a park and recites provocative song lyrics containing "fighting words" may be guilty of disorderly conduct.

[50] RCC § 22E-701.

[51] In an earlier draft of the disorderly conduct legislation, before the Council formed the Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, Bill 18-151 defined "public" as "affecting or likely to affect persons in a place to which the public has access; including but not limited to highways, streets, sidewalks, transportation facilities, schools, places of business or amusement."

[52] The District of Columbia Court of Appeals has not addressed the meaning of the phrase "open to the general public," however, it has required that disorderly conduct occur in a location and under circumstances in which a breach of public peace and tranquility could occur. *See Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[53] Current law separately punishes conduct that is disruptive to riders on public conveyances and authorizes the Washington Metropolitan Area Transit Authority ("WMATA") to refuse service to any rider who violates its rules of conduct. *See* D.C. Code §§ 22-1321(c), 35-252, 35-251, and 35-216. Additionally, any person who remains on a public conveyance without WMATA's effective consent is guilty of trespass and subject to arrest on that basis. *See generally* RCC § 22E-2601. Similarly, a private arena may eject any patron from their premises at any time and failure to leave as directed amounts to a trespass. The Central Detention Facility ("D.C. Jail") and the Central Treatment Facility ("CTF") are empowered to quell any threat of public alarm or breach of peace by immediately separating inmates, placing inmates in protective custody, and placing inmates in disciplinary detention. *See* D.C. Department of Corrections Inmate Handbook 2015-2016. Public and private schools also have authority to remove and suspend rulebreakers. *See* Tex. Penal Code § 42.01 (providing that its disorderly conduct statute categorically "do[es] not apply to a person who, at the time the person engaged in conduct prohibited under the applicable subdivision, was a student younger than 12 years of age, and the prohibited conduct occurred at a public school campus during regular school hours.").

[54] "Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or

improves the consistency and proportionality of the revised statute and reduces unnecessary overlap.

Third, the revised statute, in concert with other RCC statutes, eliminates separate, distinct liability for jostling, crowding, and placing a hand near someone's purse or wallet. Subsection (g) of the current disorderly conduct statute provides, "It is unlawful, under circumstances whereby a breach of the peace may be occasioned, to interfere with any person in any public place by jostling against the person, unnecessarily crowding the person, or placing a hand in the proximity of the person's handbag, pocketbook, or wallet." DCCA case law interpreting a prior version of the disorderly conduct statute stated that "jostling against" "contemplates rough physical touching of one individual by another."[55] However, in the RCC, jostling, crowding, and reaching toward a wallet that actually places a person in fear of an immediate unlawful taking[56] is criminalized by the disorderly conduct statute subparagraph (a)(2)(A). Other RCC offenses such as offensive physical contact[57] and attempted theft from a person[58] also criminalize aspects of the current disorderly statute's jostling provision. It is unclear whether the current jostling provision in the D.C. Code covers any further conduct. [59] This change clarifies and reduces unnecessary overlap in the revised offenses.

Fourth, the revised statute more precisely defines committing disorderly conduct by means of incitement to violence. Paragraph (a)(2) of the current disorderly conduct statute explicitly provides that it is unlawful to, "Incite or provoke violence where there is a likelihood that such violence will ensue." [60] The term "incite" is not defined by in the statute, and case law has not interpreted the term. Legislative history provides no indication of the term's intended meaning.[61] "Incites," however, is also predicate

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otherwise causing a disturbance." Committee on Public Safety and the Judiciary Report on Bill 18-425 at Page 3.

[55] *Matter of A. B.*, 395 A.2d 59, 62 (D.C. 1978).

[56] The revised statute may be narrower than the current jostling provision in D.C. Code § 22-1321(g). Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," the DCCA recently explained that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 9).

[57] RCC § 22E-1205;

[58] RCC § 22E-2101; RCC § 22E-301.

[59] Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," legislative history cited in dicta by the DCCA suggests that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 9).

[60] D.C. Code § 22-1321(a)(2).

[61] Legislative adoption of the "incite" language in subsection (a)(2) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE) and included language identical to the current subsection (a)(2). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report") at Page 16. The CCE recommendations did not provide an explanation for the meaning or significance of the "incite" language in their recommendation beyond a general statement that that and other language was a reformulation of the "catchall" provision in the disorderly

conduct in the current D.C. Code rioting statute.[62] To resolve ambiguities about the scope and meaning of disorderly conduct by incitement, subparagraph (a)(2)(B) of the revised statute punishes a person who "[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur." Similar language appears in the provision governing liability for criminal solicitation in the general part of the revised code.[63] The terms "bodily injury," "property," and "reckless" each have standardized definitions in RCC §§ 22E-701 and 22E-206. This change improves the clarity and consistency of the revised statute.

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

First, the revised statute replaces the words "reasonable fear" with "reasonably believe" that that there will be immediate and unlawful harm. The current disorderly conduct statute states that it is unlawful for a person to "cause another person to be in reasonable fear" of specified harms that generally appear to entail immediate acts.[64] The statute does not define the term "fear." A recent DCCA opinion held that the statute "requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person."[65] The revised disorderly conduct statute specifies that the observer must reasonably believe that they will suffer an immediate and unlawful[66] harm. This word choice clarifies that it is the observer's reasoned judgment, not their emotion that matters as to liability. It also clarifies, through the requirement of immediacy, that the harm must be imminent.

Second, the revised statute explicitly distinguishes between speech and non-speech conduct, consistent with standard definitions that apply throughout the RCC. Current D.C. Code § 22-1321(a) uses the verb "act" in paragraph (1), "[i]ncite or provoke" in paragraph (2), and "[d]irect abusive or offensive language" in paragraph (3). The D.C. Code does not define the word "act" in the disorderly conduct statute or provide a general definition. District case law has not addressed the issue. The RCC uses standardized definitions of "act"[67] and "speech,"[68] which provide that an act includes verbal speech, and that speech includes certain non-verbal conduct. Consistent with these definitions, and to clarify that the intended meaning of paragraph (a)(1) of the current disorderly statute is intended to not include verbal speech, the revised statute uses different terminology. The revised statute replaces the word "act" with the phrase

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conduct statute prior to 2011, which referred to "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." CCE Report at 9.

[62] D.C. Code § 22-1322(c).

[63] RCC § 22E-302.

[64] D.C. Code § 22-1321(a)(1).

[65] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).

[66] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[67] RCC § 22E-202 ("'Act' means a bodily movement.").

[68] RCC § 22E-701 ("'Speech' means oral or written language, symbols, or gestures.").

"conduct other than speech"[69] in subparagraph (a)(2)(A) and uses the defined term "speech" in subparagraph (a)(2)(C).

Third, the revised statute clarifies that conduct that raises concerns about self-injury,[70] other than provoking an injury to oneself by abusive language, is not disorderly conduct. The current disorderly conduct statute states that it is unlawful for a person to "intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that *a person* or property in *a person*'s immediate possession is likely to be harmed or taken" (emphasis added).[71] The DCCA recently interpreted this language as requiring that the conduct cause fear of harm to the observer's own person.[72] The RCC accordingly clarifies that conduct raising concerns solely about self-injury, other than provoking an injury to oneself by abusive language, is not a basis for disorderly conduct liability.[73]

Fourth, the revised statute replaces the phrase "abusive or offensive" with the term "abusive," which has the same general meaning.[74]

[69] RCC § 22E-4201(a)(2)(A).
[70] Examples include a person angrily kicking the fender of their broken-down car which is parked on the street, and a skate-boarder doing jaw-dropping tricks at a public park.
[71] D.C. Code §22-1321(a)(1).
[72] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).
[73] There is separate authority for an officer to detain and transport for emergency medical care any person believed to be mentally ill and likely to injure herself. *See* D.C. Code § 21-521.
[74] *See* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/abusive (defining "abusive" as "harsh and insulting").

RCC § 22E-4202. Public Nuisance.

Explanatory Note. *This section establishes the public nuisance offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that deliberately disturbs others and is not protected by the First Amendment or District law relating to freedom of assembly. The revised offense replaces subsections (b), (c), (c-1), (d), and (e) of D.C. Code § 22-1321 (Disorderly Conduct).*[1]

Subsection (a) requires that there be a significant interruption to others' activities.[2] This interruption must be committed purposely, a term defined in RCC § 22E-206. The accused must consciously desire that his or her conduct cause a significant interruption of specified activity.[3] Determination of whether a particular interruption is "significant" is an objective, fact-sensitive inquiry that, in part, must take into account the time, place, and manner of the conduct, as well as account public norms about what kinds of behavior should reasonably be expected and tolerated.[4]

Paragraphs (a)(1)-(4) list four specific types of nuisance that are prohibited. Paragraph (a)(1) replaces D.C. Code § 22-1321(c-1) and prohibits interference with the orderly conduct of a District or federal public body's meeting. The culpable mental state of "purposely" applies to the fact that the event is a public body meeting, requiring that it be the actor's conscious object to interrupt such an event. The terms "public body" and "meeting" are defined in the District's Open Meeting Act,[5] which includes hearings of record and excludes chance or social meetings of councilmembers.[6]

Paragraph (a)(2) replaces D.C. Code § 22-1321(d) and prohibits causing a significant interruption of any person's objectively reasonable quiet enjoyment of their dwelling between 10:00 p.m. and 7:00 a.m., and continuing or resuming such conduct after receiving oral or written notice to stop. "Dwelling" is a defined term[7] and means a structure that is either designed or actually used for lodging or residing overnight,

[1] Subsections (a) and (g) of D.C. Code § 22-1321 are replaced wholly or in part by RCC § 22E-4201 (Disorderly Conduct). Subsection (f) of D.C. Code § 22-1321 is replaced by RCC § 22E-4205.

[2] As the Council observed during its recent rewrite of the disorderly conduct statute, "Freedom of speech permits loud and annoying language, which some people might find 'threatening' or 'abusive,' so more is required. The speech should have *both* the 'intent and effect' of impeding or disrupting a gathering. In this regard, 'disturbing' is too subjective." *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.

[3] Persisting in disruptive conduct after receiving a law enforcement officer's warning may be evidence of that person's purposeful conduct.

[4] For example, loud church bells at 12:00 p.m. may be reasonable, whereas knocking on a private door at 1:00 a.m. may not be.

[5] D.C. Code § 2-574.

[6] Legislative adoption of the "public building" language in subsection (c-1) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report"). While D.C. Code § 22-1321 does not define a "public building," the CCE recommendations encouraged the Council to enact a provision that forbids disruption of the D.C. Council or other public meetings, comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress. CCE Report at Page 11.

[7] RCC § 22E-701.

including, in multi-unit buildings, communal areas secured from the general public. An interruption of reasonable quiet enjoyment means a significant interference with the in-home activities of a person of ordinary sensitivity.[8] The intrusion may be a noise, smell, light, disturbing image or otherwise.[9] The notice to stop may be given by any person and is not limited to notice from a law enforcement officer.[10] The culpable mental state of "purposely" applies to the fact that the effect of the conduct is a disturbance of a person's quiet enjoyment of their residence from 10:00 p.m. to 7:00 a.m.[11] The "purposely" culpable mental state requirement also applies to the fact that the accused continued or resumed the conduct after previously receiving notice, directly or indirectly, to cease the conduct. The person must be afforded a reasonable opportunity to comply with the notice to cease.[12] Where a person is uncertain as to whether they can safely comply with the notice, a justification defense may apply.

Paragraph (a)(3) replaces D.C. Code § 22-1321(c) and prohibits interruption of any person's lawful use of a public conveyance. RCC § 22E-701 defines a public conveyance as any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat. Such interruption may consist of diverting a passenger's pathway or the pathway of the vehicle. The culpable mental state of "purposely" applies to the fact that the actor is interrupting another's lawful use of a public conveyance. Conduct intended to generally disrupt traffic in which a public conveyance operates is insufficient,[13] rather the conscious object of the actor must be to interrupt the use of the complainant's particular public conveyance.

Paragraph (a)(4) replaces D.C. Code § 22-1321(b) and prohibits the disruption of a lawful religious service, funeral.[14] The culpable mental state of "purposely" applies to

[8] What is reasonable, depends on the time, place, and manner of the activity. For example, at midnight on New Year's Day it may be reasonable to blare noisemakers for several seconds, but unreasonable to do so for several minutes.

[9] Intrusions into the enjoyment of one's home may be appropriately regulated without offending the First Amendment, under the captive audience doctrine. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

[10] For example, a private citizen may give notice by calling a noisy neighbor and asking them to, "Keep it down."

[11] Loud noise that recklessly or negligently disturbs others, or occurs at different hours or in different locations, may be punished under 20 DCMR § 2701.

[12] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[13] Such conduct may be punished as Blocking a Public Way, under RCC § 22E-4203.

[14] In the current D.C. Code disorderly conduct statute, subsection (b) prohibits impeding "a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding." Legislative history indicates this provision was intended to broaden an 1892 law titled "Disturbing Religious Congregation" beyond churches to include other worship services and funerals. *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.

the fact that the event is a lawful religious service, funeral, or wedding, requiring that it be the actor's conscious object to interrupt such an event. The event must occur in a location that is "open to the general public," a defined term that excludes locations that require payment or special permission to enter.[15] The word "lawful" requires that the gathering or event not violate another District or federal law.[16] The term "in fact" specifies that the accused is strictly liable[17] with respect to whether the event lawful and with respect to whether the event is in a public place. The accused's conduct must have the intent and effect of interrupting the event, not merely upsetting participants and onlookers.[18]

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

Subsection (c) provides the penalty for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised public nuisance statute clearly changes current District law in three main ways.*

First, the revised public nuisance statute potentially includes any type of offensive conduct, not just noise, that disturbs a person in his or her residence at night. The D.C. Code disorderly conduct statute currently makes it unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.[19] In contrast, the revised statute includes all nuisances that cause a significant interruption to any person's reasonable, quiet enjoyment of their dwelling at night, including noises, smells, and bright lights. This change clarifies the statute and eliminates an unnecessary gap in the law.

Second, the revised statute limits the residential intrusion provision to interactions that follow a notice to cease the interruption. The D.C. Code disorderly conduct statute currently does not limit liability for disturbing noises to situations where the accused has received notice to cease the disturbance, and it appears that a single loud noise "that is likely to annoy" may constitute a violation under the current statute. There is no case law on point. By contrast, the revised statute requires proof of prior notice to the actor to stop the conduct, followed by continuance or resumption of the conduct. Notice to cease makes future disturbances into an act of ignoring the victim's directive to be left alone and invading the victim's privacy. Having prior notice does not necessarily mean that continuance or resumption of the disruption is done with the purpose of disrupting the complainant, but it will typically show that the conduct is at least knowingly done with that effect. The revised statute more narrowly criminalizes behavior that is calculated to

[15] RCC § 22E-701.
[16] Consider, for example, a wedding that is blasting music in violation of the District's noise control regulations under 20 DCMR § 2701. A neighbor who disrupts the event by shouting, "Hey, keep it down!" does not commit a public nuisance offense.
[17] RCC § 22E-207.
[18] *See Snyder v. Phelps*, 562 U.S. 443, 445 (2011) (upholding First Amendment protections where there was no indication that the picketing interfered with the funeral service itself.)
[19] D.C. Code § 22-1321(d).

torment the complainant without reaching other legitimate or protected conduct.[20] This change improves the proportionality and, perhaps, the constitutionality of the revised statute.

Third, the revised public nuisance statute eliminates urinating and defecating in a public place as a distinct basis of criminal liability. Current District statutory law explicitly punishes public urination or defecation as a form of disorderly conduct[21] and as defacing property.[22] Legislative history indicates that when the Council revised the disorderly conduct statute in 2011, it retained a provision separately criminalizing public urination at subsection (e) only because the executive did not appear to have an adequate process for civil infraction enforcement.[23] In contrast, the RCC does not specifically criminalize urination or defecation. In the RCC there may still be liability for such conduct insofar as it causes property damage,[24] causes another person to reasonably believe that the conduct will cause property damage,[25] or involves publicly exposing genitalia.[26] Persons experiencing homelessness and mental illness may be disproportionately affected by criminal sanctions for defecation and urination,[27] and other, non-criminal remedies may address the problem as, or more, effectively. This change improves the proportionality of the revised offense.

Beyond these three changes to current District law, three additional aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies "purposely" as the required culpable mental state as to causing a significant interruption of lawful activity. Three of the four relevant subsections of the current disorderly conduct statute, D.C. Code § 22-1321, that are replaced by the revised public nuisance statute require that the accused act "with the intent and effect of impeding or disrupting" lawful activity.[28] However, the meaning of acting "with intent" is not defined by the statute. The fourth relevant subsection of the

[20] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977).

[21] D.C. Code § 22-1321(e).

[22] D.C. Code § 22-3312.01 (making it unlawful to "place filth or excrement of any kind…upon…[a]ny structure of any kind or any movable property"); *see Scott v. United States*, 878 A.2d 486 (D.C. 2005).

[23] See Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 9 (stating, "The committee agrees that public urination would be better handled as a civil infraction punishable by a ticket and a fine.")

[24] RCC § 22E-2503(c)(5) would punish public urination and defecation as fourth degree criminal damage to property to the extent it causes a permanent, observable or measurable diminution in value to public or private property—however urination and defecation are not specifically referenced in the statute.

[25] *See* RCC § 22E-4201, Disorderly Conduct.

[26] *See* RCC § 22E-4206, Indecent Exposure.

[27] In 2011, Metropolitan Police Department statistics indicated that a large number of the 300-400 persons arrested for public urination each year were not homeless, however, a concern remains that persons experiencing homeslessness are impacted disproportionately. *See* CCE Report at 12.

[28] D.C. Code §§ 22-1321(b), concerning worshippers; subsection (c), concerning public conveyances; and subsection (c-1), concerning public buildings.

current disorderly conduct statute, D.C. Code § 22-1321, that is replaced by the revised public nuisance statute does not specify any culpable mental state.[29] There is no relevant case law on the culpable mental states for any of these provisions.[30] To resolve this ambiguity, the RCC public nuisance offense requires proof that the defendant acted purposely, a defined term in the RCC that requires that it be the conscious object of an actor to cause a significant interruption.[31] A purposeful culpable mental state distinguishes interruptions to lawful activities that are deliberate and in committed in bad faith, from other common interruptions of such activities. This change clarifies and improves the consistency and proportionality of the revised statute.

Second, the revised statute replaces the phrase "lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding"[32] with "lawful religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public." The current disorderly conduct statute does not define the term "public gathering," and there is no case law on point. The legislative history of D.C. Code § 22-1321(b) states that the Council intended to broaden an 1892 law titled "Disturbing Religious Congregation" so that it is "applicable to any religious service or proceeding, or any similar gathering engaged in worship, including a funeral."[33] The legislative history does not provide any examples of gatherings other than worship services that it intended to include. To resolve ambiguity about the scope of a "lawful public gathering," the revised statute includes only religious services, and funerals and weddings—which may be religious or secular—provided that they occur in a location open to the public.[34] A broad construction of a "lawful public gathering" would potentially reach any gathering of people[35] and may be vulnerable to challenges for vagueness or overbreadth.[36] This change clarifies the revised statute and may ensure its constitutionality.

Third, the revised statute replaces the phrase "disrupting the orderly conduct of business in that public building"[37] with significant interruption of "[t]he orderly conduct of a meeting by a District or federal public body" and the inclusion in the statute of cross-references to specific definitions of "public body" and "meeting" in the D.C. Code. The terms "orderly conduct," "business," and "public building" are not defined in the current disorderly conduct statute or in District case law. However, legislative history indicates this provision was intended to forbid disruption of the D.C. Council or other public meetings, in a manner comparable to D.C. Code §10-503.15, which prohibits the

[29] D.C. Code § 22-1321(d), concerning disturbance of persons in their residences.
[30] Since the disorderly conduct statute was revised in 2011 to significantly change its scope and language, the D.C. Court of Appeals ("DCCA") has yet to publish an opinion interpreting the statute.
[31] RCC § 22E-206.
[32] D.C. Code § 22-1321(b).
[33] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.
[34] If a person disrupts a religious service, funeral, or wedding in a private place, that conduct may be punishable as a trespass. RCC § 22E-2601.
[35] For example, players in a game in a public park, a gathering of acquaintances at a street corner, or a couple on a sidewalk might all reasonably fall within the ambit of a broad construction of "a public gathering."
[36] Consider, for example, a counter-protest that aims to disrupt a lawful public demonstration.
[37] D.C. Code § 22-1321(c-1).

disruption of Congress.[38] To resolve ambiguities about the scope of this provision, the revised statute clarifies that it is the nature of the meeting as one of a public decision-making body that is controlling, and not the ownership or operation of the building. The revised statute incorporates the definition of a public body meeting from the District's Open Meetings Act[39] to clarify what types of governmental decision-making bodies are included, be they federal or District. This change improves the clarity of the revised statute.

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

The RCC criminalizes public nuisances in a stand-alone offense. Under current District law, conduct constituting a public nuisance is criminalized in the disorderly conduct statute,[40] along with crimes such as stealthily looking into a dwelling where there is an expectation of privacy and engaging in conduct that puts someone in reasonable fear a crime is about to occur. The RCC separately groups and subjects to the same punishment public nuisance-type offenses.

[38] CCE Report at Page 11.
[39] D.C. Code § 2-574.
[40] D.C. Code § 22-1321.

RCC § 22E-4203. Blocking a Public Way.

Explanatory Note. *This section establishes the blocking a public way for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that renders impassable, without unreasonable hazard, public ways after receiving a law enforcement order to stop such conduct. The revised Blocking a Public Way offense and revised Unlawful Demonstration offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2] The revised blocking a public way offense also replaces the crime of Obstructing a Bridge Connecting Virginia to the District of Columbia[3] and also replaces several older District offenses.[4]*

Paragraph (a)(1) specifies that a person's conduct must block a street, sidewalk, bridge, path, entrance, exit, or passageway.[5] The term "blocks" is defined in RCC § 22E-701 to mean "render safe passage through a space difficult or impossible."[6] The revised offense does not include minor incommoding that poses no risk to passers-by.[7] However, a person is liable under the revised statute for conduct that, but for the intervention of a law enforcement officer, would render the public way impassable without unreasonable hazard.[8] Because the definition refers to "render impassable," no proof that a person actually attempted to make use of the public way and was unable to do so is required.[9] Paragraph (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "blocks" a street, sidewalk, bridge, etc.

Paragraph (a)(2) specifies that the area the person is blocking must occur while the person is on land or in a building that is owned by a government,[10] government agency,[11] or government-owned corporation.[12] This includes passageways through or within a park or reservation.[13] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), requiring the defendant to be at least aware to a practical certainty that they are in a government-owned space.

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[1] RCC § 22E-4204.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 22-1323.
[4] D.C. Code §§ 22-1318; 22-3319; 22-3321; and 22-3322.
[5] The words "street" and "path" broadly encompass all roads, trails, tunnels, alleys, boulevards and avenues.
[6] For example, a person blocking a sidewalk such that pedestrians have to walk around onto a busy street in order to pass likely is an offense.
[7] For example, a person standing or sitting on part of a sidewalk that pedestrians have to step around likely is not committing an offense.
[8] For example, a person lying down and blocking two lanes of a highway, forcing police to redirect traffic around the person to avoid an unreasonable hazard, likely is an offense.
[9] For example, if a group of persons blocked off a street that was not currently in use by cars or pedestrians and refused to move after receiving a police order to do so, these persons would be guilty of completed blocking a public way.
[10] E.g., District of Columbia, federal government.
[11] E.g., Washington Metropolitan Area Transit Authority.
[12] E.g., Amtrak.
[13] D.C. Code § 22-1307(a)(1)(D).

Paragraph (a)(3) requires the government to prove that the accused received a lawful law enforcement order to stop blocking and that the accused disregarded that directive. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to most elements in paragraph (a)(3). "Knowingly" is a defined term[14] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[15] "Law enforcement officer" is a defined term.[16] The order may be personalized to the individual or directed to an entire group and may be articulated in various ways so long as the meaning is clear. The order may be temporary or enduring in scope.[17] There is no requirement that the police order indicate the reasons for the order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop blocking.[18] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply.[19] The accused must also be practically certain that his or her action constitutes a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order. The order itself must be lawful.[20] "In fact," a defined term,[21] is used to indicate that there is no culpable mental state requirement as to whether the order is lawful.[22]

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

Subsection (c) provides the penalty for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised blocking a public way statute clearly changes current District law in three main ways.*

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[14] RCC § 22E-206.

[15] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.

[16] RCC § 22E-701.

[17] Consider, for example, a person who is asked by the same officer day after day to move away from blocking a store entrance and is then warned, "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again, you will be arrested." If the person resumes the blocking the next day, they have committed a blocking offense. A new warning is not required.

[18] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[19] *See* RCC § 22E-401, Lesser Harm.

[20] Where a law enforcement officer infringes on a person's freedom of movement without requisite cause or authority, in violation of any federal or District law, the person has not committed a blocking offense.

[21] RCC § 22E-207.

[22] Consider, for example, a construction team or a group of organized protesters that (incorrectly) believes it has a valid permit to block a particular street. Such a group is subject to criminal liability for blocking. Such conduct also may subject to arrest pursuant to 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer) or 24 DCMR § 2100 (Crowd and Traffic Control).

First, the revised statute does not prohibit blocking use of or passage through a public conveyance. In addition to public land and buildings, the current D.C. Code § 22-1307(a)(1)(C) refers to "The use of or passage through any…public conveyance." The term "public conveyance" is not defined, and there is no case law on point. The District's disorderly conduct statute contains a similar provision relating to public conveyances.[23] In contrast, the RCC punishes purposely interrupting a person's lawful use of a public conveyance as a public nuisance crime.[24] This change clarifies and eliminates unnecessary overlap between revised offenses.

Second, the revised statute applies only to land or buildings owned by a government, government agency, or government-owned corporation. The current crowding, obstructing, or incommoding statute is unclear as to whether the streets, sidewalks, etc.,[25] or entrances to buildings[26] covered by the statute must be on publicly owned property. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history,[27] the DCCA has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building."[28] In contrast, the RCC blocking a public way statute excludes conduct on or in all privately owned land and buildings. Unwanted entries onto private property remain separately criminalized as trespass.[29] The revised statute's phrase "owned by a government, government agency, or government-owned corporation" makes clear that land or buildings owned by the Washington Metropolitan Area Transit Authority, Amtrak, and similar locations are within the scope of the revised statute. This change clarifies and reduces unnecessary overlap between revised offenses.

Third, the revised statute repeals and replaces the archaic and unused offense of Driving or riding on footways in public grounds[30] and several other older District offenses.[31] Since this statute was codified in 1892, modes of transportation have drastically change and the District now regulates licensure, traffic, and safety through other mechanisms. Statistics indicate that the statute has not been charged in recent years and the penalty—$1-5—indicates that it has not been a practical deterrent in decades. In contrast, the revised statute provides a clear, consistent way to address misuse of public ways. This change clarifies the revised statute.

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[23] D.C. Code § 22-1321(c) ("It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons.").
[24] RCC § 22E-4202.
[25] D.C. Code § 22-1307(a)(1)(A).
[26] D.C. Code § 22-1307(a)(1)(B).
[27] *Morgan v. District of Columbia*, 476 A.2d 1128, 1130 (D.C. 1984).
[28] *Id.*
[29] RCC § 22E-2601.
[30] D.C. Code § 22-1318 ("If any person shall drive or lead any horse, mule, or other animal, or any cart, wagon, or other carriage whatever on any of the paved or graveled footways in and on any of the public grounds belonging to the United States within the District of Columbia, or shall ride thereon, except at the intersection of streets, alleys, and avenues, each and every such offender shall forfeit and pay for each offense a sum not less than $1 nor more than $5.").
[31] D.C. Code §§ 22-1318; 22-3319; 22-3321; and 22-3322.

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

First, the revised statute specifies that knowledge is the mental state that applies to the elements in paragraphs (a)(1)-(a)(3). No mental state is specified in the current D.C. Code § 22-1307 statute with respect to any elements. Case law indicates some kind of intent is necessary, though the precise kind of intent is unclear.[32] In one case, the District of Columbia Court of Appeals ("DCCA") has recognized that a reasonable mistake defense may apply to crowding, obstructing, or incommoding.[33] The Obstructing bridges connecting D.C. and Virginia statute[34] specifies a culpable mental state of "knowingly and willfully" but does not require a prior law enforcement order to cease obstructing a bridge. To resolve this ambiguity, the revised statute clearly specifies a culpable mental state of "knowingly." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[35] Given that the current and revised statutes require a warning from a law enforcement officer to the defendant, the defendant will typically have actual knowledge that he or she is blocking a public way. This change improves the clarity, consistency, and completeness of the revised statute.

Second, through its use of the definition of "block," the revised blocking a public way offense specifies that the standard for determining prohibited conduct is whether it makes safe passage on the street, sidewalk, etc., difficult or impossible. The current statute is silent as to the meaning of the verbs "crowd, obstruct, or incommode"[36] used to indicate the prohibited behavior. No case law has defined these words either, although the fact patterns in cases are generally consistent with the revised definition of "blocks."[37] To resolve this ambiguity, the revised statute codifies a standard definition of what constitutes blocking. The requirement that the accused's conduct render safe passage difficult or impossible does not provide liability for mere loitering, where a person can still navigate around the accused without undue risk. This change improves the clarity of the revised statute.

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[32] The DCCA has stated that the offense is one of "general intent" which it noted is frequently defined to require "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984). Under the RCC all physical acts must be voluntary per RCC § 22E-203, but neither the *Morgan* court nor any other DCCA rulings specifically address in detail the culpable mental state required for particular elements in the current crowding, obstructing, or incommoding statute.

[33] *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984).

[34] D.C. Code § 22-1323.

[35] *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.)"). See also *Carrell v. United States*, 165 A.3d 314, 323 n. 22 (D.C. 2017) (analogizing the difference between "general intent" and "specific intent" as recognized in Supreme Court case law to the difference between "knowledge" and "purpose," respectively.

[36] D.C. Code § 22-1307.

[37] For example, the DCCA affirmed a conviction where protestors blocked the front of the Rayburn congressional office building and "the trial judge found that, 'while not 100 percent blocked, [the building entrance] was significantly impeded or incommoded' because 'people had to pick their way around individuals lying on the ground in sheets,' some 'less than two or three feet…from the entryway.'" *Tetaz v. District of Columbia*, 976 A.2d 907, 911 (D.C. 2009). Such facts would likely constitute blocking under revised statute because the entryway was rendered impassable without unreasonable hazard.

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

First, the revised statute, in combination with unlawful demonstration, RCC § 22E-4204, divides and replaces the current District offense of crowding, obstructing, or incommoding.[38] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This change logically reorganizes the statutes, given that each provision describes markedly different conduct.

Second, the revised statute prohibits blocking a street, sidewalk, bridge, path, entrance, exit, or passageway. Current D.C. § 22-1307(a) makes it unlawful to block (A) The use of any street, avenue, alley, road, highway, or sidewalk; (B) The entrance of any public or private building or enclosure; (C) The use of or passage through any public building or public conveyance; (D) The passage through or within any park or reservation. These terms are not defined by statute or in case law. The Obstructing bridges connecting D.C. and Virginia statute[39] refers only to "any bridge connecting the District of Columbia and the Commonwealth of Virginia." The revised statute simplifies the list of covered locations to a street, sidewalk, bridge, path, entrance, exit, or passageway. The common meanings of these undefined terms are intended, and they should be construed broadly.

Third, the revised offense blocking a public way offense merges in the existing District offense for obstructing bridges connecting D.C. and Virginia statute.[40] A separate statute regarding bridges to Virginia is unnecessary. The revised statute specifically lists bridges as one of the covered locations, and the revised statute is intended to cover bridges to the same extent as the prior statute.[41]

[38] D.C. Code § 22-1307.

[39] D.C. Code § 22-1323.

[40] D.C. Code § 22-1323 ("Effective with respect to conduct occurring on or after August 5, 1997, whoever in the District of Columbia knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia: (1) Shall be fined not less than $1,000 and not more than $5,000, and in addition may be imprisoned not more than 30 days; or (2) If applicable, shall be subject to prosecution by the District of Columbia under the provisions of District law and regulation amended by the Safe Streets Anti-Prostitution Amendment Act of 1996.").

[41] Notably, unlike the revised Blocking a Public Way offense, current D.C. Code § 22-1323 does not require a lawful law enforcement order. Additionally, current law authorizes a fine of $5,000, making it a jury-demandable offense. D.C. Code § 16-705(b)(1)(A).

RCC § 22E-4204. Unlawful Demonstration.

Explanatory Note. *This section establishes the unlawful demonstration offense for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that constitutes a demonstration, in locations where demonstration is prohibited by law, after receiving a law enforcement order to stop such conduct. The revised Unlawful Demonstration offense and revised Blocking a Public Way offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2] The revised unlawful demonstration offense also replaces D.C. Code § 10-503.17 (Parades, assemblages, and displays forbidden).*

Paragraph (a)(1) describes the conduct required for the offense: engaging in a demonstration. The term "demonstrating" is defined in RCC § 22E-701 and means marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, with the desire to persuade one or more individuals, or the public, or to protest some action, attitude, or belief. Paragraph (a)(1) also specifies that the person must act "knowingly," a term that is defined in RCC § 22E-206 and here requires that the defendant at least be aware to a practical certainty that his or her conduct constitutes a demonstration.

Paragraph (a)(2) requires that the defendant engage in a demonstration in a place where it is otherwise unlawful. Thus, if a civil or criminal statute specifically prohibits a demonstration inside the United States Capitol[3] or the Supreme Court,[4] a person may commit the revised unlawful demonstration offense by engaging in a demonstration in that location. However, there is no liability for unlawful demonstration unless some other law prohibits demonstration in that location.[5] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the defendant at least to be aware to a practical certainty that the location is one where demonstration is otherwise unlawful.

Paragraph (a)(3) requires the government to prove that the accused received a law enforcement order to stop demonstrating and that the accused disregarded that directive. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(3). "Knowingly" is a defined term[6] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[7] "Law enforcement officer" is a defined term.[8] The order may be personalized to the individual or directed to

[1] RCC § 22E-4203.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 10-503.16.
[4] 40 U.S.C. § 6135.
[5] For example, absent any law prohibiting demonstration on a particular sidewalk, an advocacy group does not commit unlawful demonstration by standing on that sidewalk and soliciting petition signatures or donations. Similarly a group of laborers who are picketing on a sidewalk does not commit unlawful demonstration absent a law prohibiting demonstration in that location. Notably, a person may be liable under RCC § 22E-4203, blocking a public way, for related conduct.
[6] RCC § 22E-206.
[7] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.
[8] RCC § 22E-701.

an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop demonstrating.[9] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply. The accused must also be practically certain that his or her action constitutes a continuance or resumption of the demonstrating conduct that was the object of the law enforcement officer order

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

Subsection (c) provides the penalties for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised unlawful demonstration statute does not clearly change current District law, however, two aspects of the revised statute may constitute substantive changes to current District law.*

First, the revised statute clarifies that a culpable mental state of "knowingly" applies to all elements of the offense, except strict liability is required as to the fact that demonstration in the location is otherwise unlawful under District of Columbia or federal law. The current statute is silent as to culpable mental state elements. There is no case law on the unlawful demonstration portion of the crowding, obstructing, or incommoding offense.[10] To resolve this ambiguity, the revised statute specifies a knowledge culpable mental state requirement to most elements, except it applies strict liability to the unlawfulness of demonstrating in the particular location. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[11] Given that the current and revised statute require a warning from a law enforcement officer to the defendant, a defendant will typically have actual knowledge that he or she is demonstrating in an area where demonstration is not permitted. However, given that failure to obey a lawful law enforcement order likely already involves prohibited conduct,[12] strict liability is imposed as to the additional fact of the location being barred

[9] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[10] D.C. Code § 22-1307(b). Note that this portion of the statute is new, having been introduced as legislation in as part of the omnibus Criminal Code Amendments Act of 2012 at the suggestion of the United States Attorney. Report on Bill 19-645, the "Criminal Code Amendments Act of 2012," Council of the District of Columbia Committee on the Judiciary (December 1, 2012).

[11] *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.)").

[12] *See* 18 DCMR § 2000.2 and RCC § 22E-4203.

from demonstration under another law. This change improves the clarity and completeness of the revised statute.

Second, the revised statute repeals D.C. Code § 10-503.17. Identical to language in a federal statute that has been held unconstitutional on First and Fifth Amendment grounds.[13] This change ensures the constitutionality of the revised statutes.

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

The revised statute, in combination with blocking a public way, RCC § 22E-4203, divides and replaces the current District offense of crowding, obstructing, or incommoding.[14] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This logically reorganizes the offense, given that each provision describes markedly different conduct.

[13] *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972) (concerning 40 U.S.C. § 193g).
[14] D.C. Code § 22-1307.

RCC § 22E-4205. Breach of Home Privacy.

Explanatory Note. *This section establishes the invasion of home privacy offense and penalty for the Revised Criminal Code (RCC). The offense prohibits peering into a dwelling without permission. The offense replaces a subsection of the current disorderly conduct offense, D.C. Code § 22-1321(f).*[1]

Paragraph (a)(1) specifies that a person must act knowingly and surreptitiously. "Knowingly" is a defined term[2] and, applied here, means that the person must be practically certain that they are observing inside a dwelling. The term "dwelling" is defined in RCC § 22E-701 to include any structure that is designed for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public.[3] The dwelling may be occupied or unoccupied at the time of the offense. The phrase "by any means" clarifies that, unlike a trespass,[4] the offense does not require a physical intrusion into the dwelling. Unlike a burglary,[5] the offense does not require other criminal intent such as an intent to commit theft or voyeurism.

Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the occupant's circumstances would reasonably expect that such an observation would not occur. A person does not commit an offense where it is objectively reasonable to peer into the dwelling of another.[6]

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

Subsection (c) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised breach of home privacy statute does not clearly change current District law, however, one aspect of the revised statute may constitute a substantive change to current District law.*

The revised statute defines the term "dwelling" differently than in the current statute to address multi-unit buildings. Current D.C. Code § 22-1321(f) refers to the definition of "dwelling" in D.C. Code § 6-101.07(4). This provision, in turn, states: "The term 'dwelling' means any building or structure used or designed to be used in whole or in part as a living or a sleeping place by 1 or more human beings." In contrast, the definition of "dwelling" in RCC § 22E-701 more precisely states: "'Dwelling' means a structure that is either designed for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public." This change improves the consistency of the revised statutes.

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[1] Other subsections of the current disorderly conduct statute have been addressed elsewhere in the revised code.

[2] "Knowingly" is defined in RCC § 22E-206.

[3] This includes motor vehicles, watercraft, and tents that are designed or used as a residence.

[4] RCC § 22E-2601.

[5] RCC § 22E-2701.

[6] For example, it may be reasonable for a prospective buyer to peer into a window that is uncovered of a building that is for sale.

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

First, the revised offense clarifies that the observation may occur "by any means." Current D.C. Code § 22-1321(f) makes it unlawful to "stealthily look into a window or other opening of a dwelling." It is unclear from the phrase "look into" whether the statute includes a person hacking into a camera inside a home.[7] District case law has not addressed this issue. The revised offense explicitly criminalizes observations "by any means." This change eliminates a possible gap in liability.

Second, the revised statute substitutes the word "surreptitiously" for "stealthily," for continuity with the revised burglary offense.[8] This change is not intended to substantively change the offense elements.

[7] *See, e.g.*, Allyson Chiu, *She installed a Ring camera in her children's room for 'peace of mind.' A hacker accessed it and harassed her 8-year-old daughter.*, Washington Post (December 12, 2019).
[8] RCC § 22E-2701.

RCC § 22E-4206. Indecent Exposure.

Explanatory Note. *This section establishes the indecent exposure offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits public nudity and sex acts that are lewd. The offense replaces the current lewd, indecent, or obscene acts offense in the first sentence of D.C. Code § 22-1312.*[1]

Subsection (a) specifies the elements of first degree indecent exposure. Paragraph (a)(1) requires that the accused knowingly engage in a sexual act, masturbation, or a sexual or sexualized display of the genitals, pubic area,[2] or anus, when there is less than a full opaque covering. "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they are engaging in the prohibited conduct.[4] The term "sexual act" is defined in RCC § 22E-701 and does not include a mere simulation.[5]

Subparagraph (a)(2)(A) specifies that the person's conduct must be visible to the complainant. The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[6] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are visible to the complainant.

Subparagraph (a)(2)(B) requires that the person act without the complainant's effective consent. The terms "consent" and "effective consent" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they do not have the complainant's effective consent to engage in the prohibited sexual activity in that place and at that time.[7]

Subparagraph (a)(2)(C) specifies that the accused must also act with the purpose of alarming or sexually abusing, humiliating, harassing, or degrading the complainant. As applied here, "purpose," a term defined in RCC § 22E-206, requires a conscious desire to alarm or sexually abuse, humiliate, harass, or degrade the complainant. The

[1] The second sentence of the current statute (pertaining to sexual proposal to a minor) is addressed in RCC § 22E-1305 (Enticing a Minor Into Sexual Conduct).

[2] Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia.

[3] "Knowingly" is defined in RCC § 22E-206.

[4] Consider, for example, a person who is wearing a skirt that they believe is opaque but is actually sheer in natural sunlight. Such a person does not commit an indecent exposure offense. "The exposure must be intentional and not accidental…" *Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953). "Ordinary acts involving exposure as a result of carelessness or thoughtlessness, particularly when such acts take place within the privacy of one's home, do not in themselves establish the offense of indecent exposure." *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 826-27 (D.C. 2007) (citing *Selph v. District of Columbia*, 188 A.2d 344, 345 (D.C.1963)).

[5] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Pages 7-8 (rejecting a proposal by USAO, OAG, and MPD to include simulations).

[6] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[7] A person does not commit first degree indecent exposure if they subjectively believe—reasonably or unreasonably—that the recipient consents to viewing the conduct. The indecent exposure statute was not intended to apply to an act committed in private in the presence of a single and consenting person. *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 827 (D.C. 2007) (citing *Rittenour v. District of Columbia*, 163 A.2d 558, 559 (D.C.1960); *District of Columbia v. Garcia*, 335 A.2d 217, 224 (D.C. 1975)).

phrase "with the purpose" indicates that it need not be proven that the complainant was actually alarmed, sexually abused, sexually humiliated, sexually harassed, or sexually degraded, so long as the actor consciously desired such a result.[8] The actor's behavior must be directed at the complainant to whom the actor's behavior is visible and who has not given effective consent, not a third party.

Subsection (b) specifies the elements of second degree indecent exposure. Paragraph (b)(1) is nearly identical to paragraph (a)(1), except that paragraph (b)(1)(C) does not require that a display of a person's genitals, pubic area, or anus be "sexual or sexualized." For example, a person may commit second degree indecent exposure by merely walking naked in a location open to the general public at the time of the offense. Although the other elements of second degree indecent exposure differ from first degree, these offenses are intended to merge when they arise from a single act or course of conduct.[9]

Paragraph (b)(2) requires that a person is either located in or visible from a location that is open to the general public; communal area of multi-unit housing; a public conveyance; or a rail transit station. The terms "open to the general public" and "public conveyance," and "rail transit station" are defined in RCC § 22E-701. A location is open to the general public only if no payment, membership, affiliation, appointment, or special permission is required to enter.[10] The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[11] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are either in one of those locations or visible from one of those locations.

Paragraph (b)(3) specifies that the person must also be reckless as to three circumstances being present. The term "reckless" is defined in the revised code and here means the person must be aware of a substantial risk that they are visible to the complainant and behave in a manner that is clearly blameworthy under the circumstances.[12]

Subparagraph (b)(3)(A) specifies that the person's conduct must be visible to the complainant. The word "visible" means within the complainant's sightline and does not

[8] The phrase "with the purpose," like the phrase "with intent," makes the language that follows inchoate. *See* RCC § 22E-205(b).

[9] *See* RCC § 22E-214. Absent a contrary legislative intent, the DCCA currently applies the *Blockburger* "elements test" to determine if two offenses that arise from a single act or course of conduct should merge. *Byrd v. United States*, 598 A.2d 386 (D.C. 1991). Under this test, if it possible to commit one offense without necessarily committing the other, the offenses do not merge.

[10] For example, a person who undresses inside a private theater or poses nude for a private art class does not commit indecent exposure. *See also, Bolz v. D.C.*, 149 A.3d 1130, 1143 (D.C. 2016) ("Even as to expressive nudity, the provision's imposition on First Amendment rights is limited. It applies only "in public," a phrase that the legislative history defines as "in open view; before the people at large," D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010). Thus, the challenged provision does not encompass a number of the settings cited by Mr. Givens, for example, an in-studio display of nudity for a painting class or an indoor theatrical performance that requires the purchase of a ticket.").

[11] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[12] RCC § 22E-206.

require proof that the complainant actually viewed the indecent display.[13] Per the rules of interpretation in RCC § 22E-207, the person must be at least reckless as to the fact that their conduct is visible to the complainant.[14]

Subparagraph (b)(3)(B) requires that the person act without the complainant's effective consent. The terms "consent" and "effective consent" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must be reckless as to the fact that they do not have the complainant's effective consent to engage in the prohibited conduct.

Subparagraph (b)(3)(C) requires that the person actually alarm[15] or sexually abuse, humiliate, harass, or degrade the complainant. Per the rules of interpretation in RCC § 22E-207, the person must be at least reckless as to the fact that their conduct is alarming, sexually abusive, humiliating, harassing, or degrading to the complainant.

Subsection (c) establishes three exclusions from liability for the indecent exposure offense. Paragraph (c)(1) provides that a young child, under 12 years of age, is not liable for indecent exposure. Paragraph (c)(2) excludes liability for a person who is engaging in conduct that is visible only to people who are inside the actor's home. This provision provides a clear safe harbor for nudity within one's dwelling that is not visible to anyone outside the dwelling. Paragraph (c)(3) excludes liability for employees of licensed adult entertainment businesses (e.g., a strip club) who are acting within the reasonable scope of their professional duties.[16] This provision provides a clear safe harbor for nudity within a business licensed for such conduct and within the normal scope of that business. The term "sexually-oriented business establishment" is defined in paragraph (f)(2) to have the meaning specified in 11 DCMR § 199.1.

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting second degree indecent exposure.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.]

Paragraph (f) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised indecent exposure statute clearly changes current District law in two main ways.*

First, the revised statute establishes two distinct penalties for indecent exposure. Current D.C. Code § 22-1312 provides only one sentencing gradation: 90 days in jail. In contrast, the revised statute punishes purposeful conduct directed at a complainant more severely than reckless conduct in a location open to the general public. For example, a person who confronts a complainant in an office building and masturbates in front of them, with a desire to alarm or sexually harass or sexually degrade the complainant, commits first degree indecent exposure. A couple having sex in a car in a public park,

[13] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[14] *See Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953).

[15] The word "alarm" is not defined and should be construed broadly per its ordinary meaning. Consider, for example, a crossing guard who is not personally offended but is nevertheless alarmed out of concern for children who might see the exposure.

[16] The exclusion does not apply to a rogue employee who is acting *ultra vires*.

reckless as to the fact that passersby see them and are alarmed, commits second degree indecent exposure. This change improves the proportionality of the revised offense.

Second, the revised statute expands liability to conduct that occurs in a location that is not public. Current D.C. Code § 22-1312 requires that an indecent exposure offense occur "in public." The term "public" is not defined in the statute. District case law—relying on legislative history—has explained that "in public" means "in open view; before the people at large."[17] In contrast, the revised statute provides liability for conduct that is calculated to offend an individual complainant in any location (first degree) and conduct that more broadly offends order in specified locations "open to the general public" (second degree). Sexual conduct described in the statute that is without effective consent and targets a complainant may not be otherwise criminal,[18] but may be extremely alarming or sexually degrading whether or not the conduct occurs in a non-public setting. Unlike the current statute's undefined reference to a location that is "in public," for second degree liability under the revised statute a person must also be in a location that is "open to the general public" at the time of the offense, a communal area of multi-unit housing, a "public conveyance," or a "rail transit station," as these terms are defined in RCC § 22E-701. The revised statute also provides clear exceptions to liability for a person who disrobes inside their own home or inside an adult entertainment business, without exposing themselves to others outside.[19] This change improves the clarity and consistency of the revised offense and eliminates an unnecessary gap in law.

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

First, the revised statute applies standardized definitions for the culpable mental states required for indecent exposure liability. Current D.C. Code § 22-1312 does not specify a culpable mental state for any element of the offense. The sole appellate decision interpreting the current version of the statute does not address the issue.[20] In contrast, the revised statute uses the RCC's general provisions that define "purposefully," "knowingly," and "recklessly"[21] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[22] Applying a knowledge

[17] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143-44 (D.C. 2016) ("Even as to expressive nudity, the provision's imposition on First Amendment rights is limited. It applies only "in public," a phrase that the legislative history defines as "in open view; before the people at large," D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010). Thus, the challenged provision does not encompass a number of the settings cited by Mr. Givens, for example, an in-studio display of nudity for a painting class or an indoor theatrical performance that requires the purchase of a ticket. Instead, the revised statute confines this provision's reach to settings wherein expressive nudity can be constitutionally regulated because minors might be present or nonconsenting adults are not easily shielded from displays of nudity. 31 Cf. *Parnigoni v. District of Columbia*, 933 A.2d 823 (D.C. 2007) (upholding, under an earlier form of § 22–1312 that lacked an express "in public" element, a conviction for conduct that occurred in a private home).").

[18] For example, masturbating in front of another person is not otherwise criminal under the current D.C. Code or RCC unless there is a minor complainant, or the conduct has additional characteristics that make it constitute a criminal threat, disorderly conduct, or attempted sexual crime.

[19] RCC §§ 22E-4206(c)(3) and (4).

[20] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143 (D.C. 2016).

[21] RCC § 22E-206.

[22] RCC § 22E-207(a).

culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[23] These changes clarify and improve the consistency of District statutes.

Second, the revised statute defines the type of nudity that is prohibited in public, consistent with other privacy offenses. Current D.C. Code § 22-1312 makes it unlawful for a person to publicly "make an obscene or indecent exposure of his or her genitalia or anus." The terms "obscene," "indecent," and "genitalia" are not defined in the statute. District case law has not addressed the meaning of "obscene" or "indecent" in the context of the indecent exposure statute.[24] However, the DCCA has held that the term "genitalia" in a prior version of D.C. Code § 22-1312 includes the "front vaginal area."[25] It is not clear whether frontal nudity that does not show female genitalia is covered by the current statute. Resolving these ambiguities, the revised statute includes liability for display of the pubic area and the statute's gradations provide liability for both sexual and non-sexual displays of the genitals, pubic area, and anus. Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia. This change improves the clarity, consistency, and proportionality of the revised offense.

Third, the revised statute applies the standardized definition of "sexual act" in RCC § 22E-701. Current D.C. Code § 22-1312 makes it unlawful to publicly "engage in a sexual act as defined in § 22-3001(8)." The definition of "sexual act" in D.C. Code § 22-3001(8) requires in subsection (C) an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire." It is unclear whether penetration of the sort described in the current statute can be done with an intent that is not sexual in nature. There is no DCCA case law on point. Resolving this ambiguity, the revised statute applies the standardized RCC definition of "sexual act" which, in relevant part,[26] requires

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

[24] The DCCA's sole ruling on the current indecent exposure statute indicates that the statute covers non-obscene nudity. *Bolz v. D.C.*, 149 A.3d 1130, 1144 (D.C. 2016) ("Moreover, the challenged provision does not prohibit all nudity in public. It prohibits the exposure only of one's genitals or anus, thereby directing the prohibition at certain kinds of nudity that tend to be sexually evocative even if not "obscene." See *Miller v. California*, 413 U.S. 15, 24, 27, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (defining obscene materials as "works which depict or describe [hard core] sexual conduct,…appeal to the prurient interest," and lack "serious literary, artistic, political, or scientific value")."). *But see Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (narrowly construing "obscene" and "indecent" to ensure the constitutionality of the District's obscenity statute).

[25] *Rolen-Love v. Dist. of Columbia*, 980 A.2d 1063, 1066 (D.C. 2009) (The external organs "include the mons veneris…[and] the labia majora…").

[26] Other differences between D.C. Code § 22-3001(8) and the revised definition of "sexual act" in RCC § 22E-701—e.g., the specific inclusion of bestiality and elimination of the "of another" requirement in

the intent to abuse, humiliate, etc. be sexual in nature. However, practically, it would be an exceedingly rare fact pattern where penetration-type conduct would occur that is with intent to abuse, humiliate, harass, degrade, or arouse or gratify that is not also done with intent to sexual abuse, humiliate, harass, degrade, or arouse or gratify.[27] This revision improves the clarity and consistency of the revised statute.

Fourth, the revised statute specifies that the Office of the Attorney General shall prosecute second degree indecent exposure. The prosecutorial authority of the OAG stems from D.C. Code § 23-101(b), which states in relevant part: "*Prosecutions* for violations of section 6 of the Act of July 29, 1892 (D.C. Official Code, sec. 22-1307), relating to disorderly conduct, and *for violations of section 9 of that Act (D.C. Official Code, sec. 22-1312), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel* [Attorney General for the District of Columbia] or his assistants." (Emphasis added.) However, section 9 of the Act of July 29, 1892 does not include conduct by a person in a private location to a person who is in a private location (as is included in first degree indecent exposure).[28] Controlling DCCA case law based on the Home Rule Act precludes Council assignment of prosecutorial authority to OAG unless the offenses falls into one of the categories in D.C. Code § 23-101(a) or is otherwise specifically provided by Congress.[29] To resolve ambiguity about prosecutorial authority, the revised statute does not purport to assign any prosecutorial authority to OAG for first degree indecent exposure because doing so may be inconsistent with District case law based on the Home Rule Act. However, based on the longstanding OAG prosecutorial jurisdiction over D.C. Code § 22-1312, the revised statute maintains OAG jurisdiction for locations open to the general public. This change improves the enforceability and consistency of the revised statutes.

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subsection (A) of the current statute—do not appear to change the operation of the revised indecent exposure offense as compared to D.C. Code § 22-1312.

[27] While there can be virtually no penetration or oral contact that satisfies the definition of "sexual act" that is not sexual in nature, defining the term in this way aligns the revised definition of "sexual act" with the revised definition of "sexual contact" where requiring a sexual intent does have practical impact on distinguishing liability for an assault (e.g., hitting someone with a bicycle or car on their buttocks) and a sexual assault (e.g., hitting someone on their buttocks while commenting on their sexual attractiveness).

[28] *See United States v. Strothers*, 228 F.2d 34, 35 (D.C. Cir. 1955) ("On July 29, 1892, Congress passed 'An act for the preservation of the public peace and the protection of property within the District of Columbia', 27 Stat. 322. The first seventeen sections of this Act enumerated and made unlawful a number of certain actions, mostly minor in nature, some more serious, each section containing a separate provision for a penalty ranging from a maximum fine of five dollars in some instances to a maximum fine of two hundred and fifty dollars in some others. Section 18 of this Act provided that all prosecutions for the offenses were to be conducted in the name of and for the benefit of the District of Columbia. From the date of the passage of this Act until August 15, 1935, the Corporation Counsel for the District of Columbia, and his predecessors, prosecuted cases arising thereunder…"); An act for the preservation of the public peace and the protection of property within the District of Columbia, 52nd Cong. § 9 (July 29, 1892) ("That it shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person or their persons in any street, avenue, or alley, road, or highway, open space, public square, or inclosure in the District of Columbia, or to make any such obscene or indecent exposure of person in any dwelling or other building or other place where from the same may be seen in any street, avenue, alley, road, or-highway, open space, public square, or inclosure, under a penalty not exceeding two hundred and fifty dollars for each and every such offense.").

[29] *See, generally: In re Crawley*, 978 A.2d 608 (D.C. 2009); *In re Hall*, 31 A.3d 453, 456 (D.C. 2011); and *In re Settles*, 218 A.3d 235 (D.C. 2019).

RCC § 22E-4301. Rioting.

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[1] which here means the person must be practically certain that he or she is personally attempting or committing a crime[2] involving bodily injury, taking of property, or damage to property.[3] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[4] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that threatens a non-criminal harm or a harm not involving bodily injury, taking of property, or damage to property[5] is not a predicate for rioting liability.

Paragraph (a)(2) requires proof that seven[6] or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the precise type of conduct the actor is engaged in, but must also be criminal harm[7] involving bodily injury, taking of property, or damage to property.[8] The revised statute does not require that the eight people act in concert with one another[9] or organize

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[1] RCC § 22E-206.

[2] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[3] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).

[4] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

[5] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.

[6] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[7] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[8] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[9] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

together in advance.[10] However, the others' conduct must be in a location where the actor can reasonably see or hear their activities.[11] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[12] nor is a person engaged in First Amendment activities or seeking to prevent criminal activities liable.[13]

Subsection (b) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit specified District crimes are part of the element specified in paragraph (a)(1).

Subsection (c) provides the penalty for this offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised rioting statute clearly changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[14] The lower grade consists of such conduct that merely "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[15] Limited case law indicates that this lower grade does not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by

[10] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[11] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[12] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[13] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[14] D.C. Code § 22-1322(a).

[15] D.C. Code §§ 22-1322(b) and (c).

the use of actual force or violence against property or persons."[16] The higher grade consists of inciting such conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[17] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[18] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[19] Or, in the case of police-monitored crowds, such conduct may violate the RCC failure to disperse offense.[20] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[21] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[22] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[23] focusing the offense on large-scale

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[16] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

[17] D.C. Code § 22-1322(d).

[18] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).

[19] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

[20] RCC § 22E-4302.

[21] D.C. Code § 22-1322(a).

[22] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[23] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[24] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[25] The terms "incite" and "urge" are not defined in the statute or in case law.[26] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[27] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[28] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[29] or is part of a criminal conspiracy.[30] The revised statute relies on general provisions regarding accomplice and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a proportionate penalty for acting as an accomplice or co-conspirator. This change improves the clarity, consistency, and proportionality of the revised offense.

Fourth, the revised offense bars any attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[31] In contrast, under the revised

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[24] Speech that incites violence as punished as disorderly conduct. RCC § 22E-4001(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4001(a)(2)(C).

[25] D.C. Code § 22-1322(c).

[26] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).

[27] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[28] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[29] *See* RCC § 22E-210.

[30] *See* RCC § 22E-303.

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

offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to rioting, that person has committed no offense under the revised code. Completed rioting is already an inchoate crime, closely related to predicate offenses involving bodily injury, taking of property, and damage to property, for which the RCC provides separate liability. This change improves the proportionality of the revised statute.

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

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[32] In contrast, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[33] run a similar risk of escalating into mob-like action. This change clarifies the revised statute and eliminates an unnecessary gap in liability.

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

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[34] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[35] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can reasonably perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[36] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the

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[32] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[33] *See, e.g.*, United States House of Representatives, *The Most Infamous Floor Brawl in the History of the U.S. House of Representatives: February 06, 1858*, History, Art, and Archives (available at https://history.house.gov/Historical-Highlights/1851-1900/The-most-infamous-floor-brawl-in-the-history-of-the-U-S--House-of-Representatives/).

[34] DC Code § 22-1322.

[35] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

[36] D.C. Code § 22-1322(a).

defendant such that the person could "could reasonably have been expected to see or to hear" their action.[37] The revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[38] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[39] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[40] as the culpable mental state for paragraph (a)(1).[41] Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[42] This change clarifies and improves the consistency of the revised statute.

[37] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[38] D.C. Code § 22-1322.

[39] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").

[40] RCC § 22E-206.

[41] Other participants in the riot must meet the culpable mental state for their own underlying offenses.

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

RCC § 22E-4302. Failure to Disperse.

Explanatory Note. *This section establishes the new failure to disperse offense for the Revised Criminal Code (RCC). The offense does not exist under current District law but is closely related to conduct already punished in D.C. Code § 22-1322 (Rioting or inciting to riot) and 18 DCMR § 2000.2 (Failure to obey a lawful police order).*[1]

Paragraph (a)(1) requires that the accused act "knowingly," a term defined in RCC § 22E-206, that here means a person must be practically certain that he or she received a dispersal order from someone he or she is practically certain is a law enforcement officer.[2] "Law enforcement officer" is a defined term.[3] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the dispersal order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to disperse from the scene.[4] Where a person is uncertain as to whether they can safely comply with the dispersal order, a justification defense may apply.[5]

Paragraph (a)(2) requires proof that eight[6] or more persons are engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be identical, but each person's conduct must be causing criminal harm[7] involving bodily injury, taking of property, or damage to property.[8] The revised statute does not require that the eight people act in concert with one another[9] or organize together in advance.[10] However, the others' conduct must be in a location where the actor can

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[1] The failure to disperse offense does not replace or subsume the existing regulation in 18 DCMR § 2000.2.

[2] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit failure to disperse.

[3] RCC § 22E-701.

[4] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[5] *See* RCC § 22E-401, Lesser Harm.

[6] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[7] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[8] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[9] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[10] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular

reasonably see or hear their activities.[11] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that eight or more persons are engaged in riotous conduct nearby.

Paragraph (a)(3) requires that the presence of the person substantially impairs the ability of a law enforcement officer to stop the riotous conduct. The impairment must be substantial, not trivial, and is a highly fact-specific assessment.[12] The term "in fact" here means that no culpable mental state is required as to the need for the order to disperse, but the objective fact still must be proven that the actor's presence substantially impairs the ability of a law enforcement officer to stop the conduct. False assertions that an actor must disperse because they are substantially impairing the law enforcement response would not satisfy this element of the failure to disperse offense.

Subsection (b) provides the penalties for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *Failure to disperse is a new offense and, in that sense, all aspects of the crime are substantive changes to District law. However, as compared to the District's current rioting[13] and failure to obey a lawful police order[14] laws, four aspects of the revised offense may constitute substantive changes to current District law.*

First, the RCC failure to disperse statute specifies that a culpable mental state of knowing is required for failing to disperse. The current D.C. Code does not include a failure to disperse offense but it does punish rioting[15] which requires "willful" conduct. A District municipal regulation criminalizes failure to obey a lawful police order,[16] and

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persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[11] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[12] For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not, alone, amount to substantial impairment. On the other hand, peaceful demonstrators linking arms in a manner that blocks police access to a site where rioters are engaged in setting fire to a building may amount to substantial impairment. Relevant considerations may include: the delay in response time to the arson due to the demonstrators' continued presence, the potential severity of the arson, and the vulnerability of the demonstrators to unintended harm if there is resistance by those committing arson to the course of a law enforcement response.

[13] D.C. Code § 22-1322.

[14] 18 DCMR § 2000.2.

[15] D.C. Code § 22-1322.

[16] 18 DCMR § 2000.2.

case law holds that a knowing refusal to obey a lawful order is sufficient for liability.[17] The RCC clearly specifies that knowledge, defined in RCC § 22E-206, is the applicable mental state. The focus of the offense is the person's response to a law enforcement order. Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[18] This change improves the clarity and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[19]

Second, the revised statute specifies that no culpable mental state needs to be proven as to the substantial impairment to law enforcement resulting from the person's failure to disperse. The current District regulation in 18 DCMR § 2000.2 is silent as to the culpable mental state, if any, required for this element of the offense. Case law interpreting 18 DCMR § 2000.2 suggests that a person need not believe or agree that an order is lawful before being required to obey it.[20] The RCC clearly specifies that no culpable mental state is required as to this element. The focus of the revised offense is the person's response to a law enforcement order and, in some situations, a person in a crowd may not know that their continued presence in the crowd substantially impairs law enforcement's ability to respond. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[21] This change improves the clarity and consistency of the revised offense.

Third, the revised statute specifies that a reckless culpable mental state must be proven as to the existence of riotous activity nearby. This culpable mental state of recklessness as to the criminal conduct being attempted or committed in the area perceptible to the actor distinguishes the culpability of an actor for the crime of failure to disperse as compared to the civil penalties for failure to obey a law enforcement officer's order per 18 DCMR § 2000.2 (Failure to obey a lawful police order). This change improves the consistency and proportionality of the revised offenses.

Fourth, the revised offense requires eight or more actors be engaged in riotous activity for an actor to be liable for failure to disperse liability. Current District law defines a riot as five or more people engaged in "tumultuous and violent conduct,"[22] in

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[17] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998) ("According to his own testimony, Karriem *knowingly* refused to comply with lawful police orders. That refusal provided an objective basis for the police officers' probable cause determination, and thus as a matter of law their arrest of Mr. Karriem was valid.") (emphasis added).

[18] *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)).

[19] Were a person strictly liable for conduct that causes liability under 18 DCMR § 2000.2, even mistakes or accidents by a defendant could be the basis of criminal liability for failing to obey a lawful police order. For example, a person who starts to disperse but twists their ankle and cannot move further without severe pain would be liable.

[20] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998).

[21] *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015)("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)*).*

[22] D.C. Code § 22-1322.

part, because it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[23] However, there are many instances in which a group of five disorderly persons may not rise to the level of a riot.[24] This change reduces unnecessary overlap between the composite offense of rioting and the underlying substantive offenses.

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

The revised offense requires proof that the person's continued presence substantially impairs the ability of a law enforcement officer to stop the riotous conduct of others nearby. In such circumstances, a law enforcement order to disperse is a "lawful" order under current District law. Under current law, a refusal to follow a necessary[25] and lawful[26] move-on order may subject a person to arrest in a variety of circumstances.[27] Crowd control measures in current law are designed to ensure law enforcement has adequate authority to immediately intervene when necessary to restore public order.[28] The revised offense merely clarifies the particular circumstances in which a law enforcement dispersal order is valid.

[23] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses.").

[24] Examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

[25] *See Bolz v. District of Columbia*, 149 A.3d 1130, 1137 (D.C. 2016).

[26] *See Streit v. District of Columbia*, 26 A.3d 315, 319 (D.C. 2011).

[27] *See, e.g.*, 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer); 24 DCMR § 2100 (Crowd and Traffic Control); D.C. Code § 22-1307 (Crowding, obstructing, or incommoding); D.C. Code § 22-1314.02 (Prohibited acts); D.C. Code § 22-1321 (Obstructing bridges connecting D.C. and Virginia); D.C. Code § 22-2752 (Engaging in an unlawful protest targeting a residence); D.C. Code § 22-3302 (Unlawful entry on property); D.C. Code § 22-3321 (obstructing public highway).

[28] "The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 3.

RCC § 22E-4401. Prostitution.

Explanatory Note. *The RCC prostitution offense prohibits engaging in, agreeing to, or soliciting for a commercial sex act in exchange for the actor or a third party receiving anything of value. Along with the RCC patronizing prostitution offense,[1] the RCC prostitution offense replaces two distinct offenses in the current D.C. Code: prostitution[2] and soliciting for prostitution.[3]*

Subsection (a) specifies the prohibited conduct for the revised prostitution statute. Paragraph (a)(1) specifies one type of prohibited conduct—pursuant to a prior agreement, explicit or implicit, engaging in or submitting to a sexual act or sex contact in exchange for the actor or a third party receiving anything of value. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor or a third party actually receives anything of value or if anything of value was promised to the actor or a third party.[4] Paragraph (a)(1) is intended to apply only to a prostitute—an individual that receives or agrees to receive payment for sexual activity—and not a patron. The RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor, pursuant to a prior agreement, explicit or implicit, engages in or submits to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(2) specifies the second type of prohibited conduct—agreeing, explicitly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor or a third party receives anything of value or if anything of value was promised to the actor or a third party. Paragraph (a)(2) is intended to apply only to a prostitute—an individual that receives or agrees to receive payment for sexual activity—and not a patron. The RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor agrees, explicitly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value.

[1] RCC § 22E-4402.
[2] D.C. Code § 22-2701.
[3] D.C. Code § 22-2701.
[4] If anything of value is promised as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to engage in or submit to sexual activity in exchange for the actor or a third party receiving anything of value.

"Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(3) prohibits the final type of prohibited conduct—commanding, requesting, or trying to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor or a third party receives anything of value or if anything of value was promised to the actor or a third party. Paragraph (a)(3) is intended to apply only to a prostitute—an individual that receives or agrees to receive payment for sexual activity—and not a patron. The RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (b) codifies immunity from the offense for a person under 18 years of age. Paragraph (b)(1) states that an actor does not commit an offense under this section when, "in fact" the actor is under 18 years of age. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the age of the actor. Paragraph (b)(2) requires that the Metropolitan Police Department and any other District agency designated by the Mayor refer a person under the age of 18 years that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of minors under RCC § 22E-1605.

Subsection (c) specifies procedures by which a judge may dismiss or defer proceedings.

Paragraph (c)(1) provides that when "a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe." Under paragraph (c)(1), if the person violates a condition of probation, the court "may enter an adjudication of guilt and proceed as otherwise provided." If the person does not violate probation, paragraph (c)(1) provides for an early dismissal of the proceedings, and once the period of probation expires, paragraph (c)(1) states that "the court shall discharge such person and dismiss the proceedings against the person." Under paragraph (c)(1), such a dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime," including recidivist penalties such as in RCC § 22E-606. Under paragraph (c)(1), a judge may defer and dismiss proceedings for a prostitution case, even if the defendant has previously had a case dismissed.

Paragraph (c)(2) states that upon discharge of the proceedings under paragraph (c)(1), the person may apply to the court for an order to expunge "from all official records all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection." If the court determines, the person or her discharged, paragraph (c)(2) provides that "it shall enter such order." Further, under paragraph (c)(2), "No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of the person for any purpose."

Subsection (d) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised prostitution statute clearly changes District law in eight main ways.*

First, the revised prostitution statute is limited to an individual that engages in sexual activity in exchange for receiving payment. The current D.C. Code prostitution offense[5] and current D.C. Code soliciting for prostitution offense[6] include, without distinction, a patron that pays for sexual activity, as well as an adult[7] who receives payment for sexual activity. In contrast, the RCC prostitution statute is limited to an individual that engages in, agrees to engage in, or solicits for sexual activity, in exchange for the actor or a third party receiving payment. As is discussed in the explanatory note, the phrase "in exchange for" in paragraphs (a)(1), (a)(2), and (a)(3) of the revised statute is intended to exclude a patron from the offense. The RCC patronizing prostitution statute (RCC § 22E-4402) separately criminalizes patronizing prostitution—paying for, agreeing to pay for, or soliciting for sexual activity in exchange for giving payment. As

[5] The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution" and defines "prostitution" as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definition of "prostitution" is inserted into the current prostitution or solicitation statute, the statute prohibits both engaging in sexual activity "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

[6] The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution." D.C. Code § 22-2701(a). "Solicit for prostitution" is defined, in relevant part, as "to invite, entice, offer, persuade, or agree to engage in prostitution, or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution" and "prostitution" is defined as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definitions of "solicit for prostitution" and "prostitution" are inserted into the current prostitution or solicitation statute, the statute prohibits offering, agreeing, or soliciting to engage in sexual activity both "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

[7] Although the current D.C. Code prostitution offense includes both a prostitute and a patron, the "safe harbor" provision in subsection (d)(1) of the current statute is limited to the individual that engages in sexual activity for payment, and excludes patrons. D.C. Code § 22-2701(d)(1) ("A child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.").

part of this revision, the revised prostitution statute no longer uses the current D.C. Code definitions of "prostitution" (D.C. Code § 22-2701.01(3)) or "solicit for prostitution" (D.C. Code § 22-2701.01(7)), and there is no longer a separate soliciting for prostitution form of the offense.[8] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised prostitution statute deletes the special recidivist penalty for engaging in or soliciting for prostitution set forth in current D.C. Code § 22-2701(b).[9] For the first offense, the current D.C. Code prostitution or solicitation statute has a maximum term of imprisonment of 90 days.[10] The special recidivist penalty provides that for the second offense, the maximum term of imprisonment is 180 days,[11] and for a third or subsequent offense, the conviction is a felony with a maximum term of imprisonment of two years.[12] This special enhancement is highly unusual in current District law. In contrast, for the revised prostitution statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist prostitution, consistent with other misdemeanor offenses. There is no clear basis for singling out recidivist prostitution or solicitation offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

Third, the revised prostitution statute limits soliciting for prostitution to conduct that "commands, requests, or tries to persuade" another person. The current D.C. Code definition of "solicit for prostitution" is "to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution."[13] There is no DCCA case law interpreting this special definition of "solicit for prostitution."[14] However, an older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[15] for the purpose of prostitution. The DCCA stated that the older statute used the term "address," as opposed to "solicit" or "solicitation,"[16] which "removes the suggestion that an initial, active effort to engage

[8] D.C. Code § 22-2701 prohibits both "engag[ing] in prostitution" and "solicit[ing] for prostitution."

[9] D.C. Code § 22-2701 ("(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be: (A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and (B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense. (2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both. (c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of: (1) This section; (2) A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or (3) Conduct that would constitute a violation of this section if committed in the District of Columbia.").

[10] D.C. Code § 22-2701(b)(1)(A).

[11] D.C. Code § 22-2701(b)(1)(B).

[12] D.C. Code § 22-2701(b)(2).

[13] D.C. Code § 22-2701.01(7).

[14] The current D.C. Code definition of "solicit for prostitution" was enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16–482).

[15] D.C. Code § 22-2701 (1973).

[16] *Dinkins v. United States*, 374 A.2d 292, 294 (D.C. 1977).

someone in a conversation or transaction involving prostitution is a prerequisite to guilt,"[17] and that "an enticement also does not require an active, initiatory effort but can occur in a responsive manner."[18] Under this case law, it is also irrelevant which party broaches the subject of payment: "[o]nce there is an enticement or an address for the purpose of enticement, it becomes unimportant who broaches the commercial nature of the transaction."[19] In contrast, the revised prostitution statute limits soliciting for prostitution to conduct that "commands, requests, or tries to persuade" another person to engage in sexual activity in exchange for the actor or a third party receiving anything of value. With this change, the revised prostitution statute uses language identical to the general RCC solicitation statute (RCC § 22E-302), and the RCC prostitution statute differs from the general RCC solicitation statute primarily in the required culpable mental state—prostitution requires "knowingly" rather than "purposely." To the extent that DCCA case law interpreting the older statute is still good law under the current D.C. Code, the revised statute preserves case law establishing that it is irrelevant which party initiates the encounter or brings up the subject of payment. However, unlike current case law, liability under paragraph (a)(3) of the revised statute does require active efforts to solicit another person—"commands, requests, or tries to persuade another person." This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. The current D.C. Code definitions of "prostitution" and "solicit for prostitution" use the terms "sexual act" and "sexual contact" as those terms are currently defined in D.C. Code § 22-3001[20] for the current

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[17] *Dinkins v. United States*, 374 A.2d 292, 295 (D.C. 1977). The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

[18] *Dinkins*, 374 A.2d at 295. The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

[19] *Dinkins*, 374 A.2d at 295. The DCCA further stated that "[i]t is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent."
Dinkins, 374 A.2d at 296.

[20] D.C. Code §§ 22-2701.01(5), (6) (stating the terms "sexual act" and "sexual contact" in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph" and "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing,

D.C. Code sexual abuse statutes. In contrast, the revised prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of "sexual act" and "sexual contact" differ in multiple ways as compared to current law. As a result, the scope of the revised prostitution statute will differ as compared to the current D.C. Code prostitution or solicitation statute. For example, the current D.C. Code definitions of "sexual act" and "sexual contact" extend to conduct done with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually "abuse, humiliate, harass, degrade, arouse, or gratify" any person. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, a vehicle used in furtherance of the RCC prostitution offense is no longer subject to vehicle impoundment. Current D.C. Code § 22-2724[21] provides that when there is probable cause that a vehicle "is being used in furtherance of a prostitution-related offense," including prostitution or solicitation,[22] and there is an arrest,[23] the vehicle "shall" be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.[24] There is no requirement that the owner be involved in the offense or know of the vehicle's use in the offense. The owner is "entitled to a due process hearing regarding the seizure of the vehicle,"[25] but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed "at any time" by paying several different penalties, fees, and costs,[26]

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of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[21] In addition to D.C. Code § 22-2724, D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which "shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense." D.C. Code § 22-2725(b).

D.C. Code § 22-2725 states that all "funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723" will be deposited in the fund. D.C. Code § 22-2725(a). The reference to "§ 22-2723" appears to be an error, however, and the text should instead refer to "§ 22-2724." D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law "An act for the suppression of prostitution in the District of Columbia." The text of Section 7 in the Omnibus Act, establishing § 22-2725, states "All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*." The reference to section 5 appears to be an error. Section 5 of the 1935 "An act for the suppression of prostitution in the District of Columbia" is specific to forfeiture, not impoundment. The text in the Omnibus Act should instead refer to "section 6," which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

[22] D.C. Code § 22-2724(b). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[23] D.C. Code § 22-2724(b).

[24] D.C. Code § 22-2724(b)(1), (b)(2).

[25] D.C. Code § 22-2701(f) ("An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.").

[26] D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time

which are either not refundable,[27] or are refundable only in narrow circumstances.[28] Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner's right to a due process hearing.[29] There is no DCCA case law interpreting the current D.C. Code prostitution impoundment provision. In contrast, a vehicle used in furtherance of the RCC prostitution offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what otherwise is a minor misdemeanor offense or comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. A vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under

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(subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.").

[27] Subsection (d) requires paying "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing" and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6)."); § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[28] D.C. Code § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[29] Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner "shall be entitled to a due process hearing regarding the seizure of the vehicle," D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must "convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing." D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing." D.C. Code § 22-2724(d) (emphasis added).

certain circumstances, however, as opposed to impoundment, because that statute targets "pimps" and owners of prostitution businesses, as opposed to an individual engaged in consensual commercial sex work. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised prostitution statute is no longer subject to civil asset forfeiture. Current D.C. Code § 22-2723 makes subject to forfeiture all conveyances that are used, or intended to be used, "to transport, or in any manner to facilitate a violation of a prostitution-related offense,"[30] and all "money, coins, and currency" which are used, or intended to be used "in violation of a prostitution-related offense."[31] Prostitution forfeitures currently are subject to D.C. Law 20-278,[32] which provides significant due process protections for the owner of property,[33] but still can result in a lengthy or permanent loss of an individual's vehicle or money. There is no DCCA case law interpreting the current D.C. Code § 22-2723. However, under an earlier version of the solicitation for prostitution statute, the DCCA held in *One Toyota Pick-Up Truck v. District of Columbia* that forfeiture of the truck the defendant used to solicit for prostitution, valued at $15,500, would violate the Excessive Fines Clause of the U.S. Constitution.[34] The DCCA determined that, under controlling Supreme Court case law, the forfeiture would be "grossly disproportionate to the gravity of the defendant's offense."[35] It was the defendant's first conviction for solicitation and the DCCA stated that solicitation for prostitution "particularly for a first conviction, has historically been treated as a minor crime in the District, and was certainly so treated at the time of the defendant's conduct."[36] At the time, a first offense for solicitation for prostitution had a

[30] D.C. Code § 22-2723(a)(1). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[31] D.C. Code § 22-2723(a)(2). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[32] D.C. Code § 22-2723(b).

[33] *See* D.C. Code §§ 41-301 through 41-315.

[34] *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 559, 560 (D.C. 1998).

[35] The DCCA applied the test established in *United States v. Bajakajian*, 524 U.S. 321 (1998), which states that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 564-65 (quoting *United States v. Bajakajian*, 524 U.S. 321 (1998)). Prior to engaging in the proportionality analysis, the DCCA first had to establish whether the forfeiture provision in D.C. Code § 22-2723 was a "fine" within the meaning of the Excessive Fines Clause because "the limitation on excessive fines is meant to curb 'the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 560 (internal quotations and citations omitted) (emphasis in the original). The DCCA concluded that forfeiture of the truck pursuant to D.C. Code § 22-2723 was "at least in part," punishment for solicitation and that D.C. Code § 22-2723 "has distinct punitive aspects," an "innocent owner" defense and a direct tie to a violation of law. *Id.* at 562, 563. Although D.C. Code § 22-2723 has been amended since the version at issue in *One 1995 Toyota Pick-Up Truck*, it retains an "innocent owner defense" and directly ties the forfeiture to a violation of the prostitution laws, making it likely that the DCCA would reach the same conclusion—that D.C. Code § 22-2723 is subject to the Excessive Fines Clause.

[36] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565.

maximum criminal fine of $300 and no incarceration and the defendant actually received a $150 fine.[37] The court concluded that "forfeiting a vehicle valued at $15,500 inflicts a penalty . . . on the order of fifty times the fine authorized . . . and one hundred times the fine actually imposed."[38] Finally, the DCCA stated that while the defendant "fit[] within the class of persons for whom the statute was principally designed, he can not [sic] be made to bear grossly disproportionate responsibility for the problem of prostitution in the District or for the attendant consequences . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute."[39]

In contrast, a conveyance or money used or intended to be used in furtherance of the RCC prostitution offense is no longer subject to forfeiture. Forfeiture of a vehicle or money is a disproportionate penalty under the RCC prostitution statute and may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the statute.[40] A vehicle or money used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under RCC § 22E-4404 because that statute targets "pimps" and owners of prostitution businesses, as opposed to an individual engaged in consensual commercial sex work. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 ("current D.C. Code prostitution nuisance provisions") and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 ("Title 42 nuisance provisions."). The current D.C. Code prostitution nuisance provisions apply to "any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,"[41] or a nuisance that is

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[37] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565-66.

[38] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The court stated that these ratios are "comparable to the seventy-to-one figured considered grossly disproportionate" in the controlling Supreme Court case *United States v. Bajakajian*, 524 U.S. 321 (1998) and are "also consistent with excessiveness determinations in of other federal courts." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566 (internal citations omitted).

[39] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The DCCA further noted that "the forfeiture of the pick-up truck cannot fairly be said to compensate the District for any loss associated with Esparza's crime, one justification commonly advanced for the *in rem* action. . . . And although no findings have been made on the impact on Esparza and his family of the forfeiture of the truck, the government does not dispute Esparza's assertions that the vehicle played a significant role in the maintenance of his livelihood. *Id.* (internal citations omitted).

[40] The forfeiture statute has been amended since the version at issue in the 1998 *One 1995 Toyota Pick-Up Truck* case, but the amendments do not address the basis for the DCCA's ruling in that case that forfeiture of a vehicle valued at $15,500 was grossly disproportionate when the defendant received at $150 fine for a first conviction of solicitation for prostitution. The penalties for soliciting for prostitution have increased since the 1998 *One 1995 Toyota Pick-Up Truck* case, but it is unclear whether they would be significant enough for forfeiture of a vehicle to survive a constitutional challenge. The DCCA has not interpreted the current forfeiture statute under the increased prostitution or solicitation penalties.

[41] D.C. Code § 22-2713(a) ("Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.").

established "in a criminal proceeding."[42] The scope of "in a criminal proceeding" is unclear under current District law.[43] Violating a court order under the current D.C. Code

[42] D.C. Code § 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[43] D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if "the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding." A broad reading of "in a criminal proceeding" is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether "in a criminal proceeding" extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . ."). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a "disorderly house" under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house." Under DCCA case law, a "bawdy house" used for prostitution is a type of "disorderly house," but a "disorderly house" can extend beyond a "bawdy house" to encompass "activities on the premises that either disturb the public or constitute a nuisance per se." *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a "disorderly house" that is used for "lewdness, assignation, or prostitution" as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of "lewdness, assignation, or prostitution," and D.C. Code § 22-2717 refers to the existence of "*the* nuisance." *Id.* at 971-72 (emphasis in original). The court concluded that "the" refers back to the requirements of "lewdness, assignation, or prostitution" in D.C. Code § 22-2713 and that D.C. Code § 22-2717 "concerns only those nuisances defined in" D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a "bawdy house" under D.C. Code § 22-2722 would "clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it." *Id.* The court stated that "[b]ecause the Government failed to show that [the property] was 'used for the purpose of lewdness, assignation, or prostitution," the [defendants'] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717]." *Id.*

The court acknowledged that the DCCA in *Raleigh v. United States* had stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in

prostitution nuisance provisions is punishable by no less than three months and no more than six months imprisonment.[44] The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.[45] The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,[46] and again in 2010 to include firearm-related nuisances.[47] It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law[48] or legislative history on this issue. In contrast, the revised prostitution statute

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question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for "lewdness, assignation, or prostitution," and, furthermore, that the DCCA "did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717]." *Id*. The court stated that "we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713]." *Id.*

[44] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[45] "Drug–Related Nuisance Abatement Act of 1998," 1998 District of Columbia Laws 12-194 (Act 12–470).

[46] "Nuisance Abatement Reform Amendment Act of 2006," 2006 District of Columbia Laws 16-81 (Act 16–267).

[47] "Community Impact Statement Amendment Act of 2010," 2010 District of Columbia Laws 18-259 (Act 18-446).

[48] Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington*, D.C., 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 "authorizes a special summary action in equity to abate and enjoin" a nuisance, and that D.C. Code § 42-3102 "authorizes an action to abate, enjoin, and prevent" a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

It should be noted that the "special summary action in equity to abate and enjoin" a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 ("In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented."). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 ("Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course."). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions[49] do not apply to real property that is used for "lewdness" or "assignation" like the current D.C. Code prostitution nuisance provisions do.[50] To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.[51] Second, the Title 42 nuisance provisions apply to any "real property"[52] "used" or "intended to be used" for prostitution,[53] whereas current D.C. Code

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D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 ("(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.").

[49] The Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C).

[50] The current D.C. Code prostitution nuisance provisions apply to any "building, erection, or place used for the purposes of lewdness, assignation, or prostitution." D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of "debauchery" or "other immoral" purposes, which may overlap with "lewdness" or "assignation." However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of "prostitution."

[51] "Lewdness" and "assignation" appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that "lewdness" "has been defined by the Supreme Court as 'that form of immorality which has relation to sexual impurity.'" *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of "assignation," but Black's Law Dictionary defines it as "[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex." Assignation, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[52] The Title 42 nuisance provisions define "property" as "tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment

§ 22-2713 is limited to any "building, erection, or place used for the purpose of prostitution."[54] Third, the Title 42 nuisance provisions do not extend to a prostitution-related nuisance that is established in a "criminal proceeding" as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months' imprisonment as do the current D.C. Code prostitution nuisance provisions.[55] Fifth, while both sets of nuisance provisions provide for a preliminary injunction,[56] a permanent injunction and order of abatement,[57] and a procedure for vacating an order of abatement,[58] the

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building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land."

[53] The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

[54] D.C. Code § 22-2713.

[55] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."). A violation of a court order "issued under" the Title 42 nuisance provisions is "punishable as a contempt of court." D.C. Code § 42-3112(a).

[56] D.C. Code §§ 22-2714 (". . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . ."); 42-3104(a) ("Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .").

[57] D.C. Code §§ 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."); 42-3110(a) ("If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.").

[58] D.C. Code §§ 22-2719 ("If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in

procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,[59] as do the types of equitable relief.[60] This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised prostitution statute makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703. Current D.C. Code § 22-2703 states that the "court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct."[61] The statute specifies examples of conditions

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vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.); 42-3112(c) ("Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.").

[59] For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 ("The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111."). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

[60] For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all "fixtures, furniture, musical instruments, or movable property used in conducting the nuisance." D.C. Code § 22-2717 ("an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . ."). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) ("Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.").

[61] D.C. Code § 22-2703.

that the court may impose on the defendant, such as "an order to stay away from the area within which the offense or offenses occurred."[62] D.C. Code § 22-2703 was enacted in 1914. Despite substantive revisions to the current D.C. Code prostitution or solicitation statute (D.C. Code § 22-2701) in 2007, 2009, and 2015, D.C. Code § 22-2703 has not been substantively amended since 1996.[63] In contrast, the deferred disposition provision in the revised prostitution statute is consistent with the deferred disposition provision in the RCC possession of a controlled substance statute.[64] This revision results in several changes to law.

First, the revised deferred disposition provision no longer codifies examples of conditions that the court may impose on the defendant. This language is unnecessary because the revised provision requires "reasonable conditions"[65] and does not restrict the conditions the court may impose. Second, the revised provision deletes this language from D.C. Code § 22-2703: "The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant."[66] The current D.C. Code deferred disposition provision for possession of a controlled substance does not have such a provision,[67] and the statutory grant of authority to probation officers appears unnecessary. Similarly, it is unclear whether the Department of Human Services of the District of Columbia needs such a statutory grant of authority, and the Women's Bureau of the Police Department no longer exists. Third, the revised provision requires the consent of the defendant and limits the probation period to a maximum of one year, instead of "for such period as the court may direct"[68] in current

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[62] D.C. Code § 22-2703.

[63] The second sentence of D.C. Code § 22-2703, specifying examples of conditions that the court may impose on the defendant, was added in 1996. Safe Streets Anti–Prostitution Amendment Act of 1996, 1996 District of Columbia Laws 11-130 (Act 11–237).

[64] RCC § 48-904.01a(g).

[65] In addition to this requirement, the current D.C. Code and RCC prostitution offenses are subject to D.C. Code § 16-710, which authorizes the court to "suspend the imposition of sentence . . . for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby," although the period of probation, "together with any extension thereof, shall not exceed 5 years." D.C. Code § 16-710(a), (b). The DCCA in *Simmons v. United States* recognized that both D.C. Code § 22-2703 and D.C. Code § 16-710 apply to a deferred disposition for prostitution, and that is true under the RCC as well. *Simmons v. United States* 461 A.2d 463, 464 (D.C. 1983) ("Under D. C. Code § 22-2703 (1981), the court is authorized to 'impose conditions upon any person found guilty under § 22-2701, and ... the imposition or execution of sentence may be suspended for such period as the court may direct.' Similarly, under D. C. Code § 16-710 (1981), the court is authorized to suspend the imposition or execution of sentence "for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby." Under either statute, the decision to grant or deny probation, as well as the term of probation ordered, is within the broad sentencing discretion of the trial court.") (internal footnotes and citations omitted).

[66] D.C. Code § 22-2703.

[67] D.C. Code § 48-904.01(e).

[68] D.C. Code § 22-2703 ("The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed."). Under the revised

D.C. Code § 22-2703. Fourth, the revised provision establishes that discharge or dismissal of the charge is not a conviction "for purposes of disqualifications or disabilities imposed by law," including the imposition of recidivist penalties for prior misdemeanor convictions under RCC § 22E-606 or other similar provisions, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code[69] and the RCC.[70] These changes improve the clarity, consistency, and proportionality of the revised statutes.

Beyond these eight changes to current District law, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised prostitution statute clarifies that payment can be received by or promised to "the actor or a third party." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[71] or "solicit[ing] for prostitution"[72] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for . . . receiving anything of value."[73] It is unclear whether the recipient of payment must be the person engaging in or soliciting for sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution statute requires "in exchange for the actor or a third party receiving anything of value." This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in or soliciting for the sexual activity for payment or a third party, as long as the payment is "in exchange" for the sexual activity. This change improves the clarity and consistency of the revised statute and removes a possible gap in liability.

Second, a promise for payment of anything of value is sufficient for liability in the revised prostitution statute. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[74] or "solicit[ing] for prostitution" and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for . . . receiving anything of value."[75] It is unclear whether "receiving anything of value" requires that a person actually receive anything of value, or if a promise to receive anything of value in the future is sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution statute retains the language "receiving anything of value," but requires an agreement to engage in sexual activity in paragraphs (a)(1) and (a)(2), and, per the explanatory note to the commentary above, it is sufficient if anything of value is promised as part of this agreement. In paragraph (a)(1), the actor must engage in sexual activity in exchange for the actor or a third party "receiving anything of value" pursuant to a prior agreement. In paragraph

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deferred disposition provision, the court must have the consent of the defendant to defer imposition or execution of sentence, and the period of probation is limited to one year.

[69] D.C. Code § 48-904.01(e).

[70] RCC § 48-904.01a(g).

[71] D.C. Code § 22-2701(a).

[72] D.C. Code § 22-2701(a).

[73] D.C. Code § 22-2701.01(3).

[74] D.C. Code § 22-2701(a).

[75] D.C. Code § 22-2701.01(3).

(a)(2), the actor must agree to engage in sexual activity in exchange for the actor or a third party "receiving anything of value." In the revised statute the phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if any person receives anything of value or if anything of value was promised to any person.[76] This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Third, the revised prostitution statute requires that an individual engage in or submit to sexual activity in exchange for anything of value "pursuant to a prior agreement, explicit or implicit." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[77] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for . . . receiving anything of value."[78] It seems clear that the offense includes an individual and a patron reaching an agreement for payment "in exchange" for sexual activity, and then engaging in sexual activity. It is unclear, however, if the offense includes individuals engaging in sexual activity, and after the fact coming to an agreement about payment. Resolving this ambiguity, the revised prostitution statute includes receiving anything of value in exchange for past sexual activity only if it is "pursuant to a prior agreement, explicit or implicit." Without requiring a prior agreement, receiving anything of value in exchange for past sexual activity could criminalize consensual romantic conduct with subsequent gifts. This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engages in, agrees to engage in, or solicits for sexual activity, in exchange for the actor or a third party receiving anything of value. The current D.C. Code prostitution or solicitation statute does not specify any culpable mental states, and there is no DCCA case law on this issue.[79] Resolving this ambiguity, the revised prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engaging in, or agreeing or offering to engage in, a sexual act or sexual contact in exchange for anything of value to be received by the actor or a third party. Requiring, at a minimum, a knowing culpable mental state for the elements of an

[76] As is noted in the explanatory note, there is overlap between paragraph (a)(1) and paragraph (a)(2). In paragraph (a)(1), if anything of value is promised to the actor or a third party as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to engage in or submit to sexual activity in exchange for the actor or a third party receiving anything of value.

[77] D.C. Code § 22-2701(a).

[78] D.C. Code § 22-2701.01(3).

[79] Due to the statutory definition of "sexual contact" (D.C. Code § 22-3001(9)), prostitution based on a "sexual contact" requires that the prostitute have an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." In the context of the District's current D.C. Code sexual abuse statutes, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement. *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

offense that make otherwise legal conduct illegal is a generally accepted legal principle.[80] This change improves the clarity and consistency of the revised statutes.

Fifth, the revised prostitution statute does not require that the sexual activity be "with another person." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[81] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[82] The current D.C. Code[83] and RCC[84] definitions of "sexual act" and "sexual contact" include masturbation. However, the current statute's "with another person" requirement may narrow the offense to exclude a prostitute engaging in or soliciting to engage in masturbation because masturbation is not "with another person." Alternatively, the current prostitution or solicitation offense could be interpreted to include a prostitute engaging in or soliciting to engage in masturbation "with another person," if the latter phrase is construed to mean "for another person to watch." To resolve this ambiguity, the revised statute does not require that the sexual activity be "with another person." Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statute.

Sixth, the revised prostitution statute expands the scope of the "safe harbor" provision in the current D.C. Code prostitution or solicitation statute to include solicitation. The "safe harbor" provision in the current prostitution or solicitation statute states that a person under the age of 18 years that "engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section."[85] However, subsection (a) of the current statute prohibits conduct beyond engaging in or offering to engage in sexual activity. It also prohibits "solicit[ing] for prostitution,"[86] defined as "to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution."[87] It is unclear if the current safe harbor provision is limited to engaging in or offering to engage in sexual activity, or if it extends to all solicitation of prostitution, as prohibited in

[80] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[81] D.C. Code § 22-2701(a).
[82] D.C. Code § 22-2701.01(3).
[83] D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of "sexual act" in D.C. Code § 22-3001(8) and the definition of "sexual contact" in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."); 22-3001(9) (defining "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").
[84] RCC § 22E-701.
[85] D.C. Code § 22-2701(d)(1).
[86] D.C. Code § 22-2701(a).
[87] D.C. Code § 22-2701.01(7).

subsection (a). There is no DCCA case law interpreting the current "safe harbor" provision. Resolving this ambiguity, the safe harbor provision in the revised prostitution statute applies to all prohibited conduct in the revised statute—engages in, agrees to engage in, or solicits for sexual activity, in exchange for any person receiving payment. This change improves the clarity and may improve the proportionality of the revised statutes.

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

First, the revised prostitution statute makes "agrees" to engage in or submit to sexual activity a discrete basis of liability in paragraph (a)(2), separate from soliciting for prostitution in paragraph (a)(3). The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution"[88] and the current D.C. Code definition of "solicit for prostitution" is, in relevant part, "to invite, entice, offer, persuade, or agree to engage in prostitution."[89] Paragraph (a)(3) of the revised statute encompasses liability for "invite," "entice," "offer," or "persuade" to engage in prostitution using language consistent with the general RCC solicitation statute (RCC § 22E-302). Paragraph (a)(2) separately and clearly addresses an agreement to engage in prostitution. This change clarifies the revised statute.

Second, the revised prostitution statute specifies that an agreement can be either explicit or implicit. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[90] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[91] The language "in return for" implies the requirement of an agreement, either explicit or implicit, but there is no DCCA case law interpreting this requirement. An older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[92] for the purpose of prostitution and DCCA case law interpreting this older statute appears to have extended to both an explicit or implicit agreement.[93] More recent case law has also looked beyond spoken words to the surrounding circumstances to assess whether there is an agreement to prostitution.[94] This change improves the clarity of the revised statute.

Third, the revised prostitution statute uses "in exchange" for anything of value instead of "in return" for anything of value. The current D.C. Code definition of

[88] D.C. Code § 22-2701(a).
[89] D.C. Code § 22-2701.01(7).
[90] D.C. Code § 22-2701(a).
[91] D.C. Code § 22-2701.01(3).
[92] D.C. Code § 22-2701 (1973).
[93] *See, e.g.*, *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("In the final analysis, it is a question of fact whether the acts and words of the defendant in general, viewed in the light of surrounding circumstances, constitute the enticing or addressing prohibited by the statute. Were specific language or conduct determinative, as urged by appellant, every prostitute could know how to avoid arrest.") (internal citations omitted).
[94] In 2013, the DCCA affirmed a conviction for soliciting for prostitution under D.C. Code § 22-2701 when the current definition of "solicitation" was in effect and stated that "we do not require the government to prove any particular language" and "we look to appellant's conduct or words in light of surrounding circumstances." *Moten v. United States*, 81 A.3d 1274, 1280, 1281 (D.C. 2013) (internal citations omitted).

"prostitution" is a "sexual act or contact with another person in return for giving or receiving anything of value."[95] "In exchange" emphasizes the transactional nature of the sexual act or sexual contact, regardless of when the sexual activity occurs, and is not intended to substantively change current District law.

Fourth, the revised safe harbor provision language is changed in several minor ways to be more consistent and clear than the safe harbor provision in current D.C. Code § 22-2701(d). First, the revised prostitution statute replaces "shall be immune from prosecution" with "does not commit an offense under this section." The revised language is consistent with other RCC offenses that contain an exclusion from liability and is not intended to change the scope of the provision. Second, the revised safe harbor provision no longer uses the term "child," defined in the current safe harbor provision as a "person who has not attained the age of 18 years."[96] The revised safe harbor provision instead refers to a person that is "under 18 years of age," which is consistent with other RCC offenses. Third, the revised safe harbor provision replaces the reference to current D.C. Code § 22-1834, the sex trafficking of children offense, with RCC § 22E-1805, the equivalent RCC sex trafficking a minor offense. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised prostitution statute includes an actor who "engages in or submits to" sexual activity (paragraph (a)(1)), agrees to "engage in or submit to" sexual activity, (paragraph (a)(2)), and solicits any person to "engage in or submit to" sexual activity (paragraph (a)(3)). The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[97] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[98] The revised language is consistent with the revised sex offenses in RCC Chapter 13 and is not intended to substantively change current District law.

Sixth, the revised prostitution statute is no longer subject to the definition of "anything of value" in D.C. Code § 22-1802 that applies to the current D.C. Code prostitution or solicitation statute. Current D.C. Code § 22-1802 states that "anything of value" "shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."[99] This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within "anything of value" in the revised offense is not intended to change current District law.

Seventh, the revised prostitution offense includes states that the Metropolitan Police Department (MPD) and "and any other District agency designated by the Mayor" shall refer any person under the age of 18 years suspected of violating subsection (a) of the revised statute to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of a minor under RCC § 22E-1605. The current D.C. Code prostitution or solicitation statute states that MPD "shall" shall refer any person under the age of 18 years suspected of engaging in prostitution or soliciting for

[95] D.C. Code § 22-2701.01(3).
[96] D.C. Code § 22-2701(d)(3).
[97] D.C. Code § 22-2701(a).
[98] D.C. Code § 22-2701.01(3).
[99] D.C. Code § 22-1802.

prostitution "to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[100] Including "any other District agency designated by the Mayor" ensures the referral provision remains relevant and applicable should there be future changes in service delivery while ensuring that MPD remains bound to provide referrals. This change improves the clarity of the revised statutes.

[100] D.C. Code § 22-2701(d)(2).

RCC § 22E-4402. Patronizing Prostitution.

Explanatory Note. *The RCC patronizing prostitution offense prohibits engaging in a sexual act or sexual contact in exchange for giving another person anything of value and soliciting for this purpose, as well as agreeing to give anything of value to another person in exchange for a sexual act or sexual contact. The offense does not require that a person be convicted of the RCC prostitution offense (RCC § 22E-4401). The offense is graded based on the age of the person patronized and whether the person patronized is impaired. Along with the RCC prostitution offense,[1] the revised patronizing prostitution offense replaces two distinct offenses in the current D.C. Code: prostitution[2] and soliciting for prostitution.[3]*

Subsection (a) specifies the prohibited conduct for the revised patronizing prostitution statute. Subsection (a) and paragraph (a)(1) specify one type of prohibited conduct—pursuant to a prior agreement, explicit or implicit, the actor engages in or submits to a sexual act or sex contact in exchange for the actor giving another person anything of value. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to another person.[4] Paragraph (a)(1) is intended to apply only to a patron—an individual that pays or promises to pay for sexual activity—and not a prostitute. The RCC prostitution offense (RCC § 22E-4401) criminalizes receiving or agreeing to receive payment for sexual activity. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor, pursuant to a prior agreement, explicit or implicit, engages in or submits to a sexual act or sexual contact in exchange for the actor giving another person anything of value. The recipient or promised recipient of payment may be the person engaging in sexual activity for payment or a third party. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (a) and paragraph (a)(2) specify the second type of prohibited conduct—agreeing, explicitly or implicitly, to give anything of value to another person in exchange for any person engaging in or submitting to a sexual act or sexual contact. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to another person. Paragraph (a)(2) is intended to apply only to a patron—an individual that pays or promises to pay for sexual activity—and not a prostitute. The RCC prostitution offense (RCC § 22E-4401) criminalizes receiving or agreeing to receive payment for sexual activity. Subsection (a) specifies a culpable mental state of

[1] RCC § 22E-4401.
[2] D.C. Code § 22-2701.
[3] D.C. Code § 22-2701.
[4] If anything of value is promised to another person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to give anything of value in exchange for any person engaging in or submitting to sexual activity.

"knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor agrees, explicitly or implicitly, to give anything of value to another person in exchange for any person engaging in or submitting to a sexual act or sexual contact. The recipient or promised recipient of payment may be the person agreeing to sexual activity for payment or a third party. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (a) and paragraph (a)(3) prohibit the final type of prohibited conduct—commanding, requesting, or trying to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor giving another person anything of value. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to another person. Paragraph (a)(3) is intended to apply only to a patron—an individual that pays or promises to pay for sexual activity—and not a prostitute. The RCC prostitution offense (RCC § 22E-4401) criminalizes receiving or agreeing to receive payment for sexual activity. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor giving another person anything of value. The recipient or promised recipient of payment may be the person soliciting for sexual activity for payment or a third party. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (b) specifies procedures by which a judge may dismiss or defer proceedings.

Paragraph (b)(1) provides that when "a person is found guilty of violation of RCC § 22E-4402 the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe." Under paragraph (b)(1), if the person violates a condition of probation, the court "may enter an adjudication of guilt and proceed as otherwise provided." If the person does not violate probation, paragraph (b)(1) provides for an early dismissal of the proceedings, and once the period of probation expires, paragraph (b)(1) states that "the court shall discharge such person and dismiss the proceedings against the person." Under paragraph (b)(1), such a dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime," including recidivist penalties such as in RCC § 22E-606. Under paragraph (b)(1), a judge may defer and dismiss proceedings for a patronizing prostitution case, even if the defendant has previously had a case dismissed.

Paragraph (b)(2) states that upon discharge of the proceedings under paragraph (b)(1), the person may apply to the court for an order to expunge "from all official records all recordation relating to the person's arrest, indictment or information, trial,

finding of guilty, and dismissal and discharge pursuant to this subsection." If the court determines, the person or her discharged, paragraph (b)(2) provides that "it shall enter such order." Further, under paragraph (b)(2), "No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of the person for any purpose."

Subsection (c) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.] Paragraph (c)(2) codifies several penalty enhancements for the revised patronizing prostitution statute. If any of the specified enhancements apply, the penalty classification for the revised offense is increased by one class.

The penalty enhancement in subparagraph (c)(2)(A) applies if the actor is reckless as to the fact that the person patronized is under 18 years of age, or if, in fact, the person patronized is under 12 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person patronized is under 18 years of age. In the alternative, the penalty enhancement applies if the person patronized "in fact" is under 12 years of age. "In fact" is defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here the age of the person patronized.

Two penalty enhancements are codified under subparagraph (c)(2)(B). Under subparagraph (c)(2)(B) and sub-subparagraph (c)(2)(B)(i), the actor must be reckless as to the fact that the person patronized is "incapable of appraising the nature of the sexual act or sexual contact" or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, the person's inability must be either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (c)(2)(B) applies to the requirements in sub-subparagraph (c)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person patronized is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Under subparagraph (c)(2)(B) and sub-subparagraph (c)(2)(B)(ii), the actor must be reckless as to the fact that the person patronized is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Sub-subparagraph (c)(2)(B)(ii) includes paralyzed individuals who are able to appraise the nature of the sexual activity or of understanding the right to give or withhold consent under sub-subparagraph (c)(2)(B)(i), but are unable to communicate. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (c)(2)(B) applies to the requirements in sub-subparagraph (c)(2)(B)(9). "Reckless" is a

defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the person patronized is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.

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

Relation to Current District Law. *The revised patronizing prostitution statute clearly changes District law in ten main ways.*

First, the revised patronizing prostitution statute is limited to an individual that engages in sexual activity in exchange for paying another person. The current D.C. Code prostitution offense[5] and current D.C. Code soliciting for prostitution offense[6] include within their scope an individual that pays for sexual activity, as well as the individual that receives payment for sexual activity. In contrast, the RCC patronizing prostitution statute is limited to the individual that engages in or solicits for sexual activity in exchange for giving any person anything of value, or agrees to give any person anything of value in exchange for sexual activity. The RCC prostitution statute (RCC § 22E-4401) separately criminalizes engaging in, agreeing to, or soliciting for sexual activity in exchange for receiving payment. As part of this revision, the revised patronizing prostitution statute no longer uses the current D.C. Code definitions of "prostitution" (D.C. Code § 22-2701.01(3)) or "solicit for prostitution" (D.C. Code § 22-2701.01(7)), and there is no longer a separate soliciting for prostitution form of the offense.[7] This change improve the clarity, consistency, and proportionality of the revised statutes.

Second, the revised patronizing prostitution statute deletes the special recidivist penalty for engaging in or soliciting for prostitution set forth in current D.C. Code § 22-2701(b).[8] For the first offense, the current D.C. Code prostitution or solicitation statute

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[5] The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution" and defines "prostitution" as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definition of "prostitution" is inserted into the current prostitution or solicitation statute, the statute prohibits both engaging in sexual activity "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

Although the current D.C. Code prostitution or solicitation offense includes both a prostitute and a patron, the "safe harbor" provision in the current statute is limited to the individual that engages in sexual activity for payment, and excludes patrons. D.C. Code § 22-2701(d)(1) ("A child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.").

[6] The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution." D.C. Code § 22-2701(a). "Solicit for prostitution" is defined, in relevant part, as "to invite, entice, offer, persuade, or agree to engage in prostitution, or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution" and "prostitution" is defined as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definitions of "solicit for prostitution" and "prostitution" are inserted into the current prostitution or solicitation statute, the statute prohibits offering, agreeing, or soliciting to engage in sexual activity both "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

[7] D.C. Code § 22-2701 prohibits both "engag[ing] in prostitution" and "solicit[ing] for prostitution."

[8] D.C. Code § 22-2701 ("(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be: (A) Fined not more than the amount set forth in § 22-

has a maximum term of imprisonment of 90 days.[9] The special recidivist penalty provides that for the second offense, the maximum term of imprisonment is 180 days,[10] and for a third or subsequent offense, the conviction is a felony with a maximum term of imprisonment of two years.[11] This special enhancement is highly unusual in current District law. In contrast, for the revised patronizing prostitution statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist patronizing prostitution, consistent with other misdemeanor offenses. There is no clear basis for singling out recidivist prostitution or solicitation offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

Third, the revised patronizing prostitution statute limits soliciting to conduct that "commands, requests, or tries to persuade" any person. The current D.C. Code definition of "solicit for prostitution" is "to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution."[12] There is no DCCA case law interpreting this special definition of "solicit for prostitution."[13] However, an older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[14] for the purpose of prostitution. The DCCA stated that the older statute used the term "address," as opposed to "solicit" or "solicitation,"[15] which "removes the suggestion that an initial, active effort to engage someone in a conversation or transaction involving prostitution is a prerequisite to guilt,"[16] and that "an enticement also does not require an active, initiatory effort but can occur in a responsive manner."[17]

3571.01, imprisoned for not more than 90 days, or both, for the first offense; and (B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense. (2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both. (c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of: (1) This section; (2) A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or (3) Conduct that would constitute a violation of this section if committed in the District of Columbia.").

[9] D.C. Code § 22-2701(b)(1)(A).

[10] D.C. Code § 22-2701(b)(1)(B).

[11] D.C. Code § 22-2701(b)(2).

[12] D.C. Code § 22-2701.01(7). As is discussed elsewhere in this commentary, the current D.C. Code definition of "prostitution" includes both a patron and the individual engaging in prostitution for payment.

[13] The current D.C. Code definition of "solicit for prostitution" was enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16–482).

[14] D.C. Code § 22-2701 (1973).

[15] *Dinkins v. United States*, 374 A.2d 292, 294 (D.C. 1977).

[16] *Dinkins v. United States*, 374 A.2d 292, 295 (D.C. 1977). The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

[17] *Dinkins*, 374 A.2d at 295. The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the

Under this case law, it is also irrelevant which party broaches the subject of payment: "[o]nce there is an enticement or an address for the purpose of enticement, it becomes unimportant who broaches the commercial nature of the transaction."[18] In contrast, the revised patronizing prostitution statute limits soliciting to conduct that "commands, requests, or tries to persuade" another person to engage in sexual activity in exchange for giving any person anything of value. With this change, the revised patronizing prostitution statute uses language identical to the general RCC solicitation statute (RCC § 22E-302), and the RCC patronizing prostitution statute differs from the general RCC solicitation statute primarily in the required culpable mental state—patronizing prostitution requires "knowingly" rather than "purposely." To the extent that DCCA case law interpreting the older statute is still good law, the revised statute preserves case law establishing that it is irrelevant which party initiates the encounter or brings up the subject of payment. However, unlike current case law, liability under paragraph (a)(3) of the revised statute does require active efforts to solicit another person—"commands, requests, or tries to persuade any person." This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised patronizing prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. The current D.C. Code definitions of "prostitution" and "solicit for prostitution" use the terms "sexual act" and "sexual contact" as those terms are currently defined in D.C. Code § 22-3001[19] for the current D.C. Code sexual abuse statutes. In contrast, the revised patronizing prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of "sexual act" and "sexual contact" differ in multiple ways as compared to current law. As a result, the scope of the revised patronizing prostitution statute will differ as compared to the current D.C. Code prostitution or solicitation statute. For example, the current D.C. Code definitions of "sexual act" and "sexual contact" extend to conduct done with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," but the RCC definitions are limited to conduct that is sexual in nature—with the desire to

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officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

[18] *Dinkins*, 374 A.2d at 295. The DCCA further stated that "[i]t is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent." *Dinkins*, 374 A.2d at 296.

[19] D.C. Code §§ 22-2701.01(5), (6) (stating the terms "sexual act" and "sexual contact" in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph" and "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

sexually "abuse, humiliate, harass, degrade, arouse, or gratify" any person. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, a vehicle used in furtherance of the RCC patronizing prostitution offense is no longer subject to vehicle impoundment. Current D.C. Code § 22-2724[20] provides that when there is probable cause that a vehicle "is being used in furtherance of a prostitution-related offense," including prostitution or solicitation,[21] and there is an arrest,[22] the vehicle "shall" be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.[23] There is no requirement that the owner be involved in the offense or know of the vehicle's use in the offense. The owner is "entitled to a due process hearing regarding the seizure of the vehicle,"[24] but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed "at any time" by paying several different penalties, fees, and costs,[25] which are either not refundable,[26] or are refundable only in narrow circumstances.[27]

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[20] In addition to D.C. Code § 22-2724, D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which "shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense." D.C. Code § 22-2725(b).
D.C. Code § 22-2725 states that all "funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723" will be deposited in the fund. D.C. Code § 22-2725(a). The reference to "§ 22-2723" appears to be an error, however, and the text should instead refer to "§ 22-2724." D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law "An act for the suppression of prostitution in the District of Columbia." The text of Section 7 in the Omnibus Act, establishing § 22-2725, states "All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*." The reference to section 5 appears to be an error. Section 5 of the 1935 "An act for the suppression of prostitution in the District of Columbia" is specific to forfeiture, not impoundment. The text in the Omnibus Act should instead refer to "section 6," which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

[21] D.C. Code § 22-2724(b). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[22] D.C. Code § 22-2724(b).

[23] D.C. Code § 22-2724(b)(1), (b)(2).

[24] D.C. Code § 22-2701(f) ("An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.").

[25] D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.").

[26] Subsection (d) requires paying "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing" and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time

Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner's right to a due process hearing.[28] There is no DCCA case law interpreting the current D.C. Code prostitution impoundment provision. In contrast, a vehicle used in furtherance of the RCC patronizing prostitution offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what otherwise is a minor misdemeanor offense or comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. A vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under certain circumstances, however, as opposed to impoundment, because that statute targets "pimps" and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised patronizing prostitution statute is no longer subject to civil asset forfeiture. Current D.C. Code § 22-2723 makes subject to forfeiture all conveyances that are used, or intended to be used, "to transport, or in any manner to facilitate a violation of a prostitution-related offense,"[29] and all "money, coins, and currency" which are used, or

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(subject to administrative availability) by paying . . . an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6)."); § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[27] D.C. Code § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[28] Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner "shall be entitled to a due process hearing regarding the seizure of the vehicle," D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must "convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing." D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing." D.C. Code § 22-2724(d) (emphasis added).

[29] D.C. Code § 22-2723(a)(1). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

intended to be used "in violation of a prostitution-related offense."[30] Prostitution forfeitures are subject to D.C. Law 20-278,[31] which provides significant due process protections for the owner of property,[32] but still can result in a lengthy or permanent loss of an individual's vehicle or money. There is no DCCA case law interpreting the current D.C. Code § 22-2723. However, under an earlier version of the statute, the DCCA held in *One Toyota Pick-Up Truck v. District of Columbia* that forfeiture of the truck the defendant used to solicit for prostitution, valued at $15,500, would violate the Excessive Fines Clause of the U.S. Constitution.[33] The DCCA determined that, under controlling Supreme Court case law, the forfeiture would be "grossly disproportionate to the gravity of the defendant's offense."[34] It was the defendant's first conviction for solicitation and the DCCA stated that solicitation for prostitution "particularly for a first conviction, has historically been treated as a minor crime in the District, and was certainly so treated at the time of the defendant's conduct."[35] At the time, a first offense for solicitation for prostitution had a maximum criminal fine of $300 and no incarceration and the defendant actually received a $150 fine.[36] The court concluded that "forfeiting a vehicle valued at $15,500 inflicts a penalty . . . on the order of fifty times the fine authorized . . . and one hundred times the fine actually imposed."[37] Finally, the DCCA stated that while the defendant "fit[] within the class of persons for whom the statute was principally designed, he can not [sic] be made to bear grossly disproportionate responsibility for the problem of

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[30] D.C. Code § 22-2723(a)(2). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[31] D.C. Code § 22-2723(b).

[32] *See* D.C. Code §§ 41-301 through 41-315.

[33] *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 559, 560 (D.C. 1998).

[34] The DCCA applied the test established in *United States v. Bajakajian*, 524 U.S. 321 (1998), which states that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 564-65 (quoting *United States v. Bajakajian*, 524 U.S. 321 (1998)). Prior to engaging in the proportionality analysis, the DCCA first had to establish whether the forfeiture provision in D.C. Code § 22-2723 was a "fine" within the meaning of the Excessive Fines Clause because "the limitation on excessive fines is meant to curb 'the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 560 (internal quotations and citations omitted) (emphasis in the original). The DCCA concluded that forfeiture of the truck pursuant to D.C. Code § 22-2723 was "at least in part," punishment for solicitation and that D.C. Code § 22-2723 "has distinct punitive aspects," an "innocent owner" defense and a direct tie to a violation of law. *Id.* at 562, 563. Although D.C. Code § 22-2723 has been amended since the version at issue in *One 1995 Toyota Pick-Up Truck*, it retains an "innocent owner defense" and directly ties the forfeiture to a violation of the prostitution laws, making it likely that the DCCA would reach the same conclusion—that D.C. Code § 22-2723 is subject to the Excessive Fines Clause.

[35] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565.

[36] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565-66.

[37] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The court stated that these ratios are "comparable to the seventy-to-one figured considered grossly disproportionate" in the controlling Supreme Court case *United States v. Bajakajian*, 524 U.S. 321 (1998) and are "also consistent with excessiveness determinations in of other federal courts." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566 (internal citations omitted).

prostitution in the District or for the attendant consequences . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute."[38]

In contrast, a conveyance or money used or intended to be used in furtherance of the RCC patronizing prostitution offense is no longer subject to forfeiture. Forfeiture of a vehicle or money is a disproportionate penalty under the RCC patronizing prostitution statute and may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the statute.[39] A vehicle or money used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under RCC § 22E-4404 because that statute targets "pimps" and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised patronizing prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 ("current D.C. Code prostitution nuisance provisions") and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 ("Title 42 nuisance provisions."). The current D.C. Code prostitution nuisance provisions apply to "any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,"[40] or a nuisance that is established "in a criminal proceeding."[41] The scope of "in a criminal proceeding" is unclear under current District law.[42] Violating a court order under the current D.C.

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[38] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The DCCA further noted that "the forfeiture of the pick-up truck cannot fairly be said to compensate the District for any loss associated with Esparza's crime, one justification commonly advanced for the *in rem* action. . . .And although no findings have been made on the impact on Esparza and his family of the forfeiture of the truck, the government does not dispute Esparza's assertions that the vehicle played a significant role in the maintenance of his livelihood. *Id.* (internal citations omitted).

[39] The forfeiture statute has been amended since the version at issue in the 1998 *One 1995 Toyota Pick-Up Truck* case, but the amendments do not address the basis for the DCCA's ruling in that case that forfeiture of a vehicle valued at $15,500 was grossly disproportionate when the defendant received at $150 fine for a first conviction of solicitation for prostitution. The penalties for soliciting for prostitution have increased since the 1998 *One 1995 Toyota Pick-Up Truck* case, but it is unclear whether they would be significant enough for forfeiture of a vehicle to survive a constitutional challenge. The DCCA has not interpreted the current forfeiture statute under the increased prostitution or solicitation penalties.

[40] D.C. Code § 22-2713(a) ("Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.").

[41] D.C. Code § 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[42] D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if "the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding." A broad reading of "in a criminal proceeding" is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that "when a

Code prostitution nuisance provisions is punishable by no less than three months and no more than six months imprisonment.[43] The current D.C. Code prostitution nuisance

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defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether "in a criminal proceeding" extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . ."). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a "disorderly house" under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house." Under DCCA case law, a "bawdy house" used for prostitution is a type of "disorderly house," but a "disorderly house" can extend beyond a "bawdy house" to encompass "activities on the premises that either disturb the public or constitute a nuisance per se." *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a "disorderly house" that is used for "lewdness, assignation, or prostitution" as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of "lewdness, assignation, or prostitution," and D.C. Code § 22-2717 refers to the existence of "*the* nuisance." *Id.* at 971-72 (emphasis in original). The court concluded that "the" refers back to the requirements of "lewdness, assignation, or prostitution" in D.C. Code § 22-2713 and that D.C. Code § 22-2717 "concerns only those nuisances defined in" D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a "bawdy house" under D.C. Code § 22-2722 would "clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it." *Id.* The court stated that "[b]ecause the Government failed to show that [the property] was 'used for the purpose of lewdness, assignation, or prostitution," the [defendants'] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717]." *Id.*

The court acknowledged that the DCCA in *Raleigh v. United States* had stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for "lewdness, assignation, or prostitution," and, furthermore, that the DCCA "did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717]." *Id.* The court stated that "we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713]." *Id.*

[43] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and

provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.[44] The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,[45] and again in 2010 to include firearm-related nuisances.[46] It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law[47] or legislative history on this issue. In contrast, the revised patronizing prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§

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imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[44] "Drug–Related Nuisance Abatement Act of 1998," 1998 District of Columbia Laws 12-194 (Act 12–470).

[45] "Nuisance Abatement Reform Amendment Act of 2006," 2006 District of Columbia Laws 16-81 (Act 16–267).

[46] "Community Impact Statement Amendment Act of 2010," 2010 District of Columbia Laws 18-259 (Act 18-446).

[47] Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington*, D.C., 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 "authorizes a special summary action in equity to abate and enjoin" a nuisance, and that D.C. Code § 42-3102 "authorizes an action to abate, enjoin, and prevent" a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

It should be noted that the "special summary action in equity to abate and enjoin" a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 ("In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented."). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 ("Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course."). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 ("(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.").

22-2713 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions[48] do not apply to real property that is used for "lewdness" or "assignation" like the current D.C. Code prostitution nuisance provisions do.[49] To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.[50] Second, the Title 42 nuisance provisions apply to any "real property"[51] "used" or "intended to be used" for prostitution,[52] whereas current D.C. Code § 22-2713 is limited to any "building, erection, or place used for the purpose of prostitution."[53] Third, the Title 42 nuisance provisions do not extend to a prostitution-related nuisance that is established in a "criminal proceeding" as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months' imprisonment

[48] The Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C).

[49] The current D.C. Code prostitution nuisance provisions apply to any "building, erection, or place used for the purposes of lewdness, assignation, or prostitution." D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of "debauchery" or "other immoral" purposes, which may overlap with "lewdness" or "assignation." However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of "prostitution."

[50] "Lewdness" and "assignation" appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that "lewdness" "has been defined by the Supreme Court as 'that form of immorality which has relation to sexual impurity.'" *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of "assignation," but Black's Law Dictionary defines it as "[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex." Assignation, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[51] The Title 42 nuisance provisions define "property" as "tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land."

[52] The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

[53] D.C. Code § 22-2713.

as do the current D.C. Code prostitution nuisance provisions.[54] Fifth, while both sets of nuisance provisions provide for a preliminary injunction,[55] a permanent injunction and order of abatement,[56] and a procedure for vacating an order of abatement,[57] the

[54] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."). A violation of a court order "issued under" the Title 42 nuisance provisions is "punishable as a contempt of court." D.C. Code § 42-3112(a).

[55] D.C. Code §§ 22-2714 (". . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . ."); 42-3104(a) ("Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .").

[56] D.C. Code §§ 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."); 42-3110(a) ("If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.").

[57] D.C. Code §§ 22-2719 ("If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.); 42-3112(c) ("Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately

procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,[58] as do the types of equitable relief.[59] This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised patronizing prostitution statute makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703. Current D.C. Code § 22-2703 states that the "court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct."[60] The statute specifies examples of conditions that the court may impose on the defendant, such as "an order to stay away from the area within which the offense or offenses occurred."[61] D.C. Code § 22-2703 was enacted in 1914. Despite substantive revisions to the current D.C. Code prostitution or solicitation statute (D.C. Code § 22-2701) in 2007, 2009, and 2015, D.C. Code § 22-2703 has not been substantively amended since 1996.[62] In contrast, the deferred disposition provision in the revised patronizing prostitution statute is consistent with the

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if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.").

[58] For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 ("The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111."). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

[59] For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all "fixtures, furniture, musical instruments, or movable property used in conducting the nuisance." D.C. Code § 22-2717 ("an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . ."). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) ("Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.").

[60] D.C. Code § 22-2703.

[61] D.C. Code § 22-2703.

[62] The second sentence of D.C. Code § 22-2703, specifying examples of conditions that the court may impose on the defendant, was added in 1996. Safe Streets Anti–Prostitution Amendment Act of 1996, 1996 District of Columbia Laws 11-130 (Act 11–237).

deferred disposition provision in the RCC possession of a controlled substance statute.[63] This revision results in several changes to law.

First, the revised deferred disposition provision no longer codifies examples of conditions that the court may impose on the defendant. This language is unnecessary because the revised provision requires "reasonable conditions"[64] and does not restrict the conditions the court may impose. Second, the revised provision deletes this language from D.C. Code § 22-2703: "The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant."[65] The current D.C. Code deferred disposition provision for possession of a controlled substance does not have such a provision,[66] and the statutory grant of authority to probation officers appears unnecessary. Similarly, it is unclear whether the Department of Human Services of the District of Columbia needs such a statutory grant of authority, and the Women's Bureau of the Police Department no longer exists. Third, the revised provision requires the consent of the defendant and limits the probation period to a maximum of one year, instead of "for such period as the court may direct"[67] in current D.C. Code § 22-2703. Fourth, the revised provision establishes that discharge or dismissal of the charge is not a conviction "for purposes of disqualifications or disabilities imposed by law," including the imposition of recidivist penalties for prior misdemeanor convictions under RCC § 22E-606 or other similar provisions, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code[68] and the RCC.[69] These changes improve the clarity, consistency, and proportionality of the revised statutes.

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[63] RCC § 48-904.01a(g).

[64] In addition to this requirement, the current D.C. Code and RCC prostitution offenses are subject to D.C. Code § 16-710, which authorizes the court to "suspend the imposition of sentence . . . for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby," although the period of probation, "together with any extension thereof, shall not exceed 5 years." D.C. Code § 16-710(a), (b). The DCCA in *Simmons v. United States* recognized that both D.C. Code § 22-2703 and D.C. Code § 16-710 apply to a deferred disposition for prostitution, and that is true under the RCC as well. *Simmons v. United States* 461 A.2d 463, 464 (D.C. 1983) ("Under D. C. Code § 22-2703 (1981), the court is authorized to 'impose conditions upon any person found guilty under § 22-2701, and ... the imposition or execution of sentence may be suspended for such period as the court may direct.' Similarly, under D. C. Code § 16-710 (1981), the court is authorized to suspend the imposition or execution of sentence "for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby." Under either statute, the decision to grant or deny probation, as well as the term of probation ordered, is within the broad sentencing discretion of the trial court.") (internal footnotes and citations omitted).

[65] D.C. Code § 22-2703.

[66] D.C. Code § 48-904.01(e).

[67] D.C. Code § 22-2703 ("The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed."). Under the revised deferred disposition provision, the court must have the consent of the defendant to defer imposition or execution of sentence, and the period of probation is limited to one year.

[68] D.C. Code § 48-904.01(e).

Ninth, the patronizing prostitution statute authorizes enhanced penalties if the accused is reckless as to the fact that the person patronized is under 18 years of age, or if in fact, the person patronized is under 12 years of age. The current D.C. prostitution or solicitation statute does not enhance penalties based on the age of the complainant.[70] However, the current D.C. Code pandering statute[71] and the current D.C. Code procuring for prostitution statute[72] have enhanced penalties when the trafficked person is under the age of 18 years. The penalty enhancements do not specify any culpable mental states for the age of the complainant and there is no DCCA case law on this issue. In contrast, the RCC patronizing prostitution statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the complainant is under 18 years of age or, if, in fact the person patronized is under the age of 12 years. Recklessness as to under the age of 18 years and strict liability for under the age of 12 years is consistent with other age-based penalty enhancements in the RCC sex offenses and the RCC Chapter 16 human trafficking offenses. However, the patronizing prostitution penalty enhancement is intended to be used in the rare instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.[73] This change improves the consistency and proportionality of the revised statute.

Tenth, the patronizing prostitution statute authorizes enhanced penalties if the actor is reckless as to the fact that the person patronized is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a sexual act or sexual contact. The current D.C. prostitution or solicitation statute does not enhance penalties based on whether the person patronized is incapacitated or impaired.[74] In contrast, the RCC patronizing prostitution statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the person patronized is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a sexual act or sexual contact. These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement in the RCC Chapter 16 human trafficking offenses. However, the patronizing prostitution penalty enhancement is intended to be used when a more serious RCC sex offense, such as sexual assault (RCC § 22E-1301), or RCC Chapter 16 human trafficking offense does not apply. This change improves the consistency and proportionality of the revised statute.

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[69] RCC § 48-904.01a(g).

[70] D.C. Code § 22-2701(b).

[71] D.C. Code § 22-2705(c)(1), (c)(2) (pandering statute authorizing a maximum penalty of five years imprisonment, unless the person trafficked is under the age of 18 years, in which case the maximum penalty is 20 years).

[72] D.C. Code § 22-2707(b)(1), (c)(2) (procuring statute prohibiting receiving anything of value for or on account of arranging for prostitution and authorizing a maximum penalty of five years imprisonment, unless the person procured is under the age of 18 years, in which case the maximum penalty is 20 years).

[73] Because the patronizing prostitution statute includes more inchoate conduct (e.g., efforts to persuade) with a "knowingly" culpable mental state, there may be rare instances where patronizing prostitution is chargeable but attempted sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for attempt liability.

[74] D.C. Code § 22-2701(b).

Beyond these ten changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised patronizing prostitution statute clarifies that payment can be given to or promised to "another person." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[75] or "solicit[ing] for prostitution"[76] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for giving . . . anything of value."[77] It is unclear whether the payment must be given to the person engaging in or soliciting for sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised patronizing prostitution statute specifies "another person." This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in, agreeing to, or soliciting for the sexual activity for payment or a third party, as long as the payment is "in exchange" for the sexual activity. This change improves the clarity and consistency of the revised statute and removes a possible gap in liability.

Second, a promise to give anything of value is sufficient for liability in the revised patronizing prostitution statute. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[78] or "solicit[ing] for prostitution"[79] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for giving . . . anything of value."[80] It is unclear whether "giving anything of value" requires that a person actually give anything of value, or if a promise to give anything of value in the future is sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised patronizing prostitution statute retains the requirement of giving anything of value, but requires an agreement to engage in sexual activity in paragraphs (a)(1) and (a)(2), and, per the explanatory note to the commentary above, it is sufficient if anything of value is promised as part of this agreement. In paragraph (a)(1), the actor must engage in sexual activity in exchange for "giving" another person anything of value pursuant to a prior agreement. In paragraph (a)(2), the actor must agree to give another person anything of value "in exchange" for sexual activity. In the revised statute the phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value to any person or if anything of value was promised to any person.[81] This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Third, the revised patronizing prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engages in or solicits for sexual activity, in

[75] D.C. Code § 22-2701(a).
[76] D.C. Code § 22-2701(a).
[77] D.C. Code § 22-2701.01(3).
[78] D.C. Code § 22-2701(a).
[79] D.C. Code § 22-2701(a).
[80] D.C. Code § 22-2701.01(3).
[81] As is noted in the explanatory note, there is overlap between paragraph (a)(1) and paragraph (a)(2). In paragraph (a)(1), if anything of value is promised to another person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to give anything of value to another person in exchange for any person engaging in or submitting to sexual activity.

exchange for giving another person anything of value, or agrees to give anything of value in exchange for sexual activity. The current D.C. Code prostitution or solicitation statute does not specify any culpable mental states, and there is no DCCA case law on this issue.[82] Resolving this ambiguity, the revised patronizing prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engages in or solicits for sexual activity, in exchange for giving another person anything of value, or agrees to give anything of value in exchange for sexual activity. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[83] This change improves the clarity and consistency of the revised statute.

Fourth, the revised patronizing prostitution statute does not require that the sexual activity be "with another person." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[84] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[85] The current D.C. Code[86] and RCC[87] definitions of "sexual act" and "sexual contact" include masturbation. However, the current statute's "with another person" requirement may narrow the offense to exclude a patron engaging in or soliciting to engage in masturbation because masturbation is not "with another person." Alternatively, the current prostitution or solicitation offense could be interpreted to include a patron engaging in or soliciting to engage in masturbation "with another person," if the latter phrase is construed to mean "for another person to watch." To resolve this ambiguity, the revised statute does not require that the sexual activity be "with another person." Masturbation in exchange for anything of value is within the

[82] Due to the statutory definition of "sexual contact" (D.C. Code § 22-3001(9)), prostitution based on a "sexual contact" requires that the prostitute have an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." In the context of the District's current D.C. Code sexual abuse statutes, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement. *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[83] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[84] D.C. Code § 22-2701(a).

[85] D.C. Code § 22-2701.01(3).

[86] D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of "sexual act" in D.C. Code § 22-3001(8) and the definition of "sexual contact" in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."); 22-3001(9) (defining "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[87] RCC § 22E-701.

scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statute.

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

First, the revised patronizing prostitution statute makes "agrees" to give anything of value in exchange for sexual activity a discrete basis of liability in paragraph (a)(2), separate from soliciting for prostitution in paragraph (a)(3). The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution"[88] and the current D.C. Code definition of "solicit for prostitution" is, in relevant part, "to invite, entice, offer, persuade, or agree to engage in prostitution."[89] Paragraph (a)(3) of the revised statute encompasses liability for "invite," "entice," "offer," or "persuade" to engage in prostitution using language consistent with the general RCC solicitation statute (RCC § 22E-302). Paragraph (a)(2) separately and clearly addresses an agreement to engage in prostitution. This change clarifies the revised statute.

Second, the revised patronizing prostitution statute specifies that an agreement can be either explicit or implicit. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[90] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[91] The language "in return for" implies the requirement of an agreement, either explicit or implicit, but there is no DCCA case law interpreting this requirement. An older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[92] for the purpose of prostitution and DCCA case law interpreting this older statute appears to have extended to both an explicit or implicit agreement.[93] More recent case law has also looked beyond spoken words to the surrounding circumstances to assess whether there is an agreement to prostitution.[94] This change improves the clarity of the revised statute.

Third, the revised patronizing prostitution statute uses "in exchange" for anything of value instead of "in return" for anything of value. The current D.C. Code definition of "prostitution" is a "sexual act or contact with another person in return for giving or receiving anything of value."[95] "In exchange" emphasizes the transactional nature of the

[88] D.C. Code § 22-2701(a).
[89] D.C. Code § 22-2701.01(7).
[90] D.C. Code § 22-2701(a).
[91] D.C. Code § 22-2701.01(3).
[92] D.C. Code § 22-2701 (1973).
[93] *See, e.g., Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("In the final analysis, it is a question of fact whether the acts and words of the defendant in general, viewed in the light of surrounding circumstances, constitute the enticing or addressing prohibited by the statute. Were specific language or conduct determinative, as urged by appellant, every prostitute could know how to avoid arrest.") (internal citations omitted).
[94] In 2013, the DCCA affirmed a conviction for soliciting for prostitution under D.C. Code § 22-2701 when the current definition of "solicitation" was in effect and stated that "we do not require the government to prove any particular language" and "we look to appellant's conduct or words in light of surrounding circumstances." *Moten v. United States*, 81 A.3d 1274, 1280, 1281 (D.C. 2013) (internal citations omitted).
[95] D.C. Code § 22-2701.01(3).

sexual act or sexual contact, regardless of when the sexual activity occurs, and is not intended to substantively change current District law.

Fourth, the revised patronizing prostitution statute includes an actor who "engages in or submits to" sexual activity (paragraph (a)(1)), agrees to give anything of value in exchange for a person "engaging in or submitting to" sexual activity, (paragraph (a)(2)), and solicits any person to "engage in or submit to" sexual activity (paragraph (a)(3)). The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[96] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[97] The revised language is consistent with the revised sex offenses in RCC Chapter 13 and is not intended to substantively change current District law.

Fifth, the revised patronizing prostitution statute clarifies that an individual that engages in or submits to sexual activity in exchange for giving anything of value must do so "pursuant to a prior agreement, explicit or implicit." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[98] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in return for giving . . . anything of value."[99] The language "in return for" implies that there was a prior agreement, but there is no DCCA case law interpreting this language. The revised patronizing prostitution statute includes giving anything of value in exchange for past sexual activity only if it is "pursuant to a prior agreement, explicit or implicit." Without requiring a prior agreement, giving anything of value in exchange for sexual activity could criminalize consensual romantic conduct with subsequent gifts. This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised patronizing prostitution statute is no longer subject to the definition of "anything of value" in D.C. Code § 22-1802 that applies to the current D.C. Code prostitution or solicitation statute. Current D.C. Code § 22-1802 states that "anything of value" "shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."[100] This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within "anything of value" in the revised offense is not intended to change current District law.

[96] D.C. Code § 22-2701(a).
[97] D.C. Code § 22-2701.01(3).
[98] D.C. Code § 22-2701(a).
[99] D.C. Code § 22-2701.01(3).
[100] D.C. Code § 22-1802.

RCC § 22E-4403. Trafficking in Commercial Sex.

Explanatory Note. *The RCC trafficking in commercial sex statute prohibits causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a commercial sex act or providing a location for this purpose, as well as obtaining anything of value from a commercial sex act. The offense provides enhanced penalties based on the age of the person trafficked and whether the person trafficked is impaired. The RCC trafficking in commercial sex statute replaces the operating a house of prostitution statute,[1] portions of the keeping a disorderly or bawdy house statute,[2] portions of the pandering statute,[3] the procuring for prostitution statute,[4] the procuring for a house of prostitution statute,[5] and the procuring for a third person statute.[6]*

Subsection (a) specifies the prohibited conduct for the RCC trafficking in commercial sex statute. Paragraph (a)(1) specifies one basis of liability for the offense. Per paragraph (a)(1), the actor must act with "intent to receive anything of value as a result." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor would receive anything of value as a result. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually received anything of value as a result, just that the actor believed to a practical certainty that the actor would receive anything of value as a result.

Under subparagraph (a)(1)(A) and subparagraph (a)(1)(B), the actor must either cause, procure, provide, recruit, or entice a person to engage in or submit to a "commercial sex act" with or for another person, or provide or maintain a location for a person to engage in or submit to a "commercial sex act" with or for another person. "Commercial sex act" is defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." The requirement "with or for another person" may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct.[7] An actor who causes, procures, etc., a person to engage in or submit to a consensual commercial sex act with the actor, or provides or maintains a location for a person to engage in or submit to a consensual commercial sex act with the actor, may be subject to liability under the RCC patronizing prostitution statute (RCC § 22E-4402).[8]

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[1] D.C. Code § 22-2712.
[2] D.C. Code § 22-2722.
[3] D.C. Code § 22-2705(a)(1), (a)(2),
[4] D.C. Code § 22-2707.
[5] D.C. Code § 22-2710.
[6] D.C. Code § 22-2711.
[7] Masturbation is not explicitly included in the RCC definition of "commercial sex act." However, the term "commercial sex act" is defined to include any "sexual act" or "sexual contact" performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," if it performed in exchange for anything of value, it constitutes a "commercial sex act."
[8] If the commercial sex act is not consensual, or if the person whom the actor solicits or patronizes is under the age of 18 years, there may be liability under the RCC sex assault offenses in Chapter 13.

Paragraph (a)(1) also specifies a culpable mental state of "purposely." Per the rule of construction in RCC § 22E-207, the "purposely" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(A) and subparagraph (a)(1)(B). "Purposely" is a defined term in RCC § 22E-206 that here means the actor must "consciously desire" that the actor causes, procures, etc., a person to engage in or submit to a commercial sex act with or for another person, or provides or maintains a location for a person to engage in or submit to a commercial sex act with or for another person.

Paragraph (a)(2) specifies a second basis of liability for the offense. For this basis of liability, the actor must receive anything of value as a result of causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a "commercial sex act" with or for another person (subparagraph (a)(2)(A)), or providing or maintaining a location for a person to engage in or submit to a "commercial sex act" with or for another person (subparagraph (a)(2)(B)). "Commercial sex act" is defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." Paragraph (a)(2) specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(2) applies to the elements in paragraph (a)(2), subparagraph (a)(2)(A), and subparagraph (a)(2)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor receives anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person, or providing or maintaining a location for a person to engage in or submit to a commercial sex act with or for another person. An actor who receives anything of value as a result of causing, procuring, etc., a person to engage in or submit to a consensual commercial sex act with the actor, or providing or maintaining a location for a person to engage in or submit to a consensual commercial sex act with the actor, may be subject to liability under the RCC prostitution statute (RCC § 22E-4401).[9]

Paragraph (a)(3) specifies the final possible basis of liability for the offense. The actor must receive anything of value from the proceedings or earnings of a "commercial sex act" that a person has engaged in or submitted to, without consideration or when the consideration is providing or maintaining a location for a "commercial sex act." "Commercial sex act" is defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(2) applies to the elements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor receives anything of value from the proceeds or earnings of a "commercial sex act" that a person has engaged in or submitted to, without consideration or when the consideration is providing or maintaining a location for a "commercial sex act." Unlike the other bases of liability, paragraph (a)(3) does not require that the "commercial sex act" be "with or for another person." An actor that

[9] If the commercial sex act is not consensual, or if the person whom the actor solicits or with whom the actor engages in sexual activity is under the age of 18 years, there may be liability under the RCC sex assault offenses in Chapter 13.

engages in a "commercial sex act" with a person, and receives anything of value from any earnings or proceeds of that commercial sex act, has liability under paragraph (a)(3) if the other requirements of the provision are met. Similarly, if the only consideration is providing or maintaining a location for a "commercial sex act" with the actor, the actor has liability under paragraph (a)(3) if the other requirements of the provision are met.

Subsection (b) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

Paragraph (b)(2) codifies several penalty enhancements for the revised trafficking in commercial sex statute. If any of the specified enhancements apply, the penalty classification for the revised offense is increased by one class.

The penalty enhancement in subparagraph (b)(2)(A) applies if the actor is reckless as to the fact that the person trafficked is under 18 years of age, or if, in fact, the person trafficked is under 12 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person trafficked is under 18 years of age. In the alternative, the penalty enhancement applies if the person trafficked "in fact" is under 12 years of age. "In fact" is defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here the age of the person trafficked.

Two penalty enhancements are codified under subparagraph (b)(2)(B). Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(i), the actor must be reckless as to the fact that the person trafficked is "incapable of appraising the nature of the commercial sex act" or of understanding the right to give or withhold consent to the commercial sex act. In addition, the person's inability must be either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (b)(2)(B) applies to the requirements in sub-subparagraph (b)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person trafficked is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(ii), the actor must be reckless as to the fact that the person trafficked is incapable of communicating willingness or unwillingness to engage in the commercial sex act. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Sub-subparagraph (b)(2)(B)(ii) includes paralyzed individuals who are able to appraise the nature of the commercial sex act or of understanding the right to give or withhold consent under sub-subparagraph (b)(2)(B)(i), but are unable to communicate. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (b)(2)(B) applies to the requirements in sub-subparagraph (b)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk

that the person trafficked is incapable of communicating willingness or unwillingness to engage in the commercial sex act.

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

Relation to Current District Law. *The revised trafficking in commercial sex statute clearly changes District law in twelve main ways.*

First, the RCC trafficking in commercial sex statute no longer prohibits abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage. Several of the current D.C. Code prostitution statutes prohibit abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage, with maximum penalties that range from five years to 20 years.[10] In addition to these statutes, current

[10] D.C. Code § 22-2704 prohibits abducting, secreting, or harboring a person under the age of 18 years for purposes of prostitution and has a maximum penalty of 20 years. D.C. Code § 22-2704 ("(a) It is unlawful for any person, for purposes of prostitution, to: (1) Persuade, entice, or forcibly abduct a child under 18 years of age from his or her home or usual abode, or from the custody and control of the child's parents or guardian; or (2) Secrete or harbor any child so persuaded, enticed, or abducted from his or her home or usual abode, or from the custody and control of the child's parents or guardian. (b) A person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both.").

D.C. Code § 22-2705(a)(3) prohibits taking or detaining an individual to force them to marry another person, with a maximum penalty of 5 years, unless the individual is under the age of 18 years, in which case the maximum penalty is 20 years. D.C. Code §§ 22-2705(a)(3), (c)(1), (c)(2) ("(a) It is unlawful for any person, within the District of Columbia to: (3) Take or detain an individual against the individual's will, with intent to compel such individual by force, threats, menace, or duress to marry the abductor or to marry any other person. . . . (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.

D.C. Code § 22-2705(b) prohibits a parent, guardian, or other legal custodian from consenting to an individual being taken or detained for purposes of prostitution or sexual activity, with a maximum penalty of 5 years, unless the individual is under the age of 18 years, in which case the maximum penalty is 20 years. D.C. Code §§ 22-2705(b), (c)(1), (c)(2) ("(b) It is unlawful for any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual's being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact. . . . (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.").

D.C. Code § 22-2706 prohibits, by threats or duress, detaining an individual or compelling an individual to reside with any person for the purposes of prostitution or sexual activity and has a maximum penalty of 15 years, unless the complainant is under the age of 18, in which case the maximum penalty is 20 years. D.C.

D.C. Code § 22-2708 prohibits "plac[ing] or leav[ing]" a spouse or domestic partner "in a house of prostitution, or to lead a life of prostitution" by "force, fraud, intimidation, or threats."[11] These statutes overlap with the current D.C. Code kidnapping statute (RCC § 22-2001), which has a higher maximum penalty (30 years),[12] as well as other current D.C. Code statutes, such as human trafficking. In contrast, the RCC kidnapping (RCC § 22E-1401) and RCC criminal restraint (RCC § 22E-1402) statutes criminalize abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage, as well as placing or leaving a spouse or domestic partner "in a house of prostitution, or to lead a life of prostitution" by "force, fraud, intimidation, or threats." There may also be liability under the RCC human trafficking statutes in RCC Chapter 16 or other RCC offenses against persons, such as sexual assault. There is no reason why forcing a person into prostitution should be penalized differently or less severely than other forms of sexual assault, kidnapping, criminal coercion, and human trafficking. This change reduces unnecessary overlap between offenses and improves the clarity, consistency, and proportionality of the revised statute.

Second, the RCC trafficking in commercial sex statute is limited to consensual commercial sex acts that are not caused by the prohibited means in the RCC human trafficking statutes, such as physical force or a coercive threat. Two of the current D.C. Code prostitution statutes require the use of force, threats, etc.,[13] but most of the current

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Code § 22-2706 ("(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact. (b)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 15 years or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) of the section when the individual so detained or compelled is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.").

D.C. Code § 22-2709 prohibits attempting to detain an individual in a disorderly house or house of prostitution because of debt accrued while living in that house and has a five year maximum penalty. D.C. Code § 22-2709 ("Any person or persons who attempt to detain any individual in a disorderly house or house of prostitution because of any debt or debts such individual has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house shall be guilty of a felony, and on conviction thereof be imprisoned for a term not less than one year nor more than 5 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01."). This statute will also overlap with attempted kidnapping and attempted criminal restraint under the RCC general attempt provision (RCC § 22E-301).

[11] D.C. Code § 22-2708 ("Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[12] D.C. Code § 22-2001.

[13] D.C. Code § 22-2706 ("(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact."); 22-2708 ("Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of

D.C. Code prostitution statutes do not specify whether force, threats, etc., are required. As a result, most of the current D.C. Code prostitution statutes appear to extend liability equally to both coerced and consensual commercial sexual conduct, particularly the statutes that require "causing"[14] or "compelling"[15] an individual to engage in prostitution. There is no DCCA case law discussing the scope of "causing" or "compelling" in these statutes. However, under earlier versions of the D.C. Code pandering[16] and procuring for prostitution[17] statutes, the DCCA upheld the trial court admitting evidence of the appellant's assault on a prostitute because the "evidence was relevant to the issue of appellant's intent to coerce complainant to engage in prostitution."[18] To the extent that the current D.C. Code prostitution statutes extend to forced or coerced commercial sexual conduct, they overlap with the current D.C. Code human trafficking statutes, which generally have significantly higher maximum penalties for the same conduct.[19] In contrast, the RCC trafficking in commercial sex statute is limited to consensual commercial sex acts, with lower maximum penalties, and the RCC human trafficking statutes in Chapter 16 require forced or coerced commercial sex acts, and have higher maximum penalties. The seriousness of forced or coerced commercial sex acts is far

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prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[14] D.C. Code §§ 22-2705(a)(2)(C) (pandering statute prohibiting, in part, "[c]ause . . . any individual" to "engage in prostitution."); 22-2707(a) (procuring statute prohibiting, in part, receiving anything of value "for or on account of . . . causing any individual to engage in prostitution or a sexual act or contact.").

[15] D.C. Code §§ 22-2705(a)(2)(C) (pandering statute prohibiting, in part, "[c]ause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual" to "engage in prostitution.").

[16] D.C. Code § 22-2705.

[17] D.C. Code § 22-2707.

[18] *Godfrey v. United States*, 454 A.2d, 293, 295, 295 & n. 1 (D.C. 1982).

[19] The relevant D.C. Code human trafficking statutes have a maximum term of imprisonment of 20 years. *See* D.C. Code §§ 22-1833; 22-1834; 22-1837(a)(1), (c) (statutes prohibiting trafficking in labor or commercial sex acts and sex trafficking of children with maximum terms of imprisonment of 20 years, and statute prohibiting benefitting financially from human trafficking with the same maximum penalty as the underlying trafficking offense, which, in the case of trafficking in commercial sex acts and sex trafficking of children, is 20 years).

In contrast, the current D.C. Code prostitution statutes that prohibit causing individuals to engage in prostitution and procuring individuals for prostitution, have a maximum penalty of five years unless the complainant is under the age of 18 years, in which case the maximum penalty is 20 years. *See* D.C. Code §§ 22-2705(a)(2)(C), (c)(1), (c)(2) (pandering statute prohibiting causing, compelling, inducing, enticing, or procuring any individual to engage in prostitution with a maximum term of imprisonment of 5 years unless the complainant is under the age of 18 years, in which case the maximum term of imprisonment is 20 years); 22-2707 (procuring statute prohibiting receiving anything of value for arranging for or causing an individual to engage in prostitution with a maximum term of imprisonment of five years, unless the complainant is under the age of 18 years, in which case the maximum term of imprisonment is 20 years); 22-2710 (procuring statute prohibiting paying or receiving anything of value for procuring for or placing an individual in a house of prostitution with a maximum term of imprisonment of five years); 22-2711 (procuring statute prohibiting receiving anything of value for procuring and placing an individual in the custody of a third person for purposes of prostitution with a maximum term of imprisonment of five years); 22-2712 (statute prohibiting operating a house of prostitution with a maximum term of imprisonment of five years); 22-2722 (statute prohibiting keeping a bawdy house or disorderly house with a maximum term of imprisonment of five years).

greater than consensual acts. This change improves the clarity and the proportionality of the revised assault statute.

Third, the RCC trafficking in commercial sex statute requires a "purposely" culpable mental state for the prohibited conduct in subparagraph (a)(1)(A) and that the conduct be "with intent to receive anything of value as a result." The current D.C. Code pandering statute prohibits, in part, conduct to "[c]ause, compel, induce, entice, or procure" any individual "to engage in prostitution."[20] There is no requirement that the defendant receive anything of value as a result. The statute does not specify any culpable mental states and there is no District case law on this issue. However, in the context of denying a claim for merger of a pandering conviction and a procuring conviction, the DCCA has stated that "[t]o convict appellant of pandering, the government had to prove that he induced or coerced complainant to engage in prostitution, not merely that he facilitated or arranged for an act that she, herself, elected to do."[21] In contrast, the RCC trafficking in commercial sex statute requires a "purposely" culpable mental state for the pandering conduct under paragraph subparagraph (a)(1)(A)—cause, procure, provide, recruit, or entice a person to engage in or submit to a commercial sex act—and that the defendant act "with intent to receive anything of value as a result." In the RCC statute, the "purposely" culpable mental state excludes many well-intentioned individuals who might otherwise be captured by a lower culpable mental state.[22] In addition, the RCC trafficking in commercial sex offense requires that an individual must have "intent to receive anything of value as a result"—i.e. the individual must be practically certain that he or she will receive anything of value as a result of his or her actions. This requirement limits the RCC offense to traditional "pimping" behavior and would also excluded well-intentioned individuals that facilitate but do not desire to profit from the consensual commercial sex work of another. If an individual actually receives anything of value as a result of causing, procuring, etc., an individual to engage in a commercial sex act, that would satisfy the "with intent" requirement. This change is consistent with DCCA case law and improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the RCC trafficking in commercial sex statute punishes an attempted offense the same as most other criminal attempts. The current D.C. Code pandering

[20] D.C. Code § 22-2705(a)(2)(C).

[21] *Godfrey v. United States*, 454 A.2d 295 n.1 (D.C. 1982). Although *Godfrey* was decided in 1982, D.C. Code § 22-2705 has not been substantively amended since.

[22] The RCC generally uses a lower culpable mental state of knowledge for prohibited conduct, which here would require that the defendant be "practically certain" that he or she causes, procures, etc., an individual to engage in or submit to a commercial sex act. However, a knowledge culpable mental state, particularly without any additional requirement that the defendant receive or intend to receive anything of value as a result, would criminalize well-intentioned individuals such as friends, family, other individuals engaged in commercial sex work, and medical professionals, that facilitate consensual commercial sex work that a person chooses to do. For example, a friend or family member that drives an individual to a location for commercial sex work that the individual wants to do or needs to do for financial reasons is arguably "knowingly" causing that individual to engage in commercial sex work. The friend or family member is "practically certain," as required by the definition of "knowingly" in RCC § 22E-206, that his or her conduct is causing that individual to engage in commercial sex work.

statute includes an "attempt" to cause any individual to engage in prostitution,[23] and the current D.C. Code procuring for prostitution statute includes "any act . . . to attempt to procure or otherwise arrange for the purpose of prostitution."[24] There is no District case law construing this "attempt" language. The current D.C. Code pandering and procuring for prostitution statutes penalize an attempted offense the same as a completed offense. In contrast, under the RCC trafficking in commercial sex statute, the general attempt provision in RCC § 22E-301 will establish liability and penalties for attempted trafficking in commercial sex consistent with other RCC offenses. Under RCC § 22E-301, the penalty for an attempted offense is one-half the maximum penalty of the completed offense, consistent with several of the more recently revised D.C. Code offenses.[25] There is no clear rationale for attempts to be treated differently in trafficking in commercial sex as compared to other offenses, or for penalizing attempted trafficking in commercial sex the same as the completed offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability a parent or guardian of an individual consenting to that individual being used in prostitution. The current D.C. Code pandering statute prohibits, in part, "any parent, guardian, or other person having legal custody of the person of an individual [consenting] to the individual's being . . . used by any person, for the purpose of prostitution or a sexual act or sexual contact."[26] The current D.C. Code pandering statute has a maximum penalty of five years unless the complainant is under the age of 18 years, in which case the maximum penalty is 20 years.[27] In contrast, the RCC arranging for sexual conduct with a minor or person incapable of consenting statute (RCC § 22E-1306) criminalizes a person with a responsibility under civil law for the health, welfare, or supervision of a complainant that is under the age of 18 years giving effective consent for that complainant to engage in or submit to a sexual act or sexual contact. If the sexual act or sexual contact occurs, there also may be liability under the RCC sexual assault offenses in Chapter 13 or RCC human trafficking statutes in Chapter 16. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised prostitution statutes.

Sixth, to the extent that keeping a "disorderly house" does not otherwise satisfy the RCC trafficking in commercial sex statute (including accomplice liability for trafficking in commercial sex), this conduct is no longer criminalized in the RCC.[28]

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[23] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting "Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . to engage in prostitution.").

[24] This language appears in the current D.C. Code definition of "arranging for prostitution." D.C. Code § 22-2701.01(1) (defining "arranging for prostitution" as "any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or anything of value was given or received."). The definition is incorporated into the current D.C. Code procuring for prostitution statute, which prohibits receiving anything of value "for or on account of arranging for . . . any individual to engage in prostitution."). D.C. Code § 22-2707.

[25] *See, e.g.,* D.C. Code § 22–3018, Attempts to commit sexual offenses.

[26] D.C. Code § 22-2705(b).

[27] D.C. Code § 22-2705(c)(1), (c)(2).

[28] *But see* RCC § 48-904.12 prohibits knowingly maintaining or opening any location with the intent that the location will be used to manufacture methamphetamine. While it seems likely that such a location would be considered a "disorderly house" under current District law, there is no DCCA case law on point.

Current D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house" with a five year maximum penalty.[29] The statute does not codify the elements of the offense; they are established entirely by District case law. DCCA case law refers to the common law definition of a "disorderly house"[30] and establishes that keeping a "disorderly house" requires that "acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them."[31] A "bawdy house" for prostitution is a type of "disorderly house," but a "disorderly house" can extend to other conduct.[32] In contrast, the RCC trafficking in commercial sex statute, and the RCC generally, do not specifically criminalize keeping a "disorderly house." If an individual commits a crime at or in relation to the property, such as a drug-related or prostitution-related crime, that individual will have liability for that offense. If an individual does not commit a crime at or in relation to the property, but merely "knows or should know" of the activity at the property, it is disproportionate to impose criminal liability. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 et. seq. address the harm of such a property, and are discussed elsewhere in this commentary. Where, however, a person purposely maintains a "disorderly house" to facilitate trafficking in commercial

[29] D.C. Code § 22-2722 ("Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.").

[30] *See, e.g., Harris v. United States*, 315 A.2d 569, 572 (D.C. 1974) ("Since Congress in enacting our disorderly house statute made no attempt to define what conduct it was seeking to proscribe we necessarily must resort to the common-law definition of the crime.").

[31] *Harris v. United States*, 315 A.2d 569, 575 (D.C. 1947). Earlier DCCA case law (*Payne v. United States*, 171 A.2d 509, 511 (D.C. 1961)) required that the acts be "subversive of the public morals," but *Harris* specifically overruled this requirement. *Harris*, 315 A.2d at 573 ("We conclude . . . that subversion of the public morals is not an element of [keeping a disorderly house]. . . . *Payne* was incorrect in requiring proof by the government that the defendant subverted public morals."). *Payne* had upheld a disorderly house conviction when the defendant regularly purchased stolen property at her home and the court in *Harris* noted that this "departed from the mainstream of the common law that for a disorderly house to exist there must be a public disturbance or a nuisance per se." *Harris*, 315 A.2d at 573.

[32] The majority of District case law on disorderly houses is limited to prostitution, but the United States District Court for the District of Columbia noted that a "crack house" would likely be a nuisance per se and would be a disorderly house, even if it did not disturb the public peace. *United States v. Wade*, 992 F. Supp. 6, 15 & n.5 (D.D.C. 1997) (ordered vacated on other grounds by *United States v. Wade*, 152 F.3d 969 (D.C. Cir. 1998) ("A reasonable argument could be made that a crack house fits under this definition [nuisance per se]; the inherent potential for breaches of the peace when a crack house is present is beyond question. However, this court does not at this time conclude that § 22–2722 is applicable whenever police seize a crack house, and therefore limits its reach to situations in which the government has proven that there exists an actual, demonstrative public disturbance."). The United States District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

The District case law on a "disorderly house" is fairly limited in scope, but the United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

sex, there may be liability as a principal or accomplice to RCC trafficking in commercial sex statute to the extent the statutory requirements are met. This change improves the clarity, consistency, and proportionality of the revised statutes.

Seventh, to the extent that keeping a "bawdy house" does not otherwise satisfy the RCC trafficking in commercial sex statute (including accomplice liability for trafficking in commercial sex), this conduct is no longer criminalized in the RCC. Current D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house" with a five year maximum penalty.[33] The statute does not codify the elements of the offense; they are established entirely by District case law. DCCA case law refers to the common law definition of a "disorderly house"[34] and establishes that keeping a "disorderly house" requires that "acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them."[35] The DCCA has stated that "the government does not have to prove ownership or legal control of the premises"[36] and that it is sufficient that the defendant "in fact controlled or managed the premises."[37] A "bawdy house" is a type of "disorderly house," but DCCA case law does not clearly state the elements of a "bawdy house" specifically. In dicta, the DCCA referred to a "bawdy house" as "a place for the convenience of people of both sexes in resorting to lewdness.[38]

In contrast, keeping or maintaining a "bawdy house," alone, is not sufficient for liability under the RCC trafficking in commercial sex statute. Keeping or maintaining a "bawdy house" must otherwise satisfy the requirements of the RCC offense. Three provisions in particular apply to keeping or maintaining a "bawdy house," although the other provisions of the RCC offense may also apply: 1) purposely providing or maintaining a location for a commercial sex act with or for another person with intent to receive anything of value as a result (subparagraph (a)(1)(B)); 2) knowingly receiving anything of value as a result of providing or maintaining a location for a commercial sex act with or for another person; (subparagraph (a)(2)(B)); or 3) receiving anything of value

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[33] D.C. Code § 22-2722 ("Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.").

[34] *See, e.g., Harris v. United States*, 315 A.2d 569, 572 (D.C. 1974) ("Since Congress in enacting our disorderly house statute made no attempt to define what conduct it was seeking to proscribe we necessarily must resort to the common-law definition of the crime.").

[35] *Harris v. United States*, 315 A.2d 569, 575 (D.C. 1947). Earlier DCCA case law (*Payne v. United States*, 171 A.2d 509, 511 (D.C. 1961)) required that the acts be "subversive of the public morals," but *Harris* specifically overruled this requirement. *Harris*, 315 A.2d at 573 ("We conclude . . . that subversion of the public morals is not an element of [keeping a disorderly house]. . . . *Payne* was incorrect in requiring proof by the government that the defendant subverted public morals."). *Payne* had upheld a disorderly house conviction when the defendant regularly purchased stolen property at her home and the court in *Harris* noted that this "departed from the mainstream of the common law that for a disorderly house to exist there must be a public disturbance or a nuisance per se." *Harris*, 315 A.2d at 573.

[36] *Thomas v. United States*, 588 A.2d 272, 275 (D.C. 1991).

[37] *Thomas v. United States*, 588 A.2d 272, 275 (D.C. 1991).

[38] *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972) ("A bawdy house has been defined as a place for the convenience of people of both sexes in resorting to lewdness. It is a place many people may frequent for immoral purposes or a house where one may go for immoral purposes without invitation.") (citing *Trent v. Commonwealth*, 181 Va. 338 (1943)).

from a commercial sex act and providing or maintaining a location for a commercial sex act as the only consideration (paragraph (a)(3)). Unlike current law, a person that merely "knows or should know" that prostitution occurs at the property and does nothing to prevent it is not criminally liable. It is disproportionate to impose criminal liability in such a situation. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 address the harm of such a property, and are discussed elsewhere in this commentary. Although the scope of the RCC offense may be narrower than the current D.C. Code "bawdy house" offense, it is also broader in the sense that a single commercial sex act, or no commercial sex act, can be sufficient for liability, as opposed to the requirement of "regularly" sexual activity occurring under current law. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised trafficking in commercial sex statute authorizes enhanced penalties if the accused is reckless as to the fact that the person trafficked is under 18 years of age or if, in fact, the person trafficked is under 12 years of age. The current D.C. Code pandering statute[39] and the current D.C. Code procuring for prostitution statute[40] have enhanced penalties when the trafficked person is under the age of 18 years, but the current D.C. Code procuring for a house of prostitution,[41] procuring for a third person,[42] operating a house of prostitution,[43] and keeping a "bawdy house"[44] statutes do not. In the pandering and procuring statutes that do have an enhanced penalty, the penalty quadruples, increasing from a five year maximum penalty to a 20 year maximum penalty. The penalty enhancements do not specify any culpable mental states for the age of the complainant and there is no DCCA case law on this issue. It is unclear whether a reasonable mistake of fact as to the complainant's age would be a defense. In contrast, the RCC trafficking in commercial sex statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the person trafficked is under 18 years of age or if, in fact the person trafficked is under the age of 12 years. Recklessness for under the age of 18 years and strict liability for under the age of 12 years are consistent with other age-based penalty enhancements in the RCC sex offenses and the RCC Chapter 16 human trafficking offenses. However, the trafficking in commercial sex penalty enhancement is generally intended to be used when a more serious RCC sex offense, or RCC Chapter 16 human trafficking offense does not

[39] D.C. Code § 22-2705(c)(1), (c)(2) (pandering statute authorizing a maximum penalty of five years imprisonment, unless the person trafficked is under the age of 18 years, in which case the maximum penalty is 20 years).
[40] D.C. Code § 22-2707(b)(1), (c)(2) (procuring statute prohibiting receiving anything of value for or on account of arranging for prostitution and authorizing a maximum penalty of five years imprisonment, unless the person procured is under the age of 18 years, in which case the maximum penalty is 20 years).
[41] D.C. Code § 22-2710 (procuring statute prohibiting paying or receiving anything of value for or an account of procuring an individual for or placing an individual in a house of prostitution, with a maximum penalty of five years).
[42] D.C. Code § 22-2711 (procuring statute prohibiting procuring and placing an individual in the custody of a third person for purposes of prostitution with a maximum penalty of five years).
[43] D.C. Code § 22-2712 (statute prohibiting operating a house of prostitution with a five year maximum penalty).
[44] D.C. Code § 22-2722 (statute prohibiting keeping or maintaining a "bawdy house" with a maximum penalty of five years).

apply. This change improves the consistency and proportionality of the revised statute. This change improves the consistency and proportionality of the revised statutes.

Ninth, the revised trafficking in commercial sex statute authorizes enhanced penalties if the actor is reckless as to the fact that the person trafficked is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a commercial sex act. The current D.C. Code pandering,[45] procuring,[46] house of prostitution,[47] and keeping a disorderly or bawdy house[48] statutes do not enhance penalties based on whether the person trafficked is incapacitated or impaired. In contrast, the RCC trafficking in commercial sex statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the person trafficked is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a commercial sex act. These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as the requirements for an incapacitated complainant in the RCC sex trafficking of a minor or adult incapable of consenting statute (RCC § 22E-1605). However, the trafficking in commercial sex penalty enhancement is intended to be used in the rare instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.[49] This change improves the consistency and proportionality of the revised statute.

Tenth, through the RCC definition of "commercial sex act," the RCC trafficking in commercial sex statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. The current D.C. Code definition of "prostitution"[50] uses the terms "sexual act" and "sexual contact" as those terms are currently defined in D.C. Code § 22-3001[51] for the current D.C. Code sexual abuse statutes. In contrast, through the RCC definition of "commercial sex act," the RCC trafficking in commercial sex statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-

[45] D.C. Code § 22-2705(a).
[46] D.C. Code §§ 22-2707(a); 22-2710; 22-2711.
[47] D.C. Code § 22-2712.
[48] D.C. Code § 22-2722.
[49] Because the trafficking in commercial sex statute includes conduct with a "knowingly" culpable mental state, there may be rare instances where the commercial sex statute is chargeable but accomplice liability for sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for accomplice liability.
[50] D.C. Code § 22-2701.01(3) (defining "prostitution" as "a sexual act or contact with another person in return for giving or receiving anything of value."). Several of the current D.C. Code prostitution statutes that the RCC trafficking in commercial sex statute replaces use the term "prostitution." *See* D.C. Code §§ 22-2705; 22-2707; 22-2710; 22-2711; 22-2712.
[51] D.C. Code §§ 22-2701.01(5), (6) (stating the terms "sexual act" and "sexual contact" in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph" and "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

701. As the commentary to RCC § 22E-701 explains, the revised definitions of "sexual act" and "sexual contact" differ in multiple ways as compared to current law. As a result, the scope of the trafficking in commercial sex statute will differ as compared to the current D.C. Code pandering,[52] procuring,[53] and house of prostitution[54] statutes. For example, the current D.C. Code definitions of "sexual act" and "sexual contact" extend to conduct done with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually "abuse, humiliate, harass, degrade, arouse, or gratify" any person. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eleventh, a vehicle used in furtherance of the RCC trafficking in commercial sex offense is no longer subject to vehicle impoundment. Current D.C. Code §§ 22-2724[55] provides that when there is probable cause that a vehicle "is being used in furtherance of a prostitution-related offense"[56] and there is an arrest,[57] the vehicle "shall" be towed or

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[52] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting causing a person to "engage in prostitution.").

[53] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution . . . .").

[54] D.C. Code § 22-2712 ("Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[55] D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which "shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense." D.C. Code § 22-2725(b).

D.C. Code § 22-2725 states that all "funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723" will be deposited in the fund. D.C. Code § 22-2725(a). The reference to "§ 22-2723" appears to be an error, however, and the text should instead refer to "§ 22-2724." D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law "An act for the suppression of prostitution in the District of Columbia." The text of Section 7 in the Omnibus Act, establishing § 22-2725, states "All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*." The reference to section 5 appears to be an error. Section 5 of the 1935 "An act for the suppression of prostitution in the District of Columbia" is specific to forfeiture, not impoundment.

The text in the Omnibus Act should instead refer to "section 6," which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

[56] D.C. Code § 22-2724(b). The current D.C. Code definition of "prostitution-related offenses" includes the current D.C. Code prostitution offenses that the RCC trafficking in commercial sex statute replaces. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[57] D.C. Code § 22-2724(b).

immobilized and notice provided to the owner and to the person in control of the vehicle.[58] There is no requirement that the owner be involved in the offense or know of the vehicle's use in the offense. The owner is "entitled to a due process hearing regarding the seizure of the vehicle,"[59] but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed "at any time" by paying several different penalties, fees, and costs,[60] which are either not refundable,[61] or are refundable only in narrow circumstances.[62] Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner's right to a due process hearing.[63] There is no DCCA case law interpreting the current

[58] D.C. Code § 22-2724(b)(1), (b)(2).

[59] D.C. Code § 22-2701(f) ("An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.").

[60] D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.").

[61] Subsection (d) requires paying "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing" and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6)."); § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[62] D.C. Code § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[63] Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner "shall be entitled to a due process hearing regarding the seizure of the vehicle," D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must "convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing." D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection

prostitution impoundment provisions. In contrast, a vehicle used in furtherance of the RCC trafficking in commercial sex offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what is comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. However, a vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute is subject to forfeiture under the RCC prostitution forfeiture provision (RCC § 22E-4404). RCC § 22E-4404, like the current prostitution forfeiture statute,[64] requires that the seizures and forfeitures of property "be pursuant to the standards and procedures set forth in D.C. Law 20-278." D.C. Law 20-278 provides significant due process protections that are lacking in the current prostitution impoundment provisions, such as strict deadlines for filings,[65] and requires the owner's knowledge and consent to the use of the property, or willful blindness.[66] This change improves the consistency and proportionality of the revised statutes.

Twelfth, the revised trafficking in commercial sex statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2723 through 22-2720 ("current D.C. Code prostitution nuisance provisions") and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 ("Title 42 nuisance provisions."). The current D.C. Code prostitution nuisance provisions apply to "any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,"[67] or a nuisance that is established "in a criminal proceeding."[68] The scope of "in a criminal proceeding" is unclear under current District law,[69] but the DCCA has stated that "when a defendant

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(d) requires that, for the immediate release of the vehicle, the owner pay "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing." D.C. Code § 22-2724(d) (emphasis added).

[64] D.C. Code § 22-2723.

[65] D.C. Code §§ 41-301 through 41-315.

[66] D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission."). The District has the burden of proof to prove the owner's knowledge or willful blindness by a preponderance of the evidence or, if the property is a motor vehicle or real property, by clear and convincing evidence. D.C. Code § 41-308(d)(1)(A) – (C).

[67] D.C. Code § 22-2713(a) ("Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.").

[68] D.C. Code § 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[69] D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if "the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding." A broad reading of "in a criminal proceeding" is that an order of abatement is required

has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate."[70] Violating a court order under the current D.C. Code prostitution nuisance provisions is punishable by no less than three months and no more than six

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whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether "in a criminal proceeding" extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . ."). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a "disorderly house" under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house." Under DCCA case law, a "bawdy house" used for prostitution is a type of "disorderly house," but a "disorderly house" can extend beyond a "bawdy house" to encompass "activities on the premises that either disturb the public or constitute a nuisance per se." *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a "disorderly house" that is used for "lewdness, assignation, or prostitution" as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of "lewdness, assignation, or prostitution," and D.C. Code § 22-2717 refers to the existence of "*the* nuisance." *Id.* at 971-72 (emphasis in original). The court concluded that "the" refers back to the requirements of "lewdness, assignation, or prostitution" in D.C. Code § 22-2713 and that D.C. Code § 22-2717 "concerns only those nuisances defined in" D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a "bawdy house" under D.C. Code § 22-2722 would "clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it." *Id.* The court stated that "[b]ecause the Government failed to show that [the property] was 'used for the purpose of lewdness, assignation, or prostitution," the [defendants'] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717]." *Id.*

The court acknowledged that the DCCA in *Raleigh v. United States* had stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for "lewdness, assignation, or prostitution," and, furthermore, that the DCCA "did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717]." *Id*. The court stated that "we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713]." *Id.*

[70] *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)).

months imprisonment.[71] The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.[72] The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,[73] and again in 2010 to include firearm-related nuisances.[74] It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law[75] or legislative history on this issue. In contrast, the revised trafficking in

[71] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[72] "Drug–Related Nuisance Abatement Act of 1998," 1998 District of Columbia Laws 12-194 (Act 12–470).

[73] "Nuisance Abatement Reform Amendment Act of 2006," 2006 District of Columbia Laws 16-81 (Act 16–267).

[74] "Community Impact Statement Amendment Act of 2010," 2010 District of Columbia Laws 18-259 (Act 18-446).

[75] Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington*, D.C., 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 "authorizes a special summary action in equity to abate and enjoin" a nuisance, and that D.C. Code § 42-3102 "authorizes an action to abate, enjoin, and prevent" a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

It should be noted that the "special summary action in equity to abate and enjoin" a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 ("In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented."). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 ("Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course."). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 ("(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated

commercial sex prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2723 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions[76] do not apply to real property that is used for "lewdness" or "assignation" like the current D.C. Code prostitution nuisance provisions do.[77] To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.[78] Second, the Title 42 nuisance provisions apply to any "real property"[79] "used" or "intended to be used" for prostitution,[80] whereas current D.C. Code § 22-2713 is limited to any "building, erection, or place used for the purpose of prostitution."[81] Third, the Title 42 nuisance provisions do not extend to a prostitution-

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with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.").

[76] The Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C).

[77] The current D.C. Code prostitution nuisance provisions apply to any "building, erection, or place used for the purposes of lewdness, assignation, or prostitution." D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of "debauchery" or "other immoral" purposes, which may overlap with "lewdness" or "assignation." However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of "prostitution."

[78] "Lewdness" and "assignation" appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that "lewdness" "has been defined by the Supreme Court as 'that form of immorality which has relation to sexual impurity.'" *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of "assignation," but Black's Law Dictionary defines it as "[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex." Assignation, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[79] The Title 42 nuisance provisions define "property" as "tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land."

[80] The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

[81] D.C. Code § 22-2713.

related nuisance that is established in a "criminal proceeding" as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months' imprisonment as do the current D.C. Code prostitution nuisance provisions.[82] Fifth, while both sets of nuisance provisions provide for a preliminary injunction,[83] a permanent injunction and order of abatement,[84] and a procedure for vacating an order of abatement,[85] the

[82] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."). A violation of a court order "issued under" the Title 42 nuisance provisions is "punishable as a contempt of court." D.C. Code § 42-3112(a).

[83] D.C. Code §§ 22-2714 (". . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . ."); 42-3104(a) ("Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .").

[84] D.C. Code §§ 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."); 42-3110(a) ("If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.").

[85] D.C. Code §§ 22-2719 ("If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law."); 42-3112(c) ("Upon motion, the court may vacate an order or judgment of abatement if the owner of the property

procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,[86] as do the types of equitable relief.[87] This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these twelve changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability "arranging for" prostitution. Current D.C. Code § 22-2707 prohibits receiving anything of value "for or on account of arranging for . . . any individual to engage in prostitution."[88] "Arranging for prostitution" is defined in current D.C. Code § 22-2701.01, in part, as "any act to procure . . . or otherwise arrange for the purpose of prostitution."[89] It is unclear what conduct this definition covers beyond procuring an

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satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.").

[86] For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 ("The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111."). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

[87] For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all "fixtures, furniture, musical instruments, or movable property used in conducting the nuisance." D.C. Code § 22-2717 ("an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . ."). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) ("Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.").

[88] D.C. Code § 22-2707.

[89] D.C. Code § 22-271.01(1). The full definition is "any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or anything of value was given or received." The scope of the "attempt" language is unclear. To the extent the current D.C. Code definition of "arranging for prostitution" includes an attempted offense in current

individual for prostitution. There is no DCCA case law interpreting the current D.C. Code definition of "arranging for prostitution." Resolving this ambiguity, paragraph (a)(2) of the revised trafficking in commercial sex statute prohibits knowingly receiving anything of value as a result of the prohibited conduct—causing, procuring, etc., a person to engage in or submit to a commercial sex act. The prohibited conduct encompasses what is ordinarily considered "arranging" for prostitution. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC trafficking in commercial sex statute limits liability for procuring to procuring a person for a "commercial sex act." Two of the current D.C. Code procuring statutes prohibit receiving anything of value for procuring an individual for "debauchery" or an "immoral" act or purpose, in addition to prostitution.[90] "Debauchery" and "immoral" are undefined statutorily and there is no DCCA case law interpreting these terms. It is unclear to what extent these terms refer to conduct other than prostitution. Resolving this ambiguity, the procuring provisions in the RCC trafficking in commercial sex statute are limited to a "commercial sex act," as that term is defined in RCC § 22E-701. The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct.[91] To the extent that "debauchery" and "immoral" act or purpose refer to private sexual conduct other than prostitution, the current D.C. Code procuring statutes may be unconstitutional. This change improves the clarity, consistency, and proportionality of the revised statutes.

Third, the RCC trafficking in commercial sex statute clarifies that a promise for payment is sufficient for liability. The current D.C. Code definition of "prostitution" is "a sexual act or sexual contact with another person in exchange for giving or receiving anything of value."[92] The current D.C. Code pandering statute prohibits "causing" a person to engage in "prostitution,"[93] the current D.C. Code procuring for prostitution statute prohibits receiving anything of value for "arranging for or causing" a person to engage in "prostitution,"[94] and the current D.C. Code house of prostitution statute

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D.C. Code § 22-2707, the RCC trafficking in commercial sex statute is limited to a completed offense. This is discussed elsewhere in this commentary as a substantive change in law.

[90] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall . . . receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution, debauchery, or other immoral act, any individual . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution, debauchery, or other immoral purposes any individual . . . .").

[91] *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[92] D.C. Code § 22-2701.01(3).

[93] D.C. Code § 22-2705(a)(2)(C) ("(a) It is unlawful for any person, within the District of Columbia to . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (C) To engage in prostitution.").

[94] D.C. Code § 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."). The other current D.C. Code procuring statutes require procuring for "sexual intercourse, prostitution, debauchery, or other immoral [purposes]." D.C. Code §§ 22-2710 (procuring for a house of prostitution); 22-2711 (procuring for a third party). Even if the current D.C. Code

prohibits "furnishing" or "servicing" a place "for prostitution."[95] It is unclear whether "giving or receiving anything of value" in the current D.C. Code definition of "prostitution" limits these offenses to sexual activity when anything of value is given or received, or if sexual activity when there is promise to give or receive anything of value in the future is sufficient.[96] There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute uses the RCC term "commercial sex act," defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." The definition makes clear that a promise for payment is sufficient for liability. This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Fourth, the RCC trafficking in commercial sex statute clarifies that payment can be given to, received, or promised to "any person." The current D.C. Code definition of "prostitution" is "a sexual act or sexual contact with another person in exchange for giving or receiving anything of value."[97] The current D.C. Code pandering statute prohibits "causing" a person to engage in "prostitution,"[98] the current D.C. Code procuring for prostitution statute prohibits receiving anything of value for "arranging for or causing" a person to engage in "prostitution,"[99] and the current D.C. Code operating a house of prostitution statute prohibits "furnishing" or "servicing" a place "for prostitution."[100] It is unclear whether the recipient of payment for the sexual activity[101]

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definition of "prostitution" excludes a promise to pay for sexual activity, that sexual activity would likely fall under the other prohibited purposes in these statutes.

[95] D.C. Code § 22-2712.

[96] The current D.C. Code house of prostitution statute prohibits providing a place "for prostitution," and appears to be satisfied if prostitution does not occur, but is the purpose of a place. In this situation, it is similarly unclear whether the D.C. Code definition of "prostitution" limits the offense to a place where sexual activity may occur and payment is only promised. D.C. Code § § 22-2712

[97] D.C. Code § 22-2701.01(3).

[98] D.C. Code § 22-2705(a)(2)(C) ("(a) It is unlawful for any person, within the District of Columbia to . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (C) To engage in prostitution.").

[99] D.C. Code § 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."). The other current D.C. Code procuring statutes require procuring for "sexual intercourse, prostitution, debauchery, or other immoral [purposes]." D.C. Code §§ 22-2710 (procuring for a house of prostitution); 22-2711 (procuring for a third party). Even if the current D.C. Code definition of "prostitution" excludes sexual activity based upon the recipient of payment, that sexual activity would likely fall under the other prohibited purposes in these statutes.

[100] D.C. Code § 22-2712.

[101] The current D.C. Code procuring statutes require that the defendant receive anything of value for causing prostitution or procuring for purposes of prostitution. D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . ."). However this requirement is independent of

must be the person engaging in sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient.[102] There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute uses the RCC term "commercial sex act," defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in the sexual activity for payment or a third party. This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Fifth, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(A)—receiving anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person. The current D.C. Code pandering[103] and procuring[104] statutes do not specify any culpable mental states. However, the current D.C. Code operating a house of prostitution statute specifies a culpable mental state of "knowingly,"[105] which is codified in paragraph (a)(3) of the RCC trafficking in commercial sex statute. There is no DCCA case law interpreting the required mental states, if any, for the current D.C. Code pandering and procuring statutes. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(A)—receiving anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[106] This change improves the clarity and consistency of the revised statutes.

Sixth, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(B)—receiving anything of value as a result of providing or maintaining a location for a person to engage in or submit to a commercial sex act. The current D.C. Code keeping a disorderly house or bawdy house statute[107] ("bawdy house statute) does not specify any culpable mental

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whether the sexual activity satisfies the current D.C. Code definition of "prostitution"— a sexual act or sexual contact with another person in exchange for giving or receiving anything of value."

[102] The current D.C. Code house of prostitution statute prohibits providing a place "for prostitution," and appears to be satisfied if prostitution does not occur, but is the purpose of a place. In this situation, it is similarly unclear whether the D.C. Code definition of "prostitution" limits the offense to a place where sexual activity may occur and the recipient of payment is a person other than the individual engaging in the sexual activity.

[103] D.C. Code § 22-2705.

[104] D.C. Code §§ 22-2707; 22-2710; 22-2711.

[105] D.C. Code § 22-2712 ("Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[106] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[107] D.C. Code § 22-2722.

states. DCCA case law for the current bawdy house statute requires that the defendant "know or should know" of the commission of the prohibited activities and "does nothing to prevent them."[108] There is no further discussion of the meaning of "know or should know" in this case law. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(B)—receiving anything of value as a result of providing or maintaining a location for a person to engage in or submit to a commercial sex act. The "knowingly" culpable mental state as defined in RCC § 22E-206 may be a higher culpable mental state than "should know" that is sufficient under DCCA case law. However, the scope of the RCC offense is narrower—the defendant must knowingly receive anything of value "as a result" of providing the premises. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 provide a remedy when an individual merely "should know" that premises he or she owns or maintains are being used for a commercial sex act, and are discussed elsewhere in this commentary. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[109] This change improves the clarity and consistency of the revised statutes.

Seventh, paragraph (a)(3) of the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in paragraph (a)(3) regarding obtaining anything of value from the proceeds or earnings of a commercial sex act a person has engaged in or submitted to, without consideration or when the consideration is providing or maintaining a location for a commercial sex act. The current D.C. Code house of prostitution statute specifies a culpable mental state of "knowingly," making it unlawful to "knowingly . . . accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution."[110] It is unclear, however, if the mental state applies to all of the elements of the offense, or if it is limited to "accept, receive, levy, or appropriate any money or other valuable thing." There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a culpable mental state for all elements in paragraph (a)(3). Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[111] This change improves the clarity and consistency of the revised statutes.

Eighth, the RCC trafficking in commercial sex statute does not require that the sexual activity be "with another person." The current D.C. Code pandering,[112]

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[108] *Harris v. United States*, 315 A.2dc 569, 575 (D.C. 1974) (" In summary, to constitute the offense of keeping a bawdy or disorderly house under D.C. Code 1973, s 22-2722, the government must prove that acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them.").

[109] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[110] D.C. Code § 22-2712.

[111] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[112] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting causing a person to "engage in prostitution.").

procuring,[113] and house of prostitution[114] statutes incorporate the current D.C. Code definition of "prostitution"—a "sexual act or contact with another person in return for giving or receiving anything of value."[115] The current D.C. Code[116] and RCC[117] definitions of "sexual act" and "sexual contact" include masturbation. However, the current statutes' "with another person" requirement may narrow the offense to exclude a prostitute engaging in or soliciting to engage in masturbation because masturbation is not "with another person." Alternatively, the current pandering, procuring, and house of prostitution statutes could be interpreted to include a prostitute engaging in or soliciting to engage in masturbation "with another person," if the latter phrase is construed to mean "for another person to watch." To resolve this ambiguity, the revised statute does not require that the sexual activity be "with another person." Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statutes.

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

First, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability causing a person to reside in a house of prostitution or with another person for the purposes of prostitution. The current D.C. Code pandering statute prohibits placing an individual in a "house of prostitution" with intent that the individual

[113] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution . . . .").

[114] D.C. Code § 22-2712 ("Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[115] D.C. Code § 22-2701.01(3).

[116] D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of "sexual act" in D.C. Code § 22-3001(8) and the definition of "sexual contact" in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."); 22-3001(9) (defining "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[117] RCC § 22E-701.

engage in prostitution,[118] causing an individual to "reside or continue to reside in a house of prostitution,"[119] or to "reside with any other person for the purpose of prostitution."[120] Current D.C. Code § 22-2710 prohibits paying or receiving anything of value for placing a person in a "house of prostitution."[121] There is no DCCA case law interpreting these provisions. The RCC trafficking in commercial sex statute replaces reference to a "house of prostitution" and residing for purposes of prostitution with the conduct prohibited under paragraphs (a)(1) and (a)(2). This change improves the clarity of the revised statutes without changing current District law.

Second, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability causing the placement of or placing an individual in the "charge or custody" of a third person. The current D.C. Code pandering statute prohibits causing the placing of an individual in "the charge or custody of any other person" with intent that the individual engage in prostitution[122] and current D.C. Code § 22-2711 prohibits receiving anything of value for "for or on account of procuring and placing in the charge and custody of another person" for prostitution.[123] There is no DCCA case law interpreting these provisions. The RCC trafficking in commercial sex statute replaces reference to a "house of prostitution" and residing for purposes of prostitution with the conduct prohibited under paragraphs (a)(1) and (a)(2). This change improves the clarity of the revised statutes without changing current District law.

Third, the RCC trafficking in commercial sex statute no longer prohibits receiving anything of value for procuring an individual to engage in a "sexual act" or "sexual contact"[124] or for purposes of "sexual intercourse."[125] This language is unnecessary

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[118] D.C. Code § 22-2705(a)(1) ("(a) It is unlawful for any person, within the District of Columbia to: (1) Place or cause, induce, entice, procure, or compel the placing of any individual . . . in a house of prostitution, with intent that such individual shall engage in prostitution.").

[119] D.C. Code § 22-2705(a)(2)(B) ("(a) It is unlawful for any person, within the District of Columbia to: . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (B) To reside or continue to reside in a house of prostitution.").

[120] D.C. Code § 22-2705(a)(2)(A) ("(a) It is unlawful for any person, within the District of Columbia to: . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual: (A) To reside with any other person for the purpose of prostitution.").

[121] D.C. Code § 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution, debauchery, or other immoral act, any individual, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[122] D.C. Code § 22-2705(a)(1) ("(a) It is unlawful for any person, within the District of Columbia to: (1) Place or cause, induce, entice, procure, or compel the placing of any individual in the charge or custody of any other person . . . with intent that such individual shall engage in prostitution.").

[123] D.C. Code § 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution, debauchery, or other immoral purposes any individual shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[124] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.").

[125] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall . . . receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for

given the RCC definition of "commercial sex act" in RCC § 22-701[126] and deleting it does not change current District law. This change improves the clarity of the revised statutes without changing current District law.

Fourth, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability paying to obtain an individual for a house of prostitution. Current D.C. Code § 22-2710 prohibits "pay[ing]" for "the procuring for, or placing in, a house of prostitution for purposes of sexual intercourse [or] prostitution . . . any individual."[127] In the RCC trafficking in commercial sex statute, subparagraph (a)(1)(A) or subparagraph (a)(1)(B) would provide liability for this conduct. This change improves the clarity of the revised statutes without changing current District law.

Fifth, the RCC trafficking in commercial sex statute prohibits receiving anything of value "as a result of" causing, procuring, etc., a person for a commercial sex act with or for another person, or providing or maintaining a location for this purpose. The current D.C. Code procuring for prostitution statute prohibits receiving anything of value "for or on account of" arranging for or causing an individual for prostitution.[128] There is no DCCA case law interpreting this "on account of" language. The phrase "as a result of" clarifies that there must be a nexus between the receipt of anything of value and the prohibited conduct and is not intended to change current District law.

Sixth, the RCC trafficking in commercial sex statute specifically prohibits conduct that "provides" or "recruits" a person to engage in or submit to a commercial sex act. The current D.C. Code pandering statute[129] and procuring for prostitution statutes[130] appear to extend to this conduct through use of a variety of verbs, but do not specifically use the terms "provides" or "recruits." Adding the verbs "provides" and "recruits" aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

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purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . .").

[126] Subparagraph (a)(2)(A) of the RCC trafficking in commercial sex statute prohibits receiving anything of value as a result of causing, procuring, etc., an individual to engage in or submit to a "commercial sex act." RCC § 22E-701 defines "commercial sex act" as a "sexual act or sexual contact for which anything of value is given to, promised to, or received by any person." By receiving anything of value for causing, etc., a person to engage in sexual activity, the defendant satisfies the RCC definition of "commercial sex act."

[127] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . .").

[128] D.C. Code § 22-2707(a).

[129] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting, in part, "[c]ause, compel, induce, entice, or procure" an individual to engage in prostitution).

[130] D.C. Code §§ 22-2707 (procuring statute prohibiting receiving anything of value "for or on account of arranging for or causing any individual to engage in prostitution."); 22-2710 (procuring statute prohibiting paying or receiving anything of value "for or on account of the . . . placing in, a house of prostitution . . . any individual" for purposes of prostitution); 22-2711 (procuring statute prohibiting receiving anything of value "for or on account of procuring and placing in the charge or custody of another person" for prostitution).

Seventh, the RCC trafficking in commercial sex statute does not include as a discrete means of liability conduct that "induces" a person to engage in or submit to a commercial sex act. The current D.C. Code pandering statute prohibits, in relevant part, "induc[ing]" any individual to engage in prostitution.[131] There is no DCCA case law interpreting the meaning of this "inducing" language. The RCC trafficking in commercial sex statute prohibits "causes, procures, provides, recruits, or entices" a person to engage in or submit to a commercial sex act, which includes conduct ordinarily covered by the verb "inducing." Removing the verb "induc[ing]" aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

Eighth, paragraph (a)(3) of the RCC trafficking in commercial sex statute makes four clarificatory changes to the current D.C. Code house of prostitution statute. First, paragraph (a)(3) of the revised statute prohibits "obtains" anything of value, as opposed to "accept, receive, levy, or appropriate" anything of value in the current D.C. Code house of prostitution statute. "Obtains" is clearer language and is intended to encompass accepting, receiving, levying, and appropriating. Adding the verb "obtains" also aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. Second, paragraph (a)(3) refers to "anything of value" instead of "any money or other valuable thing,"[132] consistent with the other provisions in the revised statute. Third, paragraph (a)(3) refers to "providing or maintaining" a location for a commercial sex act, as opposed to "furnishing" or "servicing."[133] "Providing" and "maintaining" are clearer language and are intended to encompass "furnishing or servicing." Adding the verbs "provides" and "maintains" also aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. Fourth, paragraph (a)(3) clarifies that the proceeds or earnings must be from a commercial sex act that a person has engaged in or submitted to. The current D.C. Code house of prostitution statute refers to "from the proceeds or earnings of any individual engaged in prostitution."[134] Paragraph (a)(3) clarifies that the proceeds or earnings must be from a commercial sex act, as opposed to any earnings or money of a person that engages in prostitution, regardless of the source. These changes improve the clarity and consistency of the revised statutes.

Ninth, the RCC trafficking in commercial sex statute prohibits causing, etc., a person to "engage in or submit to" a commercial sex act (subparagraphs (a)(1)(A) and (a)(2)(A)), or providing or maintaining a location for a person to "engage in or submit to" a commercial sex act (subparagraphs (a)(1)(B) or (a)(2)(B)). Similarly, subparagraph (a)(3) refers to a person who has "engaged in or submitted to" a commercial sexual act. The current D.C. Code pandering statute prohibits causing a person to "engage" in prostitution[135] and the current D.C. Code procuring statutes prohibit either causing a

[131] D.C. Code § 22-2705(a)(2)(C).
[132] D.C. Code § 22-2712.
[133] D.C. Code § 22-2712.
[134] D.C. Code § 22-2712.
[135] D.C. Code § 22-2705(a)(2)(C).

person to "engage" in prostitution[136] or procure "for" prostitution.[137] The use of the phrase "engage in or submit to" aligns the RCC trafficking in commercial sex statute with the verbs RCC sex offense statutes in RCC Chapter 13 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

Tenth, the revised trafficking in commercial sex statute replaces references to "money or other valuable thing" in the current D.C. Code procuring statutes[138] with "anything of value" through the statute's use of the RCC definition of "commercial sex act." This clarifies the revised statute without changing current District law.

Eleventh, the revised trafficking in commercial sex statute is no longer subject to the definition of "anything of value" in D.C. Code § 22-1802 that applies to the current D.C. Code pandering,[139] procuring,[140] and house of prostitution[141] statutes.[142] Current D.C. Code § 22-1802 states that "anything of value" "shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."[143] This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within "anything of value" in the revised offense is not intended to change current District law.

Twelfth, the RCC trafficking in commercial sex statute deletes the requirement in the current D.C. Code pandering,[144] procuring,[145] house of prostitution,[146] and keeping a disorderly or bawdy house[147] statutes that the offense occur in the "District" or the "District of Columbia." This language is surplusage and deleting it does not change current District law.

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[136] D.C. Code § 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.").

[137] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . .").

[138] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing.").

[139] D.C. Code § 22-2705.

[140] D.C. Code §§ 22-2707; 22-2710; 22-2711.

[141] D.C. Code § 22-2712.

[142] The current D.C. Code pandering (D.C. Code § 22-2705), procuring (D.C. Code §§ 22-2707; 22-2710; 22-2711), and house of prostitution (D.C. Code § 22-2712) statutes incorporate the current D.C. Code definition of "prostitution," which requires "anything of value." D.C. Code § 22-2701.01(a)(3).

[143] D.C. Code § 22-1802.

[144] D.C. Code § 22-2705(a).

[145] D.C. Code §§ 22-2707(a); 22-2710; 22-2711.

[146] D.C. Code § 22-2712.

[147] D.C. Code § 22-2722.

RCC § 22E-4404. Civil Forfeiture.

Explanatory Note. *This section establishes civil forfeiture rules for conveyances and money that are intended to be used, or are used, in violation of the RCC trafficking in commercial sex statute.*[1] *All seizures and forfeitures under this section shall be pursuant to D.C. Law 20-278. The revised statute replaces the current forfeiture statute applicable to prostitution and related offenses.*[2]

Subsection (a) establishes the types of property that are subject to civil forfeiture under the revised statute. Paragraph (a)(1) applies to any property that is, in fact, a conveyance, including aircraft, vehicles, or vessels. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is a conveyance. There are two alternative bases for forfeiture of a conveyance in paragraph (a)(1). The first requires that the conveyance is possessed with intent to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." "Intent" is a defined term in RCC § 22E-206 that here means a person was practically certain that a conveyance would be used to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the conveyance was used to facilitate commission of an RCC human trafficking offense, just that a person believed to a practical certainty that a conveyance would be so used. Applying the RCC definition of "intent" does not change the mental state requirements for forfeiture in D.C. Law 20-278.[3]

The alternative basis for forfeiture of a conveyance in paragraph (a)(1) is a conveyance which is, "in fact," used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the conveyance was used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[4]

Paragraph (a)(2) applies to any property that is, "in fact," money, coins, and currency. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is money, coins, or currency. There are two alternative bases for forfeiture of money, coins, and currency in paragraph (a)(2). The

[1] RCC § 22E-4403.
[2] D.C. Code § 22-2723.
[3] This issue is discussed in detail later in the commentary to this revised statute.
[4] *See, e.g.,* D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

first requires that the money, coins, or currency are possessed with intent to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." The culpable mental state requirement of "intent" and the strict liability requirements of "in fact" are the same in paragraph (a)(2) as they are in paragraph (a)(1).

The alternative basis for forfeiture of money, coins, or currency in paragraph (a)(2) is if it is, "in fact," used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the money, coins or currency were used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[5]

Paragraph (b) establishes that the seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

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

Relation to Current District Law. *The revised forfeiture statute clearly changes District law in two main ways.*

First, the revised prostitution forfeiture statute is limited to the RCC trafficking in commercial sex statute. The current D.C. Code prostitution forfeiture provision applies to a "prostitution-related offense."[6] "Prostitution-related offenses" is defined to include all prostitution offenses in the current D.C. Code, including the misdemeanor offenses of prostitution and solicitation for prostitution.[7] In contrast, the RCC limits the prostitution forfeiture provision to the RCC trafficking in commercial sex statute and no longer uses the terms "prostitution-related offense" or "prostitution-related offenses." Forfeiture of a vehicle or money used in furtherance of prostitution or solicitation is a disproportionate penalty for otherwise very low-level conduct, and in some instances may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the prostitution forfeiture statute.[8] However, a vehicle or money used to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) remains subject to forfeiture under RCC § 22E-4404 because the statute targets "pimps" and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Second, the revised prostitution forfeiture provision applies to money, coins, and currency which are used, or intended to be used, "to facilitate commission" of the RCC

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[5] *See, e.g.,* D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[6] D.C. Code § 22-2723.

[7] D.C. Code § 22-2701.01(4) (defining "prostitution-related offenses" as "those crimes and offenses defined in this subchapter.").

[8] This case, *One 1995 Toyota Pick-Up Truck v. District of Columbia,* 718 A.2d 558 (D.C. 1998) is discussed in detail in the commentaries to the RCC prostitution and RCC patronizing prostitution statutes.

trafficking in commercial sex statute. The current D.C. Code prostitution forfeiture statute applies to conveyances that are used, or intended to be used, "to facilitate a violation" of the current D.C. Code prostitution statutes[9] and to currency that is used, or intended to be used, "in violation" of the current D.C. Code prostitution statutes.[10] "In violation" appears to be narrower than "to facilitate a violation," but there is no DCCA case law on this issue. In contrast, the revised prostitution forfeiture provision applies to currency that is used, or intended to be used, "to facilitate the commission of" of the RCC trafficking in commercial sex statute, which is consistent with the scope of conveyances subject to forfeiture. It is inconsistent to include in forfeiture conveyances that are used, or intended to be used, "to facilitate a violation" of a prostitution offense, but to limit forfeiture of currency to currency that is used, or intended to be used "in violation" of a prostitution offense. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the RCC definition of "intent to" applies to the revised forfeiture provision. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "intended for use" in a prostitution offense.[11] The meaning of "intended to" is unclear and there is no DCCA case law on this issue.[12] Resolving this ambiguity, the revised prostitution forfeiture provision applies the RCC definition of "intent" in RCC § 22E-206. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the property would be used in a prostitution offense.[13] Applying

[9] D.C. Code Ann. § 22-2723(a)(1) ("(a) The following are subject to forfeiture: (1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.").

[10] D.C. Code Ann. § 22-2723(a)(2) ("(a) The following are subject to forfeiture: . . . (2) All money, coins, and currency which are used, or intended for use, in violation of a prostitution-related offense.").

[11] D.C. Code § 22-2723(a)(1), (a)(2).

[12] The words "intended to" as used in the current prostitution forfeiture statute may refer to what was commonly known as "specific intent." However, even if this is the case, current District case law is unclear as to whether "specific intent" may be satisfied by mere knowledge, or if conscious desire is required. Compare, *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (""[a] specific intent to kill exists when a person acts with the purpose . . . of causing the death of another,") with *Peoples v. United States*, 640 A.2d 1047, 1055-56 (D.C. 1994) (proof that the appellant, who set fire to a building "knew" people inside a would suffer injuries sufficient to infer that the appellant "had the requisite specific intent to support his convictions of malicious disfigurement").

[13] Relying on the RCC definition of "intent" may produce an additional change in current District law. Under the RCC, the "intent" mental state may be satisfied by knowledge of a circumstance or result. The RCC also provides that knowledge of a circumstance may be imputed if a person is reckless as to whether the circumstance exists, and with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied to this forfeiture provision, if an owner does *not* know that property is to be used to violate the trafficking in forced commercial sex offense, but was reckless as to this fact, and avoided investigating whether this circumstance exists in order to avoid criminal liability, the imputation rule may allow a fact finder to impute knowledge to the owner. It is unclear under current District law whether a similar rule of imputation would apply. Current D.C. Code § 41-306 states that "[n]o property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission." However, this provision applies when an actual *act or omission* is the

the RCC definition of "intent" does not change the mental state requirements for forfeiture in D.C. Law 20-278.[14] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC establishes that strict liability is a distinct basis for the forfeiture of property. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "are used" in a prostitution offense.[15] It is unclear whether "are used" applies strict liability. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution forfeiture provision, by use of the phrase "in fact," clarifies that strict liability is a distinct basis for the forfeiture of property. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[16] This change improves the clarity, consistency, and proportionality of the revised statutes.

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

First, the revised forfeiture provision deletes the language "to transport." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense." The term "conveyances" sufficiently communicates an object designed to transport. The verb "to transport" is unnecessary and deleting it improves the clarity of the revised statutes.

Second, the revised forfeiture provision deletes the language "in any manner." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense."[17] "To facilitate" is sufficiently broad to encompass all methods of facilitation, particularly since the revised statute, as is discussed above, no longer specifies "to transport." Deleting "in any manner" improves the clarity of the revised statutes.

Third, the revised forfeiture provision deletes the term "property." The current D.C. Code prostitution forfeiture provision states that "All seizures and forfeitures of property under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278."[18] The term "property" is unnecessary because paragraphs (a)(1) and

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basis for forfeiture. It is unclear whether an owner's willful blindness as to *intended* uses of property still authorizes civil forfeiture. If this provision does apply even when property has not yet been used, the term "willfully blind" is undefined, and it is unclear how it differs from the deliberate ignorance provision under the RCC.

[14] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[15] D.C. Code § 22-2723(a)(1), (a)(2).

[16] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[17] D.C. Code § 22-2723(a)(1).

[18] D.C. Code § 22-2723(b).

(a)(2) of the revised provision and the current forfeiture provision[19] are limited to types of property—vehicles and money. This change improves the clarity of the revised statutes.

[19] D.C. Code § 22-2723(a)(1), (a)(2).

RCC § 22E-4601. Contributing to the Delinquency of a Minor.

Explanatory Note. *The RCC contributing to the delinquency of a minor statute prohibits being an accomplice to or criminally soliciting a person under the age of 18 years of age with respect to a District offense or comparable offense in another jurisdiction. The revised contributing to the delinquency of a minor statute applies only to actors that are at least 18 years of age and at least four years older than the minor complainant. The revised contributing to the delinquency of a minor statute replaces the current contributing to the delinquency of a minor offense[1] in the current D.C. Code.*

Subsection (a) specifies the prohibited conduct for the revised contributing to the delinquency of a minor statute. Paragraph (a)(1) and paragraph (a)(2) specify the age requirements for the actor and the complainant. Paragraph (a)(1) requires that, "in fact," the actor is at least 18 years of age and at least four years older than the complainant. The phrase "in fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to all the elements in paragraph (a)(1) and there is no culpable mental state required for the age of the actor or the age gap. Paragraph (a)(2) requires that the actor is "reckless" as to the fact that the complainant is under the age of 18 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 18 years of age.

Paragraph (a)(3) and subparagraph (a)(3)(A) specify one means of liability for the revised contributing to the delinquency of a minor statute—the actor, "in fact," is an accomplice to the complainant as proscribed in RCC § 22E-210 for a relevant District offense or a comparable offense in another jurisdiction. Per the rules of construction in RCC § 22E-207, the "in fact" specified in paragraph (a)(3) applies to the requirements in subparagraph (a)(3)(A). "In fact" is a defined term in RCC § 22E-207 which here means that, beyond the culpable mental state requirements specified in RCC § 22E-210, there are no additional culpable mental state requirements as to subparagraph (a)(3)(A). There is no culpable mental state required for the fact that the conduct constitutes a District offense or a comparable offense in another jurisdiction. "Comparable offense" is a defined term in RCC § 22E-701. To clarify any ambiguity as to whether a person may be an accomplice to a complainant purchasing, possessing, or drinking an alcoholic beverage, the statute specifically includes liability for being an accomplice to a violation of D.C. Code § 25-1002.

Paragraph (a)(3) and subparagraph (a)(3)(B) specify an alternative means of liability—the actor, "in fact," engages in a criminal solicitation of the complainant as described in RCC § 22E-302 for a relevant District offense or a comparable offense in another jurisdiction. Per the rules of construction in RCC § 22E-207, the "in fact" specified in paragraph (a)(3) applies to the requirements in subparagraph (a)(3)(B). "In fact" is a defined term in RCC § 22E-207 which here means that, beyond the culpable mental state requirements specified in RCC § 22E-302, there are no additional culpable mental state requirements as to subparagraph (a)(3)(B). There is no culpable mental state required for the fact that the conduct constitutes a District offense or a comparable offense in another jurisdiction. "Comparable offense" is a defined term in RCC § 22E-

[1] D.C. Code § 22-811.

701. To clarify any ambiguity as to whether a person may solicit a complainant to purchase, possess, or drink an alcoholic beverage, the statute specifically includes liability for soliciting a violation of D.C. Code § 25-1002.

Subsection (b) provides an exclusion from liability for the offense when, "in fact," the complainant's conduct constitutes, or if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction, during a demonstration. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to all the elements in subsection (b). The phrase "in fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here for the fact that the complainant's conduct constitutes, or would constitute, one of the specified RCC offenses, an attempt to commit one of the specified RCC offenses, or a comparable offense in another jurisdiction, during a demonstration. "Comparable offense" and "demonstration" are defined terms in RCC § 22E-701.

Subsection (c) establishes that an actor may be convicted of contributing to the delinquency of a minor upon proof of the commission of the offense, even though the minor complainant has not been arrested, prosecuted, or adjudicated delinquent of an offense.

Subsection (d) codifies an affirmative defense for an actor that engages in the conduct constituting the offense and meets certain requirements. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. First, per paragraph (d)(1), the actor must have the "intent" of safeguarding or promoting the welfare of the complainant. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would safeguard or promote the welfare of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor's conduct safeguarded or promoted the welfare of the complainant, only that the actor believed to a practical certainty that it would. The RCC general parental defense (RCC § 22E-408) also requires intent to safeguard or promote the welfare of a minor complainant and the commentary to that section discusses this requirement in detail.[2]

Paragraph (d)(2), subparagraph (d)(2)(A), and subparagraph (d)(2)(B) specify two additional requirements for the affirmative defense. Paragraph (d)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (d)(2) applies to all the elements in subparagraph (d)(2)(A) and (d)(2)(B) and no culpable mental state applies to the elements in these subparagraphs. Per subparagraph (d)(2)(A), "in fact" the conduct constituting the offense must be reasonable in manner and degree, under all the circumstances. The RCC general parental defense (RCC § 22E-408) also requires that the conduct be reasonable in manner

[2] However, the RCC parental defense includes the prevention or punishment of misconduct in the intent to safeguard or promote welfare, and the affirmative defense in the RCC contributing to the delinquency of a minor statute does not.

and degree, under all the circumstances, and the commentary to that section discusses this requirement in detail. Per subparagraph (d)(2)(B), "in fact" the conduct constituting the offense must not create a substantial risk of, or cause, death or serious bodily injury. "Serious bodily injury" is a defined term in RCC § 22E-701. The RCC general parental defense (RCC § 22E-408) also requires that the conduct does not create a substantial risk of, or cause, death or serious bodily injury and the commentary to that section discusses this requirement in detail.

Subsection (e) specifies the penalties for the revised contributing to the delinquency of a minor statute.

Subsection (f) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "chronic truancy" applicable to this statute.

Relation to Current District Law. *The revised contributing to the delinquency of a minor statute clearly changes District law in nine main ways.*

First, the revised contributing to the delinquency of a minor statute eliminates as a discrete basis of liability encouraging, causing, etc., a minor to run away from home for the purpose of criminal activity. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, encouraging, causing, etc., a minor to "[r]un away for the purpose of criminal activity from the place of abode of his or her parent, guardian, or other custodian."[3] The colloquial phrase "[r]un away" is not defined by statute. It is unclear whether this provision differs from the current statute's prohibitions on encouraging, causing, etc., a minor to violate a criminal law, a court order, or be truant from school.[4] There is no DCCA case law interpreting this provision. In contrast, the revised contributing to the delinquency of a minor statute eliminates as a discrete basis of liability encouraging, causing, etc., a minor to run away from home for the purpose of criminal activity. To the extent that this conduct overlaps with assisting, encouraging, or soliciting a minor to plan or commit a criminal offense, the revised contributing to the delinquency of a minor statute still provides liability. To the extent that the current provision prohibits conduct beyond assisting, encouraging, or soliciting a minor to plan or commit a criminal offense, there is no liability under the revised contributing to the delinquency of a minor statute. However, an adult that is civilly responsible for the health, welfare, or supervision of a minor that encourages, causes, etc., that minor to run away from home, for any reason, may have liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor ((RCC § 22E-1502) statutes if the adult causes or creates a risk of specified physical or mental harm. This change improves the clarity, consistency, and proportionality of the revised statutes.

[3] D.C. Code § 22-811(a)(3).

[4] D.C. Code § 22-811(a), (a)(1), (a)(4), (a)(5), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (1) Be truant from school; (4) Violate a court order; (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

Second, the revised contributing to the delinquency of a minor statute prohibits being an accomplice to, or soliciting, an offense in another jurisdiction that is comparable to a misdemeanor in the District. The current D.C. Code contributing to the delinquency of a minor statute limits encouraging, causing, etc., a minor to commit a misdemeanor to District law misdemeanors.[5] For felonies, however, the current D.C. Code contributing to the delinquency of a minor statute prohibits encouraging, causing, etc., a minor to commit both District law felonies,[6] and offenses in other jurisdictions that are comparable to District law felonies.[7] In contrast, the revised contributing to the delinquency of a minor statute extends to being an accomplice to, or soliciting, an offense in another jurisdiction that is a comparable offense to a misdemeanor in the District. "Comparable offense" is a defined term in the RCC that requires an offense to have elements that satisfy a District offense.[8] There is no clear reason for excluding an offense in another jurisdiction simply because it is comparable to a District law misdemeanor, as opposed to a District law felony. Although felonies are generally more serious charges than misdemeanors, there is still possible or actual legal jeopardy for the minor and the commission or possible commission of a criminal offense. This change improves the clarity, consistency, and proportionality of the revised statute, and removes a gap in liability.

Third, the revised contributing to the delinquency of a minor statute does not criminalize persons other than parents, guardians and others with custody or control of a minor from assisting, encouraging, etc. the minor to be truant. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, assisting, encouraging, etc., a minor to "[b]e truant from school."[9] The current statute does not define "truant" and there is no DCCA case law interpreting this provision. It is unclear how much school a minor must miss in order to be "truant," and more generally how the scope of the truancy prong in the current contributing to the delinquency of a minor statute differs from a violation of the District's compulsory school attendance laws—other than that the latter only applies to "the minor's parent, guardian, or other person

[5] D.C. Code § 22-811(a), (a)(5) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience.").

[6] D.C. Code § 22-811(a), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[7] D.C. Code § 22-811(a), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[8] RCC § 22E-701 ("'Comparable offense' means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.").

[9] D.C. Code § 22-811(a)(1).

who has custody or control of the minor."[10] In contrast, the revised contributing to the delinquency of a minor statute does not specifically address truancy. Instead, the revised statute only provides criminal liability for persons who are accomplices to a District offense, which includes truancy described in D.C. Code § 38-203. The revised statute's approach piggybacks on the more specific, defined District criminal statutes elsewhere in the D.C. Code to describe the elements that must be proven for liability. While it is questionable whether parents or others who encourage or assist truancy should be subject to criminal (versus civil[11]) consequences,[12] the revised contributing to the delinquency of a minor statute does not further criminalize such conduct. Among other benefits, the revised statute may avoid or limit the potential for First Amendment challenges to

[10] The District's current compulsory school attendance laws state that "The parent, guardian, or other person who has custody or control of a minor covered by § 38-202(a) who is absent from school without a valid excuse shall be guilty of a misdemeanor." D.C. Code § 38-203(d). The penalty is a fine of at least $100, a maximum term of imprisonment of 5 days, or both, for "each offense," which is defined as "[e]ach unlawful absence of a minor for 2 full-day sessions or for 4 half-day sessions during a school month shall constitute a separate offense." D.C. Code § 38-203(e), (f) ("(e) Any person convicted of failure to keep a minor in regular attendance in a public, independent, private, or parochial school, or failure to provide regular private instruction acceptable to the Board may be fined not less than $100 or imprisoned for not more than 5 days, or both for each offense. (f) Each unlawful absence of a minor for 2 full-day sessions or for 4 half-day sessions during a school month shall constitute a separate offense."). A defendant may receive a deferred sentence and be placed on probation for a first offense, and for any conviction, the courts "shall" consider requiring community service as an alternative to the fine, incarceration, or both. D.C. Code § 38-203(g), (h).

Notably, this timeline for triggering criminal liability under D.C. Code § 38-203 differs from current D.C. Municipal Regulations (DCMR) which define "chronically truant" as "absent from school without a legitimate excuse for ten (10) or more days within a single school year." D.C. Mun. Regs. tit. 5-A, § 2199 (defining "chronically truant" as "A school aged child who is absent from school without a legitimate excuse for ten (10) or more days within a single school year."). Under the DCMR, only when a student meets this definition of "chronically truant" is a school-based intervention triggered. D.C. Mun. Regs. tit. 5-A, § 2103(4) ("A student who accumulates ten (10) unexcused absences at any time during a school year shall be considered to be chronically truant. The school-based student support team assigned to the student shall notify the school administrator within two (2) school days after the tenth (10^{th}) unexcused absence with a plan for immediate intervention including delivery of community-based programs and any other assistance or services to identify and address the student's needs on an emergency basis.").

[11] Note that a child who is habitually truant may be found to be a "child in need of supervision" per Title 16 of the current D.C. Code. D.C. Code § 16-2301(8) (defining "child in need of supervision" as "a child who- (A)(i) subject to compulsory school attendance and habitually truant from school without justification; (ii) has committed an offense committable only by children; or (iii) is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable; and (B) is in need of care or rehabilitation."). Such a finding gives the Family Court jurisdiction to issue court orders to parents or caretakers to better care for the child. D.C. Code § 16–2320(c) ("If a child is found to be delinquent or in need of supervision, the Division exercising juvenile jurisdiction shall also have jurisdiction over any natural person who is a parent or caretaker of the child to secure the parent or caretaker's full cooperation and assistance in the entire rehabilitative process and may order any of the following dispositions which will be in the best interest of the child: …").

[12] The CCRC has not, at this time, reviewed or made recommendations concerning D.C. Code § 38-203 which continues to subject parents and others to criminal liability for the truancy of a minor. However, the CCRC notes that there exist serious concerns about the disparate impact and harm this offense may have on women of color in the District.

applications of the statute in particular cases of speech encouraging truancy.[13] This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised contributing to the delinquency of a minor statute does not criminalize assisting, encouraging, etc. a minor to engage in a non-criminal violation of a court order. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, assisting, encouraging, etc., a minor to "violate a court order."[14] There is no DCCA case law interpreting this provision. In contrast, the revised contributing to the delinquency of a minor statute does not specifically address violation of court orders. Instead, the revised statute only provides criminal liability for persons who are accomplices to a District offense, which includes violation of a court order that is a criminal contempt under D.C. Code § 11–741 or other contempt-type crimes (e.g., under D.C. Code § 16-1005, D.C. Code § 23–1327, D.C. Code § 23–1328, or D.C. Code § 23–1329). The revised statute's approach piggybacks on the more specific, defined District criminal statutes elsewhere in the D.C. Code to describe the elements that must be proven for liability. Among other benefits, the revised statute may avoid or limit the potential for First Amendment challenges to applications of the statute in particular cases of speech encouraging violation of a court order.[15] This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

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[13] Recognized exceptions to the First Amendment, particularly the "speech integral to criminal conduct" exception, may or may not apply to speech encouraging truancy. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010) ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *Id.*, at 382–383, 112 S.Ct. 2538. These 'historic and traditional categories long familiar to the bar,' *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment)—including obscenity, *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254–255, 72 S.Ct. 725, 96 L.Ed. 919 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949)—are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)."). Notably, the "speech integral to criminal conduct" exception is not limited to purely criminal conduct and includes at least some tortious activity. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1051 (2016).

[14] D.C. Code § 22-811(a)(4).

[15] Recognized exceptions to the First Amendment, particularly the "speech integral to criminal conduct" exception, may or may not apply to speech encouraging violation of a court order. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010) ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *Id.*, at 382–383, 112 S.Ct. 2538. These 'historic and traditional categories long familiar to the bar,' *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment)—including obscenity, *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254–255, 72 S.Ct. 725, 96 L.Ed. 919 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney v. Empire Storage &*

Fifth, the revised contributing to the delinquency of a minor statute provides an affirmative defense for an adult defendant that intends to safeguard or promote the welfare of the minor complainant. The current D.C. Code contributing to the delinquency of a minor statute does not have any such affirmative defense, and the D.C. Code does not codify any general defenses. As a result, the current D.C. Code contributing to the delinquency of a minor statute appears to apply to adults who, out of concern for the minor's well-being, encourage, cause, etc., a minor to engage in the prohibited conduct.[16] There is no DCCA case law on this issue. In contrast, the revised contributing to the delinquency of a minor statute has an affirmative defense for an adult defendant that intends to safeguard or promote the welfare of the minor complainant. The defense applies regardless of whether the adult has a duty of care to the minor. In addition to the intent requirement, the affirmative defense requires that, in fact, the actor's conduct is reasonable in manner and degree under all the circumstances and does not create a substantial risk of, or cause, death or serious bodily injury. These requirements match several of the requirements in the RCC parental defense (RCC § 22E-408) and are discussed further in the commentary to that statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, the revised contributing to the delinquency of a minor statute eliminates the special recidivist penalty in the current D.C. Code contributing to the delinquency of a minor statute. The special recidivist penalty enhancement applies to all prohibited conduct in the current D.C. Code contributing to the delinquency of a minor statute except encouraging, causing, etc., a minor to commit a felony, and provides a maximum term of imprisonment of three years.[17] In contrast, in the RCC, the general recidivism enhancement (RCC § 22E-606) will provide enhanced punishment for recidivist contributing to the delinquency of a minor, consistent with other offenses. There is no clear basis for singling out contributing to the delinquency of a minor for a recidivist enhancement as compared to other offenses of equal seriousness. The RCC general recidivism enhancement applies to a felony conviction of the revised contributing to the delinquency of a minor statute, but does not apply to a misdemeanor conviction because contributing to the delinquency of a minor is not an offense against persons in the RCC. However, if a defendant is convicted of certain misdemeanor offenses against persons in

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Ice Co., 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949)—are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)."). Notably, the "speech integral to criminal conduct" exception is not limited to purely criminal conduct and includes at least some tortious activity. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1051 (2016).

[16] For example, if an adult neighbor is concerned for the minor's well-being and speaks to the minor before school, making the minor late for school, the adult neighbor may have caused the minor to be "truant" within the meaning of the current D.C. Code contributing to the delinquency of a minor statute. Or, if that adult takes the minor to a doctor's appointment after school and causes the minor to miss court-ordered community service, that adult may have caused the minor to violate a court order within the meaning of the current D.C. Code contributing to the delinquency of a minor statute.

[17] D.C. Code § 22-811(b)(2) ("A person convicted of violating subsection (a)(2)-(6) of this section, having previously been convicted of an offense under subsection (a)(2)-(6) of this section or a substantially similar offense in this or any other jurisdiction, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 3 years, or both.").

addition to the RCC contributing to the delinquency of a minor statute, the RCC general recidivist enhancement would apply to that misdemeanor conviction.[18] This change improves the proportionality and consistency of the revised contributing statute.

Seventh, the revised contributing to the delinquency of a minor statute eliminates the special penalties in the current D.C. Code contributing to the delinquency of a minor statute for serious bodily injury or death. The current D.C. Code contributing to the delinquency of a minor statute provides for a maximum term of imprisonment of five years if the prohibited conduct "results in serious bodily injury to the minor [complainant] or any other person"[19] and a maximum term of imprisonment 10 years if prohibited conduct "results in the death of the minor [complainant] or any other person."[20] The current D.C. Code contributing to the delinquency of a minor statute does not define "serious bodily injury"[21] and there is no DCCA case law interpreting the term for this statute. In addition, it is unclear in both enhanced penalties if the prohibited conduct must cause serious bodily injury or death, or if "results in" is broader and permits enhanced penalties without causation. There is no DCCA case law on this issue. In contrast, the RCC contributing to the delinquency of a minor statute eliminates the special penalties for contributing to the delinquency of a minor that "results" in serious bodily injury or death. There is no clear basis for singling out contributing to the delinquency of a minor for these enhanced penalties as compared to other offenses of equal seriousness. In addition, the RCC assault statute provides liability for "caus[ing]" any person "bodily injury," including "serious bodily injury," as those terms are defined in RCC § 22E-701, and the RCC homicide statutes provide liability for "caus[ing]" any person death, provided that the other elements of these offenses are satisfied.[22] This change improves the clarity, consistency, and proportionality of the revised statutes.

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[18] For example, if a defendant is convicted of the revised contributing to the delinquency of a minor statute on the basis of helping the complainant commit misdemeanor assault and is also convicted of misdemeanor assault as an accomplice, the misdemeanor contributing to the delinquency of a minor conviction is not subject to the misdemeanor recidivist enhancement in RCC § 22E-606, but the assault conviction is.

[19] D.C. Code § 22-811(b)(4) ("A person convicted of violating subsection (a) of this section that results in serious bodily injury to the minor or any other person shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[20] D.C. Code § 22-811(b)(5) ("A person convicted of violating subsection (a) of this section that results in the death of the minor or any other person shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.").

[21] The current D.C. Code aggravated assault statute requires "serious bodily injury," but does not statutorily define the term. D.C. Code § 22-404.01. However, "serious bodily injury" is statutorily defined for the current D.C. Code sexual abuse statutes (D.C. Code § 22-3001(7)), and the DCCA has generally applied this definition to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). It is unclear whether the DCCA would similarly apply the definition of "serious bodily injury" in the current D.C. Code sexual abuse statutes to the current D.C. Code contributing to the delinquency of a minor statute.

[22] In addition, the RCC assault statute and the RCC murder statute provide enhanced penalties if the actor is reckless as to the fact that the complainant is a "protected person," defined in RCC § 22E-701 to include a complainant that is under 18 years of age, when, in fact, the actor is 18 years of age or older and at least 4 years older than the complainant. These are the same age and age gap requirements for an adult actor and a minor complainant that are in the RCC contributing to the delinquency of a minor statute.

Eighth, the revised contributing to the delinquency of a minor statute does not grade being an accomplice to, or soliciting, a felony offense different from a misdemeanor offense. In the current D.C. Code contributing to the delinquency of a minor statute, encouraging, causing, etc., the commission of a misdemeanor has a maximum term of imprisonment of 6 months if the enhanced penalties for recidivism, serious bodily injury, or death do not apply.[23] Encouraging, causing, etc., the commission of a felony is subject to a maximum term of imprisonment of 5 years if the enhanced penalties for serious bodily injury or death do not apply.[24] In contrast, the revised contributing to the delinquency of a minor statute grades being an accomplice to, or soliciting, any offense the same—regardless whether the offense is a misdemeanor or felony. The commission of a felony is generally more serious than misdemeanor offenses. The single flat penalty for all offenses in the revised statute effectively raises the penalty for minor misdemeanors (Classes C-E) to a Class B offense. However, where a person is an accomplice to or solicits a serious felony the actor should be charged with and subject to correspondingly higher penalties as provided under RCC § 22E-210 and RCC § 22E-302. This change improves the proportionality of the revised statute.

Ninth, the revised contributing to the delinquency of a minor statute does not purport to assign prosecutorial authority to the Attorney General for the District of Columbia (OAG), clarifying that it is an offense that the United States Attorney for the District of Columbia (USAO) prosecutes. The current D.C. Code contributing to the delinquency of a minor statute states that OAG "shall" prosecute all violations that have a maximum term of imprisonment of six months, while USAO shall prosecute violations subject to higher sentences.[25] The legislative history for the current D.C. Code contributing to the delinquency of a minor offense indicates that the Council regarded it as a new offense,[26] and the sole rationale for assignment of prosecutorial authority to

[23] D.C. Code § 22-811(b)(1) ("Except as provided in paragraphs (2) [recidivist penalty enhancement], (4) [penalty enhancement for conduct that "results in" serious bodily injury] and (5) [penalty enhancement for conduct that "results in" death] of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 6 months, or both.").

[24] D.C. Code § 22-811(b)(3) ("Except as provided in paragraphs (4) [penalty enhancement for conduct that "results in" serious bodily injury] and (5) [penalty enhancement for conduct that "results in" death] of this subsection, a person convicted of violating subsection (a)(7) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 5 years, or both.").

[25] The current D.C. Code contributing to the delinquency of a minor statute states that "The Attorney General for the District of Columbia, or his or her assistants, shall prosecute a violation of subsection (a) of this section for which the penalty is set forth in subsection (c)(1) of this section." D.C. Code § 22-811(e). The reference to paragraph "(c)(1)" appears to be an error. There is no paragraph (c)(1) in the current statute and subsection (b) codifies the penalties. Per paragraph (b)(1), all violations of the current D.C. Code contributing to the delinquency of a minor statute, except contributing, causing, etc., a minor to commit a felony, have a maximum term of imprisonment of 6 months, provided that the enhanced penalties for prior convictions, serious bodily injury, or death do not apply. D.C. Code § 22-811(b)(1) ("Except as provided in paragraphs (2), (4) and (5) of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 6 months, or both.").

[26] *See* Testimony of Robert J. Spagnoletti, Attorney General for the District of Columbia, Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006" at 27 ("The District does not have a law that prohibits contributing to the delinquency of a minor."). While it is true that at the time

OAG was the likelihood that OAG would be involved in prosecution of the underlying violations by the minor.[27] However, controlling DCCA case law based on the Home Rule Act precludes Council assignment of prosecutorial authority to OAG unless the offenses falls into one of the categories in D.C. Code § 23-101(a).[28] In contrast to current law, the revised contributing to the delinquency of a minor statute does not purport to assign any prosecutorial authority to OAG because doing so is inconsistent with District case law based on the Home Rule Act. There is no evidence that the current contributing to the delinquency of a minor statute meets or was intended to meet the exceptions to USAO prosecution for a penal statute in the nature of a police or municipal regulation, or otherwise. This change improves the enforceability and consistency of the revised statutes.

Beyond these nine changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised contributing to the delinquency of a minor statute no longer specifically or generally prohibits permitting or allowing a minor to engage in the prohibited conduct. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, "permit[ting]" or "allow[ing]" a minor to violate criminal laws or a court order, or be truant from school.[29] The plain language of the

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there was no contributing to the delinquency of a minor statute, the legislative history failed to note that, in 1963, the authority to prosecute the crime of contributing to the delinquency of a minor was provided to OAG (then Corporation Council) by Congress under D.C. Code §§ 11-1583, 11-1554. Public Law 88-241, December 23, 1963. D.C. Code § 11-1554 provided that "[t]he Juvenile Court has original and exclusive jurisdiction to determine cases of persons 18 years of age or over charged with willfully contributing to, encouraging, or tending to cause by any act or omission, a condition which would bring a child under the age of 18 years within the provisions of section 11-1551." Under then D.C. Code § 11-1583 (a)(3), the Corporation Counsel of the District of Columbia or any of his assistants shall "prosecute cases arising under sections 11-1554 and 11-1556 and the sections specified by section 11-1557, in which a person 18 years of age or over is charged with an offense." The Act Reorganizing the District of Columbia Courts, however, replaced the entirety of what was Title 11 of the D.C. Code, and created a Family Division in the Superior Court, which would handle, among others, cases of juvenile delinquency, paternity, support, and intra-family offenses (civil protective orders). Public Law 91-358, July 29, 1970 ("Title 11 of the District of Columbia Code is amended to read as follows" and did not move or restate 11-1551, 11-1554, 11-1557 in any other portion of the D.C. Code). Procedures related to the Family Division in the D.C. Superior Court and in particular, juvenile matters, were moved to Title 16 of the D.C. Code. Id. (renaming 11-1551 in 16-2303). While Public Law 91-358 did not specifically state that it was repealing sections 11-1554, 11-1556, and 11-1557, it appears that Congress intended to repeal it, as those sections did not appear in either Title 11 or 16 and the table in the 1973 version of the D.C. Code stated that these provisions were repealed by the Reorganization Act.

[27] *Id.* at 28-29 ("The misdemeanor offense would be prosecuted by OAG and the felony offense would be prosecuted by the USAO. The rationale for this bifurcated system of prosecution is based on the likelihood that OAG would be involved in the criminal and/or civil prosecution of most of the underlying offenses that would give rise to a misdemeanor violation of this Act, while the USAO is better situated to prosecute the felony violations.").

[28] *See, generally: In re Crawley*, 978 A.2d 608 (D.C. 2009); *In re Hall*, 31 A.3d 453, 456 (D.C. 2011); and *In re Settles*, 218 A.3d 235 (D.C. 2019).

[29] D.C. Code § 22-811(a), (a)(1), (a)(4), (a)(5), (a)(7) ("(a) It is unlawful for an adult, being 4 or more years older than a minor, to . . . permit, or allow the minor to: (1) Be truant from school; (4) Violate a court order; (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience; (7) Violate any criminal law of the District of Columbia for which the

current D.C. Code statute allows criminal liability based upon a person's failure to act, even if the adult defendant does not have a legal duty to act. Imposing liability for an omission when there is no prior legal duty to act is generally disfavored.[30] The DCCA has not interpreted the scope of "permit" or "allow" in the current D.C. Code contributing to the delinquency of a minor statute.[31] However, in *Conley v. United States*, in holding unconstitutional the District's former statute criminalizing presence in a motor vehicle containing a firearm, the DCCA interpreted the U.S. Supreme Court's decision in *Lambert v. California*[32] to stand for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[33] Resolving this ambiguity, the revised contributing to the delinquency of a minor statute no longer specifically or generally prohibits permitting or allowing a minor to engage in the prohibited conduct. Neither the current D.C. Code nor the RCC contributing to the delinquency of a minor statute requires that the adult defendant have a responsibility for the minor or a legal duty to act, and it is disproportionate to impose criminal liability for an omission. Depending on the facts of the case, an adult that has a responsibility under civil law for the health, welfare, or supervision of the minor may still have liability under the RCC criminal abuse of a minor statute (RCC § 22E-1501) or the RCC criminal neglect of a minor statute (RCC § 22E-1502) for failure to act or "permitting or allowing" the minor to engage in the conduct the revised contributing to the delinquency of a minor statute prohibits. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC solicitation statute (RCC § 22E-302). The current D.C. Code contributing to the delinquency of a minor statute makes it unlawful to "invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor" to violate criminal laws.[34] There is no DCCA case law interpreting this language and it is unclear whether "solicit" differs from other terms in the current statute, such as "invite," "recruit," "encourage," and "incite." There is no

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penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[30] *See* the commentary to RCC § 22E-202(c), (d).

[31] In dicta in *Joya v. United States*, the DCCA noted that it "need not resolve" the scope of "permit" and "allow" in the contributing to the delinquency of a minor statute. *Joya v. United States*, 53 A.3d 309, 322 n. 28 (D.C. 2012). The issue in *Joya v. United States* was how collateral estoppel applied to a charge of contributing to the delinquency of a minor based upon a robbery for which appellant was acquitted. *Joya*, 53 A.3d at 311-12, 319-23. The government argued that a person could be found guilty under the contributing to the delinquency of a minor statute for "allow[ing]" or "permit[ting]" a minor to engage in felony criminal conduct. *Id.* at 322 n.28. Appellant argued that "allow" and "permit" "as used in the [contributing to the delinquency of a minor] statute suggest that there must be some type of special relationship between the defendant and the minor" and that "absent such an implicit requirement . . . the statute could effectively create an affirmative duty for innocent bystanders to prevent minors from committing crimes—something there is no evidence the legislature intended." *Id.* The DCCA stated "we need not resolve this issue now." *Id.*

[32] 355 U.S. 225 (1957).

[33] *Conley v. United States*, 79 A.3d 270, 273 (D.C. 2013).

[34] D.C. Code § 22-811(a).

District case law interpreting the meaning of "solicit" in the current D.C. Code contributing to the delinquency of a minor statute. Resolving this ambiguity, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC solicitation statute (RCC § 22E-302)—"commands, requests, or tries to persuade" the complainant "to engage in or aid the planning or commission of specific conduct, which, if carried out," will constitute a criminal offense. As in the RCC solicitation statute, solicitation under subparagraph (a)(3)(B) also requires that the defendant act with the same culpability as required by the underlying criminal offense, as stated in RCC § 22E-302(a). This change improves the clarity and consistency of the revised statute.

Third, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC accomplice liability statute (RCC § 22E-210). The current D.C. Code contributing to the delinquency of a minor statute makes it unlawful to "invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor" to violate criminal laws.[35] There is no DCCA case law interpreting this language and it is unclear how the various types of prohibited conduct differ. Resolving this ambiguity, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC accomplice liability statute (RCC § 22E-210)—"assists" the complainant "with the planning or commission of conduct" or "encourages" the complainant "to engage in specific conduct" that constitutes a violation of a criminal offense, including a violation of D.C. Code § 25-1002. As in the RCC accomplice liability statute, accomplice liability under subparagraph (a)(3)(A) also requires that the defendant act with the same culpability as required by the underlying criminal offense, as stated in RCC § 22E-210(a). This change improves the clarity and consistency of the revised statute.

Fourth, the revised contributing to the delinquency of a minor statute no longer separately prohibits encouraging, causing, etc., a minor to possess or consume a trace amount of a controlled substance. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging, causing, etc., a minor to "[p]ossess or consume . . . without a valid prescription, a controlled substance as that term is defined in [D.C. Code] § 48-901.02(4)."[36] It is unclear whether this provision applies to any amount of a controlled substance or only a measurable amount and there is no DCCA case law on this issue.[37] Resolving this ambiguity, the revised contributing to the

[35] D.C. Code § 22-811(a).

[36] D.C. Code § 22-811(a), (a)(2) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (2) Possess or consume . . . without a valid prescription, a controlled substance as that term is defined in§ 48-901.02(4).").

[37] Current D.C. Code § 48-904.01 prohibits knowingly or intentionally possessing a "controlled substance" without a valid prescription or order and grades the offense based on whether the controlled substance is phencyclidine in liquid form. D.C. Code § 48-904.01(d)(1), (d)(2). The statutory language of current D.C. Code § 48-904.01 does not require a "measurable amount" of a controlled substance, but DCCA case law interpreting the offense does. *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); *see also Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance). It is unclear whether the DCCA would similarly interpret the current D.C. Code contributing to the delinquency of a minor statute to require a "measurable amount" of a controlled substance.

delinquency of a minor statute no longer specifically includes possessing or consuming a controlled substance as a discrete form of liability. Instead, the revised contributing to the delinquency of a minor statute prohibits being an accomplice to a crime, which includes the RCC Possession of a Controlled Substance offense (RCC § 48-904.01a). The RCC possession offense, like the current D.C. Code possession offense, requires that a person possess a "measurable amount" of a controlled substance. Assisting, encouraging, or soliciting a minor to possess or consume an unmeasurable (trace) amount of a controlled substance is insufficient for liability under the RCC contributing to the delinquency of a minor statute, although an adult with a responsibility under civil law for the health, welfare, or supervision of a minor may still have liability under the RCC criminal abuse of a minor statute (RCC § 22E-1501) or RCC criminal neglect of a minor statute (RCC § 22E-1502) if the adult causes or creates a risk of specified physical or mental harm. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the revised contributing to the delinquency of a minor statute requires a "reckless" culpable mental state for the age of the complainant. The current D.C. Code contributing to the delinquency of a minor statute[38] does not specify any culpable mental states and there is no DCCA case law on this issue. Resolving this ambiguity, the revised contributing to the delinquency of a minor statute requires a "reckless" culpable mental state for the age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[39] and legal experts[40] for any non-regulatory crimes. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[41] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[42] A "reckless" culpable mental state in the revised contributing to the delinquency of a minor statute is consistent with the culpable mental state required for the age of the complainant in other RCC offenses pertaining to minors, such as criminal abuse of a minor (RCC § 22E-1501),

[38] D.C. Code § 22-811.

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

[40] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[41] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

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

criminal neglect of a minor (RCC § 22E-1502), and enticing a minor into sexual conduct (RCC § 22E-1305). This change improves the consistency and proportionality of the revised offense.

Sixth, the revised contributing to the delinquency of a minor statute, by the use of the phrase "in fact," requires strict liability for the age of the actor and the required four year age gap. The current D.C. Code contributing to the delinquency of a minor statute requires that the actor be at least 18 years of age and at least four years older than the complainant, but does not specify what culpable mental state, if any, applies to these elements.[43] There is no DCCA case law on these issues. Resolving these ambiguities, the revised contributing to the delinquency of a minor statute, by the use of the phrase "in fact," requires strict liability for the age of the actor and the required four year age gap. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[44] However, the revised contributing to the delinquency of a minor statute requires a culpable mental state of recklessness for the age of the minor complainant, and an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[45] Strict liability for the age of the actor and the four year age gap is consistent with other RCC offenses that require this age for the actor and this age gap, such as third degree and sixth degree sexual abuse of a minor (RCC § 22E-1302), enticing a minor into sexual conduct (RCC § 22E-1305), and sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised offense.

Seventh, the revised contributing to the delinquency of a minor statute, by use of the phrase "in fact," applies strict liability to the fact that the conduct constitutes a District offense or a comparable offense in another jurisdiction. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, encouraging, causing, etc., a minor to violate a criminal offense in the District or elsewhere.[46] The statute does not specify any culpable mental states and it is unclear whether the actor must have subjective awareness that the planned or commissioned conduct will result in a crime. There is no DCCA case law on these issues. Resolving these ambiguities, the revised contributing to the delinquency of a minor statute, by use of the phrase "in fact,"

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[43] D.C. Code § 22-811(a), (f)(1), (f)(2) (stating "It is unlawful for an adult, being 4 or more years older than a minor . . ." and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

[44] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

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

[46] D.C. Code § 22-811(a), (a)(5), (a)(7) ("(a) It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience; (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

applies strict liability to the fact that the conduct constitutes a District offense or a comparable offense in another jurisdiction. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[47] However, requiring that the defendant have subjective awareness of the fact that planned or commissioned conduct is a crime would allow a mistake of law to preclude liability for contributing to the delinquency of a minor, which is generally disfavored in the RCC and current District law.[48] Allowing a mistake of law to preclude liability is inconsistent with the requirements in the RCC accomplice liability (RCC § 22E-210) and solicitation (RCC § 22E-302) provisions, including that the adult defendant must act with the culpability, if any, required for the underlying criminal offense. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised statute codifies an exclusion from liability when, in fact, the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction, during a demonstration. The current D.C. Code contributing to the delinquency of a minor statute prohibits encouraging, causing, etc., a minor to "violate" certain criminal laws "except for acts of civil disobedience"[49] and does not specify what culpable mental state, if any, applies to this element. There is no case law on the scope of "acts of civil disobedience" or the applicable culpable mental state. Resolving this ambiguity, the revised statute excludes from liability when, in fact, the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction, during a demonstration. While the scope of "acts of civil disobedience" in the current D.C. Code contributing to the delinquency of a minor statute is unclear, the revised statute draws a clear line at certain acts of civil disobedience statute during a demonstration. The provision makes explicit that a parent or other person cannot be held liable for encouraging or soliciting such activities protected by the First Amendment. This change improves the clarity of the revised statute.

Ninth, the revised contributing to the delinquency of a minor statute does not categorically require multiple penalties for contributing to the delinquency of a minor and a conviction for an underlying offense. The current D.C. Code contributing to the delinquency of a minor statute states that "The penalties under this section are in addition

[47] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[48] *See* Commentary to RCC § 22E-208.
[49] D.C. Code § 22-811(a), (a)(5), (a)(7) ("(a) It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience; (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

to any other penalties permitted by law." [50] The scope of the provision, whether civil or criminal, is unclear. However the reference to "penalties" may allow or require multiple criminal punishments arising from the same course of conduct. It is also unclear whether the statutory language requires consecutive sentences for contributing to the delinquency of a minor and other offenses, or if concurrent sentences are permitted. There is no relevant legislative history or DCCA case law interpreting this provision. Resolving this ambiguity, in the revised contributing to the delinquency of a minor statute, the RCC merger provision (RCC § 22E-214) determines whether multiple offenses from the same course of conduct merge, consistent with other RCC offenses. Given that the revised contributing to the delinquency of a minor statute is limited to accomplice (RCC § 22E-210) or solicitation liability (RCC § 22E-302), these offenses are lesser included offenses of and would merger into the revised contributing to the delinquency of a minor statute. This change improves the clarity, consistency, and proportionality of the revised statutes.

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

First, the revised contributing to the delinquency of a minor statute does not use the terms "adult" or "minor." The current D.C. Code contributing to the delinquency of a minor statute defines an "adult" as "a person 18 years of age or older at the time of the offense"[51] and a "minor" as "a person under 18 years of age at the time of the offense."[52] The revised contributing to the delinquency of a minor statute codifies these requirements directly into the offense as elements—the actor must be at least 18 years of age and the complainant must be under the age of 18 years—and separate terms and definitions are unnecessary. In addition, the revised contributing to the delinquency of a minor statute deletes as surplusage the "at the time of the offense" requirement in the definitions of "adult" and "minor" in the current D.C. Code contributing to the delinquency of a minor statute. This change improves the clarity of the revised statute.

Second, the revised contributing to the delinquency of a minor statute no longer includes as a discrete basis of liability encouraging or causing a minor to join a criminal street gang. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor to "[j]oin a criminal street gang as that term is defined in [D.C. Code] § 22-951(e)."[53] This provision overlaps with the current D.C. Code contributing to the delinquency of a minor statute prohibition on encouraging or causing a minor to commit a misdemeanor.[54] The RCC contributing to

[50] D.C. Code § 22E-811.
[51] D.C. Code § 22-811(f)(1).
[52] D.C. Code § 22-811(f)(2).
[53] D.C. Code § 22-811(a), (a)(6) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (6) Join a criminal street gang as that term is defined in § 22-951(e)(1).").
[54] Under current D.C. Code § 22-951, causing a person to join a criminal street gang is a misdemeanor with a maximum term of imprisonment of 6 months. D.C. Code § 22-951(a)(1), (a)(2) ("(a)(1) It is unlawful for a person to solicit, invite, recruit, encourage, or otherwise cause, or attempt to cause, another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang. (2) A person convicted of a violation of this subsection shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 6 months, or both."). Encouraging or causing a minor to join a criminal street gang violates D.C. Code § 22-951, which, in turn, violates the prohibition in

the delinquency of a minor statute prohibits assisting, encouraging, or soliciting a minor complainant to engage in conduct that constitutes a District offense, which includes the District's current criminal street gang statute.[55] It is unnecessary to codify a provision in the revised statute that is specific to encouraging or causing[56] a minor to join a criminal street gang. This change improves the clarity of the revised statutes.

Third, the revised contributing to the delinquency of a minor statute no longer specifically includes as a discrete basis of liability encouraging or causing a minor to possess or consume alcohol. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor complainant to "[p]ossess or consume alcohol."[57] The revised contributing to the delinquency of a minor statute prohibits being an accomplice to a minor complainant to engage in conduct that constitutes "a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction." This specific reference to a violation of D.C. Code § 25-1002 ensures that there is liability under the revised contributing to the delinquency of a minor statute for being an accomplice to a complainant if they "purchase, attempt to purchase, possess, or drink an alcoholic beverage in the District."[58] With this reference to D.C. Code § 25-1002 established, it is unnecessary to specially codify in the revised statute a provision that is specific to encouraging or causing a minor

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the current D.C. Code contributing to the delinquency of a minor statute on encouraging or causing a minor complainant to commit a misdemeanor. *See* D.C. Code § 22-811(a), (a)(5) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience.").

[55] D.C. Code § 22-951(a)(1), (a)(2) ("(a)(1) It is unlawful for a person to solicit, invite, recruit, encourage, or otherwise cause, or attempt to cause, another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang. (2) A person convicted of a violation of this subsection shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 6 months, or both.").

[56] The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits "permit[ting]" or "allow[ing]" a minor to join a criminal street gang. D.C. Code §§ 22-811(a), (a)(6). As is discussed elsewhere in this commentary as a possible change to current District law, the revised contributing to the delinquency of a minor statute does not include "permitting" or "allowing" any of the prohibited conduct, although there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes for an adult that is responsible under civil law for the health, welfare, or supervision of the minor. To the extent that the current D.C. Code contributing to the delinquency of a minor statute prohibits "permit[ting]" or "allow[ing]" a minor to join a criminal street gang, the revised contributing to the delinquency of a minor statute does not.

[57] D.C. Code § 22-811(a), (a)(2) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (2) Possess or consume alcohol . . . .").

[58] Current D.C. Code § 25-1002 prohibits a person under 21 years of age from "purchas[ing], attempt[ing] to purchase, possess[ing], or drink[ing] an alcoholic beverage in the District, except as provided under subchapter IX of Chapter 7." D.C. Code § 22-1002(a). A violation of current D.C. Code § 25-1002 is a "misdemeanor," although the statute also states that "No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section." D.C. Code § 25-1002(a), (c)(4)(D). Although a minor is not subject to criminal prosecution, a violation of current D.C. Code § 25-1002(a) still appears to be an "offense," and the RCC contributing to the delinquency of a minor statute treats it as such. Assisting, encouraging, etc. a minor complainant to engage in conduct that violates current D.C. Code § 25-1002(a) is sufficient for liability under the RCC contributing to the delinquency of a minor statute.

complainant to "[p]ossess or consume alcohol."[59] This change improves the clarity of the revised statutes.

Fourth, the revised contributing to the delinquency of a minor statute no longer includes as a discrete basis of liability encouraging or causing a minor to possess or consume a "measurable amount" of a controlled substance without a valid prescription. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor to "[p]ossess or consume . . . without a valid prescription, a controlled substance as that term is defined in [D.C. Code] § 48-901.02(4).[60] As is discussed elsewhere in this commentary as a possible change to current District law, it is unclear whether this provision applies to any amount of a controlled substance or only a "measurable amount." To the extent that this provision applies to a "measurable amount," it overlaps with the current D.C. Code contributing to the delinquency of a minor statute prohibition on encouraging or causing a minor to commit a misdemeanor or felony.[61] The RCC contributing to the delinquency of a minor

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[59] The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume alcohol. D.C. Code § 22-811(a), (a)(2). As is discussed elsewhere in this commentary as a possible change to current District law, the revised contributing to the delinquency of a minor statute does not include "permitting" or "allowing" any of the prohibited conduct, although there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes for an adult that is responsible under civil law for the health, welfare, or supervision of the minor. To the extent that the current D.C. Code contributing to the delinquency of a minor statute prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume alcohol, the revised contributing to the delinquency of a minor statute does not.

[60] D.C. Code § 22-811(a), (a)(2) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (2) Possess or consume . . . without a valid prescription, a controlled substance as that term is defined in§ 48-901.02(4).").

[61] Current D.C. Code § 48-904.01 prohibits knowingly or intentionally possessing a controlled substance without a valid prescription or order and grades the offense based on whether the controlled substance is phencyclidine in liquid form. D.C. Code § 48-904.01(d)(1), (d)(2) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than the amount set forth in § 22-3571.01, or both. (2) Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both."). The statutory language of current D.C. Code § 48-904.01 does not require a "measurable amount" of a controlled substance, but DCCA case law interpreting the offense does. *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

Encouraging or causing a minor to possess or consume a measurable amount of a controlled substance without a valid prescription violates D.C. Code § 48-904.01, which, in turn, violates the prohibition in the current D.C. Code contributing to the delinquency of a minor statute on encouraging or causing a minor complainant to commit a misdemeanor or a felony. *See* D.C. Code § 22-811(a), (a)(5), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil

statute prohibits assisting, encouraging, or soliciting a minor to engage in conduct that constitutes a District offense, including the RCC possession of a controlled substance offense (RCC § 48-904.01a), and it is unnecessary to codify a provision that is specific to encouraging or causing a minor to possess or consume a controlled substance.[62] This change improves the clarity of the revised statutes.

Fifth, the revised contributing to the delinquency of a minor statute does not codify a separate provision stating that "it is not a defense" that the minor complainant does not engage in the prohibited conduct or is not charged with, adjudicated delinquent for, or convicted of an offense. Subsection (d) of the current D.C. Code contributing to the delinquency of a minor statute states that "It is not a defense to a prosecution under this section that the minor does not engage in, is not charged with, is not adjudicated delinquent for, or is not convicted as an adult, for" any of the prohibited conduct.[63] Instead, subsection (c) of the revised contributing to the delinquency of a minor statute states that an actor "may be convicted of an offense under this section even though the complainant has not been arrested, prosecuted, convicted, or adjudicated delinquent for an offense." Subsection (c) of the revised statute is consistent with a provision in the general RCC accomplice liability statute (RCC § 22E-210). Subsection (c) of the revised statute is substantively identical to subsection (d) of the current D.C. Code contributing to the delinquency of a minor statute, with one exception—the revised subsection (c) does not specify that the minor "does not engage in" the prohibited conduct. This language is surplusage given the requirements of the revised statute (accomplice or solicitation liability) and deleting it is not intended to change current District law. This change improves the clarity of the revised statute.

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disobedience. . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony . . . .").

[62] The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume a controlled substance without a valid prescription. D.C. Code § 22-811(a), (a)(2). As is discussed elsewhere in this commentary as a possible change to current District law, the revised contributing statute does not include "permitting" or "allowing" any of the prohibited conduct, although there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes for an adult that is responsible under civil law for the health, welfare, or supervision of the minor. To the extent that the current D.C. Code contributing to the delinquency of a minor statute prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume a controlled substance without a valid prescription, the revised contributing to the delinquency of a minor statute does not.

[63] D.C. Code § 22-811(d).

COMMENTARY
OFFENSES OUTSIDE TITLE 22 AND OFFENSES RECOMMENDED FOR REPEAL

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

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

Subsection (a) specifies the elements of first degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (a) specifies that a person must knowingly possess[1] an unregistered firearm, destructive device, or restricted pistol bullet. "Knowingly" is a defined term[2] and applied here means that the person must be practically certain that they possess the firearm or destructive device. "Possesses" is a defined term and includes both actual and constructive possession.[3] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[4] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[5]

Paragraph (a)(1) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing an unregistered firearm. "Firearm" is a defined term,[6] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[7] but excludes antiques.[8] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess a firearm[9] or that they possess component parts

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

[2] "Knowingly" is defined in RCC § 22E-206.

[3] RCC § 22E-701.

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

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

[6] D.C. Code § 7-2501.01.

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

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

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

that could be arranged to make a whole firearm.[10] Paragraph (a)(1) requires proof that the accused lacked a firearm registration certificate on the day in question.[11] Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a registration certificate.[12] It is not a defense that the person was unaware of the duty to register the firearm.[13] It is not a defense that the firearm cannot be registered lawfully in the District.[14]

Paragraph (a)(2) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing a destructive device. The term "destructive device" is a defined[15] term that includes certain explosives and lacrimators but excludes B-B guns and flare guns. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "destructive device."

Paragraph (a)(3) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing one or more restricted pistol bullets. The term "restricted pistol bullet" is defined[16] to include several categories of pistol and rifle ammunition that are likely to pierce through bullet-resistant tactical vests. The term does not include hollow-point bullets. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "restricted pistol bullet."

Subsection (b) specifies the elements of second degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (b) specifies that a person must knowingly possess a specified object.[17] "Knowingly" is a defined term[18] and

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

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

[12] RCC § 22E-207.

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

[14] *See United States v. Carmel*, 548 F.3d 571, 579 (7th Cir.2008) (holding that defendant could have complied with statute prohibiting possession of unregistered firearms "simply by declining to possess…illegal machine guns," which could not be registered because they could not legally be possessed); *United States v. Grier*, 354 F.3d 210, 214–15 (3d Cir.2003) (same); *United States v. Bournes*, 339 F.3d 396, 399 (6th Cir.2003) (same); *United States v. Elliott*, 128 F.3d 671, 672 (8th Cir.1997) (same); *Hunter v. United States*, 73 F.3d 260, 261–62 (9th Cir.1996) (same); *United States v. Ardoin*, 19 F.3d 177, 179–80 (5th Cir.1994) (same); *United States v. Jones*, 976 F.2d 176, 183 (4th Cir.1992) (same); *but see United States v. Dalton*, 960 F.2d 121, 124 (10th Cir.1992) (reversing conviction for possession of unregistered machine gun, holding that a conviction for a crime that "ha[s] as an essential element [the defendant's] failure to do an act that he is incapable of performing" violates due process).

[15] D.C. Code § 7-2501.01.

[16] RCC § 22E-701.

[17] Knowledge of ammunition's presence may be inferred from surrounding circumstances; direct evidence is not required. *See Ko v. United States*, 722 A.2d 830 (D.C. 1998) (upholding conviction of unlawful

applied here means that the person must be practically certain that they possess the object. "Possesses" is a defined term and includes both actual and constructive possession.[19] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[20] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[21]

Subsection (b) provides that a person commits second degree possession of an unregistered firearm, destructive device, or ammunition by possessing ammunition without having a registered firearm of the same caliber. "Ammunition" is a defined term,[22] which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "ammunition." Subsection (b) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person lacked a firearm registration certificate on the day in question.[23] It is not a defense that the person was unaware of the duty to have a registered firearm. It is not a defense that a firearm of the same caliber cannot be registered lawfully in the District.

Subsection (c) establishes six exclusions from liability.Paragraph (c)(1) excludes from liability possession of a firearm frame, receiver, muffler, or silencer.[24] Possession of a silencer is punished as possession of a prohibited weapon or accessory.[25]

Paragraph (c)(2) excludes from liability possession of a lacrimator or sternutator.[26]

Paragraph (c)(3) excludes from liability possession of a firearm by a nonresident who is traveling through the District with the firearm that they have registered in another state. Subparagraph (c)(2)(A) excludes nonresidents who are participating in a lawful recreational firearm-related activity[27] inside the District. Subparagraph (c)(2)(B) excludes non-residents who are traveling to or from a lawful recreational firearm-related activity outside the District. Subparagraph (c)(2)(B) requires that the person comply with

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possession of ammunition on evidence that defendant, who had purchased a restaurant, found ammunition owned by seller in office, put that ammunition in his desk drawer, and made no attempt for several months to return ammunition to the seller).

[18] "Knowingly" is defined in RCC § 22E-206.

[19] RCC § 22E-701.

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

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

[22] RCC § 22E-701.

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

[24] D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers.

[25] RCC § 22E-4101.

[26] D.C. Code § 7-2501.01 defines "destructive device" to include any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known.

[27] E.g., safety training course, firing range practice, gun show, shooting competition.

any law enforcement officer's demand for proof that they meet the exclusion criteria. "Law enforcement officer" is a defined in RCC § 22E-701. Subparagraph (c)(2)(B) also requires that the firearm be safely transported consistent with RCC § 22E-4109.

Paragraph (c)(4) excludes from liability possession of ammunition by any person who holds an ammunition collector's certificate issued before the Firearms Control Regulation Act of 1975 became effective. Where the government presents a *prima facie* case of possession of ammunition without the necessary firearm registration, the defendant has the burden of proving this exclusion from liability by a preponderance of the evidence.[28]

Paragraph (c)(5) excludes empty cartridge casings, shells, and spent bullets from the reach of the second degree possession of an unregistered firearm, destructive device, or ammunition offense.[29]

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

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[30] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.[31]

Subsection (f) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (f)(3) provides that the Attorney General may allow a person charged with possession of an unregistered firearm, destructive device, or ammunition to resolve the charge using the District's post-and-forfeit procedure.[32]

Subsection (g) cross-references applicable definitions in the RCC and the D.C. Code.

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

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

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

[30] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991). *See also* RCC § 22E-502, Temporary Possession.

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

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

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

First, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 7-2507.06 provides two different penalties for an unregistered firearm. Subsection (a) specifies a maximum penalty of one year of incarceration, a fine of $2,500, or both.[33] Paragraph (a)(2) of D.C. Code § 7-2507.06 specifies that a second offense is punishable by a maximum penalty of five years of incarceration, a fine of $12,500, or both, unless the person is in their dwelling place, place of business, or on their land and possesses a firearm that could otherwise be registered.[34] (Subparagraph (b)(1)(A) of D.C. Code § 7-2507.06 specifically authorizes the Attorney General to offer an alternative administrative disposition without conviction, but this provision is superfluous because general authority to offer such a disposition exists in D.C. Code § 5-335.01.) In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of an unregistered firearm, destructive device, or ammunition offense may be subject to a general repeat offender penalty enhancement just as other offenses.[35] This change improves the consistency and proportionality of the revised statute.

Second, the revised offense does not include liability for possession of a frame, receiver, muffler, silencer, lacrimator or sternutator. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers and defines "destructive device" to include any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known. Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are "bearable arms" protected by the Second Amendment.[36] With limited exceptions for military and law enforcement,[37] the RCC criminalizes mere possession of a silencer as contraband *per se*[38] and, because any possession is illegal, does not regulate their registration, storage, or carrying. The RCC does not criminalize possession of self defense sprays.[39] This change improves the proportionality and logically reorganizes the revised offenses.

Third, the revised statute punishes possession of a restricted pistol bullet as possession of an unregistered firearm, destructive device, or ammunition[40] only. Current 24 DCMR § 2343.2 states, "A person issued a concealed carry license by the Chief may not carry any restricted pistol bullet as that term is defined in the Act." However, mere possession—much less actual possession or carrying—of a restricted pistol bullet by any person, including the holder of a carry license, is prohibited under other provisions in

[33] D.C. Code § 22-3571.01.
[34] D.C. Code § 22-3571.01.
[35] RCC §§ 22E-606(a) and (b).
[36] *See United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).
[37] RCC § 22E-4118.
[38] RCC § 22E-4101, possession of a prohibited weapon or accessory.
[39] See First Draft of Report #40.
[40] RCC § 7-2502.01A(b)(2).

current law.[41] In contrast, the revised code effectively repeals 23 DCMR § 2343.2 as duplicative of the prohibition on restricted pistol bullets in the revised possession of a prohibited weapon or accessory offense.[42] This change improves the logical organization of the revised code and reduces unnecessary overlap between District offenses.

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

Fifth, the revised statute's Administrative Disposition[43] provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor…may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.[44] This change improves the clarity and consistency of the revised offenses.

Sixth, the revised offense punishes possession of one restricted bullet as severely as possession of two or more. Current D.C. Code § 7-2507.06(a) provides a maximum penalty of one year in jail for possession of a single restricted pistol bullet and a

[41] With limited exceptions, a person who has any ammunition (defined in D.C. Code § 7-2501.01 to include restricted pistol bullets) without having a registered firearm of the same caliber, may be prosecuted under D.C. Code § 7-2506.01. A person who has a registered firearm is nevertheless prohibited from having one or more restricted pistol bullets under D.C. Code § 7-2506.01(a)(3).
[42] RCC § 22E-4101(a)(2)(F).
[43] The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.
[44] *See* American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

maximum of 10 years in prison for possession of two or more. D.C. Code § 7-2507.06(b)(1)(B) authorizes the Attorney General to offer an alternative administrative disposition without conviction for possession a single restricted pistol bullet but not for possession of two or more.[45] In contrast, the revised offense provides a single penalty gradation for possession of restricted ammunition. It is unclear why such a sharp difference in penalty is supported by possessing one bullet versus possessing two or more bullets.[46] This change improves the proportionality of the revised offense.

Seventh, the RCC codifies a single list of exclusions from liability for possessory weapons offenses that are incorporated into the revised possession of an unregistered firearm, destructive device, or ammunition offense by reference.[47] The current D.C. Code provisions list incongruent exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who possess an unregistered firearm, destructive device, or ammunition.[48] In contrast, RCC § 22E-4118 provides a single, comprehensive list of exclusions from liability, reconciling the exclusion circumstances described in current law. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[49] This change improves the clarity, consistency, and completeness of the revised code.

Eighth, the revised offense codifies a voluntary surrender affirmative defense. D.C. Code §§ 7-2507.05 and 7-2510.07(f)(1) preclude prosecution for certain possessory weapons offenses where the person is voluntarily surrendering the weapon to law enforcement. The statutes do not address the elements or burden of proof for a defense based on one of these provisions, however District case law has explained the showing that must be made by the defense.[50] The revised statute specifies that any voluntary surrender that is made pursuant to District or federal law is an affirmative defense that must be proven by the defense by a preponderance of the evidence.[51] This change improves the clarity, consistency, and proportionality of the revised offense.

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

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

[47] RCC § 22E-4118.

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

[49] RCC § 22E-402.

[50] *See Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

[51] *See* RCC § 22E-201(b); *see also* RCC § 22E-502, Temporary Possession.

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

First, the revised statute holds an actor strictly liable as to the existence of a firearm registration certificate. Current D.C. Code §§ 22-4502.01, 22-4506.01, and 22-4507.06 do not specify a culpable mental state for any element of the unregistered firearm, destructive device, or ammunition offenses.[52] District case law has not addressed whether a reasonable or unreasonable mistake of fact as to having validly registered a firearm is a defense.[53] The revised offense makes no allowance for such a defense. A firearm owner is required to comply with all District regulations, including receiving training on the responsibilities of ownership.[54] This change clarifies the revised offense.

Second, the RCC's exclusion for nonresidents traveling through the District, in paragraph (c)(3) of the revised offense, requires that the person exhibit proof that they meet the exclusion criteria to any "law enforcement officer" who demands it. D.C. Code § 7-2502.01(b)(3) requires that a nonresident in these circumstances comply with such a request made by a Metropolitan Police Officer "or other bona fide law enforcement officer." The term "bona fide law enforcement officer" is not defined in the statute and District case law has not interpreted its meaning. In contrast, the revised offense uses the standardized definition of "law enforcement officer" that is employed throughout the RCC.[55] The RCC definition of "law enforcement officer" includes special police officers, corrections officers, and other government actors who do not have arrest powers, which may be broader than the phrase "bona fide law enforcement officer" in current law. This change improves the clarity and consistency of the revised offense and may eliminate an unnecessary gap in liability.

Third, the revised statute refers to "possession" and does not include explicit references to transferring, offering for sale, selling, giving, or delivering a destructive device. D.C. Code § 7-2502.01(a) makes it unlawful to receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device. Such conduct is also prohibited by D.C. Code §§ 7-2504.01(b) and 7-2505.01. In contrast, the RCC's definition of possess[56] includes both actual possession and constructive possession. A person who knowingly transfers, offers, sells, gives, or delivers a destructive device appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in

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

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

[54] *See* D.C. Code § 7-2502.03(a)(10).

[55] RCC § 22E-701.

[56] RCC § 22E-701.

conduct criminalized elsewhere.[57] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

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

First, the revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an unregistered firearm, destructive device, or ammunition liability. The current statutes do not specify a requisite mental state,[58] however, District case law requires knowledge for actual or constructive possession of any item.[59] The revised statute uses the RCC's general provisions that define "knowingly" and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[60] These changes clarify and improve the consistency of District statutes.

Second, the revised code defines "possession" in its general part.[61] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[62] The RCC definition of "possession,"[63] with the requirement in the offense that the possession be "knowing,"[64] matches the meaning of possession in current DCCA case law.[65] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Third, the revised offense does not specifically include a self-defense provision. Current D.C. Code § 7-2502.01(b)(4) specifies that a person will not be subject to prosecution "who temporarily possesses a firearm…while in the home or place of

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[57] *See* D.C. Code § 22-1511 (Fraudulent advertising).
[58] D.C. Code §§ 7-2502.01; 7-2506.01.
[59] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).
[60] RCC § 22E-207.
[61] RCC § 22E-701.
[62] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[63] RCC § 22E-701.
[64] RCC § 22E-206.
[65] *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

business of the registrant…[if] the person reasonably believes that possession of the firearm is necessary to prevent imminent death or great bodily harm to himself or herself." An offense-specific self-defense provision is duplicative in the RCC. Per subsection (h) of the revised statute, the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense, including general provisions that preclude liability where a person acts in defense of one's self, a third person, or property.[66] This change improves the consistency of the revised offenses.

Fourth, the revised statute requires the government prove that a person who possesses ammunition does not have a registered firearm of the same caliber. Current D.C. Code § 7-2506.01(a) states that no person shall possess ammunition unless one of five circumstances is present. The statute does not specify whether the government has the burden of proving the absence of these circumstances or whether the defense must affirmatively raise any of the circumstances as a defense. However, the District of Columbia Court of Appeals ("DCCA") has required the government to prove the circumstance described in D.C. Code § 7-2506.01(a)(3): the absence of a firearm registration certificate.[67] The revised offense clarifies that the absence of a firearm registration certificate is an element that must be proven beyond a reasonable doubt, whereas the other exceptions[68] must be proven by the defense by a preponderance of the evidence.[69] This change improves the clarity and consistency of the revised offense.

Fifth, the revised statute is severed from D.C. Code § 7-2502.01 and given its own section in the revised code. This change clarifies that the exclusion, defense, penalties, and definitions do not apply to remaining provisions in D.C. Code § 7-2502.01 that are not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

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[66] *See* RCC §§ 22E-403; 22E-404.

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

[68] RCC §§ 7-2502.01A(c)(1); 22E-4118.

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

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

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

Subsection (a) specifies that to commit possession of a stun gun, a person must knowingly[1] possess a stun gun. "Stun gun" is a defined term and includes weapons that inflict injury by direct contact (commonly referred to as "stun guns") and weapons that can be fired from a distance (e.g., TASERs). "Possession" is also a defined term and includes both actual and constructive possession.[2] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[3]

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

Paragraph (a)(2) prohibits possession of a stun gun by any person in a specified location. Subparagraph (a)(2)(A) specifies that the first type of location where stun guns are prohibited is a District government-occupied building, building grounds, or part of a building. The term "building" is defined in RCC § 22E-701. "Building grounds" refers to the area of land occupied by the facility and its yard and outbuildings, with a clearly identified perimeter. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a location that is occupied by the District of Columbia.

Subparagraph (a)(2)(B) specifies that the second type of location that may ban stun guns under penalty of criminal prosecution under this section is a location that is a building, building grounds, or part of a building that is occupied by a preschool, primary or secondary school, public youth center, or a children's day care center.[4] The term "building" is defined in RCC § 22E-701 and does not include open campus space. "Building grounds" refers to the area of land occupied by the facility and its yard and outbuildings, with a clearly identified perimeter. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a specified location.

Subparagraph (a)(2)(C) specifies that the third type of location that may ban stun guns under penalty of criminal prosecution under this section is one that displays signage that clearly and conspicuously indicates stun guns are not permitted there. Whether a sign is clear and conspicuous may depend on facts such as its placement, legibility, and word choice.[5] Per the rules of interpretation in RCC § 22E-207, the person must know—

[1] "Knowingly" is defined in RCC § 22E-206.

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

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

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

[5] This is a more flexible standard than provided in the District's current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the

that is, be practically certain—that he or she is in a location where such signage is displayed.

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

Subsection (c) codifies an effective consent affirmative defense to the possession of a stun gun offense.[6] Subsection (c) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the actor's conduct under District law. The effective consent defense requires either the complainant's "effective consent" to the actor's conduct or the actor's reasonable belief that the complainant gave "effective consent" to the actor's conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The burden is on the defendant to raise and prove the effective consent defense by a preponderance of the evidence.

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

Subsection (e) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (c)(2) provides that the Attorney General may allow a person charged with possession of a stun gun to resolve the charge using the District's post-and-forfeit procedure.[7]

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

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

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

First, the revised offense does not separately prohibit using a stun gun. Current law provides, "No person who possesses a stun gun shall use that weapon except in the exercise of reasonable force in defense of person or property"[8] and that "brief possession [by a person under 18 years of age] for self-defense in response to an immediate threat of harm shall not be a violation of this subsection."[9] In contrast, the RCC punishes using a dangerous weapon (a defined term that includes a stun gun[10]) unlawfully against another person in a wide array of offenses against persons, such as assault,[11] or criminal threats.[12] Where a person acts in defense of one's self, a third person, or property, a general defense may apply.[13] The revised code does not criminalize using a stun gun in any other

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that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

[6] *See* D.C. Code § 7-2502.15(c) ("Unless permission specific to the individual and occasion is given…").

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

[8] D.C. Code § 7-2502.15(b).

[9] D.C. Code § 7-2502.15(a).

[10] RCC § 22E-701.

[11] RCC § 22E-1202.

[12] RCC § 22E-1204.

[13] *See* RCC §§ 22E-403; 22E-404.

manner.[14] This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised offenses.

Second, the revised code does not specifically criminalize possession of a stun gun in a correctional facility as a weapons offense. Current law prohibits possession of a stun gun in a "penal institution, secure juvenile residential facility, or halfway house" as both possession of a stun gun[15] and as unlawful possession of contraband.[16] In contrast, the revised offense applies generally to buildings, grounds, or parts thereof occupied by the District of Columbia, which effectively reaches many correctional facilities in the District. For both District and non-District occupied correctional facilities, the RCC first degree correctional facility contraband offense[17] punishes possession of a dangerous weapon (a defined term that includes a stun gun[18]) by a person who is confined to a correctional facility or secure juvenile detention facility and also punishes bringing a dangerous weapon to a person who is confined in such a facility.[19] The RCC does not separately criminalize possession of a stun gun in a halfway house, however the Director of the Department of Corrections may suspend or revoke work release for any breach of discipline or infraction of institution regulations.[20] This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised code.

Third, the RCC separately codifies a standard list of exclusions from liability for possessory weapons offenses.[21] Current D.C. Code § 7-2502.15(c), by cross-reference to § 7-2509.01, provides an exception for police officers, special police officers, and campus police officers who carry stun guns. In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement falls under the general provisions' justification defense for execution of public duty.[22] This change improves the clarity, consistency, and completeness of the revised code.

Fourth, the revised statute's Administrative Disposition[23] provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other

[14] Consider, for example, a person who uses a stun gun to see test its operation or to inflict an injury to one's self.
[15] D.C. Code § 7-2502.15(c)(2).
[16] D.C. Code § 22-2603.02.
[17] RCC § 22E-3403(a).
[18] RCC § 22E-701.
[19] Notably, the correctional facility contraband offense does not reach persons who bring a dangerous weapon to a facility without intent to give it to someone who is confined. If a person brings a dangerous weapon to a facility with intent to use it unlawfully, that conduct is punished as possession of a dangerous weapon during a crime, under RCC § 22E-4104.
[20] D.C. Code § 24-241.05(a).
[21] RCC § 22E-4118.
[22] RCC § 22E-402.
[23] The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.

than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor…may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.[24] This change improves the clarity and consistency of the revised offenses.

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

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

First, the revised statute specifies that knowledge the culpable mental states required for each element of the revised possession of a stun gun offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[25] The revised statute requires that a person know that they possess a stun gun and that they know the nature of their location. A reading of the statute that makes a person strictly liable for would leave no margin for a reasonable

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

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

mistake of fact or law by someone otherwise engaged in legal activity.[26] The revised statute does not impose criminal liability where a person exercises their constitutionally protected right to carry a stun gun[27] in a reasonably responsible manner. The revised offense applies a standardized definition for the "knowingly" culpable mental state required for possession of stun gun liability. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute codifies an effective consent affirmative defense. Current law prohibits possession of a stun gun in specified locations "Unless permission specific to the individual and occasion is given."[28] The statute does not address who must provide permission, whether permission must be freely given, whether the accused must be aware or certain of the permission, or which party has the burden of proving permission or lack of permission. Case law has not addressed these issues. To resolve these ambiguities, the revised possession of a stun gun statute details the meaning, burden of proof, and limitations of an effective consent defense to the revised possession of a stun gun offense. This change improves the clarity, consistency, and proportionality of the revised offense.

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

First, the revised statute requires signage that clearly and conspicuously indicates stun guns are not permitted. Current law criminalizes possession of a stun gun in "Any building or grounds clearly posted by the owner or occupant to prohibit the carrying of a stun gun." [29] The revised statute's language is substantively the same as the current statute, but phrased so as to be consistent with other RCC offenses. This change improves the consistency and proportionality of the revised offenses.

Second, the revised code defines "possession" in its general part.[30] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[31] The RCC definition of "possession,"[32] with the requirement in the offense that the possession be "knowing,"[33] matches the meaning of possession in current DCCA case law.[34] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[26] Consider, for example, a person who carries a stun gun for self-defense and enters a coffeehouse in a government building that they mistakenly—but understandably—believe to be a private office building. Consider also, a person who cannot read English, who brushes past a large sign stating, "No stun guns allowed," to ask a security staff person whether stun guns are permitted.
[27] *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).
[28] D.C. Code § 7-2502.15(c).
[29] D.C. Code § 7-2502.15(c)(4).
[30] RCC § 22E-202.
[31] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[32] RCC § 22E-701.
[33] RCC § 22E-206.
[34] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v.*

Third, the revised statute replaces the phrase "A building or office occupied by the District of Columbia, its agencies, or instrumentalities"[35] with the simpler "A building, building grounds, or part of a building, occupied by the District of Columbia" in subparagraph (a)(1)(A). The word "instrumentalities" as used in D.C. Code § 7-2502.15 is not defined in the statute and case law has not interpreted its meaning. Broadly construed, "instrumentalities" may include every person and business contracted to work on behalf of the District government, which would capture many locations that do not have heightened security concerns.[36]

Fourth, the revised statute clarifies the list of prohibited locations related to children. Current D.C. Code § 7-2502.15(c)(3) disallows stun guns in "[a] building or portion thereof, occupied by a children's facility, preschool, or public or private elementary or secondary school." The revised offense eliminates the superfluous reference to "public or private" and substitutes for the vague reference to "children's facility" the terms "public recreation center" and "children's day care center." The latter terms are locations similarly protected from firearms[37] and drug activity[38] under the revised code.

Fifth, the revised statute replaces the phrases "A building or office occupied by…" and "A building or portion thereof, occupied by"[39] with the simpler "A building, building grounds, or part of a building…" This clarifies that a person does not commit an offense by entering another part of the building that is not occupied by a District government office or children's facility and improves the consistency of the revised offense.[40]

United States, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

[35] D.C. Code § 7-2502.15(c)(1).

[36] Consider, for example, a restaurant that provides catering services to a District government event.

[37] RCC § 22E-4102.

[38] *See* RCC § 48-904.01b(g)(7)(C)(i).

[39] D.C. Code § 7-2502.15(c)(3).

[40] Consider, for example, two locations of the same chain of grocery stores, one occupying the ground floor of a District office building and the other occupying the ground floor of a privately-owned building. Each store has its own private entrance. In such an instance, the revised offense treats these locations alike and prohibits possession of a stun gun only if the store displays clear and conspicuous signage.

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

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

Paragraph (a)(1) specifies that to commit carrying an air or spring gun, a person must knowingly[1] possess an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, or bowgun. "Possesses" is a defined term and includes both actual and constructive possession.[2] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[3]

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

Paragraph (a)(3) specifies that a person must carry the air or spring gun in a manner that it is both conveniently accessible and within reach.[4] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the air or spring gun is conveniently accessible and within reach.

Paragraph (b)(1) excludes three categories of conduct from criminal liability under this section. First, a person is not liable under this statute[5] for using an air or spring gun outside as part of a lawful[6] theatrical performance,[7] athletic contest,[8] or athletic or cultural presentation.[9] Second, a person is not liable for using an air or spring gun in a licensed firing range.[10] Third, a person is not liable for using an air or spring gun in a location where use of the gun is permitted by the Metropolitan Police Department ("MPD"). MPD may permit the use of an air or spring gun in a particular location at a specified time or at all times.

Paragraph (b)(2) provides an exception for responsibly transporting an air or spring gun. Subparagraph (b)(2)(A) limits the exception to persons over 18 years of age.

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[1] "Knowingly" is defined in RCC § 22E-206.

[2] RCC § 22E-701.

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

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

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

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

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

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

[9] For example, a person may have a blowgun while giving an educational presentation at the National Museum of the American Indian.

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

Subparagraph (b)(2)(B) requires that the air or spring gun be both unloaded and securely wrapped.

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

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

Subsection (d) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

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

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

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

First, the revised statute does not specifically criminalize possession by a person under 18 of a "bean shooter, sling, projectile, [or] dart" in a public place. Current 24 DCMR § 2301.1 prohibits any person under 18 years of age from carrying in public "any gun, pistol, rifle, bean shooter, sling, projectile, dart, or other dangerous weapon of any character." The terms "bean shooter," "sling," "projectile," and "dart" are not defined in the DCMR or in District case law. It is unclear whether these terms would reach objects with commonplace recreational uses, such as a ball, a frisbee, or toys that launch foam or plastic rockets or other objects.[11] In contrast, the revised carrying an air or spring gun statute does not cover a "bean shooter, sling, projectile, [or] dart" by a person under 18 in public. Such behavior may, in some instances be punishable in the RCC as carrying a dangerous weapon[12] or possession of a dangerous weapon with intent to commit crime.[13] This change improves the clarity, consistency, and proportionality of the revised offenses and reduces unnecessary overlap.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses.[14] Current 24 DCMR § 2301.2 states, "Nothing in this section shall be construed as to prohibit a member of a duly authorized military organization from the proper use of the guns and other equipment used as a member of the organization." In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[15] This change improves the clarity, consistency, and completeness of the revised code.

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

[11] Notably, the D.C. Code separately regulates the any projectile or dart that is explosive, incendiary, or poisonous. *See* D.C. Code §§ 7-2501.01 and 7-2502.01.
[12] RCC § 22E-4102.
[13] RCC § 22E-4103.
[14] RCC § 22E-4118.
[15] RCC § 22E-402.

D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the carrying an air or spring gun offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[16] This change clarifies the revised statute.

Second, the revised offense requires that the air or spring gun be "conveniently accessible and within reach" and "outside a building." Current 24 DCMR § 2301.3 makes it unlawful for a person to "to carry or have in his or her possession outside any building…an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, bowgun, or any similar type gun." It is unclear whether the phrase "outside any building" applies to both carrying and possessing or to possession only. District case law has not interpreted its meaning. To resolve this ambiguity, the revised offense criminalizes possession only if the weapon is conveniently accessible and within reach and outside a building.[17] This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,[18] which improves the consistency of the revised code.

Third, the revised offense excludes from liability possession of an air or spring gun if it occurs with the permission of the Metropolitan Police Department ("MPD"). Current 24 DCMR § 2301.5(c) permits the use of an air or spring gun "at other locations where the *use* of the guns is authorized by the Chief of Police" (emphasis added). The

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

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

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

word "use" is not defined in the statute and District case law has not clarified whether MPD must authorize both the possession and the firing of air and spring guns. In contrast, the revised statute clarifies that MPD has the flexibility to authorize possession of an air or spring gun in a specific area, without permitting shooting in the same location.

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

First, the revised code defines "possession" in its general part.[19] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[20] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

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

Third, the revised offense uses the phrase "firing range" instead of "shooting gallery." Current 24 DCMR § 2301.5(b) permits adults to use an air or spring gun at "a licensed shooting gallery." This term is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to "shooting galleries," but do refer to "firing ranges."[21] The revised offense uses the Title 7 terminology to avoid confusion.[22]

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

Fifth, the revised offense excludes liability for possession of an air or spring gun during an educational or cultural presentation. Current 24 DCMR 2301.5(a) excludes liability for possession during a "theatrical performance," however, the regulation does not define the term and District case law has not addressed its meaning. The revised statute clarifies that an educational or cultural presentation is included, even if it does not occur in a theater as part of dramatic performance.

[19] RCC § 22E-701.
[20] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[21] D.C. Code § 7-2507.03.
[22] Additionally, Merriam Webster defines "shooting gallery" to include "a building (usually abandoned) where drug addicts buy and use heroin." *See* Merriam-Webster Online Dictionary at https://www.webster-dictionary.org/definition/shooting%20gallery.

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

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

Paragraph (a)(1) specifies that to commit unlawful storage of a firearm, a person must knowingly possess a firearm. "Knowingly" is a defined term that here requires the person to be practically certain that they possess the firearm.[1] "Firearm" is a defined term,[2] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[3] but excludes antiques.[4]

Subparagraphs (a)(1)(A) – (C) specify three ways a firearm owner can store a firearm to avoid prosecution under this section. Subparagraph (a)(1)(A) provides that there is no liability if a person possesses the firearm in a place that is conveniently accessible and within reach. Subparagraphs (a)(1)(B) and (a)(1)(C) provide that there is no liability if a person stores a firearm in a securely locked container or in a location that a reasonable person would believe to be secure. The words "securely" and "secure" mean secure from access by people other than the firearm owner.

Paragraph (a)(2) specifies that to commit unlawful storage of a firearm, a registrant must act at least negligently with respect to who might access the firearm.[5] That is, the person should be aware of a substantial risk that that a minor or an unauthorized person will be able to access the firearm. Negligence also requires that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.[6]

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

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

Subparagraph (a)(2)(B) prohibits storage in a location where a person who is barred under District law from having a firearm[7] is able to access the firearm. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other

[1] RCC § 22E-206.
[2] RCC § 22E-701.
[3] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[4] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[5] "Negligently" is defined in RCC § 22E-206.
[6] RCC § 22E-206.
[7] RCC § 22E-4105 bars several categories of people from having a firearm, including people with a recent conviction for a felony, weapons offense, or intrafamily offense, as well as people who are fugitives from justice or subject to a court order prohibiting possession of firearms.

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

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

Subsection (c) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (c)(2) allows a sentence increase if it is a proven beyond a reasonable doubt that a person under 18 years of age used the firearm to cause a bodily injury to himself or herself or to cause a criminal harm[8] involving a bodily injury. The term "bodily injury" is defined in RCC § 22E-701 to mean physical pain, illness, or any impairment of physical condition.

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

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

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

First, the revised statute includes two penalty gradations for unlawful storage of a firearm. Current D.C. Code § 7-2507.02 paragraph (c)(1) specifies a maximum penalty of 180 days of incarceration and fine of $1,000. Paragraph (c)(2) allows a maximum penalty of 5 years of incarceration and fine of $5,000, if the negligence results in a minor causing an injury to any person. A violation of 24 DCMR § 2348.1 is subject to a fine of $300 and is not punishable by jail time.[9] In contrast, the revised statute provides a single offense gradation plus an enhancement of one penalty class if a minor causes an injury. This change logically reorders and improves the consistency and proportionality of the revised statutes.

Second, the revised statute makes a possible basis of liability negligence that a person prohibited from possessing a firearm under District law, generally, is able to access the firearm.[10] Current 24 DCMR § 2348.1 prohibits storing a firearm where a person "reasonably should know that…a person prohibited from possessing a firearm under D.C. Official Code § 22-4503 can gain access to the firearm." In contrast, the revised statute refers broadly to persons prohibited from possessing a firearm under District law generally (not just persons referred to in D.C. Code § 22-4503). However, given other changes to firearm possession offenses in the RCC, the revised offense is in some ways broader[11] and in other ways narrower[12] than current law. This change improves the consistency and proportionality of the revised offenses.

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[8] The penalty enhancement does not apply where a minor's use of a firearm is legally justified or excused. *See generally* Chapter 4 and Chapter 5 of this title.

[9] 24 DCMR § 100.6.

[10] RCC § 22E-4105.

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

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

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

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

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

Sixth, the revised offense is not limited to lawful registrants. D.C. Code § 7-2507.02(b) provides that "[n]o person" shall store a firearm irresponsibly,[13] whereas 24 DCMR § 2348.1 states "[n]o registrant." The revised statute incorporates the broader language in Title 7. This change reduces an unnecessary gap in liability.

Seventh, the revised statute does not regulate storage of a muffler or silencer but does regulate the storage of an antique pistol. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers, and consequently the storage of these items is within the scope of D.C. Code § 7-2507.02(b). Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are "bearable arms" protected by the Second Amendment.[14] In contrast, the revised unlawful storage of a firearm statute, by use of the definition of "firearm" in RCC § 22E-701, does not cover frames, receivers, mufflers, or silencers, but does cover antique pistols.[15] With limited exceptions for military and law enforcement,[16] the RCC criminalizes mere possession of a silencer as contraband *per se*[17] and, because any

[13] This section was enacted shortly after the United States Supreme Court held the District's prohibition against rendering any lawful firearm in the home operable for purpose of immediate self-defense violated the Second Amendment to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[14] *See United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).
[15] The definition of "firearm" in D.C. Code § 7-2501.01 excludes antique pistols.
[16] RCC § 22E-4118.
[17] RCC § 22E-4101, possession of a prohibited weapon or accessory.

possession is illegal, does not regulate their registration, storage, or carrying. This change improves the proportionality and logically reorganizes the revised offenses.

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

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

First, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is "conveniently accessible and within reach." Current D.C. Code § 7-2507.02(b)(2) provides an exception where a person "[c]arries the firearm on his person or within such close proximity that he can readily retrieve and use it as if he carried it on his person." However, current 24 DCMR § 2348.1 includes no such qualifying language. It is not immediately clear how a person can both "store" a firearm and "carry" it and District case law has not addressed the issue. In contrast, the revised offense specifies that there is no unlawful storage liability if the weapon is conveniently accessible and within reach. This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,[18] and improves the consistency of the revised code.

Second, the revised offense authorizes a distinct penalty enhancement if a person under age 18 uses the firearm to cause a criminal harm involving bodily injury or to cause a bodily injury to himself or herself. Current D.C. Code § 7-2507.02(c)(2) provides that if "the minor causes injury or death to himself or another" the maximum penalty increases from 180 days of incarceration and a $1,000 fine to 5 years of incarceration and a $5,000 fine. D.C. Code § 7-2507.02(c)(3) provides that the penalty enhancement does not apply "if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person." Neither statute explicitly provides for general justification defenses that may nevertheless exist at common law. There is no District case law on point, and no relevant legislative history on the meaning of the exception for burglary or unlawful entry. In contrast, the revised offense authorizes a penalty enhancement only if the use of the firearm causes a criminal harm involving bodily injury or results in an intentional or accidental self-inflicted bodily injury to the minor, and no special exceptions for unlawful entry or burglary apply. "Bodily injury" is a defined term in the RCC.[19] The degree of the enhancement corresponds to the classification schedule inRCC

[18] RCC § 22E-4102.
[19] RCC § 22E-701.

§ 22E-601 and, like other revised offenses,[20] is limited to a severity increase of one class. No special exception for unlawful entry or burglary is provided as such a provision is either unnecessary given the offense elements or irrelevant to the harm of negligent storage.[21] This change improves the consistency and proportionality of District statutes.

Third, the revised code applies a "knowingly" culpable mental state to most offense elements and defines knowledge and negligence consistent with other revised offenses. The current statutes require that a person "knows or reasonably should know" of a risk that an unauthorized person will be able to access the firearm.[22] The current statutes do not specify a culpable mental state for other elements, such as the weapon being a firearm. However, the revised statute applies the standard culpable mental state definitions used throughout the RCC.[23] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[24] This change improves the clarity, consistency, and proportionality of the revised offense.

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

First, the revised code defines "possession" in its general part.[25] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[26] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

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[20] E.g., RCC §§ 22E-1101 (Murder); 22E-1206 (Stalking); 22E-1301 (Sexual Assault); 22E-1602 (Forced Commercial Sex); 22E-1603 (Trafficking in Labor or Services); 22E-1604 (Trafficking in Commercial Sex); 22E-1605 (Sex Trafficking of a Minor or Adult Incapable of Consenting).

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

[22] D.C. Code § 7-2507.02 and 24 DCMR § 2348.1.

[23] RCC § 22E-206.

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

[25] RCC § 22E-202.

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

Second, the revised statute does not specially codify a policy statement for the unlawful storage of a firearm offense. Current D.C. Code § 7-2507.02(a) states, "It shall be the policy of the District of Columbia that each registrant should keep any firearm in his or her possession unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device." However, the remainder of the statute does not require that a firearm be unloaded or disassembled. Nor does the statute require that a firearm be locked away or secured, unless it is readily apparent that an unauthorized person is likely to be able to access the weapon. The policy statement also is not referenced elsewhere in the D.C. Code. The revised unlawful storage of a firearm statute eliminates this language as potentially confusing or misleading as to the extent of criminal liability.[27] This change improves the clarity and consistency of the revised statutes.

Third, the revised statute is severed from D.C. Code § 7-2507.02 and given its own section in the revised code. This change clarifies that the penalties and definitions do not apply to subsection (a) of D.C. Code § 7-2507.02, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[27] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

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

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

Paragraph (a)(1) specifies that to commit carrying a pistol in an unlawful manner, a person must knowingly[1] possess a pistol. "Pistol" is a defined term,[2] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[3] but excludes antiques.[4] "Possesses" is a defined term and includes both actual and constructive possession.[5] However, paragraphs (a)(2) and (a)(3) limit the offense applies to places outside the person's home or place of business and require that the pistol is conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that he or she possesses a pistol in such a location.[6]

Paragraph (a)(2) establishes four means of carrying a pistol unlawfully. A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice[7] or if they have more than 20 rounds of ammunition,[8] whichever is least.[9] A person also carries a pistol unlawfully if they know that any part of it is visible to the public.[10] This provision applies equally to a person who is in a public place or inside a motor vehicle.[11] Lastly, a person carries a pistol unlawfully if they know that they have failed to use a holster to firmly secure it.[12] The firearm must be holstered so as to reasonably prevent loss, theft, or accidentally discharge.[13] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have excess ammunition, the pistol isn't entirely hidden from public view, or the pistol is not holstered.

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[1] RCC § 22E-206.
[2] RCC § 22E-701.
[3] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[4] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[5] RCC § 22E-701 (stating that: "'Possess,' and other parts of speech, including 'possesses,' 'possessing,' and 'possession' means: (A) Hold or carry on one's person; or (B) Have the ability and desire to exercise control over.").
[6] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).
[7] RCC § 7-2509.06A(a)(1).
[8] RCC § 7-2509.06A(a)(2).
[9] *See* 24 DCMR § 2343.1.
[10] RCC § 7-2509.06A(a)(3).
[11] *See* 24 DCMR § 2344.1.
[12] RCC § 7-2509.06A(a)(4).
[13] *See* 24 DCMR § 2344.2.

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

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

Subsection (d) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

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

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

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

First, the revised offense is not limited to licensed pistols. 24 DCMR §§ 2343.1 and 2344 apply only to "[a] person issued a concealed carry license by the Chief" and "[a] licensee." The revised offense applies to people who possess a firearm without a license to carry. The unlawful carry method poses the same danger whether the person is licensed or not. This change reduces an unnecessary gap in liability.

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

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

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statutes[14] are silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] This change clarifies the revised statute.

[14] 24 DCMR §§ 2343 – 2344.

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

Second, the revised statute criminalizes possession of a pistol in a location that is conveniently accessible and within reach.[16] Current 24 DCMR § 2343.1 refers to conduct "while carrying the pistol," 24 DCMR § 2344.1 refers to "carry any pistol in a manner that it is entirely hidden from view of the public when carried on or about a person, or when in a vehicle," and 24 DCMR § 2344.2 refers to "carry any pistol." The term "carry" in these regulations is not defined by the DCMR and there is no District case law on point. To resolve this ambiguity as to the meaning of "carry," the revised statute requires that the pistol be "in a location that is accessible and within reach." This plain language formulation is consistent with the definition of "carrying" as construed by the DCCA for other offenses. This change improves the clarity and consistency of the revised offense.

Third, the RCC codifies a list of exclusions from liability for possessory weapons offenses.[17] Current 24 DCMR §§ 2343 – 2344 do not include any exceptions for law enforcement officers, weapons dealers, or others who routinely need to carry a firearm outside of a holster or in public view. Likewise, current 24 DCMR §§ 2343 – 2344 do not exclude from liability methods of carrying or storing a pistol in one's home or place of business.[18] In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[19] This change improves the clarity, consistency, and completeness of the revised code.

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

The revised statute is severed from D.C. Code § 7-2509.06 and given its own section in the revised code. This change clarifies that the revised statute does not replace D.C. Code § 7-2509.06, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

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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)).

[16] RCC § 22E-202.

[17] RCC § 22E-4118.

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

[19] RCC § 22E-402.

D.C. Code § 16-705. Jury trial; trial by court.

Explanatory Note. *This section establishes the jury or nonjury trial provision for the Revised Criminal Code (RCC) and other D.C. Code provisions. The revised statute replaces D.C. Code § 16-705 (Jury trial; trial by court).* The revised D.C. Code § 16-705 concerns the extension of a statutory right to a jury trial in multiple circumstances. The revised statute changes the numbering, but does not alter the language of, current D.C. Code § 16-705 regarding jury size.

Subsection (a) states that the provisions in the subsection are only in effect until midnight on a date three years from the date of enactment of the RCC. After that time, subsection (b) is in effect. The subsection applies to any criminal case in Superior Court.

Paragraph (a)(1) of the revised statute provides that a trial for an offense shall be by jury under all the conditions in the following 7 subparagraphs, except as specified in paragraph (a)(2).

Subparagraph (a)(1)(A) of the revised statute permits a defendant to demand a jury trial when, according to constitutional standards, the defendant is entitled to a jury for the offense.

Subparagraph (a)(1)(B) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by a fine or penalty of more than $1,000, by imprisonment for more than 90 days, or by more than six months in the case of contempt of court.

Subparagraph (a)(1)(C) of the revised statute permits a defendant to demand a jury trial when charged with an inchoate form of an offense—i.e. attempt, solicitation, or conspiracy—that would be punishable by a fine or penalty of more than $1,000, by imprisonment for more than 90 days, or by more than six months in the case of contempt of court.

Subparagraph (a)(1)(D) of the revised statute permits a jury demand for a charge under Chapter 12 of Title 22E, including robbery, assault, criminal threats, and offensive physical contact, if the person who is alleged to have been subjected to the criminal offense [1] is a law enforcement officer as defined in § 22E-701.

Subparagraph (a)(1)(E) of the revised statute provides a right to a jury trial to a charge for a "registration offense" as defined under the District's sex offender registration statutes.

Subparagraph (a)(1)(F) of the revised statute extends a right to a jury for any charge[2] which, as a matter of law, could result in deportation of the defendant or denial of naturalization to the defendant under federal immigration law, were the defendant convicted of the crime and proven to be a non-citizen. This provision does not require any proof or assertion that the defendant is, in fact, a non-citizen or that federal authorities, in fact, would deport the defendant if convicted. The question under

[1] The term "complainant" is defined in RCC § 22E-701 as a "person who is alleged to have been subjected to the criminal offense," such that the phrasing here is identical to "complainant" in RCC § 22E-701.

[2] The application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes.

subparagraph (a)(1)(F) is purely a question of law—whether the charged offense could result in deportation under federal immigration law if the defendant were a non-citizen.

Subparagraph (a)(1)(G) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than 90 days or more than $1,000.[3]

Paragraph (a)(2) specifies that a trial shall be by a single judge whose verdict has the same force and effect as that of a jury when either of two conditions describe in sub-paragraphs (a)(2)(A) and (a)(2)(B) are met.

Sub-paragraph (a)(2)(A) includes for a trial by the court any case not specified in the preceding paragraphs (a)(1)(A) – (a)(1)(G).

Sub-paragraph (a)(2)(B) includes for a trial by the court any case specified in the preceding paragraphs (a)(1)(A) – (a)(1)(G) when the defendant, in open court, expressly waives trial by jury and requests trial by the court more than 10 days before the scheduled trial or, with the consent of the court, within 10 days of the scheduled trial.

Subsection (b) states that the provisions in the subsection are only in effect after midnight on a date three years from the date of enactment of the RCC. Prior to that time, subsection (a) is in effect. The subsection applies to any criminal case in Superior Court.

Paragraph (b)(1) of the revised statute provides that a trial for an offense shall be by jury under all the conditions in the following 3 subparagraphs, except as specified in paragraph (b)(2).

Subparagraph (b)(1)(A) of the revised statute permits a defendant to demand a jury trial when, according to constitutional standards, the defendant is entitled to a jury for the offense.

Subparagraph (b)(1)(B) of the revised statute permits a defendant to demand a jury trial when charged with any offense punishable by a fine or penalty of more than $250, by imprisonment for any length of time, or by more than six months in the case of contempt of court.

Subparagraph (b)(1)(C) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than 90 days or more than $1,000.[4]

Paragraph (b)(2) specifies that a trial shall be by a single judge whose verdict has the same force and effect as that of a jury when either of two conditions describe in sub-paragraphs (b)(2)(A) and (b)(2)(B) are met.

Sub-paragraph (b)(2)(A) includes for a trial by the court any case not specified in the preceding paragraphs (b)(1)(A) – (b)(1)(C).

Sub-paragraph (b)(2)(B) includes for a trial by the court any case specified in the preceding paragraphs (b)(1)(A) – (b)(1)(C) when the defendant, in open court, expressly waives trial by jury and requests trial by the court more than 10 days before the scheduled trial or, with the consent of the court, within 10 days of the scheduled trial.

Subsection (c) states that if a criminal case includes 2 or more charges and at least one offense is jury demandable, the trial for all offenses charged against that defendant

[3] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation).

[4] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation).

shall be by jury unless the defendant in open court expressly waives trial by jury and requests trial by the court. If there is such a request, then the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.

Subsection (d) of the revised statute is identical to the current D.C. Code except for the numbering change.

Relation to Current District Law. Revised D.C. Code § 16-705 changes current District law primarily by extending the offenses and circumstances under which a defendant is entitled to a jury trial. The revised statute also changes the ability of the prosecution or court to deny consent to a defendant's waiver of a jury or demand for a jury.

In general, current D.C. Code § 16-705 establishes the circumstances under which a criminal defendant is entitled to a jury trial,[5] the process for waiving a jury trial,[6] the procedure for adjudicating cases in which a defendant is not entitled to a jury trial or a jury trial is waived,[7] and the procedure for jury trials.[8] Under current D.C. Code § 16-705, a criminal defendant is entitled to a jury trial in six instances: (1) where a jury trial is guaranteed by the United States Constitution;[9] (2) where the defendant is charged with an offense punishable by a fine over $1,000;[10] (3) where a defendant is charged with two or more offenses punishable by a cumulative fine of over $4,000;[11] (4) where a defendant faces imprisonment for more than 6 months for contempt of court;[12] (5) where a defendant is charged with an offense punishable by more than 180 days imprisonment;[13] and (6) where a defendant is charged with two or more offenses punishable by imprisonment for more than two years.[14] The current statute also clarifies that when a defendant is charged with two or more offenses, if one of the offenses is jury demandable, all offenses shall be tried by jury unless waived.[15]

In contrast, the revised statute changes D.C. Code § 16-705 to expand the right of a criminal defendant to demand a jury trial in several ways. The statute takes a bifurcated approach to change, providing one set of rules for expanded access to jury demandability

[5] D.C. Code §§ 16-705(a)-(b-1).
[6] D.C. Code § 16-705(a); D.C. Code § 16-705(b)(2); D.C. Code § 16-705(b-1).
[7] D.C. Code §§ 16-705(a)-(b-1).
[8] D.C. Code § 16-705(c).
[9] D.C. Code § 16-705(a). According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).
[10] D.C. Code § 16-705(b)(1)(A).
[11] D.C. Code § 16-705(b)(1)(B).
[12] D.C. Code § 16-705(b)(1)(A).
[13] D.C. Code § 16-705(b)(1)(A).
[14] D.C. Code § 16-705(b)(1)(B).
[15] D.C. Code § 16-705(b-1).

when the RCC is enacted into law, and a second set of rules three years after enactment. This bifurcated approach provides an immediate expansion of jury rights that still excludes many misdemeanors and stops well short of what most states provide. During this interim three year period, government agencies and practitioners may engage in training necessary for a broader expansion of jury rights to meet the national norm. The ultimate goal of the recommendation is to ensure jury demandability for all crimes bearing imprisonment time or significant financial penalties.

Subsection (a) provides many immediate changes to current law. First, in contrast to the current standard of more than 180 days,[16] subparagraph (a)(1)(B) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries a maximum imprisonment penalty of more than 90 days, or a fine of more than $1,000. Second, in contrast to current law which makes no distinction as to whether a charge is an attempt or other inchoate form of an offense that is jury demandable, subparagraph (a)(1)(C) of the revised statute treats inchoate forms of a specified jury-demandable offense as jury demandable, regardless whether their imprisonment penalty is 90 days or less. Third, the revised statute creates entirely new statutory rights to a jury for any charge which, under subparagraph (a)(1)(D) or subparagraph (a)(1)(E) is an offense in Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in § 22E-701,[17] or a charge for a "registration offense" as defined in § 22-4001(8). Fourth, the revised statute, in subparagraph (a)(1)(F), codifies a statutory right to a jury for a charge that, as a matter of law, could result in deportation or denial of naturalization were the defendant proven to be a non-citizen and convicted of the crime. This change appears to expand D.C. Court of Appeals (DCCA) case law that provides a right to a jury on constitutional grounds for a non-citizen defendant who is subject to possible deportation if convicted of the offense.[18] Finally, subparagraph

[16] D.C. Code § 16-705(b)(1)(A).

[17] [At the time of writing, legislation is currently pending Council approval that would amend D.C. Code § 16-705(b)(1) in a narrower but consistent manner than the RCC recommendation, to provide a right to a jury under circumstances where the alleged victim of an assault is a law enforcement officer in a new subparagraph (C). *See* Comprehensive Policing And Justice Reform Second Temporary Amendment Act Of 2020, 2020 District of Columbia Laws 23-151 (Act 23-399). (""(C)(i) The defendant is charged with an offense under: "(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22–404(a)(1)); "(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405.01); or "(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22–407); and "(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405(a)); and").]

[18] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury."). The *Bado* decision does not explicitly state that a defendant must prove that he or she is a non-citizen in order to avail themselves of the right to a jury for a deportable offense, although this appears to be implicit in the *Bado* decision's reliance on Supreme Court precedent in *Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)* and repeated emphasis that the *Blanton* court relied on the consequences to a *particular* defendant. *See also Miller v. United States*, 209 A.3d 75, 79 (D.C. 2019)("Although the trial record did not reveal that Ms. Miller is not a citizen, the United States has not relied on that circumstance to

(a)(1)(G) of the revised statute reduces from two years to 90 days the cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury.

Subsection (b) provides more far-reaching changes to current law. First, in contrast to the current standard of more than 180 days,[19] subparagraph (b)(1)(B) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries any imprisonment penalty, or a fine of more than $250. Similarly, under subparagraph (b)(1)(C) the revised statute reduces from two years to 90 days the cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury.

The CCRC also recommends deletion of current D.C. Code language requiring judicial and prosecutorial consent either to a defendant's waiver of a jury trial, (except that, if the waiver occurs within 10 days of a scheduled trial the court must consent to a waiver of a jury trial), or to invoke a right to a jury trial that is not required by the Constitution. Under current D.C. Code § 16-705(a), the plain language of the statute requires that a jury trial be held for offenses to which a defendant has a right to a jury under the Constitution, unless the defendant requests trial by the court "and the court and the prosecuting officer consent thereto."[20] This language appears to allow the court or a prosecutor, by withholding their consent to a defendant's request for a trial by court, to require a defendant to have a jury trial where the Constitution provides a jury trial right. Also, under current D.C. Code § 16-705(b)(2), the plain language of the statute requires that a trial by the court be held for offenses to which a defendant does not have a right to a jury under the Constitution, unless the defendant requests trial by jury "and the court and the prosecuting officer consent thereto."[21] This language appears to allow the court or a prosecutor, by withholding their consent to a defendant's request for a jury trial, to

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argue that the error in this case was not obvious for purposes of the plain-error standard. We therefore do not address that issue. … Second, the United States's proposed reading of Bado appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be. Bado, however, repeatedly states that the relevant inquiry is whether the defendant "faces" or "is exposed" to the penalty at issue, or alternatively whether the penalty "could be" imposed, if the defendant is convicted. E.g., 186 A.3d at 1246, 1249-50, 1252, 1253, 1256, 1257, 1261.").

[19] D.C. Code § 16-705(b)(1)(A).

[20] D.C. Code § 16-705(a) ("In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial without a jury, the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.").

[21] D.C. Code § 16-705 ("(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if –(1)(A) The defendant is charged with an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days (or for more than six months in the case of the offense of contempt of court); or (B) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years; and (2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.").

require a defendant to have a trial by the court trial where the Constitution does not provide a jury trial right. It is unclear how requiring prosecutorial and court consent to demand a jury under D.C. Code § 16-705(b)(2) may limit jury demandability for offenses in the D.C. Code with a penalty of 6 months which are presumptively "petty," non-jury demandable offenses under the Constitution.[22] There is confusion in at some legislative history as to the Council's intent in categorizing some offenses as 180 day versus 6 month offenses to demarcate jury-demandability,[23] and there no case law on point.

In contrast, the RCC codifies a right to a jury as a personal right and does not allow a court or prosecutor either to require a jury trial when the defendant timely wishes to waive their right to a jury trial, or to require a trial by court when the defendant wishes to exercise their right to a jury trial for an offense that is not required to be jury demandable under the Constitution. Jurisdictions have taken a range of views on this matter, some treating a defendant's waiver of a jury as a personal right as in the RCC, some treating a defendant's waiver of a jury as subject only to court consent, and others treating a defendant's waiver of a jury as subject to both court and prosecutorial consent.[24] The revised statute resolves significant ambiguity under the current D.C. Code as to the status of offenses subject to a 6 month penalty by clarifying that all offenses specifically described in the revised statute are jury demandable and shall be by jury unless the defendant waives the right. The revised statute also addresses possible administrative concerns by requiring court consent to waiver of a jury trial within 10 days of a scheduled trial. These changes improve the clarity and proportionality of the revised statutes.

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[22] According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

As a District offense with a 6 month penalty is presumptively a "petty" offense under *Blanton*, such an offense would appear to fall under D.C. Code § 16-705(b) and by default be subject to a trial by the court unless the defendant requests a trial by jury and the prosecutor consents. It is unclear if more recent legislative decisions setting a 6 month penalty for certain offenses were made with knowledge that prosecutorial discretion could still be exercised to deny jury demands for offenses with a 6 month penalty.

[23] The Council's earliest post-*Blanton* legislation changing dozens of penalties to 180 day maximum imprisonment misstated the *Blanton* holding, with the apparent assumption that a 6 month penalty would be jury demandable under *Blanton* even though the Court holding was that offenses 6 months or less were presumptively petty. *See* Committee on the Judiciary, *Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994,"* (Jan. 26, 1994) at 3 ("Under *Blanton v. City of Las Vegas*, the Supreme Court indicated that it would presume that offenses punishable by less than 6 months imprisonment are "petty offenses" and not subject to 6th amendment guarantees for trial by Jury.").

[24] *See Waiver of Jury Trials, 0030 SURVEYS 24 (Westlaw); People v. Dist. Court of Colorado's Seventeenth Judicial Dist.*, 843 P.2d 6, 11 (Colo. 1992) (*en banc*). Notably, Maryland specifically provides that, "The State does not have the right to elect a trial by jury." Md. Rule 4-246.

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The rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District.

For most of the past century, the District has provided a more expansive jury trial right than it does today.[25] Between 1926 and 1993, criminal defendants were entitled to a jury trial in all cases punishable by a fine or penalty of $300 or more, or by imprisonment for more than 90 days.[26] In 1992, however, the D.C. Council passed the Criminal and Juvenile Justice Reform Amendment Act, increasing the penalty threshold for a jury trial more than threefold and doubling the imprisonment threshold.[27] Although this was a dramatic change to the substantive jury trial right, its impact on the actual number of jury trials in the District was minimal. As Fred B. Ugast, then Chief Judge of D.C. Superior Court subsequently explained, because the vast majority of charged misdemeanors at the time had maximum penalties of one year, the amendment did not result in a significant change in jury trial rates.[28] However, the year after the Criminal and Juvenile Justice Reform Amendment Act went into effect, the Council passed the Omnibus Criminal Justice Reform Amendment Act of 1994.[29] The legislation reduced the penalties of more than forty misdemeanor offenses to remove criminal defendants' rights to demand a jury trial.[30] Today, jury trial rates in misdemeanor cases remain well below 1%.[31]

Both the Criminal and Juvenile Justice Reform Amendment Act of 1992 and the Omnibus Criminal Justice Reform Amendment Act of 1994 were passed at a time when responding to violent crime was the Council's priority as part of a conscious effort to promote expediency in the criminal process. Although there was no claim that the legislation would result in cost savings, the stated aim of the legislation was to promote judicial efficiency:

> Title V reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable. Both the Superior

[25] *See* Act of June 17, 1870, 41st Cong., (1870) (16 Stat. 153) (providing right to trial by jury *de novo* on appeal from all actions in Police Court); Act of March 3, 1891, 51st Cong., (1891) (26 Stat. 848) (providing right to trial by jury in Police Court for all cases punishable by penalty $50 or more or imprisonment for thirty days or more); Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119) (providing right to trial by jury in Police Court for all cases punishable by penalty of $300 or more or by imprisonment for more than ninety days).

[26] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[27] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[28] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" attached "Copy of letter dated September 20, 1993 from Chief Judge Fred B. Ugast of the Superior Court ("Last year, the Council passed an amendment to D.C. Code §16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases.").

[29] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[30] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[31] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor jury trials as a percentage of misdemeanor dispositions at: 0.13% in 2003, 0.15% in 2004, 0.16% in 2005, 0.10% in 2006, 0.27% in 2007, 0.18% in 2008, 0.11% in 2009, 0.10% in 2010, 0.13% in 2011, 0.23% in 2012, 0.21% in 2013, 0.09% in 2014, 0.20% in 2015, 0.07% in 2016, 0.08% in 2017, and 0.07% in 2018.

> Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date.[32]

In 1993, the year the Criminal and Juvenile Justice Reform Amendment Act went into effect and the year the Omnibus Criminal Justice Reform Amendment Act was introduced, violent crime in the District had reached an all-time high. According to the FBI's Uniform Crime Reporting Program, rates of violent crime in the District peaked in 1993 at 2,922 per 100,000 people.[33] The D.C. Council was reaching for all available options to respond. As noted in the committee report for the Omnibus Criminal Justice Reform Amendment Act of 1994:

> Over the past few years, the Council has passed much legislation in an attempt to curtail the crime and violence in the District of Columbia. However, crime and violence continues to hold the District of Columbia within its grip. . . .
>
> . . . The Council in its continued fight, must look at all options to increase public safety, including redefining crimes, reviewing management, and reallocating resources.[34]

Yet, overall violent crime in the District has been in steady decline since 1993.[35] In 2018, violent crime in the District reached 996 per 100,000 people, a 66% decrease from 1993,[36] and the lowest since the 1967.[37] This decrease in violent crime rates in the District in recent decades undermines the primary rationale for prioritizing judicial expediency over due process.

In addition, the impact of expanding jury demandability on judicial resources is unclear. Assuming that both judicial and prosecutorial resources are relatively constant and inelastic in the near future, and that jury trials require greater resources than bench trials, the result of expanding jury demandability may be an increase in non-trial dispositions (plea, diversion, or dismissal) for lower level cases. This is because any

[32] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4.
[33] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.
[34] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 2.
[35] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.
[36] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.
[37] Federal Bureau of Investigation, UCR Data Tool, Violent Crime Rates in the District of Columbia, 1960-2014, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm.

judicial impact depends on prosecutorial charging decisions which are highly discretionary, dynamic, and likely to change with resource pressure.

Expansion of the jury trial right would almost certainly increase to some degree the number of misdemeanor jury trials held annually. However, the overall rate of jury trials has been variable but at historic lows in recent years. The rate of jury trials has steadily declined for decades across the United States, with jury trials making up only a small fraction of overall dispositions.[38] In the District, felony jury trial rates averaged 7% over the past 15 years,[39] with the vast majority of charges resulting in either dismissal (36%)[40] or a guilty plea (52%).[41] Similarly, the vast majority of misdemeanor cases in the District resolve through dismissal (42%),[42] a plea (30%),[43] or diversion (14%).[44] Misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions.[45] There is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials.

Further undermining the judicial efficiency argument is the fact that the vast majority of states successfully provide full jury trial rights to their citizens. Thirty-five

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[38] *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. L. Stud. 459 (2004); Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782.

[39] Compiled from District of Columbia Courts Annual Reports, showing felony jury trials as a percentage of felony dispositions at: 5% in 2003, 5% in 2004, 4% in 2005, 5% in 2006, 7% in 2007, 8% in 2008, 8% in 2009, 10% in 2010, 9% in 2011, 9% in 2012, 10% in 2013, 10% in 2014, 9% in 2015, 6% in 2016, 5% in 2017, and 4% in 2018.

[40] Compiled from District of Columbia Courts Annual Reports, showing felony dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of felony dispositions at: 46% in 2003, 44% in 2004, 40% in 2005, 31% in 2006, 33% in 2007, 34% in 2008, 31% in 2009, 27% in 2010, 27% in 2011, 27% in 2012, 25% in 2013, 29% in 2014, 32% in 2015, 38% in 2016, 43% in 2017, and 41% in 2018.

[41] Compiled from District of Columbia Courts Annual Reports, showing felony guilty pleas as a percentage of felony dispositions at: 34% in 2003, 35% in 2004, 28% in 2005, 62% in 2006, 59% in 2007, 58% in 2008, 60% in 2009, 63% in 2010, 63% in 2011, 62% in 2012, 64% in 2013, 59% in 2014, 58% in 2015, 56% in 2016, 51% in 2017, and 54% in 2018.

[42] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of misdemeanor dispositions at: 46% in 2003, 41% in 2004, 39% in 2005, 36% in 2006, 40% in 2007, 39% in 2008, 44% in 2009, 40% in 2010, 43% in 2011, 39% in 2012, 36% in 2013, 40% in 2014, 43% in 2015, 49% in 2016, 47% in 2017, and 51% in 2018.

[43] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor guilty pleas as a percentage of misdemeanor dispositions at: 21% in 2003, 23% in 2004, 26% in 2005, 41% in 2006, 36% in 2007, 34% in 2008, 31% in 2009, 36% in 2010, 32% in 2011, 29% in 2012, 31% in 2013, 30% in 2014, 28% in 2015, 27% in 2016, 28% in 2017, and 27% in 2018.

[44] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor diversion as a percentage of misdemeanor dispositions at: 8% in 2003, 9% in 2004, 5% in 2005, 10% in 2006, 11% in 2007, 14% in 2008, 15% in 2009, 14% in 2010, 17% in 2011, 23% in 2012, 25% in 2013, 21% in 2014, 20% in 2015, 18% in 2016, 18% in 2017, and 16% in 2018.

[45] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor bench trials as a percentage of misdemeanor dispositions at: 3% in 2003, 4% in 2004, 4% in 2005, 5% in 2006, 5% in 2007, 5% in 2008, 6% in 2009, 8% in 2010, 6% in 2011, 7% in 2012, 6% in 2013, 7% in 2014, 7% in 2015, 5% in 2016, 5% in 2017, and 5% in 2018.

states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[46] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo* on appeal, effectively guaranteeing a jury trial right in every case.[47] Another three states have developed systems that stop short of a full jury trial right, but are more expansive than the constitutional minimum.[48] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[49]

Yet, even if the rationale of judicial efficiency or financial[50] cost still holds for the District today, for several reasons, it is not clear that these considerations should outweigh right to a jury of one's peers.

First, the right to a jury is a foundational right of the American legal system. It is one of the only rights enumerated in the original, unamended Constitution[51] and is given additional protection in the Sixth Amendment.[52] The constitutional language itself is unequivocal, ensuring the right to a jury trial for "all Crimes"[53] and in "all criminal prosecutions."[54] As many historians, legal scholars, and Supreme Court Justices have pointed out, the jury trial serves a score of critical democratic functions.[55] It ensures that community standards are represented in local courtrooms.[56]

Second, the Council itself, in considering legislation impacting the jury trial right in the District, has repeatedly discussed and considered numerous circumstances in which the jury serves a particularly important role in weighing the outcome of a case. This

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[46] The following thirty-five states ensure the right to a jury trial in the first instance for virtually all criminal offenses: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details. Some states provide this right by judicial interpretation of state constitutional provisions while others have legislatively enacted it.

[47] Arkansas, North Carolina, and Virginia. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[48] Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City). See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[49] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[50] Considering that the 1994 reduction in jury-demandable offenses had no anticipated monetary impact, it is likewise unlikely that the reverse process, an expansion of jury-demandable offenses, would result in additional cost. Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4 (indicating no monetary savings as a result of the amendment).

[51] U.S. Const. art. III, § 2, cl. 1 (The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury).

[52] U.S. Const. amend. VI, cl. 1 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed).

[53] U.S. Const. art. III, § 2, cl. 1.

[54] U.S. Const. amend. VI, cl. 1.

[55] *See, e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. R. 133, 136-37 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[56] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

includes cases where civil liberties are at stake,[57] cases where subjectivity plays a large role in demarcating criminal conduct,[58] and cases where law enforcement officers' credibility is at issue.[59] While these Council statements have been made in the context of specific offenses, these rationales apply much more broadly across misdemeanors.[60]

Third, rights-based arguments aside, the limitations on jury demandability produce two main problems in specific cases.

First, the existence of a divide between jury-demandable and non-jury demandable cases in which the former require greater prosecutorial and judicial resources than the latter distorts charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction is less likely,[61] a prosecutor may be incentivized to do so—

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[57] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, —that is, allowing for a jury trial—is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones will permit law enforcement against otherwise permitted activity—freedom of association, for instance—and thus the bill permits trial by jury.").

[58] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e. a jury) to answer the question whether there is guilt beyond a reasonable doubt."); Committee on the Judiciary Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," at 33 ("A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, '[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable.'").

[59] *See* Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17 (emphasizing the importance of the jury in moderating prosecutorial charging decisions and the importance of removing the judge from having to make officer credibility findings as support for making assault on police officer offenses jury demandable).

[60] For example, for a charge of current D.C. Code § 22–1307, Crowding, obstructing, or incommoding (a 90 day offense) or other misdemeanor public order offenses the complainant of record and sole witness may be a law enforcement officer. Arguably, as with assault on a police officer, the same rationale of removing the judge from having to make officer credibility findings in a case would support making this offense jury demandable.

[61] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended

he or she often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and there is no record as to the reason for choosing one charge over another.[62] However, there are two examples that indicate the impact of this practice.

One example of how restriction of jury demandability distorts charging is the use of attempt charges to avoid jury trials in threat cases. D.C. Code § 22-407 criminalizes threats to do bodily harm.[63] Because the authorized maximum penalty for threats to do bodily harm is six months, a criminal defendant charged with the offense is entitled to a jury trial.[64] The District's attempt statute, however, has a maximum authorized penalty of 180 days for non-crime of violence offenses, making an attempted threat to do bodily harm non-jury demandable.[65] Although it is legally possible to attempt a threat without actually completing a threat, the likelihood of this factual scenario both occurring and resulting in prosecution is exceedingly low.[66] Nonetheless, of the 6,556 charges brought under D.C. Code § 22-407 between 2009 and 2018, 56% were for attempted threats rather than completed threats.[67] As there is no practical difference in the authorized imprisonment penalty between the attempt and completed offense (the difference between 6 months and 180 days), such a high percentage of charges for attempted threats of bodily injury suggests charging decisions may be based on jury demandability rather than how the facts fit the law.

Another example of example of how restriction of jury demandability distorts charging is evidenced by the shift in the number of charges brought under D.C. Code § 22-405(b)—assault on a police officer (APO)—before and after the offense became jury demandable. In 2016, the D.C. Council passed the Neighborhood Engagement Achieves

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with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

[62] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

[63] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.").

[64] D.C. Code § 22-407; D.C. Code § 16-705.

[65] D.C. Code § 22-1803; D.C. Code § 16-705.

[66] *See Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001) (holding that "if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense" but recognizing that "[a]s a practical matter, such unconsummated threats may be unprovable").

[67] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Also, of the 1,869 convictions under D.C. Code § 22-407 between 2009 and 2018, 72% were for attempted threats rather than completed threats. *Id.*

Results (NEAR) Act, which split the existing 180 day, non-jury demandable APO offense into a new APO offense and a resisting arrest offenses and increased the penalty for both to six months.[68] The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges.[69] But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and 1,712 for every two-year period between 2009 and 2016.[70] However, after the NEAR Act, for the period of 2017 to 2018, the combined number of charges for APO[71] and resisting arrest[72] dropped by about a thousand charges to a mere 529[73] This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C. Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018.[74] The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges so simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law.

The second main problem caused by the limitation of the right to a jury is that the maximum term of imprisonment is sometimes an inaccurate proxy for the real seriousness of a criminal charge to a particular person. Some offenses carry severe consequences for those charged despite having relatively low terms of incarceration yet are not afforded a jury trial.

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[68] Neighborhood Engagement Achieves Results Amendment Act of 2016 (effective June 30, 2016), D.C. Law 21-125.

[69] *See* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Ward 5 Councilmember Kenyan McDuffie, who wrote the NEAR Act, tells City Paper that the goal was the make the crime jury-demandable."); Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

[70] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Specifically, the numbers were: 1,712 in 2009-2010, 1,592 in 2011-2012, 1,659 in 2013-2014, 1,697 in 2015-2016. *Id.*

[71] The 2017-2018 charges for the unrevised and revised APO, D.C. Code § 22-405, were 355, with 80 convictions (a 23% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[72] The 2017-2018 charges for D.C. Code § 22-405.01 were 174, with 25 convictions (a 14% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[73] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[74] The charges for D.C. Code § 22-404(a) were: 3,221 in 2009-2010, 3,506 in 2011-2012, 3,432 in 2013-2014, 3,865 in 2015-2016, and 5,282 in 2017-2018.

One example of how an imprisonment penalty misrepresents the seriousness of a criminal charge is D.C. Code § 22-3010.01—misdemeanor sexual abuse of a child or minor—a 180-day offense that currently is not entitled to a jury trial.[75] But the offense is a "registration offense" under D.C. Code § 22-4001(8)(A).[76] Because of this, a person convicted of misdemeanor sexual abuse of a child or minor is subject to mandatory sex offender reporting requirements for ten years following their conviction or release.[77] The collateral consequences of sex offender registration—including burdensome restrictions on residency, internet usage, and access to public housing have been extensively documented.[78] The long-term and public nature of reporting requirements, the increased exposure to criminal liability for failures to report, and the additional social and structural consequences that accompany sex offender registration indicate that the seriousness of a misdemeanor sexual abuse or other charge involving sex offender registration may warrant elevated due process rights as a matter of policy.[79]

A second example of how imprisonment penalties do not accurately represent the seriousness of a criminal charge is when that charge could result in deportation. In 2018, an *en banc* decision of the D.C. Court of Appeals in *Bado v. United States* first held that a criminal defendant is entitled to a jury trial under the United States Constitution if charged with an offense that could result in deportation.[80] Although this decision addressed the fundamental issue of severe consequences resulting from juryless convictions, it has also produced its own set of challenges. As Senior Judge Washington noted in his concurring opinion, the court's decision created an odd dichotomy in which non-citizens are now entitled to more due process in the District's Superior Court than citizens for the exact same offense.[81] While the *Bado* decision extends jury demandability to relevant crimes for non-citizens, these non-citizens are in the difficult position of having to reveal their immigration status in open court in order to claim a constitutional right.[82]

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[75] D.C. Code § 22-3010.01. See also misdemeanor sexual abuse, D.C. Code § 22–3006, carrying a 180 day (non-jury demandable) maximum imprisonment penalty.

[76] D.C. Code § 22-4001(8)(A).

[77] D.C. Code § 22-4003.

[78] *See, e.g.*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 532-539 (2007); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (September 2007).

[79] The DCCA has previously held that, as a matter of law, a right to a jury does not exist for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

[80] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.")

[81] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018) (en banc) ("I write separately because I am concerned that our decision today, while faithful to the dictates of *Blanton*, creates a disparity between the jury trial rights of citizens and noncitizens that lay persons might not readily understand. That disparity is one that the legislature could, and in my opinion, should address. The failure to do so could undermine the public's trust and confidence in our courts to resolve criminal cases fairly.").

[82] This point previously has been raised the Public Defender Service for the District of Columbia, a CCRC Advisory Group Member. *See* CCRC Comments on First Draft of Report #41 Ordinal Ranking of Maximum Imprisonment Penalties, 2 (November 15, 2019).

The partial restoration of a jury right may have significant benefits to public safety insofar as this change in District law helps to restore community support for the criminal justice system.[83] In his concurring opinion to the *Bado* decision, Judge Washington urged the D.C. Council to adopt a full jury trial right and stating:

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.[84]

However, the revised statute does not address all rights-based and other problems with restriction of jury-demandability. As long as the right to a jury trial is restricted for some charges and the prosecution of those charges require fewer resources or are more likely to result in a conviction, there will continue to be incentives to base charging decisions on jury demandability rather than what charge best fits the facts of the case at hand. In addition, as noted above, the revised statute's codification of the *Bado* holding requires non-citizen defendants to disclose their citizenship status in court in order to avail themselves of jury demandability. Finally, there may be significant judicial efficiency costs that arise from litigation over the right to a jury for specific charges and individual defendants—efficiency costs that would not exist if the District followed the majority of states in extending a right to a jury in every criminal case carrying an imprisonment penalty.

The revised statute is a compromise solution to restore jury demandability that mitigates the potential impact on judicial efficiency. The revised statute, however, should not be construed as a permanent judgment as to the appropriate balance between judicial efficiency and the right to a jury of one's peers. A future expansion of jury-demandability to all criminal offenses may be feasible and warranted in the near future.

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[83] Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)

[84] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (en banc).

RCC § 16-1005A. Criminal Contempt for Violation of a Civil Protection Order.

Explanatory Note. *This section establishes the criminal contempt for violation of a civil protection order provision for the Revised Criminal Code (RCC). The offense prohibits violating a temporary or final protection order issued in any jurisdiction. It replaces subsections (f), (g),[1] (g-1), (h), and (i) of D.C. Code § 16-1005, Hearing, evidence, protection order.*

Paragraph (a)(1) requires that the person knows that they are subject to a temporary or final civil protection order issued in the District or a valid foreign protection order. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they are subject to a protection order.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether the circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists.[3]

Subparagraph (a)(1)(A) specifies that there are three types of protection orders that cannot be violated. The phrase "in fact" indicates that the accused is strictly liable[4] with respect to whether the order was a temporary protection order, final protection order, or valid foreign protection order. Invalidity of the order is not a defense.[5] The reference to temporary civil protection orders includes both orders issued outside of court business hours (termed emergency temporary protection orders) and those issued during regular business hours. A respondent is not subject to a temporary order until they are properly served with a notice of the hearing and an order to appear, a copy of the petition, and the temporary protection order.[6] The reference to final civil protection orders includes orders entered by consent without admission of guilt.[7] The term "valid foreign protection order" is a defined term with the meaning specified in D.C. Code § 16-1041.

Subparagraphs (a)(1)(B) – (a)(1)(D) require that the release order is in writing,[8] advises the person of the consequences for violating the order, and is sufficiently clear

[1] The District of Columbia Court of Appeals has held that the elements of the offense are the same whether charged under § 16-1005(f) (violation of CPO as contempt) or § 16-1005(g) (violation of CPO as independent offense). *Ba v. U.S.*, 809 A.2d 1178, 1182 n.6 (D.C. 2002).

[2] Consider, for example, a person who is unable to read or understand the protection order due to illiteracy or a language barrier. That person may not be practically certain that they are now subject to a protection order.

[3] Consider, for example, a person who is handed a protection order and angrily tears it up and throws it in the garbage before reading it. That person may be said to know that they were subject to the order, even though they were not practically certain of it.

[4] RCC § 22E-207.

[5] A person is not entitled to attack the validity of a court order in a contempt proceeding. *See, e.g., Shewarega v. Yegzaw*, 947 A.2d 47, 51 (D.C. 2008) (respondent not entitled to attack validity of a CPO in contempt proceeding; he was obligated to obey the court order unless and until it was reversed or vacated). "Compliance with court orders is required until they are reversed on appeal or are later modified." *Baker*, 891 A.2d at 212 (quoting *Kammerman v. Kammerman*, 543 A.2d 794, 798–99 (D.C. 1988)). *See also Thomas v. U.S.*, 934 A.2d 389, 391 (D.C. 2007).

[6] *See* D.C. Code § 16-1004(d), requiring compliance with notice and service rules of the Superior Court of the District of Columbia.

[7] *See* D.C. Code § 16-1005(i).

[8] *See* D.C. Code §§ 16-1004 and 1005 requiring that protection orders be made in writing.

and specific to serve as a guide for the person's conduct.[9] Per the rules of interpretation in RCC § 22E-207, a person is strictly liable as to whether the order is compliant with these requirements.

Paragraph (a)(2) requires that the person fail to comply[10] with the protection order. Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means the person must be practically certain that they failed to comply with one or more provisions in the order. Under RCC § 22E-203, the person's conduct must be voluntary.[11] A person must be afforded a reasonable opportunity to comply with the condition.[12]

Subsection (b) specifies that a person does not commit an offense when they have the effective consent of a judicial officer to be excused from the provision of the order that is the subject of the charged offense.[13] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[14] "Consent" is also defined in RCC § 22E-701.

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[9] *Hector v. U.S.*, 883 A.2d 129, 131 (D.C. 2005) (explaining "A defendant cannot be convicted of criminal contempt where he or she is not put on notice of the specific conditions of the [CPO] order."); *Smith v. U.S.*, 677 A.2d 1022, 1031 (D.C. 1996) (reversing contempt for violating CPO where no evidence that defendant was informed by court that "no contact" order meant no contact through writing as well as no physical contact); *In re Jones*, 898 A.2d 916, 920 (D.C. 2006) (stating, the order must be "specific and definite, or clear and unambiguous.").

[10] The failure must be to comply with a mandatory condition. For example, if the order permits, but does not require, parental visitation, a person does not violate the order by declining to visit.

[11] A person does not commit an offense if the act or omission was not subject to the person's control. For example, a person does not violate a condition to attend a domestic violence intervention program if they are incarcerated, hospitalized, or stranded. *See, e.g., Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness."); *Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction under a similar statute where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."); *but see Grant v. U.S.*, 734 A.2d 174, 177 (D.C. 1999) (holding that "[a]ddiction to heroin [does] not constitute a defense to the charge of contempt based upon violating a condition of pretrial release not to use drugs.").

[12] For example, a person does not violate a condition to stay away from a complainant where the complainant is physically chasing after the person and the person makes reasonable efforts to distance themselves. *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty).

[13] Consider, for example, a judge in one case orders a person to complete a domestic violence intervention program and a judge in another case orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

[14] RCC § 22E-701.

The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[15]

Subsection (c) establishes jurisdiction where a person communicates to a person located in the District from a location outside the District.[16]

Subsection (d) specifies the penalty for the revised offense.[17] [*See* Third Draft of Report #41.] In some cases, the conduct criminalized under this section may also constitute criminal contempt under D.C. Code §§ 11-741 or 11-944[18] or failure to appear in violation of a court order under RCC § 23-1327[19] and, in that situation, convictions for the offenses must merge under RCC § 22E-214(a)(4).[20]

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

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 16 offense.

Relation to Current District Law. *The revised criminal contempt for violation of a civil protection order statute clearly changes current District law in two main ways.*

First, the revised statute does not criminalize failure to appear for a hearing on a civil protection order as criminal contempt. Current D.C. Code § 16-1005(f) states, "respondent's failure to appear as required by subsection (a) of this section, shall be punishable as [criminal] contempt." In contrast, the revised statute does not distinctly punish such conduct as criminal contempt. Unlike failure to appear as a defendant in a criminal case, which is punished under RCC § 22E-1327, failure to appear in a civil case or quasi-civil case does not frustrate the court's ability to proceed.[21] Accordingly, for violation of a civil protection order a default judgment and civil contempt may be more appropriate sanctions,[22] although criminal contempt also remains available under D.C. Code § 11-944. This change reduces unnecessary overlap and improves the consistency and proportionality of the revised statutes.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of

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[15] RCC § 22E-207.

[16] *See* 16-1005(h).

[17] This section operates independently of and in addition to statute eliminating limitation on length of sentence for criminal contempt, thus the sentencing limit effectively does not apply. *Caldwell v. U.S.*, 1991, 595 A.2d 961 (D.C. 1991).

[18] *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991); *Vest v. United States*, 834 A.2d 908 (D.C. App. 2003).

[19] *See, e.g., Swisher v. U.S.*, 572 A.2d 85, 89 (D.C. 1990).

[20] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[21] Due process and procedural rules may require a defendant's presence in a criminal case. *See, e.g.,* FRCrP 43. However, in a civil case, the court can proceed in the defendant or respondent's absence and grant the plaintiff or petitioner relief by default. D.C. Code § 16-1004(3) authorizes the entry of a final civil protection order by default, if a respondent fails to appear. This is a particularly robust sanction because, unlike a default or default judgment in a purely civil case, a civil protection order appears in a criminal records search, triggering a multitude of collateral consequences for the respondent.

[22] *See, e.g.,* D.C. Code § 16-2325.01(c) (authorizing civil contempt instead of criminal contempt for failure to appear as a participant in a delinquency or neglect proceeding).

interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the revised offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

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

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code §§ 16-1005(f) and (g) do not specify a culpable mental state requirement. District case law has held that a person must act "willfully, i.e. that he had a 'wrongful state of mind.'"[23] However, case law does not provide a clear definition of "willfully." Resolving this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[24] and "in fact,"[25] applying the former to the actor's failure to comply with the order and the latter to the nature and issuance of the order. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are subject to a protection order, and, to avoid liability, avoids confirming or fails to investigate whether they are subject to a protection order. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[26] of a judicial officer. Current D.C. Code § 16-1005(f) – (i) are silent as to whether a person may be excused from complying with an order with the consent of a judicial officer.[27] Resolving this ambiguity, the revised statute makes clear that the court is empowered to excuse the accused from complying. This change improves the clarity and proportionality of the revised offense.

Third, the revised statute requires that the release order be in writing,[28] advise the person of the consequences for violating the order, and be clear and specific. Current D.C. Code § 16-1005 is silent as to whether or how a person's conditions of release be specified in an order. District case law has held that evidence of contempt is insufficient where the civil protection order is not sufficiently clear and specific to serve as a guide to defendant's conduct.[29] However, case law has not addressed whether other criteria, such

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[23] *See Davis v. U.S.*, 834 A.2d 861, 867 (D.C. 2003) (reversing a conviction where a defendant was removed from a required 22-week program "willfully.")

[24] RCC § 22E-206.

[25] RCC § 22E-207.

[26] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.

[27] Consider, for example, a judge who in one case orders a person to complete a domestic violence intervention program and a judge in another case who orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

[28] *See* D.C. Code §§ 16-1004 and 1005 requiring that protection orders be made in writing.

[29] *Hector v. U.S.*, 883 A.2d 129, 131 (D.C. 2005) (explaining "A defendant cannot be convicted of criminal contempt where he or she is not put on notice of the specific conditions of the [CPO] order."); *Smith v.*

as notice of the potential penalties for failure to comply, must also be satisfied. To resolve this ambiguity, the revised statute codifies this point and requires notice similar to what is required for criminal contempt for violation of a release condition under RCC § 22E-1329A. This change clarifies and improves the consistency of District statutes.

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

First, the revised statute does not specify that children must be prosecuted as children. Current D.C. Code § 16-1005(g-1) states, "Enforcement proceedings under subsections (f) and (g) of this section in which the respondent is a child as defined by § 16-2301(3) shall be governed by subchapter I of Chapter 23 of this title." This language appears to be superfluous and potentially confusing, as no other criminal offense definition includes a similar cross-reference. This change clarifies the revised statute and does not change District law.

Second, the revised statute does not specify that final civil protection orders include orders entered by consent without admission. Current D.C. Code § 16-1005(i) states, "Orders entered with the consent of the respondent but without an admission that the conduct occurred shall be punishable under subsection (f), (g), or (g-1) of this section." This language appears to be superfluous, however, the Explanatory Note makes clear that a court order includes a consent order. This change clarifies the revised statute and does not change District law.

Third, the revised statute is severed from D.C. Code § 16-1005 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsections (a) – (e) of current D.C. Code § 16-1005, which are not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

U.S., 677 A.2d 1022, 1031 (D.C. 1996) (reversing contempt for violating CPO where no evidence that defendant was informed by court that "no contact" order meant no contact through writing as well as no physical contact); *In re Jones*, 898 A.2d 916, 920 (D.C. 2006) (stating, the order must be "specific and definite, or clear and unambiguous.").

RCC § 16-1021. Parental Kidnapping Definitions.

Explanatory Note. *This section defines relevant terms for Subchapter II of Chapter 10 of Title 16. This section replaces current D.C. Code § 16-1021.*

The revised section defines terms as used in Subchapter II of Chapter 10 of Title 16. Paragraph (1) defines the term "child" as a person under the age of 16. Paragraph (2) defines the term "lawful custodian" to mean a person who is authorized to have custody under District law, or by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child. This term is intended to include persons who are authorized to have custody under District law, whether or not that authority is pursuant to a court order. Paragraph (3) defines the term "relative" to mean a parent, other ancestor, brother, sister, uncle, or aunt, or one who has been lawful custodian at some prior time.

Relation to Current District Law. *The revised statute makes one change that constitutes a substantive change to current District law.*

The revised definition of "lawful custodian" includes any person who is authorized to have custody over a child *under District law*. Under the current D.C. Code definition, "lawful custodian" only includes persons who have custody "by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child."[1] Under the plain language of the current definition, parents who have lawful custody of their children other than pursuant to a court order[2] are not "lawful custodians," so taking a child from such a parent would not constitute parental kidnapping under current law. There is no case law on point. By contrast, under the revised definition of "lawful custodian," any parent who has custodial rights under District law constitutes is included in the definition of "lawful custodian." This change improves eliminates a gap in liability and improves the proportionality of the revised offense.

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

The revised definition section does not define the term "District." Omitting this term is not intended to change current District law. The term "District" as used in this subchapter is still intended to refer to the District of Columbia.

[1] D.C. Code § 16-1021(3).
[2] For example, children with their birth parents who have not been through court proceedings.

RCC § 16-1022. Parental Kidnapping Criminal Offense.

Explanatory Note. *This section establishes the parental kidnapping offense, and replaces the current parental kidnapping statute in the D.C. Code. The offense criminalizes taking, concealing, or detaining a child who has another lawful custodian, with intent to prevent a lawful custodian from exercising rights to custody. The offense only applies to relatives of the child or persons acting at the direction of a relative of the child. The revised statute also incorporates statutes that define relevant terms; establish defenses to prosecution; specify that the offense is continuous; specify payment of expenses; specify prosecutorial authority; and establish procedures for expungement. This revised parental kidnapping statute replaces current D.C. Code §§ 16-1022, 1024, and 1025; and portions of D.C. Code § 16-1023 relating to defenses, parental kidnapping as a continuous offense, and reimbursement of expenses.*

Subsection (a) specifies the elements of first degree parental kidnapping. Paragraph (a)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (a)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District for more than 24 hours. Paragraph (a)(3) requires that the child was, in fact, outside the custody of the lawful custodian for more than 30 days. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the child was outside of the custody of a lawful custodian for more than 30 days.

Subsection (b) specifies the elements of second degree parental kidnapping. Paragraph (b)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (b)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District for more than 24 hours. Paragraph (b)(3) requires that the actor did not release the child without injury in a safe place prior to arrest. This element is satisfied if the child is not released at all prior to arrest, or if the child is released prior to arrest in a place that creates a risk of harm or injury.

Subsection (c) specifies the elements of third degree parental kidnapping. Paragraph (c)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (c)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph also specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District.

Subsection (d) specifies the elements of fourth degree parental kidnapping. Paragraph (d)(1) requires that the actor knowingly takes, conceals, or detains a person who has another lawful custodian. The term "lawful custodian" is defined D.C. Code § 16-1021. Paragraph (d)(1) specifies a culpable mental state of "knowledge," a term defined in RCC § 22E-206 to mean the actor must be practically certainty that he would

take, conceal, or detain a person. The actor must also be practically certain the person has another lawful custodian.

Paragraph (d)(2) requires that the actor takes, conceals, or detains a person with intent to prevent a lawful custodian from exercising rights to custody of the child. "Intent" is a term defined in RCC § 22E-206 that here means that the actor was practically certain that he would prevent a lawful custodian from exercising rights to custody of the child. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually interfered with another lawful custodian's right to custody, only that the actor believed to a practical certainty that he would interfere with a right to custody. A right to custody need not be permanent; intent to interfere with limited rights to custody or temporary visitation rights would suffice under this subparagraph.

Paragraph (d)(3) requires that the person taken, concealed, or detained, in fact, is under the age of 16. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state as to the person's age.

Paragraph (d)(4) requires that the actor is a relative of the child, or a person who believes he or she is acting pursuant to direction of a relative of the child. This element may be satisfied even if the actor unreasonably believes that he or she is acting that direction of a relative. Per the rule of interpretation in RCC § 22E-207, the term "in fact" in paragraph (d)(4) also applies to this paragraph. There is no culpable mental state required as to whether the actor is a relative of the child, or person who believes he or she is acting pursuant to direction of a relative of the child.[1]

The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state as to whether the actor is a relative of the child, or believes he or she is acting pursuant to direction of a relative.

Subsection (e) establishes three exclusions to liability. Paragraph (e)(1) establishes that an actor is not liable under this section if he or she was a parent fleeing from imminent physical harm to the parent. Paragraph (e)(2) establishes that an actor is not liable under this section if the other parent effectively consented to the act constituting the offense. The term "effective consent" is defined in RCC § 22E-701, and requires that the consent was obtained other than by deception or coercive threat. Paragraph (e)(3) establishes that an actor is not liable under this section if he or she acted to protect the child from imminent physical harm.

Subsection (f) establishes a defense to prosecution under this section. Under paragraph (f)(1), the actor may file a petition that states that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and seeks to establish custody, to transfer custody, or to revise or to clarify an existing custody order. If the actor files a petition with the Superior Court of the District of Columbia within 5 business days of the acts constituting the offense, a court finding that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child shall be a defense to prosecution under this section.

[1] Although no culpable mental state as defined in RCC § 22E-205 is required, paragraph (d)(4) still requires that the actor subjectively believed that he or she was acting at the direction of a relative.

Subsection (g) specifies that parental kidnapping is a continuous offense that continues long as the child is concealed, detained, or otherwise unlawfully physically removed from the lawful custodian.

Subsection (h) specifies relevant penalties for parental kidnapping. Paragraph (h)(5) specifies that expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this section, and reasonable costs incurred by the lawful custodian or child victim shall be reimbursed to the lawful custodian. Paragraph (h)(6) specifies that notwithstanding the authorized maximum penalties, first and second degree parental kidnapping are designated as felonies[2] for purposes of D.C. Code 23-563.[3]

Subsection (i) cross references terms defined elsewhere in the subchapter, and in the RCC.

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

Relation to Current District Law. *The revised parental kidnapping statute makes three substantive changes to current District law.*

First**,** the revised parental kidnapping offense no longer provides liability for a parent concealing the child from another parent, absent additional intent. Under the current statute, parental kidnapping includes a parent concealing a child from the child's other parent, even if there is no additional intent to interfere with the other parent's custodial rights. The plain language would appear to criminalize a parent with custody at a given time refusing to give the child's whereabouts to another parent who does not have custody at that time. There is no case law on point. By contrast, the revised parental kidnapping statute requires that the actor had intent to interfere with a lawful custodian's custodial rights. This change improves the proportionality of the revised offense.

Second, the revised definition of "lawful custodian" under D.C. Code § 16-1021 includes any parent who is authorized to have custody over a child *under District law*. Under the current definition, "lawful custodian" only includes persons who have custody "by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child."[4] Under the plain language of the current definition, parents who have lawful custody of their children other than pursuant to a court order[5] are not "lawful custodians," so taking a child from such a parent would not constitute parental kidnapping under current law. There is no case law on point. By contrast, under the revised definition of "lawful custodian," taking a child from any parent who has custodial rights under District law constitutes parental kidnapping, even if the custodial rights are not pursuant to a court order. This change improves eliminates a gap in liability and improves the proportionality of the revised offense.

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[2] Designating the parental kidnapping offense as a felony is an exception to the general definition of "felony" under RCC 22E-701, which defines "felony" as "an offense punishable by a term of imprisonment that is more than one year" or "in other jurisdictions, an offense punishable by death."

[3] D.C. Code § 23-563 states that a warrant or summons for a felony under § 16-1022 issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.

[4] D.C. Code § 16-1021 (3).

[5] For example, children with their birth parents who have not been through court proceedings.

Third, the revised parental kidnapping statute's penalty grades that are predicated on taking, concealing, or detaining a person outside of the District require that the actor did so for more than 24 hours. Under current law, penalty gradations based on taking, concealing, or detaining a child outside of the District does not include any minimum time duration.[6] By contrast, first, second, and third degree parental kidnapping require that the person was taken, concealed, or detained outside of the District for more than 24 hours. This revision prevents disproportionately severe penalties when an actor briefly takes a child over the border. This change improves the proportionality of the revised offense.

Beyond these three substantive changes to current District law, nine other aspects of the revised parental kidnapping statute may constitute substantive changes to current District law.

First, the revised statute requires that the actor "knowingly" takes, conceals, or detains the complainant. The current parental kidnapping statute does not specify a culpable mental state. The current parental kidnapping statute references acting "with the intent to prevent a lawful custodian from exercising rights to custody," "with intent to harbor, secrete, detain, or conceal the child" or "with intent to deprive the other person of the right of limited custody or visitation,"[7] but it is not clear whether these culpable mental states apply to other elements of the offense, and the phrases "with intent" and "with the intent" are not defined in the statute. There is no case law on point. Resolving this ambiguity, the revised parental kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of taking, concealing, or detaining the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] Specifying a culpable mental state for the offense improves the clarity of the revised offense and is consistent with requirements for most other offenses.

Second, the revised statute does not explicitly include taking a child outside of the District for the purpose of depriving a lawful custodian of physical custody of the child after having been served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody rights. It is unclear whether this prong of parental kidnapping includes taking a child who does not yet have another lawful custodian, in expectation that another person *may* obtain custodial rights to the child, or whether this prong of the current statute requires that the child has another "lawful custodian" who already has custodial rights. There is no DCCA case law on point. Resolving this ambiguity, the revised parental kidnapping offense requires that the actor intended to interfere with a lawful custodian's pre-existing right to custody. This change improves the clarity of the revised offense.

Third, the revised statute specifies that the actor must take the child "to another location." The current statute merely states that the actor must "take" a child, but does

[6] D.C. Code § 16-1024.
[7] D.C. Code § 16-1022.
[8] *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)")

not define the term, and there is no relevant DCCA case law. Resolving this ambiguity, the revised statute specifies that the child must be moved to a different location. Merely seizing a child without any movement is insufficient under the revised statute.[9] This change improves the clarity of the revised offense.

Fourth, the revised statute specifies that there is no culpable mental state as to the age of the complainant. The current statute requires that the complaining witness is a "child," which is defined as a "person under the age 16 years of age."[10] The current statute does not specify whether the actor must be aware that the complainant is under 16 years of age. There is no DCCA case law on point. Resolving this ambiguity, the revised statute specifies that there is no culpable mental state requirement as to the age of the complainant. This change improves the clarity of the revised offense.

Fifth, the offense requires that the actor is either a relative or a person who believes he or she is acting pursuant to directions of a relative. The current statute requires that the actor is either a relative of the complainant, or is acting pursuant to directions of a relative. However, the current statute does not specify whether the offense includes a person who incorrectly believes he or she is acting at the direction of a relative. There is no DCCA case law on point. Resolving this ambiguity, the revised statute requires that the actor believed he or she was acting at the direction of a relative. This change improves the clarity of the revised offense.

Sixth, the exclusion to liability under paragraph (e)(2) requires that the other parent gave effective consent to the conduct constituting the offense. Under current law, it is a defense to prosecution that the action constituting the offense was "consented to by the other parent[.]"[11] The term "consent" is not defined in the statute, and there is no relevant DCCA case law. It is unclear if the defense would apply if the consent were induced by physical force, coercive threats, or deception. Resolving this ambiguity, the revised statute provides the defense only if the other parent gave "effective consent," as defined in RCC § 22E-701[12] to the conduct constituting the offense. This requires that the consent was not obtained by physical force, coercive threat, or deception. This change improves the clarity and proportionality of the revised statute.

Seventh, the jurisdiction provision in current D.C. Code § 16-1023 (h) is omitted. The current statute states that "Any violation of this subchapter is punishable in the District, whether the intent to commit the offense is formed within or without the District, if the child was a resident of the District, present in the District at the time of the taking, or is later found in the District." This language apparently is intended to ensure that District courts have jurisdiction over parental kidnappings that do not entirely occur within the District of Columbia. However, the DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements

[9] Attempt liability may still apply in these cases, provided the requirements for attempt liability under RCC § 22E-301 are satisfied.
[10] D.C. Code § 16-1021 (1).
[11] D.C. Code § 16-1023 (a)(4).
[12] "Effective consent means consent other than consent induced by physical force, a coercive threat, or deception."

occurred outside of the District."[13] Consequently, although the DCCA has not applied this rule to parental kidnapping cases, it appears that even without any statutory language in the revised statute on jurisdiction District courts would have jurisdiction over any case in which a child was present in the District at the time of the taking, or was later found in the District. It is unclear, however, whether the current jurisdiction provision would extend jurisdiction to cases where the child is a District resident, but none of the acts constituting the offense occurs within the District. There is no relevant DCCA case law. Resolving this ambiguity, the revised statute applies jurisdictional principles the same as for other crimes, eliminating the offense-specific jurisdiction provision. This change improves the clarity and consistency of the revised offense.

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

Ninth, the revised statute does not specifically include liability for acting as an aider and abettor, conspirator, or accessory to any of the conduct proscribed by the offense. The current statute prohibits "Act[ing] as an aider and abettor, conspirator, or accessory to any of the actions forbidden by this section[.]"[14] There is no case law on point. By contrast, under the revised parental kidnapping statute, accessory and conspiracy liability for parental kidnapping is subject to the RCC's general accomplice liability[15] and conspiracy[16] statutes. The RCC's general accomplice and conspiracy statutes detail the culpable mental state and other requirements of accomplice and conspiracy liability in a manner consistent with other criminal offenses. To the extent that the RCC's general conspiracy and accomplice provisions differ from the law on conspiracy and accomplice liability as applied to the current parental kidnapping statute,[17] relying on the RCC's general provisions may constitute a change in current law.[18] This change improves the clarity and consistency of the revised offense.

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[13] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[14] D.C. Code § 16-1022 (b)(6).
[15] RCC § 22E-210.
[16] RCC § 22E-303.
[17] [The Commission plans to address liability for conduct constituting being an accessory after the fact with recommendations for reform to the District's obstruction of justice statutes.]
[18] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy. For discussion on the RCC's accomplice liability statute's possible changes to current District law, see First Draft of Report #22, Accomplice Liability and Related Provisions.

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

First, the revised parental kidnapping statute specifically refers to an actor who "takes, conceals, or detains" a child, but does not specifically include "abducting," "harboring," or "secreting" a child. However, omitting these terms is not intended to change current District law. The term "taking," "detaining," and "concealing" cover all of the conduct covered by "abducting" or "secreting." Although "harboring" may be broader and include conduct that does not constituting "taking," "detaining," or "concealing," omitting this term does not change current District law. The current penalty provision for parental kidnapping determines penalties based on whether the actor "takes," "detains," or "conceals" a child inside or outside the District[19] and there is no penalty specified for merely "harboring" a child under the current statute. Omitting the word "harboring" does not change current District law, and improves the clarity of the revised offense.

Second, the revised statute omits several versions of the offense specified under current law.[20] Omitting these specific versions of parental kidnapping is not intended to change current District law. Each of these versions of parental kidnapping still satisfies the elements of the offense specified in the revised statute. These versions of parental kidnapping all require taking, concealing, or detaining a child, with intent to interfere with a lawful custodian's rights to custody over the child. Omitting these versions of parental kidnapping improves the clarity of the revised statute.

[19] D.C. Code § 16-1024.

[20] The current statute specifically criminalizes: 1) abducting, taking, or carrying away a child from a person with whom the relative has joint custody pursuant to an order, judgment, or decree of any court, with the intent to prevent a lawful custodian from exercising rights to custody to the child; 2) having obtained physical control of a child for a limited period of time in the exercise of the right to visit with or to be visited by the child or the right of limited custody of the child, pursuant to an order, judgment, or decree of any court, which grants custody of the child to another or jointly with the relative, with intent to harbor, secrete, detain, or conceal the child or to deprive a lawful custodian of the physical custody of the child, keep the child for more than 48 hours after a lawful custodian demands that the child be returned or makes all reasonable efforts to communicate a demand for the child's return; 3) Having custody of a child pursuant to an order, judgment, or decree of any court, which grants another person limited rights to custody of the child or the right to visit with or to be visited by the child, conceal, harbor, secrete, or detain the child with intent to deprive the other person of the right of limited custody or visitation; 4) Concealing, harboring, secreting, or detaining the child knowing that physical custody of the child was obtained or retained by another in violation of this subsection with the intent to prevent a lawful custodian from exercising rights to custody to the child; and 5) After issuance of a temporary or final order specifying joint custody rights, taking or enticing a child from the other joint custodian in violation of the custody order.

RCC § 16-1023. Protective Custody and Return of Child.

Explanatory Note. *This section specifies when a law enforcement officer may take a child into protective custody, and establishes a duty to return a child to a lawful custodian or other entity authorized by law. This section replaces portions of D.C. Code § 16-1023 relating to law enforcement officers' authority to take a child into protective custody, and duty to return the child.*

Subsection (a) specifies that a law enforcement officer may take a child into protective custody when the officer reasonably believes that a person has committed an offense under this subchapter, and unlawfully will flee the District with the child.

Subsection (b) specifies that a law enforcement officer shall return a child who has been detained or conceals to the child's lawful custodian or place the child in custody with another entity authorized by law.

Relation to Current District Law. *This section does not change current District law. This statute is taken verbatim from current D.C. Code § 16-1023 (d) and (e).*

RCC § 16-1024. Expungement of Parental Kidnapping Conviction.

Explanatory Note. *This section specifies procedures for expunging record of convictions for parental kidnapping. This section replaces current D.C. Code § 16-1026.*

This section provides that a person convicted of parental kidnapping under D.C. Code § 16-1022 may have all records of the conviction expunged. A person who commits parental kidnapping with respect to his or her own child may apply for expungement when the person's youngest child reaches the age of 18, provided that the person has no more than one conviction for parental kidnapping. A person who commits parental kidnapping with respect to a person who is not his or her child may apply for expungement five years after the conviction, or after the child has reached 18 years of age, whichever occurs later, provided that the person has no more than one conviction for parental kidnapping.

Relation to Current District Law. *This section does not change current District law. This statute is taken verbatim from current D.C. Code § 16-1026.*

RCC § 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond.

Explanatory Note. *This section establishes the failure to appear after release on citation or bench warrant bond offense for the Revised Criminal Code (RCC). The offense prohibits knowingly failing to appear for a hearing after being released on citation and ordered to appear under D.C. Code § 23-584. It replaces subsection (b) of D.C. Code § 23-585, failure to appear.*

Subsection (a) specifies the elements of first degree failure to appear after release on citation or bench warrant bond. Paragraph (a)(1) requires that the person was required to appear before a judicial officer on a specified date and time for a felony offense. The term "judicial officer" is a defined term under D.C. Code § 23-501.[1] The term "appear" is not defined and should be construed broadly to include all types of appearances, including both in-person and virtual hearings. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they are required by a citation or by a bench warrant to appear at a specific date and time.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether a circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied here, knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and to avoid liability avoids confirming or fails to investigate whether they are required to appear at a specified date and time.[3] The term "in fact" indicates that the accused is strictly liable with respect to whether a citation was issued under D.C. Code § 23-584,[4] which authorizes law enforcement officers to release arrestees to appear before a judge at a later date (with or without conditions[5]), or a bond was posted pursuant to a Superior Court bench warrant. The term "in fact" also indicates that the accused is strictly liable with respect to whether the offense for which they were cited is a felony, as defined in RCC § 22E-701.[6]

Paragraph (a)(2) requires that the person fail to appear at the time specified in the court's order or to remain until excused by a judicial officer. The terms "appear" and "judicial officer" have the same meaning as in paragraph (a)(1). Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means that the person must be practically certain that they failed to appear or remain

[1] D.C Code § 23-501(1) ("The term 'judicial officer' means a judge of the Superior Court of the District of Columbia or of the United States District Court for the District of Columbia, or a United States commissioner or magistrate for the District of Columbia.").

[2] Consider, for example, a person who is unable to read or understand the citation due to illiteracy or a language barrier. That person may not be practically certain that they were required to appear.

[3] Consider, for example, a person who is handed a citation to appear and angrily tears it up and throws it in the garbage before reading the date. Knowledge that they were required to appear on the specified date and time may be imputed even though they were not practically certain of it.

[4] RCC § 22E-207.

[5] Failure to abide by a condition of release is not a criminal offense but it does subject a person to being taken into custody and presented before a judicial officer. D.C Code § 23-585(a).

[6] The offense for which the person is cited may differ from the offense that is eventually charged by a prosecutor. First degree liability is dependent upon the offense the law enforcement officer indicated on the citation. It is not a defense that there was no probable cause for the felony offense.

as required.[7] Determining whether a failure to appear is knowing or inadvertent is a fact-sensitive inquiry.[8] Under RCC § 22E-203, the person's conduct must be voluntary.[9]

Subsection (b) specifies the elements of second degree failure to appear after release on citation or bench warrant bond. The elements are identical to the elements of first degree, except that first degree is limited to a felony offense and second degree applies more broadly to either a felony or misdemeanor.

Subsection (c) specifies that a person does not commit an offense when they have the effective consent of a releasing official,[10] prosecutor,[11] or judicial officer[12] to miss the hearing or arrive at a later time. "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[13] "Consent" is also defined in RCC § 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective

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[7] Consider, for example, a person who misunderstands when and where they are to appear because the courthouse is closed due to inclement weather or because the hearing is moved to another courtroom. The evidence must show beyond a reasonable doubt that the person was practically certain or deliberately ignorant as to when and where they needed to appear. RCC §§ 22E-206; 22E-208(d). *See, e.g., Smith v. United States*, 583 A.2d 975, 979 (D.C. 1990); *Bolan v. United States*, 587 A.2d 458, 460 (D.C. App. 1991) (reversing a conviction on sufficiency grounds where a defendant was not notified of a courtroom change).

[8] *See Laniyan v. United States*, 18-CM-589, 2020 WL 2494587, at *3 (D.C. May 14, 2020) (explaining that the factfinder must give sufficient consideration to the defendant's personal circumstances); *see also Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness.").

[9] A person does not commit failure to appear after release on citation if the absence was not subject to the person's control. For example, a person does not commit an offense if they are incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due a technological problem. *See, e.g., Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction under a similar statute where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."). Likewise a person does not commit an offense if they are detained by a court security officer while being searched, temporarily removed from the courthouse for a fire drill, or made to wait outside a courtroom until a non-public hearing concludes.

[10] The term "releasing official" is defined in paragraph (e)(3). Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells her that she is excused from appearing on the date specified. The arrestee has the effective consent of a releasing official to not appear.

[11] Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be "no papered") and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear.

[12] Consider, for example, a presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear.

[13] RCC § 22E-701.

consent was given.[14] It is not a defense that the person mistakenly believed that they were excused when actually they were not excused.[15]

Subsection (d) specifies the penalties for each gradation of the revised offense. [*See* Third Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 23 offense.

Relation to Current District Law. *The revised failure to appear after release on citation statute clearly changes current District law in three main ways.*

First, the revised statute imposes a single penalty class for all misdemeanor offenses. Current D.C. Code § 23-585(b)(1), concerning misdemeanors, imposes a maximum penalty of "not more than the maximum provided for the offense for which such citation was issued." In contrast, the revised code specifies a penalty class for every offense, including the failure to appear offenses. This change improves the consistency and proportionality of the revised statutes.

Second, the revised statute allows for higher fines for organizational defendants who violate the statute. Current D.C. Code § 23-585(b)(3) states that: "For the purposes of this section, section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C Law 19-317; D.C. Official Code § 22-357.01), shall not apply." While the main portion (subsection (b)) of section 101 of the Criminal Fine Proportionality Amendment Act of 2012 sets fines for certain classes of offenses, subsection (c) of Section 101 provides that organizational defendants are subject to heightened (double) fines. Consequently, D.C. Code § 23-585(b)(3) not only exempts the statute from the standard fine provisions applicable to most other current D.C. Code offenses, but also exempts organizational defendants from the heightened fine provisions otherwise applicable to most current D.C. Code offenses. In contrast, the revised code does not specifically exclude failure to appear violations from the higher fines applicable to organizational defendants under RCC § 22E-604(b). There is no clear rationale for treating organizational defendants differently for this particular offense. This change improves the consistency and proportionality of the revised statutes.

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

[14] RCC § 22E-207.

[15] Consider, for example, a person who mistakenly believes they may leave the courtroom temporarily to use the bathroom or to smoke a cigarette. Liability depends entirely on the judge's courtroom policy.

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

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code § 23-585(b) requires that the accused act willfully. Although the term "willfully" is not defined in the statute, the District of Columbia Court of Appeals ("DCCA") has explained that, in a closely related statute,[16] "willful" means "knowing, intentional, and deliberate, rather than inadvertent or accidental," but does not mean "done with a bad purpose," as it might in other statutes.[17] To resolve this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[18] and "in fact,"[19] applying the former to the actor's failure to appear as required and the latter to the nature of the citation. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and, to avoid liability, avoids confirming or fails to investigate whether they are required to appear at a specified date and time. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[20] of a releasing official, prosecutor, or judicial officer. Current D.C. Code § 23-585(b) is silent as to whether a person may be excused from appearing for a hearing with the consent of a releasing official,[21] prosecutor,[22] or judicial officer.[23] The revised statute makes clear that each of these actors is empowered to excuse the accused from appearing. This change improves the clarity and proportionality of the revised offense.

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

The revised statute is severed from D.C. Code § 23-585 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsection (a) of current D.C. Code § 23-585, which is not being revised at

[16] D.C. Code § 23-1327, also proscribing failure to appear.
[17] *Trice v. United States*, 525 A.2d 176, 181 (D.C. 1987); *see also Patton v. U. S.*, 326 A.2d 818, 820 (D.C. App. 1974).
[18] RCC § 22E-206.
[19] RCC § 22E-207.
[20] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.
[21] Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells them that they are excused from appearing on the date specified. The arrestee has the effective consent of a releasing official to not appear.
[22] Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be "no papered") and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear.
[23] Consider, for example, the presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear.

this time. This change improves the clarity and logical organization of the revised statutes.

RCC § 23-1327. Failure to Appear in Violation of a Court Order.

Explanatory Note. *This section establishes the failure to appear in violation of a court order offense for the Revised Criminal Code (RCC). The offense prohibits knowingly failing to appear for a hearing after being ordered to appear by a judge. It replaces D.C. Code § 23-1327, Penalties for failure to appear.*

Subsection (a) specifies the elements of first degree failure to appear in violation of a court order. Paragraph (a)(1) requires that the person was required to appear for a hearing before a judicial officer on a specified date and time by a court order that is issued under D.C. Code § 23-584 for a felony. The term "judicial officer" is a defined term under D.C. Code § 23-1331.[1] The term "appear" is not defined and should be construed broadly to include in-person and virtual hearings. The term "court order" includes any judicial directive, oral or written. Common examples include a summons to appear signed by a judge, a pretrial release order that specifies a hearing date and requires the defendant's presence, a scheduling order, and oral directive to return after a recess. A single missed appearance constitutes a single offense, even if the underlying case involved multiple charges.[2] Paragraph (a)(1) also requires that the person knows they are subject to a court order to appear before a judicial officer. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they are required to appear at a specific date and time.[3] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether a circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied here, knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and to avoid liability avoids confirming or fails to investigate whether they are required to appear at a specified date and time.[4]

Subparagraphs (a)(1)(A) and (a)(1)(B) specify two types of hearings that will trigger first degree liability. Under (a)(1)(A), first degree liability attaches when the person is scheduled to appear as a defendant in a felony case. The term "felony" is defined in RCC § 22E-701. A conviction for the underlying offense is not required.[5] Under (a)(1)(B), first degree liability attaches when the person is scheduled to be sentenced. This does not include hearings in which sentencing is merely a possibility, e.g., a status hearing at which the parties expect to resolve a case short of trial by guilty plea and proceed to sentencing, a trial date on which the parties expect to conclude quickly and proceed to sentencing (if applicable), a probation revocation hearing during

[1] D.C Code § 23-1331(1) ("The term 'judicial officer' means, unless otherwise indicated, any person or court in the District of Columbia authorized pursuant to section 3041 of Title 18, United States Code, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court.").
[2] *Lennon v. United States*, 736 A.2d 208, 210 (D.C. App. 1999).
[3] Consider, for example, a person who is unable to read or understand the citation due to illiteracy or a language barrier. That person may not be practically certain that they were required to appear.
[4] Consider, for example, a person who is handed a scheduling order and angrily tears it up and throws it in the garbage before reading the date. That person may be said to know that they were required to appear on the specified date even though they were not practically certain of it.
[5] *Williams v. U. S.*, 331 A.2d 341, 342 (D.C. App. 1975).

which the court may resentence, a status hearing after an appellate court has remanded for resentencing. The term "in fact" indicates that the accused is strictly liable with respect to whether the hearing was one of those two types.

Paragraph (a)(2) requires that the person fail to appear[6] at the time specified in the court's order[7] or to remain until excused by a judicial officer.[8] The term "appear" has the same meaning as in paragraph (a)(1). Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means the person must be practically certain that they failed to appear or remain as required.[9] Determining whether a failure to appear is knowing or inadvertent is a fact-sensitive inquiry.[10] Under RCC § 22E-203, the person's conduct must be voluntary.[11]

Subsection (b) specifies the elements of second degree failure to appear in violation of a court order. The elements are identical to the elements of first degree, except for the type of hearing that will trigger liability. Subparagraphs (b)(1)(A) and (b)(1)(B) specify two types of hearings that will trigger second degree liability. Under (b)(1)(A), second degree liability attaches when the person is scheduled to appear as a defendant for either a felony or misdemeanor. Under (b)(1)(B), second degree liability attaches when the person is ordered[12] to appear as a material witness in a criminal case.

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[6] *See Macklin v. United States*, 733 A.2d 962, 964 (D.C. App. 1999) (reversing a conviction where there was no evidence presented that the defendant failed to appear).

[7] *See Wilkins v. United States*, 137 A.3d 975, 979 (D.C. App. 2016).

[8] *See Gilliam v. United States*, 46 A.3d 360, 371 (D.C. App. 2012) (affirming a conviction where the defendant was present but subsequently left the courtroom).

[9] Consider, for example, a person who misunderstands when and where they are to appear because the courthouse is closed due to inclement weather or because the hearing is moved to another courtroom. The evidence must show beyond a reasonable doubt that the person was practically certain or deliberately ignorant as to when and where they needed to appear. RCC §§ 22E-206; 22E-208(d). *See, e.g.*, *Smith v. United States*, 583 A.2d 975, 979 (D.C. 1990); *Bolan v. United States*, 587 A.2d 458, 460 (D.C. App. 1991) (reversing a conviction on sufficiency grounds where a defendant was not notified of a courtroom change).

[10] *See Laniyan v. United States*, 18-CM-589, 2020 WL 2494587, at *3 (D.C. May 14, 2020) (explaining that the factfinder must give sufficient consideration to the defendant's personal circumstances); *see also Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness.").

[11] A person does not commit failure to appear in violation of a court order if the absence was not subject to the person's control. For example, a person does not commit an offense if they are incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due a technological problem. *See Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."). Likewise, a person does not commit an offense if they are detained by a court security officer while being searched, temporarily removed from the courthouse for a fire drill, or made to wait outside a courtroom until a non-public hearing concludes.

[12] A subpoena is insufficient.

Subsection (c) specifies that a person does not commit an offense when they have the effective consent of a judicial officer[13] to miss the hearing or arrive at a later time. "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[14] "Consent" is also defined in RCC § 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[15] It is not a defense that the person mistakenly believed that they were excused when actually they were not excused.[16]

Paragraphs (d)(1) and (d)(2) specify the penalties for each gradation of the revised offense. [*See* Fourth Draft of Report #41.] In some cases, the conduct criminalized under this section will also constitute criminal contempt for violation of a court order under RCC § 23-1329(c) or D.C. Code § 11-944 and, in that situation, convictions for both offenses merge under RCC § 22E-214(a)(4).[17]

Paragraph (d)(3) authorizes the court to order the forfeiture of any security which was given or pledged for the defendant's release, subject to the Federal Rules of Criminal Procedure.[18]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 23 offense.

Relation to Current District Law. *The revised failure to appear in violation of a court order statute clearly changes current District law in two main ways.*

First, the revised offense provides for two degrees of punishment. Current D.C. Code § 23-1327 effectively has three sentencing gradations: 1-5 years for missing a sentencing hearing or a hearing in a felony case, 90-180 days for missing a hearing in a misdemeanor case, and 0-180 days for failing to appear as a material witness. In contrast, because the RCC imposes only maximum penalties and no mandatory or statutory minimums for this offense,[19] the revised statute condenses the offense to two gradations. This change improves the consistency and proportionality of the revised offenses.

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[13] Consider, for example, a presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear. Consider also a judge who calls a case and is informed that the defendant did not due to a family emergency. If the judge excuses the person's absence and reschedules the hearing, the person does not commit an offense.

[14] RCC § 22E-701.

[15] RCC § 22E-207.

[16] Consider, for example, a person who mistakenly believes they may leave the courtroom temporarily to use the bathroom or to smoke a cigarette. Liability depends entirely on the judge's courtroom policy.

[17] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[18] *See United States v. Nell*, 515 F.2d 1351 (D.C. Cir. 1975).

[19] *See* CCRC Advisory Group Memorandum #32 (March 20, 2020) (available at https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-32-Supplemental-Materials-to-the-First-Draft-of-Report-52.pdf).

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

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

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code § 23-1327 requires that the accused act "wilfully." Although the term "wilful" is not defined in the statute, the District of Columbia Court of Appeals ("DCCA") has explained that, in this statute, it means "knowing, intentional, and deliberate, rather than inadvertent or accidental," but does not mean "done with a bad purpose," as it might in other statutes.[20] On at least three occasions, the DCCA has remanded back to the trial court with a directive to more closely consider the impact of a defendant's personal and financial circumstances on their ability to understand, recall, and comply with an order to appear.[21] To resolve this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[22] and "in fact,"[23] applying the former to the actor's failure to appear as required and the latter to the nature and issuance of the citation. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and, to avoid liability, avoids confirming or fails to investigate whether they are required to appear at a specified date and time. These changes clarify and improve the consistency of District statutes.

Second, the revised statute omits specific references to provision of notice. Current D.C. Code § 23-1327 discusses notice in three places, all of which appear to provide exceptions or qualifications to the offense's requirement that the person's failure to appear be "willful" (a term the D.C. Code does not define). First, subsection (b) states, "Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is wilful." Second, subsection (b) also specifies that notice of the potential penalties for failure to appear is not required but "shall be a factor" in determining whether such failure to appear is wilful.[24] It further states that, "such

[20] *Trice v. United States*, 525 A.2d 176, 181 (D.C. 1987); *see also Patton v. U. S.*, 326 A.2d 818, 820 (D.C. App. 1974).
[21] *See Laniyan v. United States*, 18-CM-589, 2020 WL 2494587, at *3 (D.C. May 14, 2020) (citing *Evans v. United States*, 133 A.3d 988, 992 (D.C. 2016); *Foster v. United States*, 699 A.2d 1113 (D.C. 1997)).
[22] RCC § 22E-206.
[23] RCC § 22E-207.
[24] This provision appears to be superfluous. Unlike the preceding sentence which establishes a permissive inference by use of the phrase "shall be prima facie evidence," it is unclear what effect, if any, the phrase

warning shall not be a prerequisite to conviction under this section." Third, subsection (c) provides that a factfinder "may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made, and (2) the defendant, by his own actions, has frustrated the receipt of actual notice." Resolving these ambiguities about exceptions to the otherwise applicable requirement that conduct be "willful," the revised statute requires only that a person actually be required to appear, know that they are required to appear, and knowingly fail to appear. In the revised statute, the provision of notice may well be relevant to proving a defendant's culpable mental state about their duty to appear or failure to appear. However, more specific references to provision of notice are unnecessary because the RCC's general part defines all applicable mental states[25] and includes a deliberate ignorance provision[26] that clarify the culpable mental that must be proven. This change improves the clarity and consistency of the revised statutes.

Third, the revised offense does not include a special circumstances defense. The D.C. Code is silent as to a special circumstances defense. However, the DCCA has held "if there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."[27] The court provides an example in which a person is so ill that it is physically impossible to appear in court but does not further clarify what types of circumstances may qualify under the DCCA-recognized defense. Resolving this ambiguity, the revised statute incorporates RCC § 22E-203, which provides, as a matter of law that: "No person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense…When a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when: (A) The person has the physical capacity to perform the required legal duty; or (B) The failure to act is otherwise subject to the person's control." The applicability of RCC § 22E-203 to the revised failure to appear in violation a court order statute effectively renders the special circumstances defense unnecessary, using standardized principles of voluntariness applicable to all revised offenses. This change improves the clarity and consistency of the revised statute.

Fourth, the revised statute includes a defense where the accused acts with the effective consent[28] of a judicial officer. Current D.C. Code § 23-1327 is silent as to

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"shall be a factor" has on the statute. No reference to penalty warnings appears in any of the jury instructions the DCCA has reviewed for error or in the pattern jury instruction for the offense. *Trice v. U.S.*, 525 A.2d 176, 181–82 (D.C. 1987); *Robinson v. U.S.*, 322 A.2d 271 (D.C. 1974); *Raymond v. U.S.*, 396 A.2d 975 (D.C. 1979); *Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005); *Cooper v. U.S.*, 680 A.2d 1370, 1372 (D.C. 1996); Crim. Jury Inst. for DC 6.602 (2019).

[25] *See* RCC § 22E-206 and accompanying commentary.

[26] RCC § 22E-208(d).

[27] *Fearwell v. United States*, 886 A.2d 95, 101 (D.C. 2005) (internal citations omitted); *see also Laniyan v. United States*, 18-CM-589, 2020 WL 2494587, at *3 (D.C. May 14, 2020) (explaining the factfinder must either discredit the defendant's evidence or credit some or all of it while pointing to other evidence overcoming it).

[28] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.

whether a person may be excused from appearing for a hearing with the consent of a judicial officer.[29] Resolving this ambiguity, the revised statute makes clear that the court is empowered to excuse the accused from appearing. This change improves the clarity and proportionality of the revised offense.

Fifth, the revised statute is limited to persons who are subject to a court order. Current D.C. Code § 23-1327 does not specify that it applies only to court orders (as opposed to releases on citation[30]). However, the statute's location in the District's release and pretrial detention chapter of an enacted title suggests that it may apply only to defendants who have been released under D.C. Code § 23-1321. In addition, District practice is consistent with this reading of the law.[31] To resolve this ambiguity, the revised statute is limited only to persons who are subject to a court order. This change clarifies the revised statute.

Sixth, the revised statute is limited to material witnesses who are required to appear in a criminal case. Current D.C. Code § 23-1327(a) does not specify that it applies only to criminal cases, however, the statute's location in the District's release and pretrial detention chapter of an enacted title suggests that it is specific to criminal matters. To resolve this ambiguity, the revised statute is limited to material witnesses in criminal cases. Criminal contempt remains available under D.C. Code § 11-944. This change clarifies the revised statute.

[29] Consider, for example, a presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear.
[30] *See* RCC § 23-585.
[31] *See* Crim. Jury Inst. for DC 6.602 (2019) (including in the first element of the offense that the defendant was "released by a judicial officer").

RCC § 23-1329A. Criminal Contempt for Violation of a Release Condition.

Explanatory Note. *This section establishes the criminal contempt for violation of a release condition provision[1] for the Revised Criminal Code (RCC). The offense prohibits violating a condition of a pretrial release order issued under D.C. Code § 23-1321. It replaces subsections (a-1) and (c) of D.C. Code § 23-1329, Penalties for violation of conditions of release.*

Paragraph (a)(1) requires that the person knows that they are required to comply with conditions while on release. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they must comply with certain conditions.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether the circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists.[3]

Subparagraphs (a)(1)(A) – (a)(1)(D) require that the person is conditionally released under D.C. Code § 23-1321[4] and that the release order meet the criteria codified in D.C. Code § 23-1322(f).[5] The term "in fact" indicates that the accused is strictly liable[6] with respect to whether the conditional release order is issued under D.C. Code § 23-1321, is in writing, is sufficiently clear and specific to serve as a guide for the person's conduct, and advises the person of the consequences for violating the order. These consequences include immediate arrest or the issuance of a warrant for the person's arrest, criminal penalties under this section, the pretrial release penalty

[1] "[A] criminal contempt proceeding is not a criminal prosecution, and consequently not all procedures required in a criminal trial are necessary in a hearing on a charge of contempt." *Smith v. United States*, 677 A.2d 1022, 1028 (D.C. App. 1996); *In re: Wiggins*, 359 A.2d 579, 580 (D.C.1976).

[2] Consider, for example, a person who is unable to read or understand the release order due to illiteracy or a language barrier. That person may not be practically certain of their release conditions.

[3] Consider, for example, a person who is handed a release order and angrily tears it up and throws it in the garbage before reading it. That person may be said to know that they were conditionally released, even though they were not practically certain of it.

[4] D.C. Code § 23-1321(b) requires that the court impose a condition "that the person not commit a local, state, or federal crime during the period of release." D.C. Code § 23-1321(c)(1)(B)(xiv) authorizes the court to impose "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." Disobedience of these and other court orders are also punished under D.C. Code §§ 11-741 and 11-944. *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991). The statute does not apply to a person who is detained. That is, a person cannot be subject to pretrial or presentencing conditions if they are detained in the same case. For example, no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness.

[5] *See, e.g., Vaas v. U.S.*, 852 A.2d 44, 46 (D.C. 2004) (defendant's conduct not willful where order failed to meet specificity standard of § 23-1322(f) in case where written order to stay away from "1 block radius" and oral order to stay away from "1 block area" created an ambiguity regarding area from which defendant was barred); *Smith v. U.S.*, 677 A.2d 1022 (D.C. 1996) (no contempt where written statement of conditions was not sufficiently clear and specific to serve as a guide to defendant's conduct where court could not conclude that defendant could reasonably infer from order to stay away from complainant that she was not to have contact with complainant's attorney).

[6] RCC § 22E-207.

enhancements under RCC § 22E-607, and the criminal penalties for obstruction of justice under D.C. Code § 22-722. Invalidity of the order is not a defense.[7]

Paragraph (a)(2) requires that the person fail to comply with the release order. Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means the person must be practically certain that they failed to comply with one or more provisions in the order. Under RCC § 22E-203, the person's conduct must be voluntary.[8] For example, being arrested on probable cause is not a volitional act, however, committing a crime while on release is.[9] A person must be afforded a reasonable opportunity to comply with the condition.[10]

Subsection (b) specifies that a person does not commit an offense when they have the effective consent of a judicial officer to be excused from the condition of release that is the subject of the charged offense.[11] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[12] "Consent" is also defined in RCC § 22E-701.

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[7] A person is not entitled to attack the validity of a court order in a contempt proceeding. *See, e.g., Shewarega v. Yegzaw*, 947 A.2d 47, 51 (D.C. 2008) (respondent not entitled to attack validity of a CPO in contempt proceeding; he was obligated to obey the court order unless and until it was reversed or vacated). "Compliance with court orders is required until they are reversed on appeal or are later modified." *Baker*, 891 A.2d at 212 (quoting *Kammerman v. Kammerman*, 543 A.2d 794, 798–99 (D.C. 1988)). *See also Thomas v. U.S.*, 934 A.2d 389, 391 (D.C. 2007).

[8] A person does not commit an offense if the act or omission was not subject to the person's control. For example, a person does not violate a condition to meet with their pretrial services officer if they are incarcerated, hospitalized, or stranded. *See, e.g., Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness."); *Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction under a similar statute where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."); *but see Grant v. U.S.*, 734 A.2d 174, 177 (D.C. 1999) (holding that "[a]ddiction to heroin [does] not constitute a defense to the charge of contempt based upon violating a condition of pretrial release not to use drugs.").

[9] *Parker v. U. S.*, 373 A.2d 906, 907 (D.C. App. 1977).

[10] For example, a person does not violate a condition to stay away from a complainant where the complainant is physically chasing after the person and the person makes reasonable efforts to distance themselves. *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty).

[11] Consider, for example, a judge in one case orders a person to complete a domestic violence intervention program and a judge in another case orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

[12] RCC § 22E-701.

The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[13]

Subsection (c) authorizes the court to initiate contempt proceedings *sua sponte*.[14]

Subsection (d) specifies that contempt proceedings must be tried to the court.[15]

Subsection (e) specifies the penalties for the revised offense.[16] [*See* Fourth Draft of Report #41.] In some cases, the conduct criminalized under this section will also constitute criminal contempt under D.C. Code §§ 11-741 or 11-944,[17] failure to appear in violation of a court order under RCC § 23-1327,[18] or tampering with a detection device under RCC § 22E-3402 and convictions for the offenses must merge under RCC § 22E-214(a)(4).[19] Additionally, where the violation of release conditions is committing a new offense,[20] the contempt conviction must merge with or bar any conviction for the new offense.[21]

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

Subsection (g) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 23 offense.

Relation to Current District Law. *The revised criminal contempt for violation of a court order statute clearly changes current District law in one main way.*

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

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[13] RCC § 22E-207.

[14] *See* D.C. Code § 23-1329(c). "[A] criminal contempt proceeding is not a criminal prosecution, and consequently not all procedures required in a criminal trial are necessary in a hearing on a charge of contempt." *Smith v. United States*, 677 A.2d 1022, 1028 (D.C. App. 1996); *In re: Wiggins*, 359 A.2d 579, 580 (D.C.1976).

[15] *See* D.C. Code § 23-1329(c). "[A] criminal contempt proceeding is not a criminal prosecution, and consequently not all procedures required in a criminal trial are necessary in a hearing on a charge of contempt." *Smith v. United States*, 677 A.2d 1022, 1028 (D.C. App. 1996); *In re: Wiggins*, 359 A.2d 579, 580 (D.C.1976).

[16] This section operates independently of and in addition to statute eliminating limitation on length of sentence for criminal contempt, thus the sentencing limit effectively does not apply. *Caldwell v. U.S.*, 1991, 595 A.2d 961 (D.C. 1991).

[17] *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991); *Vest v. United States*, 834 A.2d 908 (D.C. App. 2003).

[18] *See, e.g., Swisher v. U.S.*, 572 A.2d 85, 89 (D.C. 1990).

[19] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[20] D.C. Code § 23-1321(b) requires that the court impose a condition "that the person not commit a local, state, or federal crime during the period of release."

[21] *See Haye v. United States*, 67 A.3d 1025, 1031 (D.C. App. 2013); *United States v. Dixon*, 509 U.S. 688, 698 (1993).

provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

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

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code § 23-1329(c) requires that the accused "intentionally violated a condition of his release." The term "intentionally" is not defined in the statute. There is limited DCCA case law on point that does not clearly distinguish between voluntariness and culpable mental states, but suggests that proof of knowledge or awareness of the violation is sufficient, and not a conscious desire to commit the violation.[22] To resolve this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[23] and "in fact,"[24] applying the former to the actor's failure to comply with the order and the latter to the nature and issuance of the order. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are subject to a conditional release order, and, to avoid liability, avoids confirming or fails to investigate whether they are subject to a conditional release order. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[25] of a judicial officer. Current D.C. Code § 23-1327 is silent as to whether a person may be excused from appearing for a hearing with the consent of a judicial officer.[26] Resolving this ambiguity, the revised statute makes clear that the court is empowered to excuse the accused from appearing. This change improves the clarity and proportionality of the revised offense.

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[22] *Grant v. United States*, 734 A.2d 174, 177 n. 6 (D.C. 1999) ("Proof of the intent element of criminal contempt only requires proof that the appellant intended to commit the actions constituting contempt. *See, e.g., Jones v. Harkness*, 709 A.2d 722, 723–24 (D.C.1998) (no defense to contempt that appellant's violations of civil protection order were due to his psychological condition and not motivated by disrespect to court)."); *Jones v. Harkness*, 709 A.2d 722, 723–24 (D.C. 1998) ("Appellant admitted that, knowing the CPO was in place, he contacted Ms. Harkness in violation of the court order on numerous occasions. As the court noted, appellant deliberately engaged in continuing behavior that violated the court order. From appellant's actions, the court properly inferred wrongful intent. *See Swisher, supra*, 572 A.2d at 89 n. 9 (explaining that willfulness could be inferred from the defendant's failure to appear for trial after having been warned that his attendance was required); *see also Hager v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 475 A.2d 367, 368 (D.C.1984) ("Generally, [willful] means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.' ") (quoting *Townsend v. United States*, 68 App. D.C. 223, 229, 95 F.2d 352, 358, cert. denied, 303 U.S. 664, 58 S.Ct. 830, 82 L.Ed. 1121 (1938)).").

[23] RCC § 22E-206.

[24] RCC § 22E-207.

[25] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.

[26] Consider, for example, a judge in one case orders a person to complete a domestic violence intervention program and a judge in another case orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

Third, the revised statute requires that the release order comply with the requirements of D.C. Code § 23-1322(f). Current D.C. Code § 23-1329 is silent as to whether or how a person's conditions of release be specified in an order. District case law has held that evidence of contempt is insufficient where conditions of release are not in writing and sufficiently clear and specific to serve as a guide to defendant's conduct.[27] However, case law has not addressed whether other criteria specified in the detention statute, such as notice of the potential penalties for failure to comply, must also be satisfied. To resolve this ambiguity, the revised statute codifies this point and clarifies that the written order must meet all requirements of D.C. Code § 23-1322(f). This change clarifies and improves the consistency of District statutes.

Fourth, the revised statute does not specify that contempt proceedings must be "expedited." Current D.C. Code § 23-1329(c) states, "contempt proceedings shall be expedited." The term "expedited" is undefined and District case law has not interpreted its meaning. In contrast, the RCC does not include a rule of criminal procedure in the statutory language. This change improves the consistency of the revised statutes.

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

The revised statute is severed from D.C. Code § 23-1329 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsections (a), (b), (d), (d-1), (e), and (f) of current D.C. Code § 23-1329, which are not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[27] *Smith v. U.S.*, 677 A.2d 1022 (D.C. 1996); *Vaas v. U.S.*, 852 A.2d 44, 46 (D.C. 2004).

RCC § 24-241.05A. Violation of Work Release.

Explanatory Note. *This section establishes the violation of work release offense for the Revised Criminal Code (RCC). The offense prohibits knowingly violating a work release privilege. It replaces subsection (b) of D.C. Code § 24-241.05, violations of a work release plan.*

Paragraph (a)(1) requires that the person is subject to a work release privilege. The term "in fact" indicates that the accused is strictly liable with respect to whether they were on work release at the time the elements of the offense were completed.[1]

Paragraph (a)(2) requires that the person fail to return to the place of confinement designated in their work release plan. Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that they failed to return as required.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether a circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied here, knowledge may be imputed when a person consciously disregards a substantial risk that that they have been granted a work release privilege, and to avoid liability avoids confirming or fails to investigate whether they have been granted a work release privilege.[3] Under RCC § 22E-203, the person's conduct must be voluntary.[4]

Subsection (b) specifies that a person does not commit an offense when they have the effective consent of a judicial officer,[5] the Director of the Department of Corrections, or the Chairman of the United States Parole Commission,[6] to be absent from their designated place of confinement. "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[7] "Consent" is also defined in RCC § 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[8] It is not a defense that the person mistakenly believed that they were excused when actually they were not excused.

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

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[1] RCC § 22E-207.

[2] Consider, for example, a person who is unable to read or understand their work release plan due to illiteracy or a language barrier. That person may not be practically certain that they failed to return as required.

[3] Consider, for example, a person who is handed a work release plan and angrily tears it up and throws it in the garbage before reading the designated place of confinement. That person may be said to know that they failed to return even though they were not practically certain that they did.

[4] A person does not commit violation of work release if the absence was not subject to the person's control. For example, a person does not commit an offense if they are incarcerated, hospitalized, or stranded.

[5] Paragraph (e)(2) specifies that the term "judicial officer" has the meaning specified in D.C. Code § 23-1331.

[6] The D.C. Board of Parole, referenced in D.C. Code § 24-241.02 no longer exists and its responsibilities are now handled by the United States Parole Commission. D.C. Code § 24-404.

[7] RCC § 22E-701.

[8] RCC § 22E-207.

Subsection (d) specifies the penalties for the revised offense. [*See* Fourth Draft of Report #41.] In some cases, the conduct criminalized under this section will also constitute third degree escape under RCC § 22E-3401(c) and convictions for both offenses must merge under RCC § 22E-214(a)(4).[9]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 24 offense.

Relation to Current District Law. *The revised violation of work release statute clearly changes current District law in two main ways.*

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

Second, the revised statute eliminates the mandatory consecutive sentencing provision. Current D.C. Code § 23-241.05(b) states, "such sentence of imprisonment [shall] run consecutively with the remainder of previously imposed sentences." In contrast, the RCC imposes only maximum penalties and no mandatory or statutory minimums for this offense, recognizing that sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.[10] This change improves the consistency and proportionality of the revised offenses.

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

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. The current violation of a work release plan statute[11] punishes "Any prisoner who willfully fails to return at the time and to the place of confinement designated in his work release plan." However, the term "willfully" is not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "knowingly"[12] and "in fact"[13] and specifies that culpable

[9] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[10] *See* CCRC Advisory Group Memorandum #32 (March 20, 2020) (available at https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-32-Supplemental-Materials-to-the-First-Draft-of-Report-52.pdf).

[11] D.C. Code § 24-241.05.

[12] RCC § 22E-206.

mental states apply until the occurrence of a new culpable mental state or strict liability in the offense.[14] . In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they have been granted a work release privilege, and, to avoid liability, avoids confirming or fails to investigate whether they have been granted a work release privilege. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[15] of a judicial officer, the Director of the Department of Corrections, or the Chairman of the United States Parole Commission. Current D.C. Code § 24-241.05(b) is silent as to whether a person may be excused from returning to the place designated on their work release plan with the consent of a judicial officer,[16] the Department of Corrections,[17] or the United States Parole Commission.[18] Resolving this ambiguity, revised statute makes clear that each of these actors is empowered to excuse the accused from returning. This change improves the revised offenses by describing all elements that must be proven and applying consistent definitions throughout the revised code.

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

The revised statute is severed from D.C. Code § 24-241.05 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsection (a) of current D.C. Code § 24-241.05, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

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[13] RCC § 22E-207.
[14] RCC § 22E-207(a).
[15] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.
[16] Consider, for example, a judge who orders a person to remain in court for a hearing instead of returning to their residence at the time specified on their work plan. That person does not commit an offense by abiding by the court's order.
[17] Consider, for example, a halfway house which directs a person to return at 8:00 p.m. and not 7:00 p.m. as specified in the work release plan, to avoid conflict with another resident. That person does not commit an offense by adhering to the safety rules of the confining institution.
[18] Consider, for example, a parole officer who directs a supervisee by text message to report to another placement for the night, due to overcrowding or an emergency evacuation. That person does not commit an offense by following their parole officer's amended work release plan.

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

(a) Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant for an offense if:
  (1) The defendant was sentenced pursuant to § 24-403 or § 24-403.01, or was committed pursuant to § 24-903, and has served at least 15 years in prison; and
  (2) The court finds, after considering the factors set forth in subsection (c) of this section, that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.

(b)
  (1) A defendant convicted as an adult of an offense may file an application for a sentence modification under this section. The application shall be in the form of a motion to reduce the sentence. The application may include affidavits or other written material. The application shall be filed with the sentencing court and a copy shall be served on the United States Attorney.
  (2) The court may direct the parties to expand the record by submitting additional testimony, examinations, or written materials related to the motion. The court shall hold a hearing on the motion at which the defendant and the defendant's counsel shall be given an opportunity to speak on the defendant's behalf. The court may permit the parties to introduce evidence.
  (3)
    (A) The defendant shall be present at any hearing conducted under this section unless the defendant waives the right to be present. Any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in the video teleconference.
    (B) A defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility.
  (4) The court shall issue an opinion in writing stating the reasons for granting or denying the application under this section, but the court may proceed to sentencing immediately after granting the application.

(c) The court, in determining whether to reduce a term of imprisonment pursuant to subsection (a) of this section, shall consider:
  (1) The defendant's age at the time of the offense;
  (2) The history and characteristics of the defendant;
  (3) Whether the defendant has substantially complied with the rules of the institution to which he or she has been confined and whether the defendant has completed any educational, vocational, or other program, where available;
  (4) Any report or recommendation received from the United States Attorney;
  (5) Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;

(6) Any statement, provided orally or in writing, provided pursuant to § 23-1904 or 18 U.S.C. § 3771 by a victim of the offense for which the defendant is imprisoned, or by a family member of the victim if the victim is deceased;

(7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;

(8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

(9) The extent of the defendant's role in the offense and whether and to what extent an adult was involved in the offense;

(10) The diminished culpability of juveniles as compared to that of adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to lengthy terms in prison, despite the brutality or cold-blooded nature of any particular crime; and

(11) Any other information the court deems relevant to its decision.

(d) If the court denies or grants only in part the defendant's 1st application under this section, a court shall entertain a 2nd application under this section no sooner than 3 years after the date that the order on the initial application becomes final. If the court denies or grants only in part the defendant's 2nd application under this section, a court shall entertain a 3rd and final application under this section no sooner than 3 years following the date that the order on the 2nd application becomes final. No court shall entertain a 4th or successive application under this section.

(e)

(1) Any defendant whose sentence is reduced under this section shall be resentenced pursuant to § 24-403, § 24-403.01, or § 24-903, as applicable.

(2) Notwithstanding any other provision of law, when resentencing a defendant under this section, the court:

(A) May issue a sentence less than the minimum term otherwise required by law; and

(B) Shall not impose a sentence of life imprisonment without the possibility of parole or release.

Explanatory Note & Relation to Current District Law. *This section establishes, for the Revised Criminal Code (RCC) and other D.C. Code provisions, authority and procedures for the court to modify a defendant's terms of imprisonment after serving at least 15 years' imprisonment. The revised statute replaces current D.C. Code § 24-403.03, Modification of an imposed term of imprisonment.*

The only changes in the revised statute as compared to the current D.C. Code provision are replacement of the phrases "offense committed before the defendant's 18th birthday" with "offense" in subsection (a) and paragraph (b)(1) of the current statute, and

omitting "for violations of law committed before 18 years of age" from the statute's title.[1] For there to be a sentence modification under the revised statute a person must have served at least 15 years of their sentence and there must be judicial findings, after consideration of victim statements and other procedural requirements, that the person is not a danger to the safety of any person or the community, and that the interests of justice warrant such a sentence modification. When these stringent requirements are met, continued incarceration may be unjustifiable regardless of a defendant's age when he or she committed a crime.

The revised statute does not diminish the fact that the age when a person commits a crime remains a special factor in sentencing. For over a decade it has been well-established that adolescents are less able to understand the long term consequences of their actions and conform their behavior accordingly.[2] Moreover, the underlying brain and social development that marks adolescent criminal behavior is also common to individuals through age 24.[3] Yet, while these considerations suggest youth offenders may be less blameworthy for their conduct, there is also extensive research indicating that criminal behavior peaks in late teen years and declines from the early 20s onward.[4] Older individuals are less likely to recidivate after release than younger offenders with similar sentences.[5] These considerations undermine arguments for lengthy incarceration as being generally necessary for public safety.

More fundamentally, however, the revised statute recognizes the need for the District's criminal justice system to have a procedural mechanism to review in particular cases whether further incarceration continues to benefit public safety and serve the interests of justice after the person has served at least 15 years. This procedure helps

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[1] [The CCRC recommendation is based on current law. A bill now pending before the D.C. Council, B23-0127, the "Omnibus Public Safety and Justice Amendment Act of 2020" would extend eligibility for second look procedures to persons who committed an offense when they were under 25 years of age, among other changes. For the reasons described below, the CCRC supports not only extension of second look procedures to persons who were under 25 years of age at the time of committing the offense, but extension to persons of any age. However, the CCRC takes no position on other changes proposed in the "Omnibus Public Safety and Justice Amendment Act of 2020." Should the "Omnibus Public Safety and Justice Amendment Act of 2020" become law, the CCRC recommendation would be updated to include all amended language except for an age limitation.]

[2] *See* Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016", (Oct. 5, 2016), available at: http://lims.dccouncil.us/Download/35539/B21-0683-CommitteeReport1.pdf ("citing Laurence Steinberg, Adolescent Development and Juvenile Justice, Ann. Rev. Clin, Psychol. 2009 5:47-73).

[3] *See, e.g., U.S. Department of Justice, National Institute of Justice, "From Juvenile Delinquency to Young Adult Offending," (March 10, 2014) (available at* https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending) ("[R]esearchers concluded that young adult offenders ages 18-24 are more similar to juveniles than to adults with respect to their offending, maturation and life circumstances. Changes in legislation to deal with large numbers of juvenile offenders becoming adult criminals should be considered. One possibility is to raise the minimum age for referral to the adult court to 21 or 24, so that fewer offenders would be dealt with in the adult system.").

[4] *See, e.g.,* U.S. Department of Justice, National Institute of Justice, *From Juvenile Delinquency to Young Adult Offending, (March 10, 2014) (available at* https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending) ("The prevalence of offending tends to increase from late childhood, peak in the teenage years (from 15 to 19) and then decline in the early 20s.")

[5] *See, e.g.,* U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017).

ensure that criminal punishment decisions remain grounded in evidence and contemporary norms. As the American Law Institute (ALI)[6] recently stated in its recent recommendation for a judicial second look procedure after 15 years of time served,[7] such a policy: "is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."[8] Finality is a key component of criminal justice system decisions. However, no sentencing regime in the United States is entirely determinate and determinate sentences "are least justifiable as they extend in length from months and years to decades."[9]

Uniquely, federal law blocks other potential mechanisms the District might use to evaluate the continued benefits to public safety and justice of incarceration after 15 years. Federal law has eliminated the District's Parole Board,[10] limits Bureau of Prisons (BOP)

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[6] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations on second look procedures and other matters.

[7] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

[8] Model Penal Code: Sentencing §305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017).

[9] Model Penal Code: Sentencing §305.6 cmt. b (Am. Law Inst., Proposed Final Draft 2017). *See, also, id.* ("The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue. On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived. An optimist would expect this to be so. For example, research into assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change. Proven and credible rehabilitative programming may become a pillar of deincarceration policy in the United States, as some contemporary advocates of "evidence-based sentencing" now expound. Twenty years or more in the future, with sturdier empirical foundations, the perceived collapse of rehabilitation theory could be substantially reversed."

[10] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act"). The District of Columbia is one of only 16 American jurisdictions without a local parole opportunity of any kind. Other jurisdictions include: Arizona,

reductions in incarceration for good behavior to a maximum of 15%,[11] and deprives the Mayor of commutation and exoneration powers ordinarily available to the head of the Executive Branch.[12] Other jurisdictions do not confront these barriers, yet several have still implemented second look provisions in addition to other mechanisms for sentence review.[13] The revised statute bypasses these obstacles by expanding current law to provide a second look for all incarcerated persons who have served at least 15 years of their sentence.

District judges are trusted to decide initial sentences of incarceration, but they are not infallible and cannot see into the future. They must work with imperfect information about potential threats to public safety, the likelihood of rehabilitation, and ever-evolving public norms about the seriousness of criminal behavior. The revised statute provides judges with an opportunity to reassess the continued justification for incarceration of an individual after 15 years of time served. This procedural mechanism helps ensure the ongoing proportionality of punishments in the District's criminal justice system.

Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. In addition, California has a parole system that is limited to life indeterminate life sentences. *See* Prison Policy Initiative, *Failure should not be an option: Grading the parole systems of all 50 states*, Appendix A, (2019), available at https://www.prisonpolicy.org/reports/parole_grades_table.html

[11] 18 U.S.C. 3624(b).

[12] The District's Mayor does have a limited power to pardon certain "offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." D.C. Code Ann. § 1-301.76. However, the extent of Mayoral power to pardon does not reach the overwhelming majority of District crimes. See *United States v. Cella*, 37 App. D.C. 433, 435 (1911) ("crimes committed [in the District of Columbia] are crimes against the United States"); U.S. Const. art. II, § 2, cl. 1 ("…he shall have Power to grant Reprieves and Pardons for Offenses against the United States").

[13] For further background information, *see* Advisory Group Memorandum #25 –"Second Look" and Related Provisions in Other Jurisdictions.

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

Explanatory Note. *This section establishes the possession of an open container or consumption of alcohol in a motor vehicle offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 25-1001 (Drinking of alcoholic beverage in public place prohibited; intoxication prohibited).*

Paragraph (a)(1) specifies that a person must act at least knowingly. "Knowingly" is a defined term[1] and applied here means that the person must be practically certain that they are consuming or possessing an alcoholic beverage. The term "alcoholic beverage" is defined[2] and means a liquid or solid containing alcohol capable of being consumed by a human being. It does not include a liquid or solid containing less than one-half of 1% of alcohol by volume.[3]

Subparagraph (a)(2)(A) specifies that the first way of committing the offense is by consuming an alcoholic beverage. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they are consuming an alcoholic beverage.[4]

Subparagraph (a)(2)(B) specifies that the second way of committing the offense is by possessing an alcoholic beverage in an open container.[5] "Possesses" is a defined term and includes both actual and constructive possession.[6] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[7] The term "open container" is defined and means "a bottle, can, or other container that is open or from which the top, cap, cork, seal, or tab seal has at some time been removed."[8] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that the container contains an alcoholic beverage[9] and that the container is unsealed.[10]

Paragraph (a)(2) specifies that the possession or consumption of alcohol must occur in the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway. The term "passenger area" is undefined but is intended to have a meaning that is consistent with federal regulations.[11] The term "motor vehicle" is defined

[1] "Knowingly" is defined in RCC § 22E-206.
[2] RCC § 22E-701.
[3] RCC § 22E-701; D.C. Code § 25-101(5); *Reid v. District of Columbia*, 980 A.2d 1131, 1133 (2009).
[4] For example, if a passenger surreptitiously spikes a driver's drink, the unknowing driver does not commit an offense.
[5] Possessing one or more open beverages on a single occasion constitutes a single offense.
[6] RCC § 22E-701.
[7] *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[8] D.C. Code § 25-101(35); *see also Bean v. United States*, 17 A.3d 635, 637 (D.C. 2011) (holding the definition is not unconstitutionally vague); *but see* D.C. Code § 25-113(b)(5) (permitting a licensed restaurant to reseal one bottle of wine per patron in a manner that it is visibly apparent if the container has been subsequently opened).
[9] There must be evidence that the alcohol bottle contains some liquid. *See Workman v. United States*, 96 A.3d 678, 681-82 (2014).
[10] *See Robinson v. Gov't of the Dist. of Columbia*, 234 F. Supp. 3d 14, 26 (D.D.C. 2017).
[11] *See* 23 U.S.C. § 154(a)(4). Under the Transportation Equity Act for the 21st Century (TEA-21), "Passenger area" is currently defined as the area designed to seat the driver and passengers while the motor

in RCC § 22E-701 and the term "highway" is defined in 23 U.S.C. § 101(a). Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that the beverage is in the passenger area of the vehicle and that they are in the prohibited location.

Subsection (b) excludes liability for passengers in motor vehicles designed for commercial transportation of many passengers, such as a limousine, or a recreational vehicle.[12] This exclusion does not apply to passengers in other vehicles or to drivers.

Subsection (c) specifies that attempted possession of an open container or consumption of alcohol in a motor vehicle is not an offense.

Subsection (d) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC, the D.C. Code, and the United States Code.

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

Relation to Current District Law. *The revised possession of an open container or consumption of alcohol in a motor vehicle offense clearly changes current District law in four main ways.*

First, the revised statute does not criminalize possession of an open container outside of a motor vehicle. Current D.C. Code § 25-1001(4) makes it unlawful to possess an open container of alcohol in "[a]ny place to which the public is invited and for which a license to sell alcoholic beverages has not been issued…" The current statute provides exceptions for private residences and special events.[13] In *Robinson v. Gov't of the Dist. of Columbia*,[14] the court explained that the statute furthers a legitimate interest in proscribing public consumption of alcohol and public intoxication. However, the scope of the statutory language is not limited to possessing an open container with intent to consume its contents in public or with intent to become intoxicated in public. Rather, the language more broadly criminalizes any possession of an open container, including some conduct not commonly considered criminal.[15] In contrast, the revised statute offense is limited to motor vehicles, where the danger of intoxication is so grave that mere access to alcohol warrants criminal punishment. Civil penalties may be warranted for individuals

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vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment. Vehicles without trunks may have an open alcoholic beverage container behind the last upright seat or in an area not normally occupied by the driver or passengers. A law that permits the possession of open alcoholic beverage containers in an unlocked glove compartment, however, will not conform to the requirements. An unlocked glove compartment is within the scope of the revised statute.

[12] *See* 23 U.S.C. § 154(b)(2).

[13] D.C. Code § 25-1001(b).

[14] 234 F. Supp. 3d 14, 26 (D.D.C. 2017).

[15] For example, carrying a bag full of half empty beers to a recycling bin in an alleyway or carrying a bottle of homemade sangria to a gathering at a friend's home. In contrast, the District does not arrest for public smoking of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, WASHINGTON POST (September 21, 2018).

who possess an open container of alcohol in other locations.[16] Businesses that provide alcohol in open containers to a customer risk losing their license to sell or serve alcohol.[17] This change improves the proportionality[18] of the revised offenses.

Second, the revised code does not criminalize public intoxication.[19] Current D.C. Code § 25-1001(c) provides: "No person, whether in or on public or private property, shall be intoxicated and endanger the safety of himself, herself, or any other person or property." The term "intoxicated" is undefined in the current statute and District case law has not interpreted its meaning.[20] District case law has held that chronic alcoholism is a defense to public intoxication,[21] but has not defined the meaning of the phrase

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[16] In contrast to cities that have fully legalized public drinking (e.g., Las Vegas, NV; New Orleans, LA; Sonoma, CA; Fort Worth, TX; Savannah, GA; Indianapolis, IN; Erie, PA; Butte, MT; Hood River, OR; Gulfport, MS), the revised code decriminalizes public possession of an open container of alcohol and intoxication without making any recommendation as to whether and what civil remedies should be promulgated and enforced.

[17] D.C. Code § 25-741.

[18] Drinking in a public place is a public order crime that carries significant collateral consequences and may disproportionately impact persons of color. An arrest for POCA, similar to the effects of possession of marijuana, may lead to discrimination in employment, housing, and education. *See* Report on Bill 20-409, the "Marijuana Possession Decriminalization Amendment Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (January 15, 2014) at Page 5. It also may divert police resources away from investigating serious crime. *Id*. at Page 7. The direct and collateral consequences disproportionately impact low-income people and people of color. *Racial Disparities in D.C. Policing: Descriptive Evidence From 2013-2017*, American Civil Liberties Union of the District of Columbia (May 13, 2019) ("Because people in poverty are less likely to own property than wealthier individuals, they have fewer private places to congregate with friends. That makes members of low-income communities more likely to gather in public—and commit open container violations if they drink alcohol while doing so."); *see also* Joseph Goldstein, *Sniff Test Does Not Prove Public Drinking, a Judge Rules*, NEW YORK TIMES (June 14, 2012) (noting one study determined 85% of open-container charges were given to Black and Latino people and 4% given to White people in Brooklyn, NY). By comparison, 87% of POCA charges in D.C. Superior Court adult charges for POCA from 2009-2019 were for Black and 5% to white people. CCRC Advisory Group Memorandum #28, Statistics on District Adult Criminal Charges and Convictions, Appendix D (10-21-19).

[19] *But see* RCC § 22E-4201 (Disorderly Conduct), which punishes recklessly causing another person to reasonably believe that he or she is likely to suffer bodily injury, taking of property, or damage to property in a public place. The revised disorderly conduct statute does not reach conduct that occurs in private or behavior that only endangers a person's own bodily integrity or property. *See also* 36 CFR § 2.35(c) (prohibiting presence in a federal park area when under the influence of alcohol or a controlled substance to a degree that may endanger oneself or another person, or damage property or park resources).

[20] Title 50, Chapter 22 of the D.C. Code, concerning impaired operating or driving defines "intoxicated" to mean a specific blood alcohol content for persons over 21 years of age and any measurable blood alcohol content for persons under 21 years of age. *See* D.C. Code § 50-2206.01.

[21] *Easter v. Dist. of Columbia*, 361 F.2d 50, 53-55 (D.C. Cir. 1966) (explaining, "One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public…[A] chronic alcoholic is in fact a sick person who has lost control over his use of alcoholic beverages…[T]o convict such a person of that crime would also offend the Eighth Amendment."); *see also* Anne E. Marimow, *Court Strikes Down Virginia Law 'Criminalizing an Illness' In Targeting Homeless Alcoholics*, THE WASHINGTON POST (July 17, 2019); *compare Robinson v. California*, 370 U.S. 660, 660 (1962) (holding that criminalizing the status of narcotics *addiction* as cruel and unusual punishment) *with Powell v. State of Tex.*, 392 U.S. 514 (1968) (upholding a conviction for *public* drunkenness); *Hicks v. Dist. of Columbia*, 383 U.S. 252, 252 (1966) (J. Douglas, dissenting) (stating the District's vagrancy statute violates due process).

"chronic alcoholic." In contrast, the revised statute eliminates criminal liability for any form of public intoxication, whether or not a person is a "chronic alcoholic." The District has long recognized the need of addressing public health issues through means other than criminalization.[22] Separate from D.C. Code § 25-1001(c), D.C. Code § 24-604 already provides that any person who is intoxicated in public may be (1) taken or sent to his home or to a public or private health facility; or (2) taken to a detoxification center.[23] Moreover, under D.C. Code § 25-781, a business that sells to an intoxicated person or a person who appears to be intoxicated, risks losing its license to sell or serve alcohol. This change improves the proportionality of the revised offenses.

Third, the revised statute provides specific exclusions from liability for passengers in commercial and certain other recreational and mass transit vehicles. D.C. Code § 25-1001(a)(2) prohibits possession of an open container in a "vehicle in or upon any street, alley, park, or parking area," without exception. Under current District law, a person who commissions a limousine or an event bus faces the same penalty for possession of an open container in that vehicle as a person who drives their own vehicle while drinking. In contrast, the revised offense does not punish drinking as a passenger in a commercial, recreational, or mass transit vehicle. This change allows persons with an open container of alcohol to hire a driver potentially providing a safe alternative to driving under the influence of alcohol.[24] This change improves the proportionality of the revised offenses.

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

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[22] *See, e.g.,* D.C. Code § 24-601 ("all public officials in the District of Columbia shall take cognizance of the fact that public intoxication shall be handled as a public health problem rather than as a criminal offense, and that a chronic alcoholic is a sick person who needs, is entitled to, and shall be provided appropriate medical, psychiatric, institutional, advisory, and rehabilitative treatment services of the highest caliber for his illness."); Report on Bill 21-360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," Council of the District of Columbia Committee on the Judiciary (January 28, 2016) at Page 4 ("There has been a growing consensus in recent years that violence is a public health problem that can be best prevented by identifying and addressing its root causes and by improving access to social services and supports."). In *Easter v. Dist. of Columbia,* the D.C. Circuit cited legislative history in which the Council noted, "[A]nything more futile than this process of getting drunk, being arrested, receiving 10, 15, or 30-day sentences, going to the Jail and to the Workhouse serving time, going out and getting drunk again, can scarcely be imagined." 361 F.2d 50, App. B (D.C. Cir. 1966) (noting "[T]he average person arrested for intoxication during that test period had a record of 12 prior arrests for the same offense…the best evidence that existing procedures are failing to rehabilitate the alcoholic.").

[23] D.C. Code § 25-1001(d) includes a cross-reference to this provision.

[24] Notably, nonprofit organization Mothers Against Drunk Driving has not actively supported public consumption laws, adding "We're concerned about [open-container laws] for vehicles." Emile Shire, Drunk on Power: It's Time to Ditch America's Idiotic Open-Container Laws, THE DAILY BEAST (April 14, 2017).

provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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

The revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an open container or consumption of alcohol in a motor vehicle liability. The current statute does not specify a requisite mental state,[25] however, the United States District Court for the District of Columbia has construed the law to require knowledge implicitly.[26] Furthermore, District case law generally requires knowledge for actual or constructive possession of any item.[27] The revised statute uses the RCC's general provisions that define "knowingly" and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[28] These changes clarify and improve the consistency of District statutes.

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

The revised code defines "possession" in its general part.[29] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[30] The RCC definition of "possession,"[31] with the requirement in the offense that the possession be "knowing,"[32] matches the meaning of possession in current DCCA case law.[33] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[25] D.C. Code § 25-1001.

[26] *Robinson v. Gov't of the Dist. of Columbia*, 234 F. Supp. 3d 14, 26 (D.D.C. 2017) (explaining the individual must know the container he possesses contains an alcoholic beverage, know the container is unsealed, and know he is standing in a public space while in possession of that container).

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

[28] RCC § 22E-207.

[29] RCC § 22E-202.

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

[31] RCC § 22E-701.

[32] RCC § 22E-206.

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

that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195-1196 (D.C.1990).").

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

Explanatory Note. *This section establishes the possession of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing a controlled substance. The offense is divided into two penalty gradations which are based on the type of controlled substance possessed by the actor. The revised possession of a controlled substance statute replaces D.C. Code § 48-904.01(d), the applicable language of the attempt and conspiracy penalty provision,[1] and the applicable language of the repeat offender penalty enhancement statute.[2]*

Subsection (a) specifies the elements of first degree possession of a controlled substance. Paragraph (a)(1) specifies that the person must knowingly possess a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[3] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed a controlled substance. It is not required that the accused knew which specific controlled substance he or she possessed. This element may be satisfied by showing that the accused was practically certain that he or she possessed any controlled substance.

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

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

Subsection (c) provides two exclusions from liability under subsections (a) and (b). Paragraph (c)(1) specifies it is an exclusion to liability if a person possesses a controlled substance that was obtained directly from, or pursuant to, a valid prescription or order of a practitioner, or if the possession is otherwise authorized by Chapter 9 of Title 48 or Chapter 16B of Title 7. Paragraph (c)(2) specifies that it is an exclusion to liability that the actor satisfied the requirements under D.C. Code § 7-403.

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

Subsection (d) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

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

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

Subsection (g) specifies procedures by which a judge may dismiss or defer proceedings.

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

First, the revised possession of a controlled substance offense changes current District law by dividing the offense into two penalty grades based on whether the controlled substance is an abusive or narcotic drug. The current D.C. Code possession of controlled substance offense is divided into two penalty grades based on whether the controlled substance is phencyclidine (commonly known as "PCP") in liquid form[4] as compared to any other drug. In contrast, in the revised offense, first degree possession of a controlled substance requires possession of one of the substances enumerated in subparagraphs (a)(2)(A)-(H), and second degree possession of a controlled substance requires possession of any controlled substance. In the revised offense first degree possession of a controlled substance includes possession of phencyclidine, but does not provide any heightened penalty for possession of phencyclidine in liquid form. Grading possession based on whether the controlled substance is an abusive or narcotic drug uses the same standards (based on the potential harm of the drug) as in the current and RCC offenses of distribution and possession with intent to distribute. There is no clear rationale for why, at present, the *possession* of any quantity of liquid phencyclidine, alone, merits categorically more severe penalties[5] than all other controlled substances.[6] This change improves the proportionality and consistency of revised statutes.

[4] D.C. Code § 48-904.01(d)(2).

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

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

Second, the RCC possession of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[7] In contrast, under the RCC attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[8] and conspiracy[9] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statutes.

Third, the RCC possession of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[10] In contrast, the revised code omits a drug offense-specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 to address any increase in penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised criminal code.

Fourth, subsection (g), which provides for a deferral or dismissal is adapted from current D.C. Code § 48-904.01 (e)(1), but makes two changes. Under current law, a judge may not defer or dismiss proceedings if the defendant previously had a case dismissed under § 48-904 (e)(1), or if the defendant has ever been convicted of an offense under Chapter 9 or Title 48, or of any offense under the law of the United States or any other state relating to narcotic or abusive drugs, or depressant or stimulant substances. By contrast, under RCC subsection (g), a judge may still defer and dismiss proceedings, even if the defendant has previously had a case dismissed, or if the defendant has prior convictions for controlled substance offenses in another jurisdiction. Due to the addictive nature of many controlled substances, persons may repeatedly be charged and convicted of possession of a controlled substance. This change will provide trial judges with broader discretion to dismiss proceedings when appropriate, even if the defendant has prior convictions, or has had other cases dismissed. This change improves the proportionality of the revised criminal code.

[7] D.C. Code § 48-904.09.
[8] RCC § 22E-301.
[9] RCC 22E-303.
[10] D.C. Code § 48-904.08.

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

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

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

First, the revised statute requires that the accused possess a "measurable amount" of a controlled substance. Although the current statute does not specify that the accused must possess a measurable amount, the D.C. Court of Appeals (DCCA) has held that the offense requires possession of a "measurable amount" of a controlled substance.[11] This language is intended to codify current DCCA case law which requires that the accused possesses a measurable amount of a controlled substance.

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

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

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

Explanatory Note. *This section establishes the trafficking of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, manufacturing, or possessing with intent to distribute or manufacture a controlled substance. The offense is divided into five penalty gradations based on the type and quantity of controlled substance involved in the offense. The revised trafficking of a controlled substance statute replaces portions of the District's current controlled substance prohibited acts statute,[1] the distribution to minors statute,[2] enlistment of minors statute,[3] the drug free zones statute,[4] the attempt and conspiracy penalty provision,[5] the repeat offender penalty enhancement statute,[6] part of the statute criminalizing possession of a firearm or imitation firearm during a dangerous crime,[7] and the additional penalty for committing crime when armed statute.[8]*

Subsection (a) specifies the elements of first degree trafficking of a controlled substance. Paragraph (a)(1) requires that the person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[9] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.01, and means "the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship."[10] The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.01, and includes a broad array of substances organized into five different schedules.

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 to mean that the accused was practically certain that he or she would distribute or manufacture a controlled substance. It is not required that the accused knew which specific controlled substance he or she would distribute or

[1] D.C. Code § 48-904.01(a)(1).
[2] D.C. Code § 48-904.06.
[3] D.C. Code § 48-904.07.
[4] D.C. Code § 48-904.07a.
[5] D.C. Code § 48-904.09.
[6] D.C. Code § 48-904.08.
[7] D.C. Code § 22-4504 (b).
[8] D.C. Code § 22-4502.
[9] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).
[10] The terms "administering" and "dispensing" are also defined in D.C. Code § 48-901.02.

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

Paragraph (a)(2) requires that the controlled substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[11] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

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

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

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

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

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

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

Subsection (g) specifies rules for edible products and non-consumable containers in determining the weight of compounds or mixtures containing controlled substances. Paragraph (g)(1) specifies that when a controlled substance is contained within an edible product, the weight of the inert edible mixture will not be included in determining the weight of the compound or mixture containing a controlled substance. Paragraph (g)(2) specifies that the weight of non-consumable containers in which a substance is stores shall not be included in the weight of the compound or mixture containing the controlled substance.[12]

Subsection (h) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.] Paragraph (g)(6) provides for enhanced penalties for each grade of the offense. If the government proves at least one of the elements listed under subparagraphs (h)(6)(A)-(C), the penalty classification for each offense may be increased in severity by one penalty class. This penalty enhancement may be applied in addition to any penalty enhancements authorized by RCC Chapter 6.

Subparagraph (h)(6)(A) codifies a penalty enhancement if the actor was, in fact, over the age of 21, and distributed a controlled substance to a person with recklessness as to the fact that the person is under the age of 18. This enhancement requires that the actor was aware of a substantial risk that the controlled substance would be distributed to a person under the age of 18. This enhancement does not apply if an actor distributes a controlled substance to an adult who subsequently distributes the substance to a person under the age of 18, unless the actor knew that the adult was going to transfer the substance to the other person, and the actor was at least reckless as to the fact that other person was under the age of 18.

Subparagraph (h)(6)(B) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a controlled substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is

[12] For example, if a cigarette is dipped in liquid PCP, the weight of the tobacco containing the liquid PCP may be included in the weight of the compound or mixture. However, if some of the liquid PCP also soaks into the cigarette box, the weight of the box would *not* be included in the weight.

in "close proximity or easily accessible during the commission of the offense."[13] The term "firearm" is defined in RCC § 22E-701 to have the same meaning as under D.C. Code § 7-2501.01.[14] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Subparagraph (g)(6)(B) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[15] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must at least facilitate commission of the offense in some manner.[16]

Subparagraph (h)(6)(C) codifies as a penalty enhancement that the actor was, in fact, 21 years of age or older, and engages in the conduct constituting the offense by enlisting, hiring, contracting, or encouraging any person to sell or distribute any controlled substance for the profit or benefit of the actor, with recklessness as to the person being under the age of 18. This enhancement requires that the actor was aware of a substantial risk that the person enlisted, hired, contracted, or encouraged to sell or distribute a controlled substance is under the age of 18. A person may be liable for committing an offense under this section based on the conduct of another if the actor satisfies either the requirements for accomplice liability[17], or liability for causing crime by an innocent or irresponsible party.[18] If an actor commits trafficking of a controlled substance under either of these theories of liability, with recklessness that the person enlisted, hired, etc. is under the age of 18, this penalty enhancement applies.

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

[14] However, the term "firearm" as used in the RCC "shall not include a firearm frame or receiver; [s]hall not include a firearm muffler or silencer; and [s]hall include operable antique pistols."

[15] 18 U.S.C. § 924 (c)(1)(A). *See*, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018, at 8 (discussing the "in furtherance" requirement under 18 U.S.C. § 94, and federal courts' holdings regarding factors that are relevant in determining whether possession of firearm was in furtherance of predicate drug offense).

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

[17] RCC § 22E-210.

[18] RCC § 22E-211. Although this enhancement does not require any culpable mental state as to enlisting, hiring, contracting, or encouraging any person to sell or distribute a controlled substance, liability still requires that the actor satisfy the *mens rea* requirements for accomplice liability under RCC § 22E-210 or causing crime by an innocent or irresponsible party.

Subparagraph (h)(6)(D) codifies a penalty enhancement if the person commits the offense in a location that is, in fact, within 300 feet of a school, college, university, public swimming pool, public playground, public recreation center, public library, or children's day care center, that displays clear and conspicuous signage which indicates controlled substances are prohibited or the location is a drug free zone. This enhancement applies if the offense occurs within 300 feet of the building or grounds, or within the building or grounds. The term "in fact" specifies that there is no culpable mental state as to whether the person committed the offense while in the specified location.

Subsection (i) specifies two defenses to prosecution under this section. Under paragraph (i)(1), it is a defense that the person distributes or possesses with intent to distribute a controlled substance, but such distribution or possession with intent to distribute is not in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. In addition, paragraph (i)(1) requires that either the quantity of the substance distributed does not exceed the amount for a single use by the recipient, or the recipient intends to immediately use the controlled substance. This defense generally applies to sharing or giving away controlled substances for free,[19] rather than substances distributed in exchange for anything of value, which includes services, satisfaction of debt, or promises of future payment or services. However, even when sharing or giving away controlled substances for free, the defense is not available if such action was taken with future expectation of financial gain from distribution of a controlled substance.[20]

Under paragraph (i)(2), it is a defense to that the person manufactured, or possessed with intent to manufacture, a controlled substance by packaging, repackaging, labeling, or relabeling a controlled substance for his or her own personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or re-label the substance for one of the purposes specified in paragraph (h)(2). Under this defense, packaging, repackaging, labeling, or relabeling a controlled substance for personal use, or possessing a controlled substance with intent to package, repackage, label, or relabel it for personal use does not constitute a violation of this section.[21]

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

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

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

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

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

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

First, the revised offense grades, in part, based on the weight of the controlled substance involved in the offense. The current D.C. Code statute only provides for different penalties based on the *type* of controlled substance, but not the weight. The current statute provides for a maximum 30-year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, under subsection (f), when a single scheme or course of conduct could give rise to multiple charges of trafficking of a controlled substance, the government may bring one charge and aggregate the quantity of the controlled substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves controlled substances under Schedules IV or V. The current D.C. Code statute provides for different maximum penalties based on whether the actor committed the offense with respect to a controlled substance under Schedule IV or V.[22] In contrast, under the revised statute, fifth degree trafficking of a controlled substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor. This change improves the proportionality of the revised statute.

Third, the revised statute includes a defense if the person distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. Under the current D.C. Code, a person commits distribution of a controlled substance regardless of whether the controlled substance was distributed in exchange for anything of value.[23] Consequently, non-commercial transfers of a controlled substance between two people such as gifting and sharing are subject to liability.[24] In contrast, the revised statute provides a defense if the actor distributed or possessed with intent to distribute a controlled substance, but did not do so in exchange for anything of value or future expectation of receiving something of value. However, both the person distributing and the recipient of such a transaction likely would still be liable for a lesser possessory offense.[25] This change improves the proportionality of the revised statute.

Fourth, the revised statute includes a defense if the person packages, repackages, labels or relabels a controlled substance for his or her own personal use, or possesses a controlled substance with intent to do so. Under the current D.C. Code, a person commits manufacturing of a controlled substance regardless of the purpose for packaging, repackaging, labeling, or relabeling of a controlled substance. Consequently,

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

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

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

[25] RCC § 48-904.01a.

a person who packages a controlled substance for his or her own use is subject to liability. In contrast, the revised statute provides a defense if the actor packaged, repackaged, labeled, or relabeled a controlled substance for his or her personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or relabel a substance for one the purposes specified in paragraph (h)(2). However, the person would still be liable for a lesser possessory offense.[26] This change improves the proportionality of the revised statute.

Fifth, the RCC trafficking of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[27] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[28] and conspiracy[29] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Sixth, the RCC trafficking of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[30] In contrast, the revised code omits a drug-offense specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 address any increased penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised statute.

Seventh, the RCC limits the area around schools and other specified locations that are subject to a penalty enhancement, and eliminates public housing and "video arcade[s]" altogether as specified locations. Under the current D.C. Code, drug free zones extend to all areas within 1,000 feet of any designated location, including all day care centers (public or private), schools, playgrounds, libraries, public housing, and video arcades.[31] In contrast, the revised statute applies a penalty enhancement only if the

[26] RCC § 48-904.01a.
[27] D.C. Code § 48-904.09.
[28] RCC § 22E-301.
[29] RCC 22E-303.
[30] D.C. Code § 48-904.08.
[31] Drug free zones include "[a]ll areas within 1000 feet of an appropriately identified public or private day care center, elementary school, vocational school, secondary school, junior college, college, or university, or any public swimming pool, playground, video arcade, youth center, or public library, or in and around public housing, as defined in section 3(1) of the United States Housing Act of 1937, approved August 22,

offense occurs within 100 feet of a designated location, which does not categorically include public housing or video arcades. While heightened penalties are warranted for committing trafficking of a controlled substance on or near locations where youth gather, 1,000 feet appears to be an excessive distance. In an urban jurisdiction like the District, a 1,000 foot radius around every playground, school, etc. listed in the current drug free zone statute leaves almost no location in the District in an *unenhanced* location.[32] In addition to considerably expanding the zones where there are enhanced penalties, categorically raising penalties in areas of public housing (as opposed to private housing) raises concerns about equitable treatment under the law. This change improves the proportionality of the revised statute.

Eighth, the RCC includes a penalty enhancement only if the person commits an offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of the offense. The current D.C. Code "while armed" enhancement in § 22-4502[33] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[34] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a controlled substance. D.C. Code § 22-4502

1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority, or an event sponsored by any of the above entities shall be declared a drug free zone." D.C. Code § 48-904.07a.

[32] See, Judith Greene, Kevin Prains, Jason Ziedenberg, Justice Policy Institute. *Disparity by Design: How drug-free zone laws impact racial disparity – and fail to protect youth*. March, 2006. This report notes that the New Jersey Sentencing Commission concluded that under New Jersey's drug free zone laws, "urban areas where schools, parks, and public housing developments are numerous and closely spaced, overlapping zones turn entire communities into prohibited zones – erasing the very distinction between school and non-school areas that the law was intended to create." *Id*. at 4. For example, drug free zones covered 76 percent of Newark, and over half of Camden and Jersey City. *Id*. at 26. A partial map of District schools and other locations which comprise the District's gun-free zone (locations nearly identical to those listed in the drug-free zone) was compiled by the Crime Prevention Research Institute. *See* https://crimeresearch.org/2017/10/dcs-gun-free-zone-problem-regulations-effectively-ban-anyone-legally-carrying-gun/ (last visited June 25, 2019).

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

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

authorizes an enhanced penalty for distributing of or possessing with intent to distribute a controlled substance[35] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[36] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[37] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[38]

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the controlled substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[39] Second, the revised

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

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

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

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

[39] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504

enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[40] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the controlled substance offense, which excludes coincidental possession.[41] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[42] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[43] These changes improve the clarity, consistency, and proportionality of the revised statute.

Ninth, the trafficking of a controlled substance statute does not include a separate penalty for first time offenders who distribute or possess with intent to distribute ½ pound or less of marijuana. Under the current statute, distributing or possessing with intent to distribute marijuana is subject to a 5 year maximum sentence. However, if the offense involved ½ pound or less of marijuana, and the person had not been previously convicted of the offense, the maximum sentence is 180 days. In contrast, the revised trafficking of a controlled substance statute does not provide a separate penalty for first time offenders trafficking ½ pound or less of marijuana. Violations of this statute involving marijuana constitutes fourth degree trafficking of a controlled substance, and is subject to the penalty specified in paragraph (g)(4).[44] This change improves the consistency and proportionality of the revised statutes.

Beyond these nine substantive changes to current District law, three other aspects of the revised trafficking of controlled substances statute may constitute substantive changes to current District law.

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provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15-year sentence.

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

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

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

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

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

First, the revised statute caps the increased penalties an actor may be subject to for different types of penalty enhancements. The current D.C. Code provides separate penalty enhancements in the current distribution to minors statute[45], the drug free zone statute[46], and portions of the while armed enhancement statute.[47] However, the D.C. Code is silent as to whether or how these different penalty enhancements may be stacked, and there is no relevant D.C. Court of Appeals (DCCA) case law. The revised statute resolves this ambiguity by specifying that only one of the enhancements may apply.[48] This change improves the clarity and proportionality of the revised statutes.

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

Third, the penalty enhancement under paragraph (h)(6)(C) requires that the actor encourages, hires, contracts, or encourages a person to sell or distribute a controlled substance, and was reckless as to the person being under the age of 18. This penalty enhancement is intended to replace current D.C. Code § 48-904.07, which criminalizes enlistment of minors to distribute a controlled substance. Although D.C. Code § 48-904.07 does not specify a culpable mental state, the D.C. Court of Appeals (DCCA) has held that current statute does not require knowledge as to the age of the person enlisted to distribute a controlled substance.[49] However, the DCCA has not directly held that strict liability is sufficient, or if any other culpable mental state is required as to the enlisted person's age. By contrast, the revised statute's penalty enhancement requires that the actor was reckless as to the fact that the enlisted person was under the age of 18. Applying a penalty enhancement when the actor was not aware of a substantial risk that the enlisted person was under the age of 18 is disproportionately severe.

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

First, the revised statute specifies particular controlled substances rather than rely on the defined terms "abusive" or "narcotic" drugs to list those controlled substances. The current statute provides different maximum penalties based on the type of controlled substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A controlled substance classified in Schedule I or II that is

[45] D.C. Code 48-904.06.
[46] D.C. Code § 48-904.07a.
[47] D.C. Code § 22-4502.
[48] For example, a person who sells a controlled substance to a minor while in a drug free zone would only be subject to an increase in penalty severity of one class.
[49] *Outlaw v. United States*, 604 A.2d 873, 876 (D.C. 1992).

a narcotic or abusive drug[.]"[50] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[51] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the person distributes, manufactures, or possesses a "measurable quantity" of a controlled substance. Although the current statute does not require any minimum quantity of controlled substance, the DCCA has clearly held that the current statute requires distribution, manufacture, or possession of a measurable quantity of a controlled substance.[52]

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

[50] D.C. Code § 48-904.01 (a)(2)(A).
[51] D.C. Code § 48-901.02.
[52] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994).

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

Explanatory Note. *This section establishes the trafficking a counterfeit substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, creating, or possessing with intent to distribute a counterfeit substance. The offense is divided into five penalty gradations which are based on the type and quantity of counterfeit substance. The revised trafficking a counterfeit substance statute replaces portions of the District's current controlled substance prohibited acts statute,[1] the attempt and conspiracy penalty provision,[2] and the repeat offender penalty enhancement statute.[3]*

Subsection (a) specifies the elements of first degree trafficking of a counterfeit substance. Paragraph (a)(1) requires that the accused knowingly distributes, creates, or possesses with intent to distribute, a measurable quantity of a counterfeit substance. A measurable quantity means a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[4] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.02, and means "the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship." The term "creates" is intended to have the same meaning as under current law. The term "counterfeit substance" is defined under D.C. Code § 48-901.02, and means "a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance."

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

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

counterfeit substance, only that the actor believed to a practical certainty that he or she would distribute a counterfeit substance.

Paragraph (a)(2) requires that the counterfeit substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[5] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

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

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

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

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

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

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

Subsection (g) specifies rules for edible products and non-consumable containers in determining the weight of compounds or mixtures containing counterfeit controlled substances. Paragraph (g)(1) specifies that when a counterfeit controlled substance is contained within an edible product, the weight of the inert edible mixture will not be included in determining the weight of the compound or mixture containing a controlled substance. Paragraph (g)(2) specifies that the weight of non-consumable containers in which a substance is stores shall not be included in the weight of the compound or mixture containing the counterfeit controlled substance.[6]

Subsection (h) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

Paragraph (h)(6) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a counterfeit substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is in "close proximity or easily accessible during the commission of the offense."[7] The term "firearm" is defined in RCC § 22E-701 to have the same meaning as under D.C. Code § 7-2501.01.[8] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Paragraph (h)(6) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[9] It is not required that the actor actually displayed or used the firearm, imitation firearm, or

[6] For example, if a cigarette is dipped in liquid PCP, the weight of the tobacco containing the liquid PCP may be included in the weight of the compound or mixture. However, if some of the liquid PCP also soaks into the cigarette box, the weight of the box would *not* be included in the weight.
[7] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).
[8] However, the term "firearm" as used in the RCC "shall not include a firearm frame or receiver; [s]hall not include a firearm muffler or silencer; and [s]hall include operable antique pistols."
[9] 18 U.S.C. § 924 (c)(1)(A).

dangerous weapon, but the imitation firearm or weapon must facilitate commission of the offense in some manner.[10]

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

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

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

First, the first three grades of the revised offense are based on the quantity of the counterfeit substance. The current statute only provides for different penalties based on the *type* of substance, but not the quantity. The current statute provides for a maximum 30 year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, when a single scheme or course of conduct could give rise to multiple trafficking of a counterfeit substance charges, bring one charge and aggregate the quantity of the counterfeit substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves counterfeit substances under Schedules IV or V. The current statute provides for different maximum penalties based on whether the actor committed the offense with respect to substances under Schedule IV or V.[11] In contrast, under the revised statute, fifth degree trafficking of a counterfeit substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor.[12] This change improves the proportionality of the revised statute.

Third, the RCC trafficking of a counterfeit substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[13] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[14] and conspiracy[15] liability which specify the relevant elements and provide a

[10] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.
[11] D.C. Code § 48-904.01 (a)(2)(C), (D).
[12] The current D.C. Code provides tests for determining which substances should be categorized into each schedule. The tests for schedules IV and V are require a "low potential for abuse," and "limited physical dependence or psychological dependence" if the substance is abused. D.C. Code §§ 48-902.03, 48-902.05, 48-902.07, 48-902.09, 48-902.11.
[13] D.C. Code § 48-904.09.
[14] RCC § 22E-301.
[15] RCC 22E-303.

penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Fourth, the RCC trafficking of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under current law, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[16] In contrast, the revised code omits a drug-offense specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 address any increased penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised statute.

Fifth, the RCC includes a penalty enhancement only if the person commits the offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of and while committing the offense. The current D.C. Code "while armed" enhancement in § 22-4502[17] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[18] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a counterfeit substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with intent to distribute a counterfeit substance[19] "when armed with or having readily

[16] D.C. Code § 48-904.08.

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

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

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

available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[20] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[21] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[22]

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the counterfeit substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[23] Second, the revised enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change

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

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

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

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

requires, as in comparable federal legislation,[24] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the counterfeit substance offense, which excludes coincidental possession.[25] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[26] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[27] These changes improve the clarity, consistency, and proportionality of the revised statute.

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

First, the revised statute specifies that the actor must knowingly distribute, create, or possesses a counterfeit substance. The current statute does not specify any culpable mental state, there is no relevant DCCA case law, and there is no Redbook Jury Instruction that specifically applies to the counterfeit substance offense. One means of committing the current offense is to "possess with intent to distribute a counterfeit substance,"[28] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[29] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of

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

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

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

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

[28] D.C. Code § 48-904.01 (b)(1).

[29] *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)").

interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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

First, the revised statute does not refer to the terms "abusive" or "narcotic" drugs. The current statute provides different maximum penalties based on the type of substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A counterfeit substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[30] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[31] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the actor distributes, creates, or possesses a "measurable quantity" of a counterfeit substance. Although the current statute does not require any minimum quantity of counterfeit substance, the DCCA has clearly held that the current statute requires distribution, creation, or possession of a measurable quantity of a controlled substance.[32]

[30] D.C. Code § 48-904.01 (a)(2)(A).
[31] D.C. Code § 48-901.02.
[32] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994). Although the *Thomas* case did not involve the counterfeit substance offense, the DCCA held that "in order to secure a conviction for controlled substance violations, the government need only prove there was a measurable amount of the controlled substance in question."

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

Explanatory Note. *This section establishes the possession of drug manufacturing paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing an object with intent to use the object to manufacture a controlled substance. The revised possession of drug manufacturing paraphernalia offense does not cover possession of objects with intent to use them for any other purpose related to controlled substances. The revised possession of drug paraphernalia statute replaces the current possession of drug paraphernalia statute that applies specifically to hypodermic needles and syringes[1], portions of the general drug paraphernalia statute criminalizing possession of drug paraphernalia,[2] the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11[3], and the statute specifying factors to be considered in determining whether object is paraphernalia.[4]*

Subsection (a) specifies the elements of possession of drug paraphernalia. Subsection (a) specifies that the accused must knowingly possess an object. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Subsection (a) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed an object. Subsection (a) also requires that the actor had intent to use the object to manufacture a controlled substance. The term "manufacture" is defined in RCC § 22E-701, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would use the object to manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the person actually used the object to manufacture a controlled substance, only that the person believed to a practical certainty that he or she would use the object to manufacture a controlled substance.

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

[1] D.C. Code § 48-904.10.
[2] D.C. Code § 48-1103 (a)(1).
[3] D.C. Code § 48-1101 (3).
[4] D.C. Code § 48-1102.

Subsection (c) specifies penalties for the offense. [*See* Fourth Draft of Report #41.]

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

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

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

First, the revised statute limits liability to possession of objects related to the manufacture of a controlled substance. The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use "drug paraphernalia," a defined term,[5] to "plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]"[6] In addition, current D.C. Code § 48-904.01 specifically criminalizes possession of a "hypodermic needle, hypodermic syringe . . . with intent to use it for administration of a controlled substance by subcutaneous injection"[7] In contrast, the revised statute does not use a defined term of "drug paraphernalia" and more simply requires that the person possessed an object that was actually used to manufacture a controlled substance, or with intent to use it to manufacture a controlled substance. Objects that are used or intended for use for any other purpose, most notably personal consumption, are not covered by the revised statute.[8] This change improves the clarity and proportionality of the revised criminal code.

Second, the revised statute does not provide as a basis for liability that a person possesses an object that has been "designed for use" in manufacturing a controlled substance. The current D.C. Code paraphernalia statute includes liability for "objects used, intended for use, or designed for use in manufacturing…a controlled substance." [9] In contrast, the revised statute provides liability only for possession of an object with intent to use the object to manufacture a controlled substance. Determining whether an item is specially "designed for" a particular purpose based on its objective features is a potentially difficult task, subject to arguments over whether a possessor is sufficiently on notice as to the item being contraband.[10] Moreover, in practice, the revised statute's elimination of separate liability for possession of items "designed for use in

[5] D.C. Code § 48-1101 (3). This definition of "drug paraphernalia" includes a list of items that largely, though not entirely, replicates the functions of the object described in the general paraphernalia statute, for example: "planting," "propagating," "cultivating," "growing."
[6] D.C. Code § 48-1103.
[7] This statute also requires that the needle or syringe "has on it or in it any quantity (including a trace) of a controlled substance [.]"
[8] For example, possession of an instrument with intent to use it to ingest a controlled substance is not covered by the revised statute. This decriminalizes conduct currently covered by both D.C. Code § 48-904.10, and § 48-1103.
[9] D.C. Code § 48-1101 (3)(B).
[10] *See, generally, Fatumabahirtu v. United States*, 26 A.3d 322, 333 (D.C. 2011)(discussing constitutional litigation of paraphernalia statutes regarding "notice as to when otherwise innocuous household items qualified as drug paraphernalia.").

manufacturing…a controlled substance" may be quite narrow. Most objects involved in the planned[11] manufacture of a controlled substance are either general purpose items not specially designed[12] for manufacturing a controlled substance, or, if they are so specially designed,[13] would need few additional facts to allow inference of an intent to use to manufacture a controlled substance under the revised statute. This change clarifies and improves the proportionality of the revised statute.

Third, the revised statute includes an exclusion to liability if a person possesses an object with intent to use the object to package or repackage a controlled substance for the person's own use. Under current law, the term "manufacturing" includes "any packaging or repackaging of the [controlled] substance" with no exception for personal use.[14] In contrast, the revised statute provides an exclusion to liability for possessing an object with intent to use it to package or repackage a controlled substance for the actor's own use. This change improves the proportionality of the revised statute.

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

First, the revised statute specifies that the actor must knowingly possess an object. The current D.C. Code statute does not specify any culpable mental state as to the possession of the object, and there is no DCCA case law on point. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

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

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

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

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

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

[15] *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)").

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

First, the revised statute does not include an exception to liability for possession of testing equipment for the purpose of testing personal use quantities of a controlled substance. The current statute provides that "it shall not be unlawful for a person to use, or possess with the intent to use, [paraphernalia] for the purpose of testing personal use quantities of a controlled substance."[16] However, omitting this language is not intended to change District law. Under the revised possession of drug paraphernalia statute, possession of testing equipment with intent to test personal quantities of a controlled substance is not criminalized, as the revised statute requires that the actor possesses an object that has been used, or with intent to use, it to manufacture a controlled substance.

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

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

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

[16] D.C. Code § 48-1103.

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

Explanatory Note. *This section establishes the trafficking of drug paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly selling or delivering, or possessing with intent to sell or deliver, an object with intent that another person will use the object for one of several specified purposes in conjunction with a controlled substance. The revised distribution of drug paraphernalia statute replaces portions of the general drug paraphernalia statute that criminalize sale, delivery, or possession with intent to sell or deliver drug paraphernalia,[1] the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11,[2] and the statute providing factors to be considered in determining whether an object is paraphernalia.[3]*

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

Paragraph (a)(2) requires that the person had intent that another person will use the object to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that another person would use the object for one of the specified purposes. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that another person actually used the object, only that the person believed to a practical certainty that another person would use the object for one of the specified purposes.

Subsection (b) provides defenses. Paragraph (b)(1) specifies that it is a defense that the actor is a community-based organization that delivers, or possesses with intent to deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance, or for ingestion or inhalation of a controlled substance. The term "community-based

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

organization" is defined in D.C. Code § 7-404, and means "an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use . . . [and] includes all organizations currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01."

Paragraph (b)(2) specifies that it is a defense that the actor sells, delivers, or possesses with intent to sell or deliver an unused hypodermic syringe or needle.

Paragraph (b)(3) specifies that it is a defense that the actor sells, delivers, or possesses with intent to sell or deliver, an item intended for use in a medical procedure or treatment permitted under District or federal civil law, to be performed by a licensed health professional or by a person acting at the direction of a licensed health professional.

Paragraph (b)(4) specifies that it is a defense that the actor delivers or sells, or possesses with intent to deliver or sell, any object that is 50 years of age or older. This defense applies regardless of the intended use of the object.

Subsection (c) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

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

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

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

First, the revised distribution of drug paraphernalia statute does not require that the actor distributed or possessed "drug paraphernalia," a defined term that includes objects designed in a particular way. The current D.C. Code statute requires delivery or sale, or possession with intent to deliver or sell of "drug paraphernalia," a defined term which includes a broad array of specified objects used to produce, package, test, measure, or ingest a controlled substance, as well as any object "used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing . . . [a] controlled substance into the human body[.]"[4] In contrast, the revised statute covers any object provided that the accused intended that another person would use it for one of the specified purposes.[5] This change improves the clarity of the revised criminal code.

Second, the revised statute requires that the actor's sale, delivery, or possession with intent to sell or deliver the object be with intent that another person would use the object for one of the specified purposes. The current D.C. Code statute requires that the defendant sells or delivers paraphernalia "knowingly, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body

[4] D.C. Code § 48-1101 (3).

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

a controlled substance[.]" The D.C. Court of Appeals has applied this culpable mental state language without discussion as to the meaning of such terms or whether or how such language equates to a negligence standard under the Model Penal Code or other jurisdictions."[6] Coupled with the current D.C. Code definition of "drug paraphernalia" as including, in part, items that are "designed for" use with controlled substances, the current statute provides liability for selling or delivering an item, without any awareness of that the other person may or will use that item in relation with a controlled substance. In contrast, the revised statute requires that the person's sale, delivery, or possession be with intent to sell or deliver an object be done "with intent" that the object be used for one of the specified purposes. While it need not be proven that an actor consciously desired for the recipient of the object to use it with respect to a controlled substance, the actor must be at least practically certain that the object would be used for such purposes. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[7] while basing criminal liability on negligence[8] is generally disfavored.[9]. This change improves the clarity and proportionality of the revised criminal code.

Third, the revised statute does not specifically criminalize sale of items currently enumerated in D.C. Code § 48-1103 (e)(1). Under the current D.C. Code statute, sale of cocaine free base kits, glass or ceramic tubes,[10] cigarette rolling papers, and cigar wrappers is criminalized for most[11] vendors, regardless of their actual or intended use. In

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

[7] *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)").

[8] The DCCA's opinion in *Fatumabahirtu* strongly suggests that, per the current statute's reference to "under circumstances where one reasonably should know…," something akin to mere *negligence* as to whether the buyer would use the paraphernalia to ingest a controlled substance would suffice for criminal liability. The DCCA's opinion referenced the Model Drug Paraphernalia Act, which served as a model for the District's current paraphernalia statute and stated: "The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from *which he should reasonably conclude there is a high probability* an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care." *Fatumabahirtu*, 26 A.3d at 334 (emphasis added). To the extent that the DCCA ruling in *Fatumabahirtu* establishes or requires a lower culpable mental state as to whether the person to whom an object is delivered or sold will use the object in a proscribed manner with respect to a controlled substance, that case would no longer be valid law upon adoption of the revised statute.

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

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

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

contrast, under the revised statute sale of these objects is not criminalized, unless the person selling the objects intends that another person will use them in a manner specified in paragraph (a)(2) in relation to a controlled substance. Most of these items are objects with legitimate uses[12] and are currently available for purchase by District residents on the websites of major online retail sellers—any sale of which may constitute a crime under current law.[13] This change improves the proportionality of the revised criminal code.

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

Fifth, the revised statute eliminates penalty enhancements for delivering or selling paraphernalia to a person under the age of 18. Under the current D.C. Code statute, any person who is 18 year of age or older who delivers or sells paraphernalia to a person who is under the age of 18 and who is at least 3 years younger may be sentenced to a term of imprisonment of up to 8 years, sixteen times the penalty for delivery or sale to an adult.[14] In contrast, the revised statute does not include an age-based penalty enhancement. Delivering or selling drug paraphernalia to a minor would likely give rise to liability for contributing to the delinquency of a minor[15] that effectively raises the penalty for such behavior in a more proportionate manner. This change improves the proportionality of the revised criminal code.

Sixth, paragraph (b)(1) of the revised statute include a defense for community-based organizations selling, delivering, or possessing with intent to sell or deliver any item for ingestion or inhalation of a controlled substance. The current D.C. Code statute states that "it shall not be unlawful for a community based organization as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[16] By reference to D.C. Code § 48-1101(3)(D), the current statute excludes community-based organizations selling, delivering, or possessing with intent to sell or deliver certain types of testing equipment. In contrast, the revised statute also excludes community-based organizations selling, delivering, or

[12] *See, e.g.*, Toff, Nancy, *The Flute Book: A Complete Guide for Students and Performers* (2012) at 36.
[13] *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.").
[14] D.C. Code § 48-1103 (c). Notably, an 8 year maximum sentence is longer than the maximum sentence authorized for felony assault, D.C. Code § 22-404, fourth degree sexual abuse, D.C. Code §22-3005, or second degree sexual abuse of a minor, D.C. Code § 22-3009.02.
[15] D.C. Code § 22–811(a)(5)(carrying a six-month maximum penalty for a first-time offense).
[16] D.C. Code § 48-1103(b)(1)(A).

possessing with intent to sell any item for ingestion or inhalation of a controlled substance. Community-based organizations may address public health concerns associated with controlled substance use by distributing items for use in ingesting or inhaling controlled substance. The revised statute bars criminal liability in these cases. This change improves the proportionality of the revised criminal code.

Seventh, paragraph (b)(2) of the revised statute includes a defense for selling, delivering, or possessing with intent to sell or deliver an unused hypodermic syringe or needle. Under current D.C. Code § 48-1103.01, certain persons authorized by the Needle Exchange Program may distribute hypodermic needles and syringes. In contrast, the revised statute excludes any person selling, delivering, or possessing with intent to sell an unused hypodermic needle. Used hypodermic syringes and needles present significant health risks, and distribution of unused needles and syringes can mitigate this risk, regardless of whether the person distributing them is authorized under the Needle Exchange Program. This change improves the proportionality of the revised criminal code.

Eighth, paragraph (b)(3) of the revised statute include a defense for selling, delivering, or possessing with intent to sell or deliver an item intended for use in a medical procedure or treatment. Current District law does not provide a defense for distribution of paraphernalia for such purposes. Under current law, it appears that selling a hypodermic needle intended for use by a physician or nurse in administering a controlled substance constitutes a criminal offense. In contrast, the revised statute establishes that this conduct is not subject to criminal liability. Including this defense improves the clarity and proportionality of the revised criminal code.

Beyond these eight substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may constitute substantive changes to current District law.

First, the revised statute specifies that the actor must knowingly distribute or sell the object that is to be used in connection with a controlled substance. The current D.C. Code statute does not specify any culpable mental state for "deliver or sell," however the DCCA has stated that the current statute requires "specific intent" to deliver or sell the paraphernalia.[17] The revised statute specifies that a "knowingly" culpable mental state is required. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[18] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

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

[17] *Fatumabahirtu*, 26 A.3d at 325 ("We hold that D.C.Code § 48–1103(b) requires the government to prove that an owner or a clerk of a commercial retail store had (1) the specific intent to deliver or sell drug paraphernalia (as defined in D.C.Code § 48–1101(3))…."). The DCCA discussion of "specific intent" in *Fatumabahirtu* does not appear to distinguish between conduct to "deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell."

[18] *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)").

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

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

First, the revised statute does not specifically criminalize manufacturing drug paraphernalia. The current D.C. Code statute specifically includes "manufacture with intent to deliver or sell drug paraphernalia" as a distinct form of a paraphernalia offense.[19] The revised statute, however, does not explicitly refer to manufacturing objects that are intended for use with controlled substances because such language is surplusage and potentially confusing. A person who manufactures an object would also necessarily possess the object, and fall within the scope of the revised statute.

Second, the defense under paragraph (b)(1) specifically lists testing equipment and other objects rather than rely on a cross reference. The current D.C. Code statute states that "it shall not be unlawful for a community based organization to as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[20] In the revised statute the term "community based organization" is cross-referenced in the subsection (e), and retains the same meaning as under current law. However, instead of referring to D.C. Code § 48-1101(3), paragraph (b)(1) specifies the testing equipment and objects that are excluded from the offense, using language copied verbatim from current D.C. Code § 48-1103(3)(D).

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

Fourth, the revised statute does not include an exception for selling, delivering, or possessing with intent to sell or deliver objects with intent that another person will use the object to possess, use, grow, harvest, or process cannabis. The current statute provides an exception for selling, delivering, or possessing with intent to sell or deliver drug paraphernalia "under circumstances in which one knows or has reason to know that such drug paraphernalia will be used solely for use of marijuana that is lawful under § 48-904.01(a), or that such drug paraphernalia will be used solely for growing, possession,

[19] D.C. Code § 48-1103 (b)(1). Notably, unlike Chapter 9 of Title 48, which contains most controlled substance offenses and penalties, the term "manufacture" is not defined for Chapter 11.
[20] D.C. Code § 48-1103(b)(1)(A).

harvesting, or processing of cannabis plants that is lawful under § 48-904.01(a)."[21] However, omitting this exception is not intended to change current District law. A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that a person will use the object to use, possess, grow, harvest, or process cannabis plants in a manner that is lawful under § 48-901.01(a) will not be liable under the revised offense. Under both current law and the RCC, the term "controlled substance" does not include marijuana used or possessed in manner defined in §48-904.01 (a), or cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that another person will use the object with marijuana or cannabis plants in a manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent that another person will use the object to produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a "controlled substance," and would not liable under the revised offense.

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

[21] D.C. Code § 48-1103 (b)(1).

RCC § 48-904.12. Maintaining Methamphetamine Production.

Explanatory Note. *This section establishes the maintaining methamphetamine production offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly opening or maintaining a place with intent to manufacture methamphetamine. The offense does not include merely packaging, repackaging, labeling, or relabeling methamphetamine. The maintaining methamphetamine production offense replaces the current D.C. Code § § 48–904.03, which criminalizes opening or maintaining a place to manufacture, distribute, or store for the purposes of manufacturing or distributing a narcotic or abusive drug.*

Subsection (a) specifies the elements of maintaining methamphetamine production. Subsection (a) requires that the actor opens or maintains any location. Subsection (a) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be practically certain that he or she is opening or maintaining any location. Subsection (a) also requires that the actor with intent to manufacture methamphetamine, its salts, isomers, or salts of its isomers. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the anyone actually manufactured methamphetamine.

Subsection (a) excludes certain types of manufacturing. The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container." Subsection (a) specifies that maintaining a place with intent to package, repackage, label, or relabel methamphetamine is not included in the offense.

Subsection (b) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

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

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

Relation to Current District Law. *The revised maintaining a place for methamphetamine manufacturing statute changes current District law in two main ways.*

First, the revised requires intent to manufacture methamphetamine. The current statute includes maintaining or opening a location "for the purpose of manufacture or distribution a narcotic or abusive drug."[1] By contrast, the revised statute does not criminalize maintaining a location with intent to manufacture substances other than methamphetamine, or with intent to distribute any controlled substance. Conspiracy and accomplice liability are sufficient to deter and punish maintaining a location for manufacturing or distributing other controlled substances. However, due to the particular

[1] D.C. Code § 48-904.03a.

dangerousness associated with manufacturing methamphetamine, a separate criminal offense, with different culpability requirements than required for accomplice[2] or conspiracy[3] liability, is warranted. This change improves the proportionality of the revised criminal code.

Second, the revised excludes maintaining a location with intent to package, repackage, label, or relabel, methamphetamine. The current statute does not include any exclusions or exceptions to liability. By contrast, the revised statute excludes certain types of conduct that are included in the definition of "manufacture." Although included in the definition of "manufacture," packaging and labeling of methamphetamine does not create the same safety risks associated with the actual production of methamphetamine. This change improves the proportionality of the revised criminal code.

Beyond these two main changes to current District law, one other aspect of the revised maintaining a place for methamphetamine manufacturing statute may constitute a substantive change to current District law.

The revised statute criminalizes maintaining or opening a location with intent to manufacture methamphetamine. The current statute criminalizes knowingly opening or maintaining any location "*to* manufacture, distribute, or store *for the purpose* of manufacture or distribution a narcotic or abusive drug." The current statute is semi-inchoate in that it does not require that the location actually be used to manufacture or distribute a controlled substance. However, although the statute requires that the person must knowingly open or maintain a place, it does not specify a culpable mental state as to whether the location will be used to manufacture or store controlled substances. The revised statute resolves this ambiguity by specifying that the actor must act "with intent" that the location will be used to manufacture methamphetamine.

[2] Under RCC § 22E-210, accomplice liability requires that the actor acts with the culpability required by the offense, and either *purposely* assists another person with the planning or commission of conduct constituting that offense; or *purposely* encourages another person to engage in specific conduct constituting that offense. A person who maintains a location knowing but not *consciously desiring* that it be used to manufacture methamphetamine would not satisfy the requirements for accomplice liability.

[3] Under RCC § 22E-303, conspiracy liability requires that the actor *purposely agrees* "to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense[.]" A person who maintains a location knowing that another person will use the location to manufacture methamphetamine, without purposely forming an agreement with the other person would not be guilty of conspiracy to manufacture methamphetamine.

D.C. Code § 5-115.03. Repeal of Neglect to Make Arrest for Offense Committed in Presence.

Explanatory Note and Relation to Current District Law.

Current D.C. Code § 5-115.03 provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.[1]

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are "always on duty."[2] Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.[3]

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified "Metropolitan Police district of the District of Columbia" out of the "corporations of Washington and Georgetown, and the county of Washington." [4]

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In other words, it is unclear from the statute whether police officers may be criminally

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[1] D.C. Code § 5-115.03.

[2] *See* D.C. Code § 22–405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).

[3] *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)

[4] *See Compilation of the Laws in Force in the District of Columbia, April 1, 1868*, U.S. Government Printing Office (1868) at 400, (available online at https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: "It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.").

liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.[5]

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,[6] the arrestee's safety,[7] or the safety of a third party.[8] In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.[9] In still other situations, District law[10] conflicts with federal law[11] and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.[12]

In rare circumstances,[13] requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

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[5] For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

[6] E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

[7] E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

[8] E.g., a hostage.

[9] *See., e.g.,* Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

[10] D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

[11] 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

[12] Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, *available at* https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301.

[13] *See, e.g.,* D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

D.C. Code §§ 7-2502.12 and 7-2502.13. Repeal of Possession of Self-Defense Sprays.

Explanatory Note and Relation to Current District Law. Current D.C. Code § 7-2502.12 provides:

> For the purposes of §§ 7-2502.12 through 7-2502.14, the term:
>
> "Self-defense spray" means a mixture of a lacrimator including chloroacetophenone, alphacloracetophenone, phenylchloromethylketone, orthochlorobenazalm-alononitrile or oleoresin capsicum.

Current D.C. Code § 7-2502.13 provides:

> (a) Notwithstanding the provisions of § 7-2501.01(7)(C), a person may possess and use a self-defense spray in the exercise of reasonable force in defense of the person or the person's property only if it is propelled from an aerosol container, labeled with or accompanied by clearly written instructions as to its use, and dated to indicate its anticipated useful life.
>
> (b) No person shall possess a self-defense spray which is of a type other than that specified in §§ 7-2502.12 to 7-2502.14.

D.C. Code § 7-2502.14 has already been repealed.

The meaning and scope of a "self-defense spray" is unclear. Specifically, it is unclear from whether § 7-2502.12 defines the permissible "self-defense spray" to include any mixture containing a lacrimator of any kind and non-lacrimators, any mixture consisting solely of lacrimators that are one of the five listed substances, or any mixture consisting solely of lacrimators of any kind.

The proportionality of criminal penalties for possession of a self-defense spray is also questionable. The District of Columbia Court of Appeals ("DCCA") has held that lacrimators are unlikely to cause great bodily injury.[1] However, simple possession of a self-defense spray is currently punishable by up to one year in jail,[2] the same maximum penalty currently available for possession of a fully automatic machine gun.[3]

Under the revised code, harmful uses of a self-defense spray would remain criminal even without a separate offense penalizing possession of such a spray. Any object, including a self-defense spray of any kind, is treated as a dangerous weapon if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.[4] Furthermore, if an actor uses a self-defense spray to assault another person, the potential punishment is determined by the degree of the injury suffered. For

[1] *See Jones v. United States*, 67 A.3d 547 (D.C. 2013).
[2] D.C. Code § 7-2507.06.
[3] D.C. Code §§ 22-4514(a) and 22-4515; *see also* D.C. Code § 7-2501.01(10) (defining "machine gun").
[4] RCC § 22E-701 (defining "dangerous weapon"). Consider, for example, an actor who uses self-defense spray against a person who is operating a motor vehicle.

example, if the spray causes an injury that requires immediate medical treatment beyond what a layperson can personally administer,[5] the assault may be punished as a third or fourth degree assault, instead of as a sixth degree, simple assault.[6] Other offenses committed by use of a self-defense spray also are penalized more severely in the RCC, including robbery,[7] criminal threats,[8] sexual assault,[9] kidnapping,[10] and criminal restraint.[11]

However, the RCC differentiates self-defense sprays from firearms and other weapons. Weapons that are most likely to facilitate a mass casualty event, are prohibited and punished as contraband *per se*.[12] Weapons that are likely to cause a more serious bodily injury are punished if they are carried outside of the home,[13] possessed with intent to commit a crime,[14] or possessed during a crime.[15]

This change clarifies, logically reorganizes, and improves the consistency and proportionality of the revised offenses.

[5] *See* RCC § 22E-701 (defining "significant bodily injury").
[6] RCC § 22E-1202.
[7] RCC § 22E-1201.
[8] RCC § 22E-1204.
[9] RCC § 22E-1301.
[10] RCC § 22E-1401.
[11] RCC § 22E-1402.
[12] RCC § 22E-4101.
[13] RCC § 22E-4102.
[14] RCC § 22E-4103.
[15] RCC § 22E-4104.

D.C. Code § 22-1311. Repeal of Allowing Dogs to Go at Large.

The Commission recommends repealing in its entirety D.C. Code § 22-1311, the offense of allowing dogs to go at large. The current statute only applies to fierce or dangerous dogs, and female dogs while in heat. As it pertains to fierce or dangerous dogs, the conduct prohibited by D.C. Code § 22-1311 is duplicative of prohibited conduct found either elsewhere in the D.C. Code or in the DCMR, and is unnecessary. As it pertains to female dogs in heat, such conduct is not suitable for criminal punishment.

Explanatory Note and Relation to Current District Law.

The statutory section recommended for repeal constitute, D.C. Code § 22-1311, entitled "Allowing dogs to go at large," provides:

> (a) If any owner or possessor of a fierce or dangerous dog shall permit the same to go at large, knowing said dog to be fierce or dangerous, to the danger or annoyance of the inhabitants, he shall upon conviction thereof, be punished by a fine not exceeding $5,000; and if such animal shall attack or bite any person, the owner or possessor thereof shall, on conviction, be punished by a fine not exceeding $10,000, and in addition to such punishment the court shall adjudge and order that such animal be forthwith delivered to the poundmaster, and said poundmaster is hereby authorized and directed to kill such animal so delivered to him.
>
> (b) If any owner or possessor of a female dog shall permit her to go at large in the District of Columbia while in heat, he shall, upon conviction thereof, be punished by a fine not exceeding $20.

While D.C. Code § 22-1311(a) is constructed to apply only to dangerous or fierce dogs, the prohibited conduct is largely addressed in the D.C. Municipal Regulations (DCMR) provision regarding dogs generally. Specifically, Section 24-900 of the DCMR provides in part:

> No person owning, keeping, or having custody of a dog in the District shall permit the dog to be on any public space in the District, other than a dog park established by section 9a of the Animal Control Act of 1979, passed on 2nd reading on September 20, 2005 (Enrolled version of Bill 16-28), unless the dog is firmly secured by a substantial lease. The leash shall be held by a person capable of managing the dog.

Section 24-900 further provides that anyone who violates the subsection above, "...shall be punished by a fine of not more than three hundred dollars ($300), or by imprisonment not exceeding ten (10) days".

Much like D.C. Code § 22-1311(a), DCMR 24-900, prohibits dogs at large conduct and punishes violators with a monetary penalty. While the maximum monetary penalty allowable under D.C. Code § 22-1311(a) ($5000) is much greater than what is permissible under the DCMR ($300), the DCMR also offers a short period of imprisonment for those who violate this regulation.

The main distinction between D.C. Code § 22-1311(a) and DCMR 24-900 is that the former specifically holds owners of known dangerous or fierce dogs accountable when those dogs attack or pose a danger to others. However, the definition of a "fierce or dangerous dog" is not provided in Title 22 and has not been specified by case law.

However, Title 8, Chapter 19, the Environmental and Animal Control and Protection section of the D.C. Code does address dangerous dogs. Specifically, D.C. Code § 8-1905 provides:

> It shall be unlawful to:
>
> (1) Keep a potentially dangerous or dangerous dog without a valid certificate of registration issued under § 8-1904;
>
> (2) *Permit a potentially dangerous dog to be outside a proper enclosure unless the potentially dangerous dog is under the control of a responsible person and restrained by a chain or leash, not exceeding 4 feet in length*;
>
> (3) Fail to maintain a dangerous dog exclusively on the owner's property except for medical treatment or examination. When removed from the owner's property for medical treatment or examination, the dangerous dog shall be caged or under the control of a responsible person and muzzled and restrained with a chain or leash, not exceeding 4 feet in length. The muzzle shall be made in a manner that will not cause injury to the dangerous dog or interfere with its vision or respiration, but shall prevent it from biting any human being or animal;
>
> (4) Fail to notify the Mayor within 24 hours if a potentially dangerous or dangerous dog is on the loose, is unconfined, has attacked another domestic animal, has attacked a human being, has died, has been sold, or has been given away. If the potentially dangerous or dangerous dog has been sold or given away, the owner shall also provide the Mayor with the name, address, and telephone number of the new owner of the potentially dangerous or dangerous dog;

> (5) Fail to surrender a potentially dangerous or dangerous dog to the Mayor for safe confinement pending disposition of the case when there is a reason to believe that the potentially dangerous or dangerous dog poses a threat to public safety;
>
> (6) Fail to comply with any special security or care requirements for a potentially dangerous or dangerous dog the Mayor may establish pursuant to § 8-1903; or
>
> (7) Remove a dangerous dog from the District without written permission from the Mayor.

Much like the DCMR, D.C. Code Title 8 Chapter 19 provides for both a monetary penalty and a period of confinement for those who violate the above Code and gives the Office of the Attorney General jurisdiction to prosecute violators. As D.C. Code § 22-1311(a) provides a monetary penalty as high as $10,000 when a dangerous or fierce dog attacks or causes injury to another, Title 8 Chapter 19 provides the exact same monetary penalty but applies to a broader scope of conduct.

Notably, a CCRC analysis of data received from the Superior Court of the District of Columbia indicates that over the entire 10-year span of 2009-2018 there were no adult convictions for allowing dogs to go at large under D.C. Code § 22-1311(a), D.C. Code § 8-1905, or DCMR 24-900.

D.C. Codes §§ 22-1511 - 22-1513. Repeal of Fraudulent Advertising.

The Commission recommends the repeal of D.C. Code § 22-1511, which criminalizes fraudulent advertising, and D.C. Code §§ 22-1512 and 22-1513, which specify prosecutorial authority and relevant penalties for the offense.

Explanatory Note and Relation to Current District Law
Current D.C. Code § 22-1511 provides:

> It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt, or any security; or with the purpose to deceive, mislead, or induce any person, firm, association, or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead, or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm, association, or corporation so advertising such services.

Repealing the fraudulent advertising statute in D.C. Code § 22-1511 will decriminalize little conduct because nearly all such conduct is already prohibited under the District's current fraud statute[1] and will be criminalized by the RCC fraud statute.[2] The revised fraud statute criminalizes taking, obtaining, transferring, or exercising control over property, with the consent of the owner obtained by deception.[3] However, repealing the fraudulent advertising statute does narrow current District law in one or two minor ways.

[1] D.C. Code § 22-3221. ("A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.")
[2] RCC § 22E-2201. A person commits fraud when that person "Knowingly takes, obtains, transfers, or exercises control over the property of another; (2) With the consent of an owner obtained by deception; (3) With intent to deprive that owner of the property[.]"
[3] RCC § 22E-2201.

First, the fraudulent advertising statute differs from the RCC's fraud statute in that the fraudulent advertising statute covers conduct "with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value." Consequently, the current fraudulent advertising statute does not require that the actor actually succeeded in defrauding anyone.[4] In contrast, the RCC's fraud statute requires that the actor actually takes, obtains, transfers, or exercises control over property. However, the RCC fraud statute still criminalizes conduct an actor who is unsuccessful in defrauding anyone through the use of deceptive advertising if the conduct is sufficiently close to success that it constitutes an attempt.[5]

Second, the fraudulent advertising statute differs from the RCC's fraud statute in that the fraudulent advertising statute is silent as to whether it includes advertising with immaterial misleading statements or puffery. The plain language seems to suggest even the most trivial, ineffective, or clearly outrageous claims could satisfy the elements of the offense, and there is no relevant D.C. Court of Appeals case law. However, the revised fraud offense specifically excludes liability for such minimal harms by requiring the property of another be obtained by means of "deception" and defining "deception" as "creating or reinforcing a *material* false impression," and excludes "puffing statements unlikely to deceive ordinary persons[.]"[6] Consequently, to the extent that the fraudulent advertising statute includes displaying advertising that includes immaterial misrepresentations[7] or mere puffery[8], repealing the statute would decriminalize this conduct.

Repealing the fraudulent advertising statute eliminates unnecessary overlap, and improves the proportionality and consistency of the revised criminal code.

[4] *See, Green v. United States*, 312 A.2d 788, 791 (D.C. 1973) (evidence for fraudulent advertising sufficient even without proof that any customers actually purchased falsely advertised goods).
[5] RCC § 22E-301.
[6] RCC § 22E-701 (emphasis added).
[7] For example, if an alcohol vendor advertises liquor as being 50% alcohol by volume, but the liquor is actually only 49.9% alcohol by volume, this immaterial misrepresentation could arguably constitute fraudulent advertising.
[8] For example, if the owner of a diner displays an advertisement that says "word's best coffee," when the diner's coffee is not actually the best coffee in the entire world, these puffing statements would not constitute deception as defined in the RCC, but could arguably constitute fraudulent advertising.

D.C. Codes §§ 22-2301 – 22-2306. Repeal of Panhandling.

The Commission recommends repealing in their entirety D.C. Code §§ 22-2301 – 22-2306 concerning the offense of panhandling.[1] Most panhandling statutory provisions appear to be facially unconstitutional under recent Supreme Court case law, and the most severe forms of behavior addressed by the provisions involve conduct that is already criminalized in the RCC and current D.C. Code. For those provisions of the panhandling statute that may be constitutional and not otherwise criminalized, a criminal sanction does not appear to be proportionate. Panhandling may be regarded as a status offense that criminalizes conduct associated with poverty and homelessness. Repealing the panhandling statutes avoids constitutional challenges, eliminates unnecessary overlap, and improves the proportionality in the revised statutes.

Explanatory Note and Relation to Current District Law.

The statutory sections recommended for repeal constitute the sections in D.C. Code Title 22 Chapter 32, entitled "Panhandling." The primary statute describing the offense is D.C. Code § 22-2302, which provides:

> (a) No person may ask, beg, or solicit alms, including money and other things of value, in an aggressive manner in any place open to the general public, including sidewalks, streets, alleys, driveways, parking lots, parks, plazas, buildings, doorways and entrances to buildings, and gasoline service stations, and the grounds enclosing buildings.
> (b) No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop.
> (c) No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine (ATM).
> (d) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle that is in traffic on a public street.
> (e) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public parking space, or directing the operator or occupant to a public parking space.
> (f) No person may ask, beg, or solicit alms in exchange for cleaning motor vehicle windows while the vehicle is in traffic on a public street.
> (g) No person may ask, beg, or solicit alms in exchange for protecting, watching, washing, cleaning, repairing, or painting a motor vehicle or bicycle while it is parked on a public street.
> (h) No person may ask, beg, or solicit alms on private property or residential property, without permission from the owner or occupant.

[1] D.C. Code § 22-2301. Definitions; D.C. Code § 22-2303. Prohibited Acts; § 22-2303. Permitted activity; § 22-2304. Penalties; § 22-2305. Conduct of prosecutions; and § 22-2306. Disclosures.

Other statutes in Chapter 23 concern: definitions;[2] a statement that exercise of a constitutional right to "picket, protest, or speak, and acts authorized by a permit" issued by D.C. government are all lawful;[3] that punishment for the offense is up to 90 days imprisonment, a fine, or both;[4] and that panhandling is to be prosecuted by the Attorney General.[5]

The panhandling statute criminalizes two broad categories of speech that involve use of "ask[ing], beg[ging], or solicit[ing] alms," defined as the "the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value."[6] The first category involves asking for donations in any public place in conjunction with some additional conduct—e.g., making a person fear bodily harm, touching a person without consent, repeating requests after being told no, or blocking someone's passage.[7] The second category involves asking for donations in one of several narrowly-specified public locations[8] (e.g., at a bus stop) or any private location.[9]

It has long been established that under the First Amendment, laws that target speech based on its communicative content are presumptively unconstitutional and can survive legal challenge only if they are narrowly-tailored to serve compelling state interests (under a strict-scrutiny test).[10] When the District's panhandling statute was enacted in 1993, however, Supreme Court precedent suggested that the speech involved

[2] D.C. Code § 22-2301 ("For the purposes of this chapter, the term: (1) 'Aggressive manner' means: (A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession; (B) Touching another person without that person's consent in the course of asking for alms; (C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or (D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact. (2) 'Ask, beg, or solicit alms' includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.").

[3] D.C. Code § 22-2303 ("Acts authorized as an exercise of a person's constitutional right to picket, protest, or speak, and acts authorized by a permit issued by the District of Columbia government shall not constitute unlawful activity under this chapter.").

[4] D.C. Code § 22-2304 ("(a) Any person convicted of violating any provision of § 22-2302 shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 90 days or both. (b) In lieu of or in addition to the penalty provided in subsection (a) of this section, a person convicted of violating any provision of § 22-2302 may be required to perform community service as provided in § 16-712.").

[5] D.C. Code § 22-2305 ("Prosecutions for violations of this chapter shall be conducted in the name of the District of Columbia by the Corporation Counsel.").

[6] D.C. Code § 22-2301(2) ("'Ask, beg, or solicit alms' includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.").

[7] D.C. Code §22-2302(a); D.C. Code § 22-2301(1) ("'Aggressive manner' means: (A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession; (B) Touching another person without that person's consent in the course of asking for alms; (C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or (D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact.").

[8] D.C. Code §22-2302(b)-(g).

[9] D.C. Code §22-2302(h).

[10] R.A.V. v. St. Paul, 505 U.S. 377, 395, 112 S.Ct. 2538 (1992).

in asking for a donation of money would not constitute a content-based law subject to strict scrutiny unless the government was signaling disagreement with the content of the speech.[11] Since adoption of the panhandling statute, in the 2015 case of *Reed v. Gilbert*, the Supreme Court clarified that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based."[12]

The plain language of the District's panhandling statute suggests that it is, in large part, facially unconstitutional under the standard in *Reed v. Gilbert*.[13] Because §22-2302 only prohibits the solicitation of alms, versus other types of speech, it is a content-based statute subject to strict scrutiny and a claim as to this has been upheld by the United States District Court for the District of Columbia.[14] The most severe forms of the offense involve both a content-based regulation of speech and, through the panhandling definition

[11] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[12] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2228 (2015).
[13] The evolution of Supreme Court First Amendment case law is not the only grounds for questioning the constitutionality of the District's panhandling statute. Even at the time of enactment of the panhandling statute, there appears to have been confusion in the legal analysis. Most notably, the legislative history asserts that the initial bill for the District's statute "was modeled after the Portland, Oregon ordinance on aggressive panhandling," but also states that there was a final Amendment in the Nature of a Substitute that added other provisions. *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 3. The legal analysis and testimony regarding the initial bill by then Corporation Counsel John Payton specifically recommended alignment of the panhandling statute with the Portland, Oregon municipal ordinances which had been upheld by courts. However, the Portland, Oregon ordinances that Payton referenced and included with his testimony were 10 day, content-neutral "offensive physical contact" and pedestrian blocking statutes that do not criminalize or regulate speech at all. *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 34-35. The Portland, Oregon "offensive physical contact" statute remains in effect today. Portland, Or., Mun. Code § 14A.40.020. The legislative history for the District statute does not explain whether or how the legal analysis provided by John Payton (representing the Executive) for the original bill was updated along with the final statutory text in the Amendment in the Nature of a Substitute.
[14] *See Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019) ("As for the nature of the government's statutory prohibitions and its justifications for limiting speech in this manner, Plaintiffs allege that strict scrutiny applies, because the Panhandling Control Act is a content-based regulation insofar as it prohibits certain speech—i.e. immediate requests for money or things of value—in public areas, based on the message communicated. (See 5AC at ¶¶ 153–156.) Plaintiffs further allege that the Act cannot survive strict scrutiny, because the statutory restrictions are not narrowly tailored to promote a compelling governmental interest. (See id. at ¶¶ 158–62.) Specifically, the complaint contends that there are less restrictive alternatives available to the government, such as "enforcing existing generic criminal laws already on the books in this jurisdiction or enacting new criminal laws that directly target conduct that threatens the District's asserted interests rather than employing regulations that indirectly support those interests by directly burdening protected speech." (Id. at ¶ 161; see also id. at ¶¶ 160–62.) It is by now well established that government regulations are content-based if they "appl[y] to particular speech because of the topic discussed or the idea or message expressed[,]" Reed, 135 S. Ct. at 2227, and that content-based laws that restrict protected speech are subject to strict scrutiny, id. Furthermore, strict scrutiny " 'requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]' " Id. at 2231 (quoting Ariz. Free Ent. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011)). Thus, the complaint's First Amendment claims are plainly plausible, insofar as Plaintiffs assert that the Panhandling Control Act is both subject to strict scrutiny (because it prohibits requests for immediate donations of money in various public areas and not any other speech—i.e. it is a content-based restriction), and does not satisfy strict scrutiny (because other less restrictive alternatives are available).").

of "aggressive manner,"[15] an additional act that is already criminal under the D.C. Code and RCC.[16] The very fact that other criminal laws that aren't content-based regulation of speech already address the conduct described in the panhandling statute demonstrates that the statute is not "narrowly tailored." Additionally, since *Reed*, panhandling restrictions based on geographic areas that involve sidewalks, roads, parks, and other traditional or recognized public forums[17] have routinely been struck down by courts.[18] Specific evidence is needed as to the government's interest and, a general "public safety" justification does not constitute a compelling interest.[19] Such evidence is not part of the current legislative history, which is summary in its justification.[20]

Notably, two aspects of the current panhandling statute that may be facially *constitutional* are the D.C. Code § 22-2302(b) prohibition on panhandling "in any public

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[15] D.C. Code § 22-2301(1).

[16] For example, D.C. Code § 22-2301(1)(A) ("Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession") corresponds closely with disorderly conduct under D.C. Code § 22-1321(a) and RCC § 22E-4201. D.C. Code § 22-2301(1)(B) ("Touching another person without that person's consent in the course of asking for alms") arguably corresponds with assault under D.C. Code § 22-404 and offensive physical contact under RCC § 22E-1205. D.C. Code § 22-2301(1)(D) ("Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact") tracks Crowding, obstructing, or incommoding under D.C. Code § 22–1307.

[17] *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). The same standards apply in designated public forums—spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose.' Id., at 469–470, 129 S.Ct. 1125. In a nonpublic forum, on the other hand—a space that 'is not by tradition or designation a forum for public communication'—the government has much more flexibility to craft rules limiting speech. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The government may reserve such a forum 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'").

[18] See, e.g., *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) ("[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals… rights under the First Amendment…); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015).

[19] *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 233 (D. Mass. 2015) (striking down provisions against blocking path and following a person after they gave a negative response)

[20] *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 5 ("The Amendment in the Nature of a Substitute creates place restrictions on panhandling in these situations because persons engage in certain activity, whether it is parking their vehicle, sitting in traffic, waiting at a bus or subway stop, or conducting banking business at an ATM machine, that prevents them from 1eaving immediately after saying no to the panhandler's request for money. It is because of these situations that the Committee finds it necessary to establish place restrictions on the activities of panhandlers.").

transportation vehicle; or at any bus, train, or subway station or stop",[21] and the D.C. Code § 22-2302(h) prohibition "on private property or residential property, without permission from the owner or occupant." Unlike the other provisions of the panhandling statute which apply over-broadly to "any place open to the general public"[22] and involve otherwise criminal conduct (and so are not narrowly tailored), or occur in traditional public forums like public streets or sidewalks,[23] government has more leeway to regulate more in non-public forums such as these. Supreme Court precedent has upheld "reasonable" speech regulations in non-public forums where the government is not opposing the content of the speech.[24] Unfortunately, the current panhandling statute does not define language in D.C. Code § 22-2302(b)[25] and D.C. Code § 22-2302(h)[26] that may be key to determining the breadth (and facial constitutionality) of these provisions. Moreover, D.C. Code § 22-2302(b) and D.C. Code § 22-2302(h) may be susceptible to arguments that the laws are not reasonable given the government's interests at stake.[27] Consequently, while D.C. Code § 22-2302(b) and D.C. Code § 22-2302(h) may withstand a facial challenge under the First Amendment, this is not clear and does not preclude the possibility that many cases would raise as-applied challenges.

To the extent that the District wishes to regulate panhandling-type speech in public transportation, public transportation stations, or in door-to-door knocking on

[21] *McFarlin v. D.C.*, 681 A.2d 440, 448 (D.C. 1996) (upholding a First Amendment challenge to D.C. Code § 22-2302(b) where, under doctrine of constitutional avoidance "subway station or stop" under the statute was construed to not include traditional public fora, so strict scrutiny was not required standard of review).
[22] D.C. Code § 22-2302(a).
[23] D.C. Code § 22-2302(c)-(g).
[24] *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974).
[25] For example, the boundaries of a "subway station or stop" are undefined. The matter is the subject of litigation (see *McFarlin v. D.C.*, 681 A.2d 440, 447–48 (D.C. 1996)) and *Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).
[26] For example, it is unclear if "residential property" is intended to include government-owned (public) housing.
[27] *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 162–63 (2002) ("Despite the emphasis on the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion, these early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door was invalid because the issuance of the license depended on the exercise of discretion by a city official. Our opinion recognized that "a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." Id., at 306, 60 S.Ct. 900. Similarly, in Martin v. City of Struthers, the Court recognized crime prevention as a legitimate interest served by these ordinances and noted that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." 319 U.S., at 144, 63 S.Ct. 862. Despite recognition of these interests as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of the regulation.' " Ibid. (quoting Schneider, 308 U.S., at 161, 60 S.Ct. 146).").

private residences,[28] such conduct is better addressed through civil sanctions or other regulatory mechanisms. Soliciting a donation on public transportation or in a public transportation station appears to comparable to other undesirable conduct (e.g., spitting, smoking, playing loud music, etc.) in such locations that is currently punishable by a $50 civil fine.[29] Charitable solicitations done without meeting regulatory requirements are also subject to criminal fines and penalties under other provisions concerning charitable solicitations per Title 44, Chapter 17 of the D.C. Code.[30]

In addition, the current panhandling statute's assignment of prosecutorial authority to the Attorney General for the District of Columbia (instead of the United States Attorney for the District of Columbia) may run afoul of Home Rule Act limitations on the Council's power to assign prosecutorial authority. The panhandling offense is punishable by a fine or imprisonment or both, which under D.C. Code 23-101 (as construed by the DCCA) means that the statute cannot be prosecuted by the Attorney General for the District of Columbia unless it is deemed a "police or municipal ordinance" under subsection (a) or there is pre-Home Rule Act Congressional law specifying local prosecution per subsection (c).[31]

Case law determining prosecutorial authority in the District is complex and evolving, but the most recent DCCA opinion suggests a multi-factor analysis be used which includes consideration of: 1) the statute's nature as a "Local Regulation or General Prohibition;" 2) "History of Regulation and Enforcement;" 3) "Placement in D.C. Code;" 4) "Legislative History;" 5) "Dual Prosecution;" and 6) "Penalties."[32]

This analysis renders a mixed result for the panhandling statute. The statute is arguably a "local regulation" insofar does not absolutely bar solicitation of alms but does so in specified circumstances. Historically, the Office of the Attorney General (OAG) has prosecuted the offense since its creation in 1993.[33] Moreover, there is a link between the current panhandling statute and a prior vagrancy statute that broadly criminalized begging and was Congressionally-designated as an offense prosecuted by Corporation Counsel.[34] However, this link to the vagrancy statute is tenuous as the panhandling

[28] Notably, a person soliciting donations who remains on another person's property without the owner's permission would likely be subject to liability under D.C. Code § 22–3302, Unlawful entry on property, and RCC § 22E-2601, trespass.
[29] D.C. Code § 35–251.
[30] D.C. Code § 44-1712 ("Any person violating any provision of this chapter, or regulation made pursuant thereto, or filing, or causing to be filed, an application or report pursuant to this chapter, or regulation made pursuant thereto, containing any false or fraudulent statement, shall be punished by a fine of not more than $500, or by imprisonment of not more than 60 days, or by both such fine and imprisonment.").
[31] *See generally In re Settles,* 218 A.3d 235, 239 (D.C. 2019) ("Otherwise, § 23-101 divides criminal offenses into three general categories: violations of "police or municipal ordinances or regulations," which are prosecuted by the District of Columbia, § 23-101(a); violations of "penal statutes in the nature of police or municipal regulations," which are prosecuted by the District of Columbia as long as the "maximum punishment is a fine only, or imprisonment not exceeding one year," but not both, id.; *District of Columbia v. Moody*, 304 F.2d 943 (D.C. Cir. 1962) (per curiam); and all others, which (subject to specific statutory exceptions) are prosecuted by the United States, D.C. Code § 23-101(c).").
[32] *In re Settles,* 218 A.3d 235 (D.C. 2019).
[33] *See, e.g., McFarlin v. D.C., 681 A.2d 440, 442 (D.C. 1996); Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).
[34] *See* D.C. Code § 22–3302 (1940). ("The following classes of persons shall be deemed vagrants in the District of Columbia: …(7) Any person wandering abroad and begging, or who goes about from door to

statute is quite different in scope. Panhandling includes conduct that would constitute "simple assault" (current D.C. Code 22-404),[35] an offense prosecuted by the United States Attorney for the District of Columbia—heightening concerns that the Council's designation of OAG as prosecutor affects prosecutorial powers that Congress intended to be exercised by the United States Attorney for the District of Columbia. The panhandling offense is codified in Title 22, with other criminal offenses that are generally not regulatory in nature. The legislative history of the panhandling statute does not include any Committee on the Judiciary statement as to the propriety of jurisdiction by the Attorney General for the District of Columbia (or the predecessor Corporation Counsel), and goes out of its way to note that the conduct covered by the panhandling statute from the vagrancy statute.[36] Moreover, it is notable that the final legislation assigning prosecutorial responsibility contradicts without explanation hearing testimony by the Corporation Counsel John Payton noting that a penalty of a fine and imprisonment under D.C. Code § 23-101 would generally entails prosecution by the United States Attorney for the District of Columbia.[37] Lastly, while the penalty for the offense is within the realm of penalties for other offenses that Congress has designated as prosecutable by OAG, it is higher than most regulatory penalties and exceeds the Congressional limitation on penalties for regulations (not otherwise subject to a Congressional grant of authority) to 10 days imprisonment.[38]

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door or places himself in or on any highway, passage, or other public place to beg or receive alms."). D.C. Code § 22–3305 (1940). ("All prosecutions under sections 22-3302 to 22-3306 shall be in the police court of the District of Columbia, in the name of the District of Columbia, by the corporation counsel or any of his assistants.").

[35] *See* Testimony of John Payton, Corporation Counsel, July 10, 1991 in *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 30 ("Much of the conduct which would constitute "offensive physical contact" would constitute the offense of simple assault under D.C. Code section 22-504 (1989)"). Corporation Counsel Payton also recommended raising the penalty to 90 days to better align with the contemporary assault penalty. *Id. See, also*, Testimony of Jacqueline A. Baillargeon, Public Defender Service, July 24, 1991 in *Id.* at 89.

[36] *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 3 ("The current vagrancy law (D.C. Code§ 22-3302 et seq.) does not address the issue of aggressive panhandling or offensive physical contact, but it does make begging a criminal offense. Bill 10-72 repeals a provision of this law that was found to be too vague and thus unenforceable constitutionally. The bill is not intended to prevent the needy from begging peaceably, it is intended to rid the street of those who use the plight of the homeless as a means to achieve personal monetary gain through panhandling aggressively as well as those whose behavior presents a danger to citizens in public areas.").

[37] *See* Testimony of John Payton, Corporation Counsel, July 10, 1991 in *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 31 ("The bill should make clear who would prosecute a person for committing the offense of offensive physical contact (or the offenses of obstructing a sidewalk or an entrance). Under D.C. Code section 23-101 (1989), the general rule is that where both a fine and imprisonment may be imposed, the prosecution is conducted in the name of the United States by the United States Attorney for the District of Columbia. Therefore, if the Council intends that these offenses be prosecuted by the Corporation Counsel in the name of the district of columbia, it should expressly so state in the bill.").

[38] See D.C. Code § 1-303.05 ("The Council of the District of Columbia is hereby authorized to prescribe reasonable penalties of a fine not to exceed $300 or imprisonment not to exceed 10 days, in lieu of or in addition to any fine, or to prescribe civil fines or other civil sanctions for the violation of any building regulation promulgated under authority of § 1-303.04, and any regulation promulgated under authority of § 1-303.01, and any regulation promulgated under authority of § 1-303.03.").

While the question is unsettled, on balance these considerations suggest that the panhandling statute is not a police regulation for purposes of D.C. Code 23-101(a), and, for purposes of D.C. Code 23-101(c), is more than a mere amendment of the vagrancy statute that was Congressionally-granted to OAG for prosecution. Were the voyeurism statute to be retained in the D.C. Code, continued prosecution by OAG would be subject to challenge.

The Metropolitan Police Department in 2017 reported just 19 arrests for panhandling.[39] In contrast, Metro Transit Police over the course of just January 2019 recorded 20 arrests or citations issued for "PANHANDLING/BEG/VAGRANCY" or similar offense codes that include "panhandling".[40] This suggests that a large proportion of the enforcement of the panhandling statutes in recent years is being conducted by Metro Transit Police.

However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were fewer than 104 charges and fewer than 40 convictions of adults for panhandling—exact numbers cannot be provided due to limitations on the court data.[41] Panhandling is a crime eligible for post and forfeit procedures,[42] however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of "begging for money at a bus stop or on public transportation" when "[t]he begging is not threatening to anyone."[43] The most frequent (modal) response, selected by 48.3% of recipients, was "0," a rating that was equivalent on the chart provided to respondents to: "Not a crime (e.g., a speeding ticket)." The median response was a "1," a low rating less serious than "non-painful physical contact (e.g., pushing someone around)." The mean response was a "2.4," a rating that is one class lower than a "4" which was equivalent on the chart provided to respondents to the harm of causing a "minor injury treatable at home (e.g., a black eye)."[44] More aggressive behavior revealed nearly identical results. Where District voters were asked to rank the seriousness of "continuing to beg for money in a public place from a person who already has said no. The begging is not threatening to anyone," the most frequent response, selected by 27.3%

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[39] *See* MPD Adult Arrests by Year 2017 (available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Arrests%202017%20Public.csv).

[40] https://www.wmata.com/about/transit-police/upload/January-2019-Monthly-Blotter-Report.pdf

[41] See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[42] *See* Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral)_07052019.pdf).

[43] For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[44] This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. *See* D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.

of recipients, was ”0.” The median response was a ”2,” and the mean response was a “2.8.”

D.C. Code § 22-3224. Repeal of Fraudulent Registration.

The Commission recommends the repeal of D.C. Code § 22-3224, which criminalizes fraudulent registration at a hotel, motel, or other lodging establishment.

Current D.C. Code § 22-3224 provides: "A person commits the offense of fraudulent registration if, with intent to defraud the proprietor or manager of a hotel, motel, or other establishment which provides lodging to transient guests, that person falsely registers under a name or address other than his or her actual name or address." This conduct may still be criminalized under the RCC's fraud[1] statute. Repealing the fraudulent registration statute may change current District law in two ways.

Repealing the fraudulent registration statute in D.C. Code § 22-3224 will decriminalize little conduct because nearly all such conduct is already prohibited under the District's current fraud statute[2] and will be criminalized by the RCC fraud[3] statutes. The revised fraud statute criminalizes taking, obtaining, transferring, or exercising control over property, with the consent of the owner obtained by deception.[4] However, repealing the fraudulent registration statute does narrow current District law in one or two minor ways.

First, the fraudulent registration statute does not require that the actor actually defrauded the proprietor or manager of the hotel. The offense only requires registering under a false name or address, with *intent* to defraud. Consequently, the current fraudulent registration statute does not require that the actor actually succeeded in defrauding anyone. A person who provides a false name or address, but does not actually use the hotel room without payment would be guilty of fraudulent registration. In contrast, the RCC's fraud statute requires that the actor actually takes, obtains, transfers, or exercises control over property. However, the RCC fraud statute still criminalizes conduct an actor who is unsuccessful in defrauding anyone through the use of deceptive registration if the conduct is sufficiently close to success that it constitutes an attempt.[5]

Second, the fraudulent registration statute does not define the term "defraud." Using a false name or address to obtain a hotel room without paying for it would constitute fraud or theft of services[6] under the RCC. However, since the term "defraud" is undefined, it is unclear if the fraudulent registration statute covers cases where a person provides a false name or address to deceive the manager or proprietor of the hotel, but still intends to pay for the room. If the fraudulent registration offense includes use of a

[1] RCC § 22E-2201.
[2] D.C. Code § 22-3221. ("A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.")
[3] RCC § 22E-2201. (A person commits fraud when that person "Knowingly takes, obtains, transfers, or exercises control over the property of another; (2) With the consent of an owner obtained by deception; (3) With intent to deprive that owner of the property[.]").
[4] RCC § 22E-2201.
[5] RCC § 22E-301.
[6] RCC § 22E-2101

false name or address, even when the actor intends to pay for the room, repealing the statute would decriminalize this conduct.

Repealing the fraudulent registration statute eliminates unnecessary overlap, and improves the proportionality and consistency of the revised criminal code.

D.C. Code § 37-131.08(b). Repeal of Penalties for Illegal Vending.

Explanatory Note and Relation to Current District Law. Title 37 of the D.C. Code and Title 24 of the D.C. Municipal Regulations ("DCMR") address a wide array of rules for vending goods from public spaces such as streets and sidewalks. A failure to comply with any of the regulations triggers both civil[1] and criminal penalties.[2] D.C. Code § 37-131.08(b) specifies a maximum penalty of 90 days in jail and a $500 fine for a violation of "any of the provisions of this chapter or any regulations issued pursuant to this chapter."[3] An arrest may also result in significant business losses to a vendor.[4]

Imprisonment does not appear to be a proportionate punishment for conduct that fails to comply with vending regulations does not otherwise involve fraudulent activity,[5] physically harm others,[6] involve the sale of spoiled, contaminated, or food unfit for consumption,[7] or block public use of locations[8]—harms separately addressed in the current and/or revised criminal code. Recent journalism has highlighted that the District imposes some of the highest fees and most stringent requirements for vending of any American city, limiting the ability of micro-businesses and entrepreneurs young and old to legally engage in sales.[9] The scope of illegal vending activity[10] and the relatively small number of prosecutions (see below) also raise concerns about selective enforcement that may disproportionately affect some members of the community.[11]

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[1] The Commission makes no recommendation at this time regarding civil remedies or penalties. Notably, however, violations involving nonpayment of fees, such as failure to maintain a business license and parking illegally, trigger steeper penalties than do violations involving risks to public safety, such as failure to comply with the District's health and fire codes. *See* 16 DCMR § 3313.

[2] D.C. Code §§ 37-131.08 and 22-3571.01; 24 DCMR § 575; 16 DCMR §§ 3201 and 3313.

[3] *See also* D.C. Code § 22-3571.01.

[4] Vendors who are arrested are subject to both lost revenue and lost product. *See* Associated Press, *LA Joins Other Big Cities in Legalizing Street Vending*, U.S. NEWS & WORLD REPORT (November 28, 2018) (explaining "If someone complains, the police, they could come in and take everything from us. Make us throw all our stuff away and we lose all our money for that day.").

[5] *See* D.C. Code § 22-3221; RCC § 22E-2201.

[6] *See* D.C. Code §§ 22-401 – 22-405; 22-406; RCC § 22E-1202.

[7] *See* D.C. Code § 48-109 (authorizing a penalty of up to 1 year of imprisonment and fines of up to $10,000 for sale or possession with intent to sell an adulterated food or other item).

[8] *See* D.C. Code §§ 22-1307; RCC § 22E-4203.

[9] *See, e.g.*, Jeff Clabaugh, *Why DC is 2nd-most challenging city for food trucks*, WTOP (March 22, 2018) (noting vendors must complete at least 23 specific interactions with regulators, pay high start-up fees, and overcome a significant number of ongoing, city-imposed hurdles in their quest to turn a profit); Robert Frommer, *Washington DC vs. Entrepreneurs: DC's Monumental Regulations Stifle Small Businesses*, Institute for Justice City Study Series (November 2010).

[10] Vending without a license is an open, longstanding, tolerated practice in many District locations. *See, e.g.*, Orion Donovan-Smith, *At Dave Thomas Circle, fixing a traffic nightmare threatens a D.C. vending empire*, WASHINGTON POST (August 14, 2019).

[11] In 2017, three black teenagers were handcuffed and detained on the National Mall by undercover U.S. Park Police officers for attempting to sell cold water without a permit. In response, Councilmember Charles Allen sent a letter to the U.S. Park Police Chief, Robert D. MacLean stating, "I can't help but think how the reaction by these same officers might have varied if different children had set up a quaint hand-painted lemonade stand on the same spot. While still the same violation of selling a beverage without proper permits and licenses, I doubt we would have seen little girls in pigtails handcuffed on the ground." *See* NBC Channel 4 Washington, *Teens Detained for Selling Water on the National Mall*, (June 23, 2017). *See, also, United States v. Harrison*, 2018 WL 5046496 Slip Copy (D.D.C. Aug 7, 2018) at 1 (where a

The Metropolitan Police Department reports hundreds of arrests for vending violations each year, including 472 in 2017 (its most recent annual report).[12] However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were just 58 charges and fewer than 20 convictions of adults for vending without a license.[13] Vending without a license is a crime eligible for post and forfeit procedures,[14] however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of "selling sunglasses on a public sidewalk without a business license or vending permit, as required by law."[15] The most frequent (modal) response, selected by 28.2% of recipients, was "0," a rating equivalent to "Not a crime (e.g., a speeding ticket)." The median response was a "2," a low rating equivalent to "non-painful physical contact (e.g., pushing someone around)." The mean response was a "3.1," a rating that is about one class lower than a "4" which was equivalent to the harm of causing a "minor injury treatable at home (e.g., a black eye)."[16] Given the skewed

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parolee was arrested for vending without a license but was otherwise compliant with his conditions of release).

[12] *See* MPD Annual Report: 2017 (February 22, 2019) (available at https://mpdc.dc.gov/page/mpd-annual-reports).

[13] See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

Data labeled as vending without a license specifically cited to 24 DCMR 502.2 which states: "In addition to the requirements specified in § 502, no person shall vend food from public or private space in the District of Columbia without obtaining and maintaining a valid: (a) Health inspection certificate issued by the DOH Director; (b) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.1 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (c) Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; provided, that a vendor without such certification may employ a person who holds a valid: (1) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.3 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (2)Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (d) Required food safety analyses and plans in accordance with § 3701 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (e) Permit from FEMS, if the vendor uses propane gas, open flames, or solid fuels such as wood pellets or charcoal."

[14] *See* Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral)_07052019.pdf).

[15] For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[16] This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. *See* D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.

distribution of responses,[17] the mode or median is likely the best indicator of the central tendency of responses.

In sum, the CCRC recommends the repeal of D.C. Code § 37-131.08(b). This will eliminate imprisonment penalties of up to 90 days for violations of vending regulations but leave in place civil liability under D.C. Code § 37-131.08(a) and 24 DCMR § 575 for violations.[18] This change improves the proportionality of the revised offenses.

Legislative History. The District of Columbia has regulated street vending since 1887.[19] Past regulations have been described as "vague and practically impossible to enforce."[20] After a comprehensive reform effort in 1974 proved ineffective, the District imposed a moratorium on new vending licenses in 1998.[21] Eight years later, the Department of Consumer and Regulatory Affairs ("DCRA") produced a report comparing best practices in other cities, the moratorium was temporarily lifted, and the District began passing emergency and temporary legislation to regulate vending based on the DCRA's research.[22]

The purpose of the Vending Regulation Act of 2009 was to reestablish[23] a vibrant vending program in the District that provides residents and visitors safe and varied foods, goods, and services.[24] The bill was expected to encourage entrepreneurs and bolster the District's tax rolls.[25] The Council recognized that, "historically, vending has provided a means for people to earn a living independently while gaining experience in the operation of a small business"[26] and explained that the legislation aimed to balance interests of "safety and economic opportunity."[27]

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[17] Notably, 20.5% of survey respondents selected a value of "1," the lowest possible criminal conduct, rated a class less than to "non-painful physical contact (e.g., pushing someone around)."

[18] The fine amounts appear in D.C. Code § 22-3571.01 and 16 DCMR §§ 3201 and 3313.

[19] *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 3.

[20] *See Id.* at 3, 5.

[21] *Id.* at 3.

[22] *Id.* DCRA based its research on vending programs in Boston, Atlanta, New York City, Philadelphia, Chicago, Miami, and Portland.

[23] The Afro-American Vendors Association testified:

> Street vendors have been a hallmark in Washington, D.C. since the turn of the century when the first pushcart peddlers began selling their wares around the Capitol. Most vendors are people of color who earn very little money and work under harsh conditions. They perform an important service by providing convenient and affordable goods to both Washingtonians and tourists alike. Street vendors are entrepreneurs who ask for nothing more than the opportunity to earn a decent living. Yet, the city continues to treat these small businessowners as criminals.

Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 152.

[24] *Id.* at 2.

[25] *Id.* at 11.

[26] *Id.* at 6.

[27] *Id.* at 18.

In contrast to the substantial public comment, discussion, and controversy preceding passage of the Vending Regulation Act of 2009,[28] there was minimal community input or discussion on the record regarding amendments in 2014[29] and 2015[30] that included the criminal penalties.[31] The criminal provisions were introduced as a technical correction of an inadvertent oversight in failing to provide criminal penalties in the Vending Regulation Act of 2009.[32]

On two occasions since the current laws were passed, the Council has recognized some instances of vending without a license[33] that should not be penalized. First, in 2015, the Council authorized the mayor to establish exemptions from the licensure requirement "when the public interest would be served by establishing such an exemption." The Council explained, "[P]unishing Girl Scouts for selling cookies outside of a grocery store without a license would not serve the public interest."[34] Second, in 2019, the Council unanimously introduced the "Lemonade Stand Amendment Act of 2019," which proposes an exemption for any minor who is operating on a small-scale[35] without a business license or vending site permit.[36]

However, neither the 2015 amendment nor the pending legislation exempts a child (or adult) from other requirements such as obtaining a Health Inspection Certificate, Food Protection Manager Certificate, Certified Food Protection Manager Identification Card, or food safety analyses and plans in accordance with 25 DCMR § 3701.[37] Nor do

[28] The hearing record includes 26 witnesses, 30 letters, and a petition with 305 signatures, overwhelmingly advocating for deregulation and decriminalization. *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).

[29] D.C. Act 20-354 (temporarily adding a D.C. Code § 37-131.08(b) and a 24 DCMR § 575.4 ("A person convicted of violating any provision of this chapter shall be punished by a fine of not more than three hundred dollars ($300) or by imprisonment for not more than ninety (90) days, or both, for each such offense.")).

[30] D.C. Act 21-261.

[31] Only two parties testified at the public hearing on Oct 5, 2015, both of whom supported the addition of the penalties. The first was a panel of executives from the Washington Nationals Baseball Club, and the second was a Government Witness, Melinda Bolling, the Director of DCRA.

[32] *See* Report on Bill 21-113, the "Vending Regulations Amendment Act of 2015," Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015). Notably, however, the Committee Report on the Vending Regulation Act of 2009 does not indicate a clear intent to criminalize improper vending. *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).

[33] The D.C. Code provides that "a person shall not vend from a sidewalk, roadway, or other space unless the person holds" the proper licensure, and unless the person is located in a specifically approved vending location that has been assigned to them by lottery. D.C. Code §§ 37-131.02 – 131.04. The DCMR provides that "[n]o person shall vend any product, service, or merchandise from public space in the District of Columbia without obtaining and maintaining a valid…business license for vending…issued by the [Department of Consumer and Regulatory Affairs] Director…" 24 DCMR § 502.1.

[34] *See* Report on Bill 21-113, the "Vending Regulations Amendment Act of 2015," Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015) at Page 2.

[35] "Small-scale" means selling no more than 10 types of items on a sporadic basis, and in operation no more than 100 days per year.

[36] Bill 23-398; *see also* Natalie Delgadillo, *D.C. Council Stands United On…Lemonade Stands*, DCist (July 11, 2019).

[37] *See* 24 DCMR § 502.2.

these exceptions apply to adult owners of micro-businesses. Also, neither the 2015 amendment nor the pending legislation specify what culpable mental state, if any, a person needs as to the existence of vending regulations. A person generally is not liable for reasonable mistakes of fact about the circumstances and results of one's behavior.[38] However, neither the D.C. Code nor the DCMR address these matters, and the District of Columbia Court of Appeals ("DCCA") has not yet addressed whether a person must be notified of (or otherwise familiar with) the vending rules and whether a reasonable mistake of law is an available defense.[39]

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

[39] Some street vending rules are more obvious than others. For example, 24 DCMR § 503.3 categorically prohibits peddling counterfeit goods, pornography, and drug paraphernalia. However, it also prohibits selling large luggage and carpets, which may not be as intuitive. Moreover, a person who observes someone vending a particular item in a particular location may innocently assume that they, too, may vend. *See, e.g.*, Mikaela Lefrak, *What's the Story Behind Those $5 Baseball Hats at Nationals Park?*, WAMU 88.5 (Oct 5, 2017).

D.C. Code § 48-904.07. Repeal of Enlistment of Minors to Distribute.

The Commission recommends the repeal the enlistment of minors offense, under D.C. Code § 48-904.07, which criminalizes a person who is 21 years of age or older, enlisting, hiring, contracting, or encouraging any person under 18 years of age to sell or distribute any controlled substance.

Explanatory Note and Relation to Current District Law

Current D.C. Code § 48-904.07, provides:

> Any person who is 21 years of age or over and who enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance, in violation of § 48-904.01(a), for the profit or benefit of such person who enlists, hires, contracts, or encourages this criminal activity shall be punished for sale or distribution in the same manner as if that person directly sold or distributed the controlled substance.[1]

Repeal of D.C. Code § 48-904.07 may reduce the severity of penalties a person is subject to,[2] however, it would appear to have little or no effect on the existence of criminal liability because such liability already exists in overlapping statutes in the RCC and existing D.C. Code offenses. A person engaging in conduct constituting enlistment of minors may still be held criminally liable for such conduct: as an accomplice to the minor's trafficking of a controlled substance, or for causing an innocent or irresponsible person to commit the crime; for committing criminal conspiracy to traffic a controlled substance; and/or under the separate offense of contributing to the delinquency of a minor.

First, any conduct covered by the enlistment of minors offense in which the minor actually distributes, or attempts to distribute, a controlled substance would still be criminalized under the rules of accomplice liability set forth in RCC § 22E-210.[3] Accomplice liability requires that a person assists another person with the planning or commission of conduct constituting that offense, or encourages another person to engage in specific conduct constituting that offense. Enlisting, hiring, contracting, or encouraging a minor to distribute a controlled substance satisfies this *actus reus*

[1] D.C. Code §48-904.07 (b) specifies penalties for violation of this section: "Anyone found guilty of subsection (a) of this section shall be subject to the following additional penalties: (1) Upon a first conviction the party may be imprisoned for not more than 10 years, fined not more than the amount set forth in § 22-3571.01, or both; (2) Upon a second or subsequent conviction, the party may be imprisoned for not more than 20 years, fined not more than the amount set forth in § 22-3571.01, or both."

[2] The maximum penalties for accomplice liability and crime by an innocent, both under current District law and the RCC are the same as the maximum penalties for the predicate offense. Penalties for conspiracy are half the maximum penalty of the predicate offense in the RCC. The maximum penalty for Contributing to the Delinquency of a Minor under D.C. Code § 22-811 varies from 6 months to 10 years.

[3] The revised trafficking of a controlled substance offense specifies that Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to the offense.

requirement.[4] Accomplice liability also requires that the person had the *purpose* to assist or encourage another person in the planning or commission of the conduct constituting the offense. The enlistment of minors offense requires that the person enlists, hires, contracts, or encourages a minor "for the for the profit or benefit of such person[.]"[5] In virtually every case in which a person acts for his or her own profit or benefit, that person would also have purposely assisted or encouraged the minor to distribute a controlled substance.[6] In addition to accomplice liability, any effort that results in the minor distributing or attempting to distribute a controlled substance may render the principal liable for causing crime by an innocent or irresponsible person, as set forth in RCC § 22E-211.[7]

Second, short of the minor actually distributing, or attempting to distribute, a controlled substance, there may be liability for a conspiracy to commit the underlying controlled substance offense. If a person 21 years of age or older agrees with a minor to engage in or aid the planning or commission of conduct which, if carried out, will constitute distribution of a controlled substance or attempted distribution of a controlled substance, and either party engages in an overt act in furtherance, criminal conspiracy liability would apply.

Third, short of the minor actually distributing, or attempting to distribute, a controlled substance, a person who merely encourages or solicits minors to engage in such conduct appears to be liable under the separate contributing to the delinquency of minors offense.[8] D.C. Code § 22-811 makes it a crime for "an adult being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor" to possess a controlled substance[9] or to violate any criminal law of the District of Columbia.[10]

[4] *Outlaw v. United States*, 604 A.2d 873, 875 (D.C. 1992) (holding that acting as an aider and abettor to a minor's distribution of a controlled substance is sufficient to satisfy the elements of the enlistment of minors offense).
[5] D.C. Code § 48-904.07.
[6] Under RCC § 22E-210 a person may be convicted as an accomplice even if the principal has not been prosecuted or convicted, has been convicted of a different offense or degree of an offense, or has been acquitted. Even if the minor who distributes the controlled substance is never prosecuted or convicted for a criminal offense due to being a juvenile, accomplice liability may still apply to the person who encourages the minor to distribute a controlled substance.
[7] The revised trafficking of a controlled substance offense specifies that Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to the offense.
[8] D.C. Code § 22-811.
[9] D.C. Code § 22-811 (a)(2).
[10] D.C. Code § 22-811 (a)(5), (7).