Report #71 -
Terrorism Offenses

(First Draft)

SUBMITTED FOR PUBLIC COMMENT
October 5, 2021

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Report contains draft revisions to certain District criminal statutes. These draft revisions are part of the D.C. Criminal Code Reform Commission's (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

Written comments on the revisions in this report are welcome from government agencies, criminal justice stakeholders, and the public. Comments should be submitted via email to ccrc@dc.gov with the subject line "Comments on Report #71." The Commission will review all written comments that are timely received. The deadline for the written comments on this Report #71 – *Terrorism Offenses*, is November 16, 2021 (six weeks from the date of issue). Written comments received after November 16, 2021 may not be reviewed or considered in the agency's next draft (if another draft is deemed necessary) or final recommendations.

This Report has two main parts: (1) draft statutory text for inclusion in the Revised Criminal Code (RCC) as recommended by the CCRC on March 31, 2021; and (2) commentary on the draft statutory text.

The Report's draft statutory text is designed for inclusion in the RCC (online at https://ccrc.dc.gov/node/1531361) and uses the system of statutory numbering, the general provisions, definitions, penalty classification system, and other relevant aspects of the RCC as recommended by the CCRC on March 31, 2021. (Please note that the agency's September 30, 2021 proposed legislation, the "Revised Criminal Code Act of 2021" (RCCA), uses a different system of statutory numbering and makes various non-substantive changes as compared to the RCC.)

The Report's commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and may address the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Appendices to this report are:

- Appendix A – Black Letter Text of Draft Revised Statutes. (No commentary.)
- Appendix B – Redlined Text Comparing Draft Revised Statutes with Current D.C. Code Statutes. (No commentary.)
- Appendix C – Special Conforming Amendments.
- Appendix D – Other Background Information for Reviewers.

A copy of this document and other work by the CCRC is available on the agency website at www.ccrc.dc.gov.

Report #71 – Terrorism Offenses
Draft RCC Text and Commentary
Corresponding D.C. Code statutes in {}

RCC § 22E-701. Generally Applicable Definitions.

"Biological agent" means any microorganism, virus, infectious substance, or biological product that may be bioengineered, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, capable of causing:

(A) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(B) Deterioration of food, water, equipment, supplies, or material of any kind; or

(C) Deleterious alteration of the environment.

Explanatory Note. The RCC definition of "biological agent" replaces the current definition of "biological agent" in D.C. Code § 22-3152, applicable to provisions in Chapter 31B, Terrorism. The RCC definition of "biological agent" is used in the revised offense of Mass Destruction of the Environment or Water Supply,[1] as well as the revised definitions[2] of "vector" and "weapon of mass destruction" used in multiple terrorism offenses.

Relation to Current District Law. The RCC definition of "biological agent" is identical to the statutory definition under current law,[3] except for the replacement of the phrase "engineered as a result of biotechnology" with the clearer term "bioengineered."

"Nuclear material" means material containing any:

(A) Plutonium;

(B) Uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;

(C) Uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or

(D) Uranium 233.

Explanatory Note. The RCC definition of "nuclear material" replaces the current definition of "nuclear material" in D.C. Code § 22-3152, applicable to provisions in Chapter 31B, Terrorism. The RCC definition of "nuclear material" is used in the revised offense of Mass Destruction of the Environment or Water Supply,[4] as well as the revised definition[5] of "weapon of mass destruction" used in multiple terrorism offenses.

Relation to Current District Law. The RCC definition of "nuclear material" is identical to the statutory definition under current law,[6] except the redundant phrase "Enriched uranium, defined as" is eliminated from the beginning of paragraph (C).

[1] RCC § 22E-1705.
[2] RCC § 22E-701.
[3] D.C. Code § 22-3152.
[4] RCC § 22E-1705.
[5] RCC § 22E-701.
[6] D.C. Code § 22-3152.

"Toxic or poisonous chemical" means any chemical which, through its chemical action on life processes, can cause death, permanent incapacitation, or permanent harm to another living organism.

Explanatory Note. The RCC definition of "toxic or poisonous chemical" replaces the current definition of "toxic or poisonous chemical" in D.C. Code § 22-3152, applicable to provisions in Chapter 31B, Terrorism. The RCC definition of "toxic or poisonous chemical" is used in the revised offense of Mass Destruction of the Environment or Water Supply,[7] as well as the revised definition[8] of "weapon of mass destruction" used in multiple terrorism offenses.

Relation to Current District Law. The RCC definition of "toxic or poisonous chemical" is nearly identical to the statutory definition under current law.[9] However, the revised definition clearly changes current District law in one way.

The revised definition incorporates chemicals harmful to plants and animals, not just humans. The current definition of "toxic or poisonous chemical" in D.C. Code § 22-3152 makes no reference to chemicals harmful to plants and animals, and there is no case law or legislative history as to the exclusion of chemicals harmful to plants and animals. In contrast the revised definition includes chemicals harmful to any living organism. This is consistent with the current D.C. Code § 22-3152 and RCC § 22E-701 definitions for "biological agent" which in relevant part refer to agents "capable of causing[] death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism." The revised definition would include, for example, insecticides and herbicides that are not harmful to humans. Notably, however, the practical effect of this expansion to the definition of "toxic or poisonous chemical" is offset by a corresponding narrowing of the RCC § 22E-701 definition of "weapon of mass destruction" to items causing harm to a person. The broader definition of "toxic or poisonous chemical" allows for use of the term in RCC § 22E-1705, mass destruction of the environment or water supply. This change improves the consistency of the revised statutes.

"Toxin" means the toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule, whatever its origin or method of production, including:

(A) Any poisonous substance or biological product that may be bioengineered or produced by a living organism; or

(B) Any poisonous isomer or biological product, homolog, or derivative of such a substance;

Explanatory Note. The RCC definition of "toxin" replaces the current definition of "toxin" in D.C. Code § 22-3152, applicable to provisions in Chapter 31B, Terrorism. The RCC definition of "toxin" is used in the revised offense of Mass Destruction of the Environment or Water Supply,[10] as well as the revised definitions[11] of "vector" and "weapon of mass destruction" used in multiple terrorism offenses.

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[7] RCC § 22E-1705.
[8] RCC § 22E-701.
[9] D.C. Code § 22-3152.
[10] RCC § 22E-1705.
[11] RCC § 22E-701.

Relation to Current District Law. The RCC definition of "toxin" is identical to the statutory definition under current law,[12] except for the replacement of the phrase "engineered as a result of biotechnology" with the clearer term "bioengineered" and the insertion of the conjunction "or" in paragraph (B) to address an apparent error[13] in the legislative drafting.

"Unit of government" means:

(A) The office of the President of the United States;
(B) The United States Congress;
(C) Any federal executive department or agency;
(D) The office of the Mayor of the District of Columbia;
(E) Any executive department or agency of the District of Columbia, including any independent agency, board, or commission;
(F) The Council of the District of Columbia;
(G) The Superior Court of the District of Columbia;
(H) The District of Columbia Court of Appeals;
(I) The United States Court of Appeals for the District of Columbia;
(J) The United States District Court for the District of Columbia; or
(K) The Supreme Court of the United States.

Explanatory Note. The RCC definition of "unit of government" replaces the current definition of "unit of government" in D.C. Code § 22-3152, applicable to provisions in Chapter 31B, Terrorism. The RCC definition of "unit of government" is used in the revised offense of Act of Terrorism.[14]

Relation to Current District Law. The RCC definition of "unit of government" is identical to the statutory definition under current law.[15]

"Vector" means a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host.

Explanatory Note. The RCC definition of "vector" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "vector" is used in the revised definition[16] of "weapon of mass destruction" used in multiple terrorism offenses.

Relation to Current District Law. The RCC definition of "vector" is new[17] and does not itself substantively change current District law.

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[12] D.C. Code § 22-3152.

[13] As currently drafted, without an "or," paragraph (A) nonsensically refers to "biotechnology produced by a living organism": "Any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism." The beginning of the definition, moreover, makes clear that "toxin" is intended to cover naturally-occurring (non-engineered) materials. Legislative history provides no discussion of the language choice for this definition.

[14] RCC § 22E-1701.

[15] D.C. Code § 22-3152.

[16] RCC § 22E-701.

[17] The phrasing of the definition is identical to 18 U.S.C. § 178 (defining terms relevant to biological weapons).

As applied in the revised definition of "weapon of mass destruction," the term "vector" may substantively change current District law. The current D.C. Code § 22–3152(12)(D) definition of a "weapon of mass destruction," with respect to biological agents or toxins, refers only to a "*weapon* that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin." There currently is no provision for treating an unweaponized biological agent or toxin as a weapon of mass destruction, regardless of intent, and there is no definition of what constitutes a "weapon" in this context. To resolve this ambiguity, the revised statute specifically includes a vector as a *per se* type of weapon for a biological agent or toxin. A living organism or molecule that is, per the rest of the the "weapon of mass destruction" reference to a "biological agent or toxin "designed, planned for use, or otherwise intended to cause death or serious bodily injury" should be treated like more mechanical, inanimate weapons. This change clarifies and may reduce a possible gap in liability in the revised statutes.

"Weapon of mass destruction" means:

- **(A) An explosive, incendiary, or poison gas weapon that is designed, planned for use or otherwise used to cause death or serious bodily injury to a person, or property damage, including a:**
  - **(i) Bomb;**
  - **(ii) Grenade;**
  - **(iii) Rocket having a propellant charge of more than four ounces;**
  - **(iv) Missile having an explosive or incendiary charge of more than one-quarter ounce;**
  - **(v) Mine; or**
  - **(vi) Device similar to any of the devices described in the preceding sub-sub-paragraphs (i)-(vi);**
- **(B) Any type of weapon other than a shotgun which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter;**
- **(C) Any combination of parts designed or planned for conversion into a device described in subparagraphs (A) and (B) of this paragraph and from which such a device may be readily assembled;**
- **(D) A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a toxic or poisonous chemical or its precursors;**
- **(E) A weapon, including a vector, that is designed, planned for use or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a biological agent or toxin; or**
- **(F) A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material.**

Explanatory Note. The RCC definition of "weapon of mass destruction" replaces the current definition of "weapon of mass destruction" in D.C. Code § 22-3152,

applicable to provisions in Chapter 31B, Terrorism. The RCC definition of "weapon of mass destruction" is used in the revised offenses of Material Support for an Act of Terrorism,[18] Manufacture or Possession of a Weapon of Mass Destruction,[19] and Use, Dissemination, or Detonation of a Weapon of Mass Destruction.[20]

Relation to Current District Law. *The revised definition of "weapon of mass destruction" clearly changes current District law in one main way.*

The revised definition specifically includes only explosive, incendiary, or poisonous gas weapons, and limits such rockets and missiles to those with specified amounts of propellant or explosive or incendiary charges. The current D.C. Code definition in D.C. Code § 22-3152(12)(A) refers broadly to: "Any destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury, including: An explosive, incendiary, or poison gas: bomb; grenade; rocket; missile; mine; or device similar to any of the devices described in the preceding clause." However, the term "destructive device" in this definition is not itself defined, and it is unclear what additional items are included. Legislative history gives no indication as to the intended scope or meaning of "destructive" device in the definition of "weapon of mass destruction." Notably, however, the D.C. Code defines "destructive device" for other purposes in D.C. Code § 7-2501.01(7) and references explosive, incendiary, or poison gas weapons and similar items, as well as smooth bore projectile weapons separately listed listed in D.C. Code § 22-3152(12)(A).[21] In contrast, the revised statute refers directly to explosive, incendiary, or poisonous gas weapons rather than to an undefined "destructive device," and specifically includes rockets and missiles as such weapons only when the rocket has more than four ounces of propellant or the missile has a charge of more than one-quarter ounce. The revised definition more closely follows the scope of the federal definition of a "destructive device"[22] that is specifically referenced in the

[18] RCC § 22E-1702.
[19] RCC § 22E-1703.
[20] RCC § 22E-1704.
[21] *See* D.C. Code § 7-2501.01 (7) ("Destructive device" means: (A) An explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device; (B) Any device by whatever name known which will, or is designed or redesigned, or may be readily converted or restored to expel a projectile by the action of an explosive or other propellant through a smooth bore barrel, except a shotgun; (C) Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known; (D) Repealed. (E) Any combination of parts designed or intended for use in converting any device into any destructive device; or from which a destructive device may be readily assembled; provided, that the term shall not include: (i) Any pneumatic, spring, or B-B gun which expels a single projectile not exceeding .18 inch in diameter; (ii) Any device which is neither designed nor redesigned for use as a weapon; (iii) Any device originally a weapon which has been redesigned for use as a signaling, line throwing, or safety device; or (iv) Any device which the Chief finds is not likely to be used as a weapon.").
[22] 18 U.S.C.A. § 921(a)(4) ("The term "destructive device" means--(A) any explosive, incendiary, or poison gas--
(i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either designed or intended for use in converting any

federal definition of a "weapon of mass destruction,"[23] as well as D.C. Code § 7-2501.01(7)(A). The exclusion of extremely small rockets and missiles prevents the categorical inclusion of certain fireworks and other less dangerous items. This change improves the clarity and proportionality of the revised statutes.

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

First, the revised definition includes a category of weapons with a bore over one-half inch in diameter. The current D.C. Code definition of "weapon of mass destruction" refers, in relevant part, to "a mortar, cannon, or artillery piece." However, the terms are not defined, and it is unclear what items are within the scope of the language. Legislative history gives no indication as to the intended scope or meaning of "mortar, cannon, or artillery piece" in the definition of "weapon of mass destruction." Moreover, another portion of the current D.C. Code definition of "weapon of mass destruction" in sub-paragraph (12)(B) appears to expand the meaning of a "mortar, cannon, or artillery piece" by specifically referring to "an object similar to or used to achieve the same destructive effect of [a mortar, cannon, or artillery piece]." To resolve this ambiguity, the revised statute replaces the current (12)(A)(ii) and (12)(B) and refers, in relevant part, only to: "Any type of weapon other than a shotgun which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter." The revised definition more closely follows the federal definition of a "destructive device"[24] that is specifically

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device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.").

[23] 18 U.S.C.A. § 2332a.

[24] 18 U.S.C.A. § 921(a)(4) ("The term "destructive device" means--(A) any explosive, incendiary, or poison gas--
(i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.").

referenced in the federal definition of a "weapon of mass destruction."[25] The description of large-bored projectile weapons (other than shotguns) clearly describes items that may be intended by the current reference to a "mortar, cannon, or artillery piece," but may also include other large-bore weapons depending on the interpretation of the latter. This change improves the clarity of the revised statutes.

Second, the revised definition includes explosive, incendiary, or poison gas weapons that are intended to cause property damage. The current D.C. Code definition of "weapon of mass destruction" in sub-paragraph (12)(B) appears to expand the meaning of a "device that is designed, intended, or otherwise used to cause death or serious bodily injury" in sub-paragraph (12)(A) by specifically including in the definition "an object similar to or used to achieve the same destructive effect of any of the devices described in subparagraph (A) of this paragraph." The reference to "destructive effect" without a reference to "designed, intended, or otherwise used to cause death or serious bodily injury" may indicate the inclusion of weapons intended for use against property only. There is no case law on point, however the repeated reference to "a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property" in current D.C. Code § 22–3154 (manufacture or possession of a weapon of mass destruction) and current D.C. Code § 22–3155 (use, dissemination, or detonation of a weapon of mass destruction) indicates that the legislative intent was not to exclude from the term "weapon of mass destruction" items that are intended only for property destruction. To resolve this ambiguity, the revised statute specifically refers in paragraph (A) to a weapon that is "designed, planned for use or otherwise used to cause death or serious bodily injury to a person, or property damage…." Specific inclusion of weapons designed, planned for use or otherwise used to cause property damage is consistent with other current D.C. Code and RCC terrorism offenses. This change clarifies the revised statutes.

Third, the revised definition includes weapons involving release not only of a toxic or poisonous chemical, but the precursors of a toxic or poisonous chemical. The current D.C. Code definition makes no reference to chemical precursors of a toxic or poisonous chemical, and there is no mention of the subject in the legislative history. It is unclear whether the current definition includes a weapon designed to release a precursor that, in the presence of rain or another reactant, would form a toxic or poisonous chemical. To resolve this ambiguity, the revised definition specifically includes weapons that release not only a toxic or poisonous chemical, but the precursors of a toxic or poisonous chemical. The revised definition more closely follows the federal definition of a "weapon of mass destruction" which refers in relevant part to "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors."[26] It is unclear why a chemical precursor, released with the specified intent, would not be treated equivalent to other chemicals that already constitute a "toxic or poisonous chemical." This change improves the clarity and may improve the proportionality of the revised statutes.

[25] 18 U.S.C.A. § 2332a.
[26] 18 U.S.C.A. § 2332a.

Fourth, the revised definition specifically includes reference to a vector that is designed, planned for use or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin. The current D.C. Code § 22–3152(12)(D) definition of a "weapon of mass destruction," with respect to biological agents or toxins, refers only to a "*weapon* that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin." There currently is no provision for treating an "unweaponized" biological agent or toxin as a weapon of mass destruction, regardless of intent, and there is no definition of whether a living organism may constitute a "weapon" in this context. To resolve this ambiguity, the revised statute specifically includes a vector as a *per se* type of weapon for a biological agent or toxin. A living organism or molecule that is, per the rest of the definition's reference to a "biological agent or toxin," "designed, planned for use, or otherwise used to cause death or serious bodily injury" should be treated similarly to more mechanical, inanimate weapons. This change clarifies and may reduce a possible gap in liability in the revised statutes.

Fifth, when referencing weapons causing "death or serious bodily injury," the revised definition generally specifies that such death or serious bodily injury must be "to a person." The current D.C. Code § 22–3152(12) definition of a "weapon of mass destruction" refers typically to the weapons causing "death or serious bodily injury" without clarification as to whether non-humans are included. Some terms used in the definition of a "weapon of mass destruction" are themselves defined in a way that is explicitly limited to items harmful to humans while other terms explicitly incorporate harm to animal or plant life.[27] There is no case law or legislative history on point. Resolving this ambiguity, except for paragraph (A) which specifically includes "property damage," the revised definition is limited to weapons "designed, planned for use, or otherwise used to cause death or serious bodily injury *to a person*…" and do not include plants or animals or other organisms. The use of biological agents, toxins, toxic or poisonous chemicals, and radioactive or nuclear materials to damage plants and animals is addressed separately in RCC § 22E-1705, mass destruction of the environment or water supply. Also, first degree criminal damage to property under RCC § 22E-2503(a), which includes animals and plants, is a predicate for RCC § 22E-1701, act of terrorism. This change improves the clarity and organization of the revised statutes.

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

First, throughout the revised definition, reference is made to a "planned for use" or "planned" instead of "intended." Although undefined in the current definition of "weapon of mass destruction," the term "intended" has a special, defined meaning under RCC § 22E-701 such that the term's inclusion would bring an unintended meaning to the following portions of the definition. The phrase "planned for use" is functionally equivalent to the ordinary meaning of "intended" and is meant to be consistent with the current (undefined) D.C. Code reference to "intended."

[27] *Compare,* D.C. Code § 22–3152(9) (defining "toxic or poisonous chemical" in terms of harm to "humans") *with* D.C. Code § 22–3152(2) defining "biological agent" in terms of causing "death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism").

Second, the revised definition refers in paragraph (C) to "Any combination of parts designed or planned for conversion into a device described in … and from which such a device may be readily assembled." This language replaces the corresponding language in the current definition's sub-paragraph (12)(A)(iii): "Any combination of parts either designed or intended for use in converting any device into a device described in … and from which such device may be readily assembled." The updated language more clearly excludes from the definition of a weapon of mass destruction tools (e.g. a screwdriver) that are intended to be used for converting parts into a weapon of mass destruction but are not constituent parts of the weapon. Tools of conversion are not as inherently dangerous as the constituent parts of a weapon of mass destruction.

RCC § 22E-1701. Act of Terrorism.

(a) *First Degree.* An actor commits a first degree act of terrorism when the actor:
  (1) In fact, commits murder under RCC § 22E-1101;
  (2) With the purpose, in whole or part, of:
    (A) Intimidating or coercing a significant portion of the civilian population of the District of Columbia or the United States; or
    (B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(b) *Second Degree.* An actor commits a second degree act of terrorism when the actor:
  (1) In fact, commits:
    (A) Manslaughter under RCC § 22E-1102;
    (B) First degree assault under RCC § 22E-1202(a); or
    (C) Kidnapping under RCC § 22E-1401;
  (2) With the purpose, in whole or part, of:
    (A) Intimidating or coercing a significant portion of the civilian population of the District of Columbia or the United States; or
    (B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(c) *Third Degree.* An actor commits a third degree act of terrorism when the actor:
  (1) In fact, commits:
    (A) Arson under RCC § 22E-2501; or
    (B) First degree criminal damage to property under RCC § 22E-2503(a);
  (2) With the purpose, in whole or part, of:
    (A) Intimidating or coercing a significant portion the civilian population of the District of Columbia or the United States; or
    (B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(d) *No hate crime enhancement*. Notwithstanding RCC § 22E-608, a hate crime penalty enhancement does not apply to an offense under this section.

(e) *Penalties*.
  (1) First degree act of terrorism is a Class 1 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree act of terrorism is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree act of terrorism is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The term "purpose" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" and "unit of government" have the meaning specified in RCC § 22E-701.

Explanatory Note. *This section establishes the act of terrorism offense for the Revised Criminal Code (RCC). The offense is graded into three degrees, depending on the seriousness of the harm committed. All degrees require either a purpose to intimidate or coerce a significant portion of the civilian population, or influence the policy or conduct of a unit of government by intimidation or coercion. In combination with RCC § 22E-1702, material support for an act of terrorism, the offense replaces the acts of terrorism offense in D.C. Code § 22-3153.*

Subsection (a) specifies the requirements for the first degree act of terrorism offense.

Paragraph (a)(1) requires that a person commit murder as described in RCC § 22E-1101. The commission of any type of murder under RCC § 22E-1101 suffices for liability, first or second degree murder, enhanced or unenhanced. A person need not be convicted of such a murder offense,[28] but the elements of murder must be proven. The term "in fact" is defined in RCC § 22E-701 and here indicates that there is no additional culpable mental state requirement for the murder beyond that which is specified in the murder statute, RCC § 22E-1101.

Paragraph (a)(2) requires that a person engage in the conduct described in paragraph (a)(1) with at least one of two specified purposes. The first prohibited purpose is that the person must act to intimidate or coerce a significant portion of the civilian population of the District of Columbia or the United States. Coercion[29] differs from intimidation in that the former involves some sort of request, while the latter does not. Consistent with prior legislative history,[30] the revised statute is meant to capture violent acts that affect a substantial number of people within the population, or entire subsets or discrete groups. The revised statute is not meant to apply to crimes for which the District already has criminal penalties,[31] and paragraph (d) bars application of a hate crime penalty enhancement (which similarly targets conduct directed at a group because of prejudice) to the statute. The second prohibited purpose is that the person must act to influence the policy or conduct of a unit of government by intimidation or coercion. The

[28] For example, a murder charge may not be brought or may be dropped, but if the elements of murder are sufficiently proven the requirement of paragraph (a)(1) of act of terrorism is proven.

[29] For comparison, see commentary on the similar term "coercive threat," RCC § 22E-701.

[30] Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 17 ("By using the term "a significant portion of the civilian population," the Committee intends to capture violent acts that affect not only the entire populations of the District or of the United States, but also a substantial number of people within those populations, or entire subsets, discreet groups, or communities of people. This would include, for example, violent acts that are meant to intimidate or coerce the District's Jewish or African American communities, either the entirety of those communities or a portion of them. A further example of a significant portion of the population could be a portion of the community with an identifiable political association, for example, republicans or District-based supporters of a Palestinian state. This language is not, on the other hand, meant to apply to victims of non-terrorist violent crime, crime for which the District already has criminal penalties. For example, "a significant portion of the civilian population" is not meant to refer to a group of individuals standing on a corner, a gang targeted for its role in the drug trade, a group of bank customers present during a bank robbery or a particular neighborhood plagued by a string of serial robberies or murders.").

[31] *Id.*

term "unit of government" is defined in RCC § 22E-701 and refers to specified entities in the legislative, executive, and judicial branches.

In paragraph (a)(2) "purpose," a term defined at RCC § 22E-206, means that the actor must consciously desire to either intimidate or coerce a significant portion of the civilian population or influence the policy or conduct of a unit of government by intimidation or coercion. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that a portion of the civilian population or a government unit was intimidated, coerced, or influenced, only that the actor consciously desired to cause such a result. The phrase "in whole or part"[32] clarifies that a person is still liable if they have additional purposes for their conduct besides those specified in paragraph (a)(2).

Subsection (b) specifies the requirements for the second degree act of terrorism offense. The second degree requirements are identical to those for first degree except that, instead of murder, a person must be found to have committed manslaughter under RCC § 22E-1102, first degree assault under RCC § 22E-1202(a), or kidnapping under RCC § 22E-1401.

Subsection (c) specifies the requirements for the third degree act of terrorism offense. The third degree requirements are identical to those for first degree except that, instead of murder, a person must be found to have committed arson under RCC § 22E-2501 or first degree criminal damage to property under RCC § 22E-2503(a).

Subsection (d) specifies that, notwithstanding RCC § 22E-608, a hate crime penalty enhancement does not apply to an offense under this section. Like the act of terrorism offense's added punishment for crimes committed with the purpose of intimidating or coercing a significant portion of the civilian population, the hate crime penalty enhancement similarly targets conduct directed at a group because of prejudice.

Subsection (e) provides the penalties for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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

Relation to Current District Law. *The revised act of terrorism statute clearly changes current District law in four main ways.*

First, the predicates for liability under the revised act of terrorism statute do not include certain restraint of another person's freedom of movement, certain types of felony murder, and other types of conduct due to changes in other revised statutes that are predicates for an act of terrorism. The current D.C. Code § 22–3153 acts of terrorism statute and the definition of "specified offense" in current D.C. Code § 22–3152 state which offenses are predicates (including the offenses' statutory citations).[33] These

[32] *See also*, commentary on the phrase "in whole or part" in 22E-608, Hate Crime Penalty Enhancement.

[33] D.C. Code § 22–3152(8) ("'Specified offense' means: (A) Section 22-2101 (Murder in the first degree); (B) Section 22-2102 (Murder in the first degree — placing obstructions upon or displacement of railroads); (C) Section 22-2106 (Murder of law enforcement officer or public safety employee); (D) Section 22-2103 (Murder in the second degree); (E) Section 22-2105 (Manslaughter); (F) Section 22-2001 (Kidnapping and conspiracy to kidnap); (G) Section 22-401 (Assault with intent to kill only); (H) Section 22-406 (Mayhem or maliciously disfiguring); (I) Section 22-301 (Arson); (J) Section 22-303 (Malicious burning, destruction,

predicate offenses are the current D.C. Code murder, manslaughter, kidnapping, assault with intent to kill, mayhem, arson, and destruction of property over $500,000 in value. In contrast, the revised act of terrorism statute refers to predicate offenses in the RCC which sometimes are narrower that the current D.C. Code predicate offenses. For example, the revised act of terrorism statute includes as a predicate only RCC 22E-1401, kidnapping, not RCC § 22E-1402, criminal restraint. Also, the elements of the RCC § 22E-1101, murder, statute have changed to narrow liability for felony murder as compared to the current D.C. Code statute. The RCC predicate offenses, however, largely track the predicate offenses under the current D.C. Code. These changes improve the clarity and consistency of the revised statutes.

Second, the revised statute relies on the general attempt and conspiracy statute to define what conduct constitutes an attempt or conspiracy and the appropriate penalty. The current D.C. Code § 22–3153 acts of terrorism statute does not address attempts or conspiracy but the definition of "specified offense" in current D.C. Code § 22–3152 specifically provides liability for an attempt or conspiracy to commit any of the other enumerated offenses. The offense-specific attempt and conspiracy provisions incorporated into D.C. Code § 22-3153 do not contain any language specifying what must be proven for the attempt or conspiracy, or how that proof might or might not differ from the general attempt and conspiracy provisions in D.C. Code §§ 22–1803 and 22–1805a, respectively. There is no District case law on point. However, D.C. Code § 22-3153 does specify the same imprisonment maximums regardless of whether the predicate for the act of terrorism charge was a completed offense or an attempt or conspiracy. Such attempt and conspiracy penalties differ sharply from the 5 year and 15 year penalties established for these predicate crimes of violence under D.C. Code §§ 22–1803 and 22–1805a, respectively. In contrast, the revised act of terrorism statute relies on the RCC General Part's attempt provisions (RCC § 22E-301) and conspiracy provisions (§ 22E-303) to establish the requirements to prove an attempt or conspiracy and the applicable penalties, consistent with other offenses. The penalties in the RCC general attempt and conspiracy provisions provide penalties at ½ the maximum imprisonment sentence for all revised offenses, including murder and other major felonies. There is no clear rationale for why this offense should not differentiate the penalties for completed offenses and attempted or conspiracy like other offenses. This change improves the consistency and proportionality of revised statutes.

Third, the revised statute is graded into three degrees based on the severity of the predicate offense. The current D.C. Code § 22–3153 acts of terrorism statute has no gradations but utilizes 5 different penalties according to the severity of the predicate offense.[34] In contrast, the revised statute differentiates the penalty grading by distinguishing murder from other serious felonies and both from property crimes. While an act of terrorism involving property is a serious crime, it is substantially less serious

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or injury of another's property, if the property is valued at $500,000 or more); or (K) An attempt or conspiracy to commit any of the offenses listed in subparagraphs (A) through (J) of this paragraph.")

[34] D.C. Code § 22–3153 (Subsections (a) and (b) provide for life without the possibility of release; subsections (c), (d), and (e) provide for life imprisonment; subsections (f) and (j) provides for 30 years maximum imprisonment; subsections (g), (h), (i), and (k) provide for 20 years maximum imprisonment; subsection (l) provides for 15 years maximum imprisonment.).

than an act against a person. This change improves the proportionality of the revised statutes.

Fourth, the revised statute specifically bars application of a hate crime penalty enhancement to the offense. Current D.C. Code §§ 22–3701 and 22-3703 provide a bias-related crime penalty enhancement to any crime committed because of prejudice against a perceived characteristic of an individual or group. There is no statutory limitation on application of the bias-related crime enhancement to an act of terrorism under D.C. Code § 22–3152. In contrast, the revised statute specifically bars application of a hate crime penalty enhancement under RCC § 22E-608 to the act of terrorism statute. The social interest in providing greater punishment for targeting a segment of the population under the hate crime enhancement is substantially the same as under the act of terrorism statute.[35] This change improves the proportionality of the revised statutes.

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

The revised offense requires a "purpose" culpable mental state for whether the accused's conduct constituted an act of terrorism. The current D.C. Code § 22–3153 acts of terrorism statute does not specify a culpable mental state for elements of the offense, however the definition of an "act of terrorism" in current D.C. Code § 22–3152 uses the word "intended" without further defining the meaning of that term.[36] There is no case law on point. Legislative history says that the offense was intended to "capture violent acts that are committed with the specific intent of purposely inspiring fear and intimidation."[37] Resolving these ambiguities, the revised statute requires a "purpose" culpable mental state as to the statute. 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 current District law.

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[35] *See, e.g.,* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 17 ("By using the term "a significant portion of the civilian population," the Committee intends to capture violent acts that affect not only the entire populations of the District or of the United States, but also a substantial number of people within those populations, or entire subsets, discreet groups, or communities of people. This would include, for example, violent acts that are meant to intimidate or coerce the District's Jewish or African American communities, either the entirety of those communities or a portion of them. A further example of a significant portion of the population could be a portion of the community with an identifiable political association, for example, republicans or District-based supporters of a Palestinian state.").

[36] D.C. Code § 22–3152(1) "Act of terrorism" means an act or acts that constitute a specified offense as defined in paragraph (8) of this section and that are intended to: (A) Intimidate or coerce a significant portion of the civilian population of: (i) The District of Columbia; or (ii) The United States; or (B) Influence the policy or conduct of a unit of government by intimidation or coercion.").

[37] Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 17 ("By 'intimidate or coerce' a population, the Committee intends to capture violent acts that are committed with the specific intent of purposely inspiring fear and intimidation among a population, in much the same way Americans have been affected by the September 11, 2001 attacks. As noted in the beginning of this report, the effects of terrorist crimes reach beyond the immediate victims and their families to affect broader populations of people. The purpose of Title I of this legislation is to punish perpetrators of terrorist crimes who have an agenda that goes beyond the specified offense itself and that perpetuates a broader attempt to intimidate a population or to influence the policy or conduct of government.").

The revised statute addresses the provision of material support or resources and solicitation of material support or resources for an act of terrorism as a separate offense. The current D.C. Code § 22–3153 acts of terrorism statute includes providing material support or resources, or soliciting material support or resources for an act of terrorism in the statute. However, in the RCC such conduct is addressed as a separate offense, § 22E-1702, material support for an act of terrorism. This change improves the clarity and organization of the revised statutes.

RCC § 22E-1702. Material Support for an Act of Terrorism.

(a) *Offense.* An actor commits material support for an act of terrorism when the actor:
  (1) Knowingly provides, or commands, requests, or tries to persuade, any person to provide, material support or resources;
  (2) With intent that such material support or resources will be used, in whole or in part:
    (A) To assist the planning or commission of conduct constituting an act of terrorism under RCC § 22E-1701; or
    (B) To flee after committing an act of terrorism under RCC § 22E-1701.

(b) *Uncommunicated criminal solicitation.* It is immaterial under subsection (a) of this section that the planned recipient of the actor's command, request, or efforts at persuasion fails to receive the message, if the actor does everything they plan to do to transmit the message to the planned recipient.

(c) *Penalties.*
  (1) Material support for an act of terrorism is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Merger.* A conviction for material support for an act of terrorism merges with any other conviction for being an accomplice to an act of terrorism under RCC § 22E-1701 arising from the same act or course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(d) *Definitions*.
  (1) The terms "knowingly" and "intent" have the meaning specified in RCC § 22E-206; the term "actor" has the meaning specified in RCC § 22E-701; and
  (2) In this section, "material support or resources" means:
    (A) Expert services or assistance;
    (B) Currency, financial securities or other monetary instruments, financial services, lodging, training, false documentation or identification, equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets; or
    (C) A weapon of mass destruction.

Explanatory Note. *This section establishes the material support for an act of terrorism offense for the Revised Criminal Code (RCC). The offense provides liability for a particular means of being an accomplice to an act of terrorism, by providing or soliciting another person to provide material support or resources for an act of terrorism. Unlike the general RCC accomplice statute and the general RCC solicitation statute, a knowing culpable mental state is sufficient for liability. In combination with RCC § 22E-1701, act of terrorism, the offense replaces the acts of terrorism offense in D.C. Code § 22-3153.*

Subsection (a) specifies the requirements for the material support for an act of terrorism offense.

Paragraph (a)(1) requires that a person knowingly provides or commands, requests, or tries to persuade any person to provide material support or resources. The term "material support or resources" is a defined term under subsection (d) of this section and includes services or assistance, currency, lodging, weapons and transportation. The phrase "commands, requests, or tries to persuade" is identical to the language in RCC § 22E-302(a)(1), the general solicitation statute, and the scope of the term is meant to be interpreted consistent with that provision. "Knowingly" is a defined term in RCC § 22E-206 and applied here means that the person must be practically certain that their conduct provides or commands, requests, or tries to persuade any person to provide material support or resources. [38]

Paragraph (a)(2) requires that the person act with intent that the material support or resources referenced in paragraph (a)(1) will be used, in whole or part, for one of two types of conduct. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the material support or resources would be used for one of the two types of specified conduct. 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 one of the two specified types of conduct in sub-paragraphs (a)(2)(A) or (a)(2)(B) actually occurred, just that the defendant believed to a practical certainty that the conduct would occur.

Sub-paragraph (a)(2)(A) specifies that one of the two types of conduct that a person must intend the material support or resources to be used for in order to be held liable for the offense is the assistance or commission of conduct constituting an act of terrorism under RCC § 22E-1701. The language "planning or commission" is identical to language in the general RCC accomplice statute, RCC § 22E-210, and the scope of the term is meant to be interpreted consistent with that provision. [39] Per the rule of interpretation in RCC § 22E-207, the term "with intent" in paragraph (a)(2) also applies to this sub-paragraph. It is not necessary to prove that the material support or resources actually were used to assist the planning or commission of an act of terrorism, just that the defendant believed to a practical certainty that the material support or resources would be used in such a manner.

Sub-paragraph (a)(2)(B) specifies that the alternative of the two types of conduct that a person must intend the material support or resources to be used for in order to be held liable for the offense is to flee after conduct constituting an act of terrorism under RCC § 22E-1701. Per the rule of interpretation in RCC § 22E-207, the term "with intent" in paragraph (a)(2) also applies to this sub-paragraph. It is not necessary to prove that the material support or resources actually were used to flee an act of terrorism, just that the

[38] *See also* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 17-18 ("The language "with the purpose or knowledge that such material support or resources will be used, in whole or in part, to plan . . . an act of terrorism" is included in these definitions to insure that those who unwittingly provide support for individuals and organizations, without such knowledge, will not be penalized under the legislation.").

[39] The same language "planning or commission" is also used in RCC § 22E-302, criminal solicitation, and RCC § 22E-303, criminal conspiracy.

defendant believed to a practical certainty that the material support or resources would be used in such a manner.

Subsection (b) addresses the import of an uncommunicated solicitation, which arises when the planned recipient of the defendant's command, request, or efforts at persuasion never receives the message due to external factors (e.g., police interference or carrier malfeasance).[40] Under subsection (b), the fact that the message is never received is generally "immaterial" for purposes of solicitation liability. There is, however, one important limitation placed on this principle: the person must have "done everything he or she plans to do to transmit the message."[41] The latter proviso requires proof that, where an uncommunicated solicitation is at issue, the defendant engaged in the last proximate act necessary to transmit the message. Subsection (b) is identical to the

[40] Note that a solicitor may fail to communicate with another person because the planned recipient never receives the message—e.g., the police intercept a murder for hire letter already placed in the mail by the defendant. Or, alternatively, a solicitor may fail to communicate with the planned recipient because the message is never sent—e.g., the police intercept the solicitor holding a murder for hire letter while making his way to the post office. In the first situation, the person has engaged in what might be considered a "complete attempt" at communication—that is, the person failed to achieve his criminal objective notwithstanding the fact that he was able to carry out the entirety of his criminal plans (i.e. placing the letter in the mail). In the second situation, in contrast, the person has only engaged in what might be considered an "incomplete attempt" at communication—that is, the person was unable to carry out the entirety of his criminal plans due to external interference. Subsection (b) authorizes solicitation liability in the first, but not the second, situation.

[41] *See, e.g.,* Model Penal Code § 5.02(2) ("It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication."). In support of this approach, the drafters of the Model Penal Code argue: that:

> [T]he last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground. Conduct falling short of the last act should be excluded because it is too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether the message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be required on the solicitor's part before the party solicited could proceed to the crime.

Model Penal Code § 5.02, cmt. at 381; *see* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) (3d ed. Westlaw 2019) ("Liability properly attaches under these circumstances, as the solicitor has manifested his dangerousness and should not escape punishment because of a fortuitous event beyond his control.").

The Model Penal Code approach to uncommunicated solicitations has been adopted by various state codes. *See, e.g.,* Haw. Rev. Stat. § 705-510; Utah Code Ann. §§ 76-4-203. However, there are also numerous jurisdictions that, "while not specifically addressing the uncommunicated solicitation situation, might also permit a conviction in such circumstances . . . because the solicitation statute itself includes, in the alternative, the defendant's "attempt" to [solicit]." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) n.98 (3d ed. Westlaw 2019) (collecting statutes and case law); *see, e.g.,* N.Y. Penal Law § 100.05 (solicitation liability where a person "solicits, requests, commands, importunes or *otherwise attempts to cause such other person to engage in such conduct*") (italics added); *People v. Lubow*, 29 N.Y.2d 58, 62, 272 N.E.2d 331 (1971) (italicized language in NY statute "would seem literally to embrace as an attempt an undelivered letter or message initiated with the necessary intent.").

language in RCC § 22E-302(d) of the general solicitation statute and the scope and meaning of the language is meant to be interpreted consistent with that provision.

Subsection (c) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (c)(2) specifies that a conviction for material support for an act of terrorism merges with any other conviction for being an accomplice to an act of terrorism or soliciting an act of terrorism arising from the same act or course of conduct. Such merger shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

Subsection (d) cross-references applicable definitions in the RCC and defines the term "material support or resources" for the section.

Relation to Current District Law. *The revised material support for an act of terrorism statute clearly changes current District law in one main way.*

The revised statute directs that a conviction for material support for an act of terrorism merges with convictions for solicitation or accomplice to an act of terrorism under RCC § 22E-1701. The current D.C. Code does not specifically address merger of an act of terrorism and other offenses,[42] and does not include a general merger provision. However, the DCCA has broadly held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.[43] In contrast, the revised statute requires that a conviction for material support for an act of terrorism merges with any conviction for solicitation (under RCC 22E-302) or accomplice (under RCC § 22E-210) to an act of terrorism under RCC § 22E-1701. While the elements of the material support for an act of terrorism statute may be slightly different than the means of committing an act of terrorism under the RCC General Part's solicitation or accomplice provisions statutes, it addresses the same type of social harm. Multiple convictions and consecutive sentences under different statutes addressing the same social harm based on the same act or course of conduct is not warranted. This change improves the proportionality of the revised statutes.

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

First, the revised offense requires a "knowingly" culpable mental state as to whether the accused's conduct provides or commands, requests, or tries to persuade any person to provide material support or resources, and a "with intent" culpable mental state as to how the material support or resources will be used. The current D.C. Code § 22–3153 acts of terrorism statute and the relevant definitions in D.C. Code § 22–3152 do not specify a culpable mental state for "providing material support or resources to a person or an organization" or "raising, soliciting, or collecting material support or resources." However, current D.C. Code § 22–3152 does state that the provision or solicitation must

[42] Notably, the current act of terrorism statute, D.C. Code § 22–3153, includes providing or soliciting material support or resources for an act of terrorism in subsections (m) and (n). Whether or not convictions under those subsections would merge with accomplice or solicitation liability under other subsections has not been litigated to date.

[43] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991). The DCCA has also specifically held that a conviction for possession of a weapon of mass destruction does not merge with possession of an explosive device, though merger with other weapon offenses has not been addressed. *Gorbey v. United States*, 54 A.3d 668, 705 (D.C. 2012).

be "with the purpose or knowledge" as to the use. As a matter of practice, the District's jury instructions describe the provision or solicitation itself as a matter of general intent.[44] Resolving these ambiguities, the revised statute requires a "knowingly" culpable mental state as to provision and solicitation itself, and "with intent" as to how the support or resources will be used. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[45] The revised statute's "with intent" is comparable to the current "with the purpose or knowledge" language regarding the use of the material support or resources. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute refers broadly to a person soliciting material support or resources as "commands, requests, or tries to persuade any person to provide material support or resources." Current D.C. Code § 22–3152(7) specifically references "raising, soliciting, or collecting material support or resources." These terms are not further defined, and it is unclear whether "raising" or "collecting" are illustrative of soliciting behavior or separate types of conduct. There is no case law on point, and no relevant legislative history has been identified. Resolving these ambiguities, the revised statute does not refer separately to "raising" or "collecting" and refers to a person "soliciting" as "commands, requests, or tries to persuade any person to provide material support or resources." The RCC language is identical with other RCC references to solicitation.[46] Conduct constituting "raising" and "collecting" is completely included within the RCC definition insofar as those terms refer to some open command, request or attempted persuasion of others. However the revised offense's solicitation language would not include, for example, surreptitious "collection" from others without their knowledge. This change improves the clarity and consistency of the revised statute.

Third, the revised statute specifically provides liability for uncommunicated criminal solicitations when the actor does everything they plan to do to transmit the message to the planned recipient. Current D.C. Code § 22–3152 terrorism definitions, the acts of terrorism offense in D.C. Code § 22–3153, and the general solicitation of a crime of violence statute in D.C. Code § 22-2107 provide no information concerning the scope of uncommunicated, attempt-type solicitations. There is no relevant case law or legislative history on point. Resolving this ambiguity, the revised statute provides that there remains liability when an actor's command, request, or efforts at persuasion fail to reach the planned recipient but the actor did everything they planned to do to transmit the message. Incomplete efforts to communicate the solicitation are not sufficient, however.

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[44] D.C. Crim. Jur. Instr. § 7.301 ("1. [Name of defendant] provided [describe the alleged form of material support or resources] to a person or organization; 2. S/he did so voluntarily, on purpose, and not by mistake or accident; and 3. [Name of defendant] intended or knew that the material support or resources would be used [in part] to [plan] [prepare] [carry out] [flee after committing] an act of terrorism."); D.C. Crim. Jur. Instr. § 3.100 ("For offenses that have been understood to be "general intent" crimes, the Committee has settled on describing the required state of mind as the defendant having acted "voluntarily and on purpose, not by mistake or accident.").

[45] *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)").

[46] *See, e.g.* RCC § 22E-302.

This treatment of liability for uncommunicated criminal solicitations is consistent with the treatment in the general solicitation statute, RCC § 22E-302. 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 current District law.

The revised statute does not specifically reference an "organization" unlike current D.C. Code § 22–3152(6). However, under the RCC, as in other aspects of the D.C. Code, the general term "person" includes organizations per D.C. Code § 45-604 unless doing so is unreasonable. In the revised statute, an "organization" as well as a "corporation" and other legal entities are reasonably construed as a person and within the scope of the statute. This change clarifies the revised statutes.

RCC § 22E-1703. Manufacture or Possession of a Weapon of Mass Destruction.

(a) *Offense.* An actor commits manufacture or possession of a weapon of mass destruction when the actor:
  (1) Either:
    (A) Knowingly manufactures or possesses a weapon of mass destruction; or
    (B) With intent that it will be used to cause death or serious bodily injury to multiple persons, other than as part of a lawful medical procedure, knowingly manufactures or possesses an item that is:
      (i) A toxic or poisonous chemical or its precursors;
      (ii) A biological agent or toxin; or
      (iii) Radioactive or nuclear material; and
  (2) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or $500,000 or more in damage to property.

(b) *Exclusions from liability*. An actor does not commit an offense under paragraph (a)(1)(A) of this section when, in fact, the actor is:
  (1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;
  (2) Lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense;
  (3) Lawfully engaging in the business of shipping or delivering the weapon involved in the offense;
  (4) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court; or
  (5) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions.

(c) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor possesses the weapon or item while, in fact, voluntarily surrendering the weapon or item pursuant to District or federal law.

(d) *Penalties*.
  (1) Manufacture or possession of a weapon of mass destruction is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Merger.* A conviction for manufacture or possession of a weapon of mass destruction merges with any other weapon possession offense arising from the same act or course of conduct under Chapter 41 [Weapon Offenses and Related Provisions] of this title or Chapter 25 [Firearms Control] of Title 7 of the D.C. Code. The sentencing court

shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(e) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "biological agent," "healthcare provider," "nuclear material," "possess," "serious bodily injury," "toxic or poisonous chemical," "toxin," and "weapon of mass destruction" have the meanings specified in RCC § 22E-701.

Explanatory Note. *This section establishes the manufacture or possession of a weapon of mass destruction offense for the Revised Criminal Code (RCC). The offense prohibits knowingly manufacturing or possessing a weapon of mass destruction or, when there is intent to use the item to cause death or serious bodily injury to multiple persons, knowingly manufacturing or possessing unweaponized forms of toxic or poisonous chemicals, biological agents, toxins, or radioactive or nuclear material. The weapon of mass destruction or other unweaponized item must actually be capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive damage to property. The offense replaces the current manufacture or possession of a weapon of mass destruction offense in D.C. Code § 22-3154.*

Subsection (a) specifies the elements of the offense. Paragraph (a)(1) specifies two alternative elements, one of which is necessary for liability under the offense.

Sub-paragraph (a)(1)(A) specifies that one of the alternative elements is a person knowingly manufactures or possesses a weapon of mass destruction.[47] "Knowingly" is a defined term[48] 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.[49] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[50] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[51] The term manufacture is intended to be construed broadly to include all methods of creation. "Weapon of mass destruction" is a defined term that includes an array of specified weapons (or parts designed or planned for conversion into a weapon).

[47] As with the illegal possession of a firearm, knowledge of a weapon's presence may be inferred from surrounding circumstances; direct evidence is not required. *See, e.g., 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. *See, e.g., Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[48] "Knowingly" is defined in RCC § 22E-206.

[49] RCC § 22E-701.

[50] *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).

[51] *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.

The "knowingly" culpable mental state applies both to the act of possession or manufacturing as well as the item's attributes that make it a "weapon of mass destruction."

Sub-paragraph (a)(1)(B) alternatively requires that a person must knowingly manufacture or possess an item that is a toxic or poisonous chemical or its precursors, a biological agent or toxin, or radioactive or nuclear material—moreover the manufacture or possession of these items must be with intent that the item will be used to cause death or serious bodily injury to multiple persons. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the item will be used to cause death or serious bodily injury to multiple persons. 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 death or serious bodily injury to multiple persons actually occurred, just that the defendant believed to a practical certainty that the conduct will occur. "Serious bodily injury" is a defined term in RCC § 22E-701 and could include medical procedures that are for the benefit of those affected. Consequently, sub-paragraph (a)(1)(A) excludes from the provision those whose intent is to perform a lawful medical procedure while being practically certain that the procedure entails a serious bodily injury.[52]

Sub-paragraph (a)(1)(B) uses the defined term "knowingly"[53] which applied here means that the person must be practically certain that they possess the item. "Possesses" is a defined term and includes both actual and constructive possession.[54] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[55] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[56] The term manufacture is intended to be construed broadly to include all methods of creation. The terms "toxic or poisonous chemical," "biological agent," "toxin," and "nuclear material" are defined terms in RCC § 22E-701 and, in contrast to the definition of "weapon of mass destruction," include non-weaponized forms of the items. The "knowingly" culpable mental state applies both to the act of possession or manufacturing as well as the item's attributes that make it one of the listed items in sub-sub-paragraphs (a)(1)(B)(i) - (a)(1)(B)(iii).

Paragraph (a)(2) requires that the weapon of mass destruction or other item listed in sub-sub-paragraphs (a)(1)(B)(i) - (a)(1)(B)(iii) be capable of causing multiple deaths, serious bodily injuries to multiple persons, or $500,000 or more in damage to property.

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[52] For example, a hospital, physician, or medical supplier would not be liable for possessing quantities of toxic or poisonous chemicals or radioactive materials with intent to use the items for lawful medical procedures.

[53] "Knowingly" is defined in RCC § 22E-206.

[54] RCC § 22E-701.

[55] *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).

[56] *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.

This requirement limits liability for the crime to instances where the weapon or item is of a kind, or of a quantity, such that it could be used to engage in an act of terrorism under RCC § 22E-1701.[57] "Serious bodily injury" is a defined term in RCC § 22E-701 and the term damage to property is intended to encompass damage requiring $500,000 or more in repairs.[58] Paragraph (a)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to the weapon or item having the specified capability.

Subsection (b) specifies five categorical exclusions to liability for people whose possession or manufacture of a weapon of mass destruction under paragraph (a)(1)(A) is not a criminal offense. The criminal offense generally treats a weapon of mass destruction as a type of highly dangerous contraband. However, this subsection recognizes that there are instances where possession or manufacture of such an item serves legitimate, even socially beneficial purposes. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for the circumstances in the exclusions.

Paragraph (b)(1) excludes from liability under paragraph (a)(1)(A) District or federal government employees who are on duty and acting within the scope of those duties. Paragraph (b)(2) excludes from liability a person engaging in an otherwise lawful, under federal and local law, manufacturing, repairing, or dealing of a weapon of mass destruction. Authorized dealers and manufacturers of weaponry are not engaged in criminal activity. Paragraph (b)(3) excludes from liability the otherwise legal, under federal and local law, shipping or delivering a weapon. Common carriers and others producing and maintaining weapons for government use are not engaged in criminal activity. Paragraph (b)(4) excludes from liability persons acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court. Paragraph (b)(5) specifically excludes persons conducting research and others who work with certain federally-regulated toxins and materials.[59]

Subsection (c) establishes an affirmative defense for a person who is voluntarily surrendering a weapon or other item. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[60] Per RCC § 22E-201(b), the

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[57] This requirement is consistent with the Council's prior intent for the offense. *See* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 18 ("Section 104 creates the crime of possession of a weapon of mass destruction and provides for a penalty of up to life imprisonment. The Committee added the language 'capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property' to clarify its intent of only providing for the stronger penalty allowable for this crime if the weapon found in a defendant's possession is truly capable of causing mass damage and could be used in the course of an act of terrorism. The intent is to not provide for the stronger penalty if the weapon is in such a small quantity, for example, of a kind of poison, that it is not capable of causing mass damage, or if the weapon is, for example, a handgun.").

[58] *See* RCC § 22E-1701(c), act of terrorism, referring to first degree criminal damage to property under RCC § 22E-2503(a) (involving damage of $500,000 or more). *See also,* current D.C. Code § 22–3153 ("A person who commits malicious burning, destruction, or injury of another's property, if such property is valued at $500,000 or more, that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.").

[59] *Compare with* Cal. Penal Code § 11417(d).

[60] *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

defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (d) provides the penalty for the revised offense.[61] [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (d)(2) specifies that a conviction for manufacture or possession of a weapon of mass destruction merges with any other offense arising from the same act or course of conduct under Chapter 41 of the RCC or Chapter 25 of D.C. Code Title 7. Such merger shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

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

Relation to Current District Law. *The revised manufacture or possession of a weapon of mass destruction statute clearly changes current District law in five main ways.*

First, the revised statute includes within its scope an unweaponized toxic or poisonous chemical or its precursors, a biological agent or toxin, or radioactive or nuclear material—but only when such possession or manufacture is coupled with an intent that the items be used to cause serious bodily injury or death to multiple persons, other than by a lawful medical procedure. The current D.C. Code § 22-3152 definition of a weapon of mass destruction does not include any unweaponized (e.g. in a storage container) toxic or poisonous chemicals, biological agents, toxins, or nuclear material, and the current D.C. Code § 22–3154 offense of manufacture or possession of a weapon of mass destruction similarly does not cover unweaponized forms of these items. However, legislative history suggests the Council may have believed that such unweaponized chemicals and biological agents were included in the definition.[62] In contrast, the revised statute specifically includes unweaponized forms of these chemical, biological, and nuclear materials when possessed or manufactured with intent that the item will be used in causing death or serious bodily injury to a person, other than by a lawful medical procedure. The revised statute also specifies that the actor must know the nature of the item possessed or manufactured as being a toxic or poisonous chemical, biological agent, etc., and excludes items possessed or manufactured with intent to be used in a lawful medical procedure. While many legitimate, socially beneficial uses exist for possession

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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.

[61] *Compare with* Cal. Penal Code § 11417(a)(1) ("Any person, without lawful authority, who possesses, develops, manufactures, produces, transfers, acquires, or retains any weapon of mass destruction, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 4, 8, or 12 years."); 26 U.S.C. § 5871 (providing a maximum penalty of 10 years for possession of a "destructive device," defined similar to sub-paragraphs (A)-(C) of the RCC definition of a "weapon of mass destruction."

[62] Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 17 ("The definition of a weapon of mass destruction has also been narrowed substantially from the definition contained in Bill 14-373 as introduced. It is carefully defined to mean devices, objects, chemicals, biological agents, and weapons designed or used to kill large numbers of people. It is not intended to cover small amounts of ingredients that could conceivably be put to use to create a weapon, such as a small vial of arsenic as one witness suggested.").

and creation of chemical, biological, and nuclear materials,[63] when coupled with an intent to cause death or serious bodily injury, such materials are presumed to be extremely dangerous contraband.[64] The revised statute's inclusion of these materials follows precedent in other jurisdictions.[65] This change improves the clarity and proportionality of the revised statutes and addresses an unnecessary gap in liability.

Second, due to minor changes in the definition of a "weapon of mass destruction," the scope of items that under the revised manufacture or possession of a weapon of mass destruction statute is both expanded and narrowed in certain aspects. The current D.C. Code § 22-3152 definition of a weapon of mass destruction, among its many provisions, includes "any destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury" as well as weapons that use toxic or poisonous chemicals, biological agents and toxins or radioactive materials. However, the critical term "destructive device" is undefined in the statute. Moreover, the current definition of a weapon of mass destruction does not include toxic or poisonous chemicals, biological agents and toxins or radioactive materials themselves. In contrast, the revised statute includes slightly different items, including only explosive, incendiary, or poison gas weapons (not all destructive devices generally) and vectors as a type of weapon. These and other possible changes[66] in the scope of the revised definition of a weapon of mass destruction provide greater clarity as to the items covered by the statute. These changes improve the clarity and may reduce a possible gap in liability in the revised statutes.

Third, the revised statute relies on the general attempt and conspiracy statute to define what conduct constitutes an attempt or conspiracy and the appropriate penalty. Current D.C. Code § 22-3154(b) provides a separate attempt and conspiracy statute applicable to manufacture or possession of a weapon of mass destruction. The offense-specific attempt and conspiracy provisions in D.C. Code § 22-3154(b) do not contain any language specifying what must be proven for the attempt or conspiracy, or how that proof might or might not differ from the general attempt and conspiracy provisions in D.C. Code §§ 22–1803 and 22–1805a, respectively. There is no District case law on point. However, D.C. Code § 22-3154(b) does specify different maximums of 30 years for an attempt or conspiracy to commit manufacture or possession of a weapon of mass destruction. These attempt and conspiracy penalties differ sharply from the 5 year and 15 year penalties established for other crimes of violence under D.C. Code §§ 22–1803 and 22–1805a, respectively.[67] In contrast, the revised manufacture or possession of a weapon

[63] Notably, RCC § 22E-1703, manufacture or possession of a weapon of mass destruction, provides exceptions to liability for mere possession in exceptional cases where technically there is a plan to inflict "serious bodily injury" as defined in RCC § 22E-701 on a person, such as in consensual medical care.

[64] For example, large quantities of unweaponized industrial chemicals or hazardous materials are not a weapon of mass destruction, but if those chemicals or materials are planned for causing death to persons, they are equivalent to weapons of mass destruction the possession of which may be prosecuted under RCC § 22E-1703, manufacture or possession of a weapon of mass destruction.

[65] *See, e.g.,* Cal. Penal Code § 11417.

[66] See Commentary to RCC § 22E-701 "Weapon of mass destruction" for further discussion of changes and possible changes to current law.

[67] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "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-

of mass destruction statute relies on the RCC General Part's attempt provisions (RCC § 22E-301) and conspiracy provisions (§ 22E-303) to establish the requirements to prove an attempt or conspiracy and applicable penalties, consistent with other offenses. The penalties in the RCC general attempt and conspiracy provisions provide penalties at ½ the maximum imprisonment sentence for all revised offenses, including murder and other major felonies. There is no clear rationale for why this offense should be penalized more severely than murder or other offenses. This change improves the consistency and proportionality of revised statutes.

Fourth, the revised statute directs that a conviction for manufacture or possession of a weapon of mass destruction merges with other weapon possession convictions. The current D.C. Code does not specifically address merger of manufacture or possession of a weapon of mass destruction and other weapon offenses and does not include a general merger provision. However, the DCCA has broadly held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.[68] The DCCA has also specifically held that a conviction for possession of a weapon of mass destruction does not merge with possession of an explosive device,[69] though merger with other weapon offenses hasn't been addressed. In contrast, the revised statute requires that a conviction for use, dissemination, or detonation of a weapon of mass destruction merge with any other weapon possession offense arising from the same act or course of conduct under Chapter 41 [Weapon Offenses and Related Provisions] of Title 22E or Chapter 25 [Firearms Control] of Title 7 of the D.C. Code. While the elements of the manufacture or possession of a weapon of mass destruction statute may be slightly different than other statutes addressing weapon possession, it addresses the same type of social harm—albeit in a more serious form. Multiple convictions and consecutive sentences under different weapon possession statutes based on the same act or course of conduct is not warranted. This change improves the proportionality of the revised statutes.

Fifth, the revised statute is not subject to an additional "while-armed" penalty enhancement. Current D.C. Code § 22–4502 authorizes an additional penalty enhancement of up to an additional 30 years for committing a "crime of violence"—a term that includes the current D.C. Code § 22–3154 manufacture or possession of a weapon of mass destruction statute—while possessing a "dangerous weapon." While there are no court decisions as to whether the application of such an enhancement would merge with the manufacture or possession of a weapon of mass destruction statute, the DCCA has previously noted the enhancement's application in this context and described

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3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse, second degree sexual abuse, and third degree sexual abuse are "crimes of violence" and would have a maximum term of imprisonment of five years. Fourth degree sexual abuse is not "crime of violence," however, and would have a maximum term of imprisonment of 180 days.

[68] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[69] *Gorbey v. United States*, 54 A.3d 668, 705 (D.C. 2012).

it as a "superfluity."[70] In contrast, the revised statute is not subject to a while-armed enhancement. Such an enhancement would punish the same harm already addressed by the unenhanced offense. This change improves the proportionality of the revised statutes.

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

First, the revised offense requires a "knowingly" culpable mental state for whether the accused's conduct constituted manufacture or possession of a weapon of mass destruction or other specified item, and makes a person strictly liable as to whether the weapon (or other item) is capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive property damage. The current D.C. Code § 22–3154 manufacture or possession of a weapon of mass destruction statute does not specify a culpable mental state for any elements. However, the DCCA has upheld a conviction for possession of a weapon of mass destruction based in part on a finding that "understood the nature of the object, or that he knew it was a destructive object capable of causing serious bodily injury or significant property damage."[71] In addition, as a matter of practice, the District's jury instructions require a person must *know* that the item is a weapon of mass destruction even though the possession or manufacture of the item is itself a matter of general intent.[72] Resolving these ambiguities, the revised statute requires a "knowingly" culpable mental state as to manufacturing or possession of a weapon of mass destruction or other item, and strict liability as to the weapon or item being capable of causing multiple deaths, serious bodily injuries to multiple persons, or $500,000 or more in damage to property. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[73] Requiring a knowing culpable mental state also makes the revised offense consistent with other contraband-type offenses, which generally require that the defendant act knowingly with respect to the

[70] *In re D.T.*, 977 A.2d 346, 354 (D.C. 2009) ("The criminal laws of the District of Columbia are not free from superfluity in every respect. The criminal code, for example, provides liability for assault with a dangerous weapon while armed, a redundant enhancement we have found inapplicable in that context. D.C.Code §§ 22–402, –4502(a); *McCall v. United States,* 449 A.2d 1095, 1096 (D.C.1982); *see Gathy v. United States,* 754 A.2d 912, 916 n. 5 (D.C.2000) (addressing *McCall*). Similarly, the District's criminal code also prescribes "while armed" enhancement for possession of a weapon of mass destruction, a crime one presumably cannot accomplish without already being armed with a dangerous weapon. D.C. Code §§ 22–3154, –4501, –1331 (2007).").

[71] *Gorbey v. United States*, 54 A.3d 668, 702 (D.C. 2012)(the court was considering a constructive possession argument and its reference to understanding or knowledge about the weapon may relate solely to such possession).

[72] D.C. Crim. Jur. Instr. § 7.311 ("3. [Name of defendant] [manufactured] [possessed] [[attempted] [conspired] to [manufacture] [possess]] the weapon of mass destruction voluntarily, on purpose, and not by mistake or accident; and 4. S/he knew that it was [insert name of applicable weapon of mass destruction from statute]."); D.C. Crim. Jur. Instr. § 3.100 ("For offenses that have been understood to be "general intent" crimes, the Committee has settled on describing the required state of mind as the defendant having acted "voluntarily and on purpose, not by mistake or accident.").

[73] *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)").

elements of the offense.[74] It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[75] This change improves the clarity and consistency of the revised statutes.

Second, the revised statute codifies multiple exclusions to liability for actors who may possess or manufacture a weapon of mass destruction, and a defense for possession when voluntarily surrendering the weapon or other item. The current D.C. Code § 22–3154 manufacture or possession of a weapon of mass destruction statute does not specify any exceptions to liability for any person under any conditions, and there are no defenses or affirmative defenses. There is no DCCA case law on point. The D.C. Code also does not codify general defenses such as voluntary surrender of contraband. In contrast, the revised statute provides an affirmative defense for possession at the time (only) of surrendering the weapon or other item pursuant to District or federal law.[76] The revised statute also provides clear exceptions to liability for lawfully engaged government employees, private weapon manufacturers, common carriers, those acting within authority granted by MPD or a court, and researchers. This defense and the exclusions ensure that otherwise lawful manufacturing and possession of weapons of mass destruction and other items are not inadvertently criminalized and avoids conflict federal law regarding the handling of these materials. 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 current District law.

[74] *See, e.g.*, RCC § 22E-3403, Correctional Facility Contraband; RCC § 22E-4102, Carrying a Dangerous Weapon.

[75] *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.'").

[76] Other RCC general defenses, including a temporary possession defense under RCC § 22E-502, also apply to the revised manufacture or possession of a weapon of mass destruction offense.

RCC § 22E-1704. Use, Dissemination, or Detonation of a Weapon of Mass Destruction.

(a) *First Degree.* An actor commits first degree use, dissemination, or detonation of a weapon of mass destruction when the actor:
  (1) With intent to cause serious bodily injury or death to multiple persons, other than as part of a lawful medical procedure;
  (2) Knowingly uses, disseminates, or detonates:
    (A) A weapon of mass destruction;
    (B) A toxic or poisonous chemical or its precursors;
    (C) A biological agent or toxin; or
    (D) Radioactive or nuclear material; and
  (3) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths or serious bodily injuries to multiple persons.

(b) *Second Degree.* An actor commits second degree use, dissemination, or detonation of a weapon of mass destruction when the actor:
  (1) With intent to cause:
    (A) Bodily injury to multiple persons, other than as part of a lawful medical procedure; or
    (B) Massive damage to property, including plants and animals on land owned by a government, government agency, or government-owned corporation;
  (2) Knowingly uses, disseminates, or detonates:
    (A) A weapon of mass destruction;
    (B) A toxic or poisonous chemical or its precursors;
    (C) A biological agent or toxin; or
    (D) Radioactive or nuclear material; and
  (3) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or $500,000 or more in damage to property.

(c) *Exclusions from liability*. An actor does not commit an offense under paragraph (b)(1)(B) of this section when, in fact, the actor is:
  (1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;
  (2) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court;
  (3) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions;

(d) *Affirmative defense.* It is an affirmative defense to liability under paragraph (b)(1)(B) of this section that the actor, in fact, reasonably believes they are

acting in compliance with a current license or authority under civil law and with the effective consent of an owner of the property.

(e) *Penalties*.

(1) First degree use, dissemination, or detonation of a weapon of mass destruction is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree use, dissemination, or detonation of a weapon of mass destruction is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Merger.* A conviction for use, dissemination, or detonation of a weapon of mass destruction merges with any other weapon possession offense arising from the same act or course of conduct under Chapter 41 [Weapon Offenses and Related Provisions] of this title or Chapter 25 [Firearms Control] of Title 7 of the D.C. Code. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(f) *Definitions*. The terms "knowingly" and "intent" have the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "biological agent," "bodily injury," "effective consent," "healthcare provider," "nuclear material," "possess," "property," "serious bodily injury," "toxic or poisonous chemical," "toxin," and "weapon of mass destruction" have the meanings specified in RCC § 22E-701.

Explanatory Note. *This section establishes the use, dissemination, or detonation of a weapon of mass destruction offense for the Revised Criminal Code (RCC). The offense is graded into two degrees. Both degrees require the knowing use, dissemination, or detonation of an item that meets the definition of a weapon of mass destruction or unweaponized toxic or poisonous chemical, biological agent or toxin, or radioactive or nuclear material. Both degrees require that, in fact, the weapon of mass destruction or other item is capable of causing multiple deaths or serious bodily injuries to multiple persons. In addition, the first degree offense requires the conduct to be done with intent to cause a serious bodily injury or death to multiple persons. In contrast, the second degree offense requires the conduct to be done with intent to cause a bodily injury to multiple persons, or massive damage to property, specifically including damage to the environment on public lands. The offense replaces the current Use, dissemination, or detonation of a weapon of mass destruction in D.C. Code § 22-3155.*

Subsection (a) specifies the elements of first degree use, dissemination, or detonation of a weapon of mass destruction.

Paragraph (a)(1) specifies that the actor's conduct must be committed with intent to cause a serious bodily injury or death to another person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause a specified type of injury. 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 serious bodily injury or death occurred, just that the defendant believed to a practical certainty that such injury would result. "Serious bodily injury" is a

defined term in RCC § 22E-701 and could include medical procedures that are for the benefit of those affected. Consequently, paragraph (a)(1) excludes from the provision those whose intent is to perform a lawful medical procedure while being practically certain that the procedure entails use of a biological agency, for example, that is capable of causing multiple serious bodily injuries.[77]

Paragraph (a)(2) specifies that a person must knowingly use, disseminate, or detonate a weapon of mass destruction, a toxic or poisonous chemical or its precursors, a biological agent or toxin, or a radioactive or nuclear material. "Knowingly" is a defined term[78] and applied here means that the person must be practically certain that they are using, disseminating, or detonating the weapon. "Weapon of mass destruction" is a defined term that includes an array of specified weapons (or parts designed or planned for conversion into a weapon). The terms "toxic or poisonous chemical," "biological agent," "toxin," and "nuclear material" are defined terms in RCC § 22E-701 and, in contrast to the definition of "weapon of mass destruction," include non-weaponized forms of the items. The "knowingly" culpable mental state applies both to the act of using, disseminating, or detonating as well as the item's attributes that make it one of the listed items in sub-paragraphs (a)(2)(A) - (a)(2)(D).

Paragraph (a)(3) requires that the weapon of mass destruction or other item be capable of causing multiple deaths or serious bodily injuries to multiple persons. This requirement limits liability for the crime to instances where the weapon or item is of a kind, or of a quantity, such that it could be used to engage in an act of terrorism under RCC § 22E-1701. "Serious bodily injury" is a defined term in RCC § 22E-701. Paragraph (a)(3) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to the weapon or item having the specified capability.

Subsection (b) specifies the elements for second degree use, dissemination, or detonation of a weapon of mass destruction. Paragraph (b)(1) specifies two alternative elements, one of which is necessary for liability under the offense.

Paragraph (b)(1) first specifies that one of the alternative elements is that the actor's conduct be committed with intent to cause a bodily injury to multiple persons, other than as part of a lawful medical procedure. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause the specified type of injury. 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 bodily injury occurred, just that the defendant believed to a practical certainty that such injury would result. "Bodily injury" is a defined term in RCC § 22E-701 and could include medical procedures that are for the benefit of those affected. Consequently, sub-sub-paragraph (b)(1)(A) excludes from the provision those whose intent is to cause bodily injury by a lawful medical procedure.[79]

[77] For example, a hospital or physician would not be liable for using quantities of toxic or poisonous chemicals or radioactive materials with intent to use the items for lawful medical procedures.
[78] "Knowingly" is defined in RCC § 22E-206.
[79] For example, a hospital or physician would not be liable for using quantities of toxic or poisonous chemicals or radioactive materials with intent to use the items for lawful medical procedures.

Paragraph (b)(1) alternatively requires the actor's conduct be committed with intent to cause massive damage to property, including plants and animals on publicly owned lands. Property within the scope of the statute need not be, but includes, plants and animals on lands (including waters and wetlands) owned by a government, government agency, or government-owned corporation. The term massive destruction of property is intended to encompass massive damage requiring $500,000 or more in repairs.[80] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the item would be used to cause massive damage to 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 massive damage to property actually occurred, just that the defendant believed to a practical certainty that the conduct would occur.

Paragraphs (b)(2) and (b)(3) specify the remaining elements of the second degree offense and are identical to the requirements in subsection (a) for first degree use, dissemination, or detonation of a weapon of mass destruction except for the inclusion in (b)(3) of the capacity of the weapon or other item to cause $500,000 or more in damage to property.

Subsection (c) specifies three categorical exclusions to liability for second degree use, dissemination, or detonation of a weapon of mass destruction under paragraph (b)(1)(B). The criminal offense generally treats a weapon of mass destruction as a type of highly dangerous contraband. However, this subsection recognizes that there are instances where use, dissemination, or detonation of a weapon of mass destruction or other item[81] serves legitimate, even socially beneficial purposes. Paragraph (c)(1) excludes from liability under paragraph (b)(1)(B) District or federal government employees who are on duty and acting within the scope of those duties. Paragraph (c)(2) excludes from liability persons acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court. Paragraph (c)(3) specifically excludes persons conducting research and others who work with certain federally-regulated toxins and materials.[82] Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for the circumstances in the exclusions.

Subsection (d) provides an affirmative defense to liability for second degree use, dissemination, or detonation of a weapon of mass destruction under paragraph (b)(1)(B). The affirmative defense applies to persons who reasonably believe[83] that their conduct in

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[80] *See* RCC § 22E-1701(c), act of terrorism, referring to first degree criminal damage to property under RCC § 22E-2503(a) (involving damage of $500,000 or more). *See also,* current D.C. Code § 22–3153 ("A person who commits malicious burning, destruction, or injury of another's property, if such property is valued at $500,000 or more, that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.").

[81] Without intent to cause bodily injury to a person, the mere possession or manufacture of unweaponized a toxic or poisonous chemical or its precursors, a biological agent or toxin, or radioactive or nuclear material is not criminalized under RCC § 22E-1703. However, the use of these unusual and dangerous items to cause massive damage to property does fall within the scope of RCC § 22E-1704 outside the exceptions specified in (c).

[82] *Compare with* Cal. Penal Code § 11417(d).

[83] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not

use of the weapon of mass destruction[84] or other item is in compliance with a current license or authority under civil law and with the effective consent of a property owner. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[85] The term "effective consent" is a defined term under RCC § 22E-701 that refers to any consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no further culpable mental state requirement for the circumstances in the defense.

Subsection (e) provides the penalties for the revised offense. Paragraph (c)(1) authorizes the penalty for first degree.[86] [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (c)(2) authorizes the penalty for second degree. Paragraph (c)(3) specifies that a conviction for use, dissemination, or detonation of a weapon of mass destruction merges with any other offense arising from the same act or course of conduct under Chapter 41 of the RCC or Chapter 25 of D.C. Code Title 7. Such merger shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

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

Relation to Current District Law. *The revised manufacture or possession of a weapon of mass destruction statute clearly changes current District law in seven main ways*.

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be proven to actually exist.

[84] For example, the actor may use explosives with a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit. *See* RCC § 22E-2501, arson.

[85] *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."

[86] *Compare with* Cal. Penal Code § 11418(b)(1) ("Any person who uses or directly employs against another person a weapon of mass destruction in a form that may cause widespread, disabling illness or injury in human beings shall be punished by imprisonment in the state prison for life."); 18 U.S.C. § 2332a (A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction— (1) against a national of the United States while such national is outside of the United States; (2) against any person or property within the United States, and (A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense; (B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce; (C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or (D) the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce; (3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States; or (4) against any property within the United States that is owned, leased, or used by a foreign government, shall be imprisoned for any term of years or for life.").

First, the revised statute includes within its scope an unweaponized toxic or poisonous chemical or its precursors, a biological agent or toxin, or radioactive or nuclear material—but only when such possession or manufacture is coupled with an intent that the items be used to cause at least bodily injury or death to multiple persons, other than by a lawful medical procedure, or massive damage to property. The current D.C. Code § 22-3152 definition of a weapon of mass destruction does not include any unweaponized (e.g. in a storage container) toxic or poisonous chemicals, biological agents, toxins, or nuclear material. Similarly, the current D.C. Code § 22–3155 offense of use, dissemination, or detonation of a weapon of mass destruction also does not cover unweaponized forms of these items. However, legislative history suggests the Council may have believed that such unweaponized chemicals and biological agents were included in the definition.[87] In contrast, the revised statute specifically includes unweaponized forms of these chemical, biological, and nuclear materials when possessed or manufactured with intent for use in causing death or bodily injury to a person, other than by a lawful medical procedure, or massive damage to property. The revised statute also specifies that the actor must know the nature of the item possessed or manufactured as being a toxic or poisonous chemical, biological agent, etc., and excludes items with intent to be used in a lawful medical procedure. While many legitimate, socially beneficial uses exist for possession and creation of chemical, biological, and nuclear materials,[88] when coupled with an intent to cause death, bodily injury, or massive property damage such materials are presumed to be extremely dangerous contraband.[89] The revised statute's inclusion of terrorism liability for these unweaponized materials follows precedent in other jurisdictions.[90] This change improves the clarity and proportionality of the revised statutes and addresses an unnecessary gap in liability.

Second, the revised statute limits liability for the use, dissemination, or detonation of a weapon of mass destruction or other item when such conduct is accompanied by an intent to cause bodily injury to multiple persons or massive property damage. The current D.C. Code § 22–3155 use, dissemination, or detonation of a weapon of mass destruction does not specify a culpable mental state for any elements.[91] The plain

[87] Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002," at 17 ("The definition of a weapon of mass destruction has also been narrowed substantially from the definition contained in Bill 14-373 as introduced. It is carefully defined to mean devices, objects, chemicals, biological agents, and weapons designed or used to kill large numbers of people. It is not intended to cover small amounts of ingredients that could conceivably be put to use to create a weapon, such as a small vial of arsenic as one witness suggested.").

[88] Notably, RCC § 22E-1704, use, dissemination, or detonation of a weapon of mass destruction, provides exceptions to liability for use in exceptional cases where technically there is a plan to inflict "bodily injury" or "serious bodily injury" as defined in RCC § 22E-701 on a person, such as in consensual medical care. Other exceptions and affirmative defenses in RCC § 22E-1704(c) and (d) limit liability for other socially beneficial uses too.

[89] For example, large quantities of unweaponized industrial chemicals or hazardous materials are not a weapon of mass destruction, but if those chemicals or materials are used for causing bodily injury to persons, they are equivalent to weapons of mass destruction the use of which may be prosecuted under RCC § 22E-1703, manufacture or possession of a weapon of mass destruction.

[90] *See, e.g.,* Cal. Penal Code § 11417.

[91] Notably, the DCCA has upheld a conviction for the related possession of a weapon of mass destruction based in part on a finding that "understood the nature of the object, or that he knew it was a destructive object capable of causing serious bodily injury or significant property damage." *Gorbey v. United States*,

language of the current statute suggests that any use or detonation of a weapon of mass destruction, for any reason, is criminal. However, as a matter of practice, the District's jury instructions require a person must *know* that the object is a weapon of mass destruction and not be accidentally using or detonating the weapon.[92] In contrast, the revised statute limits liability to use, dissemination, or detonation with intent to cause bodily injury to multiple persons or massive property damage. An unintentional use of an explosive or other chemicals does not warrant special criminalization as a terrorism offense. Liability remains under other current and RCC offenses for use of a weapon of mass destruction or other item to commit an act of terrorism,[93] mere possession of a weapon of mass destruction (or other item),[94] in addition to liability for any actual harm (or attempts) to other persons[95] or property[96]. This change improves the clarity and proportionality of the revised statutes.

Third, the revised statute is graded into two degrees based on whether the use, dissemination, or detonation was intended to cause either serious harm or death to another person, or bodily injury or property damage. The current D.C. Code § 22–3155 use, dissemination, or detonation of a weapon of mass destruction statute has no gradations. In contrast, the revised statute differentiates the penalty applicable to the use of a weapon of mass destruction or other item intended to severely harm a person from a use to harm only property (or to cause any significant pain as a bodily injury). While use of such a weapon or item against property or to cause minor injury remains a serious crime, it is substantially less serious than a use to cause a person serious bodily injury or death. This change improves the proportionality of the revised statutes.

Fourth, due to minor changes in the definition of a "weapon of mass destruction," the scope of items that are contraband under the revised use, dissemination, or detonation of a weapon of mass destruction statute is both expanded and narrowed in certain aspects. The current D.C. Code § 22-3152 definition of a weapon of mass destruction, among its many provisions, includes "any destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury" and weapons that use toxic or poisonous chemicals, biological agents and toxins or radioactive materials. However, the critical term "destructive device" is undefined in the statute. Moreover, the current definition of a weapon of mass destruction does not include toxic or poisonous chemicals, biological agents and toxins or radioactive materials themselves. In contrast, the revised statute includes slightly different items, including only explosive, incendiary, or poison gas weapons (not all destructive devices generally) and vectors as a type of weapon and

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54 A.3d 668, 702 (D.C. 2012)(the court was considering a constructive possession argument and its reference to understanding or knowledge about the weapon may relate solely to such possession).

[92] D.C. Crim. Jur. Instr. § 7.312 ("3. [Name of defendant] [used] [disseminated] [detonated] [[attempted] [conspired] to [use] [disseminate] [detonate]] the weapon of mass destruction voluntarily, on purpose, and not by mistake or accident; and 4. S/he knew that it was [insert name of applicable weapon of mass destruction from statute]."); D.C. Crim. Jur. Instr. § 3.100 ("For offenses that have been understood to be "general intent" crimes, the Committee has settled on describing the required state of mind as the defendant having acted "voluntarily and on purpose, not by mistake or accident.").

[93] D.C. Code § 22-3153; RCC § 22E-1701.

[94] D.C. Code § 22-3154; RCC § 22E-1703.

[95] *See, e.g.,* D.C. Code § 22–2103 (second degree murder); RCC § 22E-1101 (murder).

[96] D.C. Code § 22-303 (malicious destruction of property); RCC § 22E-2503 (criminal damage to property).

other. These and other possible changes[97] in the scope of the revised definition of a weapon of mass destruction provide greater clarity as to the items covered by the statute. These changes improve the clarity and may reduce a possible gap in liability in the revised statutes.

Fifth, the revised statute relies on the general attempt and conspiracy statute to define what conduct constitutes an attempt or conspiracy and the appropriate penalty. Current D.C. Code § 22-3155(b) provides a separate attempt and conspiracy statute applicable to manufacture or possession of a weapon of mass destruction. The offense-specific attempt and conspiracy provisions in D.C. Code § 22-3155(b) do not contain any language specifying what must be proven for the attempt or conspiracy, or how that proof might or might not differ from the general attempt and conspiracy provisions in D.C. Code §§ 22–1803 and 22–1805a, respectively. There is no District case law on point. However, D.C. Code § 22-3155(b) does specify maximums of 30 years for an attempt or conspiracy to commit use, dissemination, or detonation of a weapon of mass destruction. These attempt and conspiracy penalties differ sharply from the 5 year and 15 year penalties established for other crimes of violence under D.C. Code §§ 22–1803 and 22–1805a, respectively.[98] In contrast, the revised use, dissemination, or detonation of a weapon of mass destruction statute relies on the RCC General Part's attempt provisions (RCC § 22E-301) and conspiracy provisions (§ 22E-303) to establish the requirements to prove an attempt or conspiracy and applicable penalties, consistent with other offenses. The penalties in the RCC general attempt and conspiracy provisions provide penalties at ½ the maximum imprisonment sentence for all revised offenses, including murder and other major felonies. There is no clear rationale for why a conspiracy offense, which does not require any actual harm to any person, should be penalized more severely than murder or other offenses. This change improves the consistency and proportionality of revised statutes.

Sixth, the revised statute directs that a conviction for use, dissemination, or detonation of a weapon of mass destruction merges with other weapon possession convictions. The current D.C. Code does not specifically address merger of use, dissemination, or detonation of a weapon of mass destruction and other weapon offenses and does not include a general merger provision. However, the DCCA has broadly held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.[99] In contrast, the revised statute requires that a conviction for use, dissemination, or detonation of a weapon of mass destruction merge with any other weapon possession offense arising from the same act or course of conduct under Chapter 41 [Weapon Offenses and Related Provisions] of Title 22E or Chapter 25

[97] See Commentary to RCC § 22E-701 "Weapon of mass destruction" for further discussion of changes and possible change to current law.

[98] Notably, despite the difference in seriousness between possession and use of a weapon, the 30 year penalty under current D.C. Code § 22-3155(b) for attempt or conspiracy to use, dissemination, or detonation of a weapon of mass destruction is identical to the penalties for attempt or conspiracy to manufacture or possess a weapon of mass destruction under current D.C. Code § 22-3154(b).

[99] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991). The DCCA has also specifically held that a conviction for possession of a weapon of mass destruction does not merge with possession of an explosive device, though merger with other weapon offenses hasn't been addressed. *Gorbey v. United States*, 54 A.3d 668, 705 (D.C. 2012).

[Firearms Control] of Title 7 of the D.C. Code. While the elements of the use, dissemination, or detonation of a weapon of mass destruction statute may be slightly different than other statutes addressing weapon possession, it addresses the same type of social harm focused on the nature of the weapon—albeit in a more serious form. Multiple convictions and consecutive sentences under different weapon possession statutes based on the same act or course of conduct is not warranted. This change improves the proportionality of the revised statutes.

Seventh, the revised statute is not subject to an additional "while-armed" penalty enhancement. Current D.C. Code § 22–4502 authorizes an additional penalty enhancement of up to an additional 30 years for committing a "crime of violence"—a term that is defined to include the current D.C. Code § 22–3155 use, dissemination, or detonation of a weapon of mass destruction statute[100]—while possessing a "dangerous weapon." While there are no court decisions as to whether the application of such an enhancement would merge with the use, dissemination, or detonation of a weapon of mass destruction statute, the DCCA has previously noted the enhancement's application in the terrorism context and described it as a "superfluity."[101] In contrast, the revised statute is not subject to a while-armed enhancement. Such an enhancement would punish the same weapon-related harm already addressed by the unenhanced offense. This change improves the proportionality of the revised statutes.

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

First, the revised offense requires a "knowingly" culpable mental state as to whether the accused's conduct constituted use, dissemination, or detonation of a weapon of mass destruction, and makes a person strictly liable as to whether the weapon or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive property damage. The current D.C. Code § 22–3155 use, dissemination, or detonation of a weapon of mass destruction does not specify a culpable mental state for any elements.[102] However, as a matter of practice, the District's jury instructions require a person must *know* that the item is a weapon of mass destruction even though the possession or manufacture of the item is itself a matter of general intent.[103] Resolving

[100] D.C. Code §§ 22–4502; 23–1331(4).

[101] *In re D.T.*, 977 A.2d 346, 354 (D.C. 2009) ("The criminal laws of the District of Columbia are not free from superfluity in every respect. The criminal code, for example, provides liability for assault with a dangerous weapon while armed, a redundant enhancement we have found inapplicable in that context. D.C.Code §§ 22–402, –4502(a); *McCall v. United States,* 449 A.2d 1095, 1096 (D.C.1982); *see Gathy v. United States,* 754 A.2d 912, 916 n. 5 (D.C.2000) (addressing *McCall*). Similarly, the District's criminal code also prescribes "while armed" enhancement for possession of a weapon of mass destruction, a crime one presumably cannot accomplish without already being armed with a dangerous weapon. D.C. Code §§ 22–3154, –4501, –1331 (2007).").

[102] Notably, the DCCA has upheld a conviction for the related possession of a weapon of mass destruction based in part on a finding that "understood the nature of the object, or that he knew it was a destructive object capable of causing serious bodily injury or significant property damage." *Gorbey v. United States*, 54 A.3d 668, 702 (D.C. 2012)(the court was considering a constructive possession argument and its reference to understanding or knowledge about the weapon may relate solely to such possession).

[103] D.C. Crim. Jur. Instr. § 7.312 ("3. [Name of defendant] [used] [disseminated] [detonated] [[attempted] [conspired] to [use] [disseminate] [detonate]] the weapon of mass destruction voluntarily, on purpose, and not by mistake or accident; and 4. S/he knew that it was [insert name of applicable weapon of mass

these ambiguities, the revised statute requires a "knowingly" culpable mental state as to use, dissemination, or detonation of a weapon of mass destruction, and strict liability as to the particular nature of the weapon or other item as being capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[104] Requiring a knowing culpable mental state also makes the revised offense consistent with other contraband-type weapon offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[105] It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[106] This change improves the clarity and consistency of the revised statutes.

Second, the revised statute codifies multiple exclusions to liability for actors who may use, disseminate, or detonate a weapon of mass destruction, and a defense for possession when voluntarily surrendering the weapon or other item. The current D.C. Code § 22–3155 use, dissemination, or detonation of a weapon of mass destruction statute does not specify any exceptions to liability for any person under any conditions, and there are no defenses or affirmative defenses. There is no DCCA case law on point. The D.C. Code also does not codify general defenses. In contrast, the revised statute provides an affirmative defense for use with intent to cause massive property damage that the actor reasonably believed that they were acting in compliance with a current license or authority under civil law and with the effective consent of an owner of the property.[107] The revised statute also provides clear exceptions to liability for intent to cause massive property damage for lawfully engaged government employees, those acting within authority granted by MPD or a court, and researchers. This defense and the exclusions ensure that otherwise lawful use of weapons of mass destruction and other items are not inadvertently criminalized, and avoids conflict federal law regarding the handling of these materials. 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 current District law.

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destruction from statute]."); D.C. Crim. Jur. Instr. § 3.100 ("For offenses that have been understood to be "general intent" crimes, the Committee has settled on describing the required state of mind as the defendant having acted "voluntarily and on purpose, not by mistake or accident.").

[104] *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)").

[105] *See, e.g.*, RCC § 22E-3403, Correctional Facility Contraband; RCC § 22E-4102, Carrying a Dangerous Weapon.

[106] *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.'").

[107] For example, the actor may use explosives with a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit. *See* RCC § 22E-2501, arson. Other RCC general defenses also apply to the revised use, dissemination, or detonation of a weapon of mass destruction offense.

Appendix A – Black Letter Text of Draft Revised Statutes.

RCC § 22E-701. Definitions. [To be incorporated with other definitions in RCC § 22E-701.]

"Biological agent" means any microorganism, virus, infectious substance, or biological product that may be bioengineered, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, capable of causing:

(A) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;
(B) Deterioration of food, water, equipment, supplies, or material of any kind; or
(C) Deleterious alteration of the environment.

"Nuclear material" means material containing any:

(A) Plutonium;
(B) Uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;
(C) Uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or
(D) Uranium 233.

"Toxic or poisonous chemical" means any chemical which, through its chemical action on life processes, can cause death, permanent incapacitation, or permanent harm to another living organism.

"Toxin" means the toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule, whatever its origin or method of production, including:

(A) Any poisonous substance or biological product that may be bioengineered or produced by a living organism; or
(B) Any poisonous isomer or biological product, homolog, or derivative of such a substance.

"Unit of government" means:

(A) The office of the President of the United States;
(B) The United States Congress;
(C) Any federal executive department or agency;
(D) The office of the Mayor of the District of Columbia;
(E) Any executive department or agency of the District of Columbia, including any independent agency, board, or commission;
(F) The Council of the District of Columbia;
(G) The Superior Court of the District of Columbia;
(H) The District of Columbia Court of Appeals;
(I) The United States Court of Appeals for the District of Columbia;

(J) The United States District Court for the District of Columbia; or
(K) The Supreme Court of the United States.

"Vector" means a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host.

"Weapon of mass destruction" means:
(A) An explosive, incendiary, or poison gas weapon that is designed, planned for use or otherwise used to cause death or serious bodily injury to a person, or property damage, including a:
(i) Bomb;
(ii) Grenade;
(iii) Rocket having a propellant charge of more than four ounces;
(iv) Missile having an explosive or incendiary charge of more than one-quarter ounce;
(v) Mine; or
(vi) Device similar to any of the devices described in the preceding sub-subparagraphs (i)-(vi);
(B) Any type of weapon other than a shotgun which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter;
(C) Any combination of parts designed or planned for conversion into a weapon described in subparagraphs (A) and (B) of this paragraph and from which such a device may be readily assembled;
(D) A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a toxic or poisonous chemical or its precursors;
(E) A weapon, including a vector, that is designed, planned for use or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a biological agent or toxin; or
(F) A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material.

RCC § 22E-1701. Act of Terrorism.

(a) *First Degree.* An actor commits a first degree act of terrorism when the actor:
(1) In fact, commits murder under RCC § 22E-1101;
(2) With the purpose, in whole or part, of:
(A) Intimidating or coercing a significant portion of the civilian population of the District of Columbia or the United States; or
(B) Influencing the policy or conduct of a unit of government by intimidation or coercion.
(b) *Second Degree.* An actor commits a second degree act of terrorism when the actor:

(1) In fact, commits:
(A) Manslaughter under RCC § 22E-1102;
(B) First degree assault under RCC § 22E-1202(a); or
(C) Kidnapping under RCC § 22E-1401;
(2) With the purpose, in whole or part, of:
(A) Intimidating or coercing a significant portion of the civilian population of the District of Columbia or the United States; or
(B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(c) *Third Degree.* An actor commits a third degree act of terrorism when the actor:
(1) In fact, commits:
(D) Arson under RCC § 22E-2501; or
(E) First degree criminal damage to property under RCC § 22E-2503(a);
(2) With the purpose, in whole or part, of:
(A) Intimidating or coercing a significant portion the civilian population of the District of Columbia or the United States; or
(B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(d) *No hate crime enhancement*. Notwithstanding RCC § 22E-608, a hate crime penalty enhancement does not apply to an offense under this section.

(e) *Penalties*.
(1) First degree act of terrorism is a Class 1 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree act of terrorism is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree act of terrorism is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The term "purpose" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" and "unit of government" have the meaning specified in RCC § 22E-701.

RCC § 22E-1702. Material Support for an Act of Terrorism.

(a) *Offense.* An actor commits material support for an act of terrorism when the actor:
(1) Knowingly provides, or commands, requests, or tries to persuade, any person to provide, material support or resources;
(2) With intent that such material support or resources will be used, in whole or in part:
(A) To assist the planning or commission of conduct constituting an act of terrorism under RCC § 22E-1701; or
(B) To flee after committing an act of terrorism under RCC § 22E-1701.

(b) *Uncommunicated criminal solicitation.* It is immaterial under subsection (a) of this section that the planned recipient of the actor's command, request, or efforts at persuasion fails to receive the message, if the actor does everything they plan to do to transmit the message to the planned recipient.

(c) *Penalties.*

(1) Material support for an act of terrorism is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Merger.* A conviction for material support for an act of terrorism merges with any other conviction for being an accomplice to an act of terrorism under RCC § 22E-1701 arising from the same act or course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(d) *Definitions*.

(1) The terms "knowingly" and "intent" have the meaning specified in RCC § 22E-206; the term "actor" has the meaning specified in RCC § 22E-701; and

(2) In this section, "material support or resources" means:

(A) Expert services or assistance;

(B) Currency, financial securities or other monetary instruments, financial services, lodging, training, false documentation or identification, equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets; or

(C) A weapon of mass destruction.

RCC § 22E-1703. Manufacture or Possession of a Weapon of Mass Destruction.

(a) *Offense.* An actor commits manufacture or possession of a weapon of mass destruction when the actor:

(1) Either:

(A) Knowingly manufactures or possesses a weapon of mass destruction; or

(B) With intent that it will be used to cause death or serious bodily injury to multiple persons, other than as part of a lawful medical procedure, knowingly manufactures or possesses an item that is:

(i) A toxic or poisonous chemical or its precursors;

(ii) A biological agent or toxin; or

(iii)Radioactive or nuclear material; and

(2) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or $500,000 or more in damage to property.

(b) *Exclusions from liability*. An actor does not commit an offense under paragraph (a)(1)(A) of this section when, in fact, the actor is:

(1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;

(2) Lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense;
(3) Lawfully engaging in the business of shipping or delivering the weapon involved in the offense;
(4) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court; or
(5) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions.

(c) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor possesses the weapon or item while, in fact, voluntarily surrendering the weapon or item pursuant to District or federal law.

(d) *Penalties*.
(1) Manufacture or possession of a weapon of mass destruction is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *Merger.* A conviction for manufacture or possession of a weapon of mass destruction merges with any other weapon possession offense arising from the same act or course of conduct under Chapter 41 [Weapon Offenses and Related Provisions] of this title or Chapter 25 [Firearms Control] of Title 7 of the D.C. Code. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(e) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "biological agent," "healthcare provider," "nuclear material," "possess," "serious bodily injury," "toxic or poisonous chemical," "toxin," and "weapon of mass destruction" have the meanings specified in RCC § 22E-701.

RCC § 22E-1704. Use, Dissemination, or Detonation of a Weapon of Mass Destruction.

(a) *First Degree.* An actor commits first degree use, dissemination, or detonation of a weapon of mass destruction when the actor:
(1) With intent to cause serious bodily injury or death to multiple persons, other than as part of a lawful medical procedure;
(2) Knowingly uses, disseminates, or detonates:
(A) A weapon of mass destruction;
(B) A toxic or poisonous chemical or its precursors;
(C) A biological agent or toxin; or
(D) Radioactive or nuclear material; and

(3) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths or serious bodily injuries to multiple persons.

(b) *Second Degree.* An actor commits second degree use, dissemination, or detonation of a weapon of mass destruction when the actor:

(1) With intent to cause:

(A) Bodily injury to multiple persons, other than as part of a lawful medical procedure; or

(B) Massive damage to property, including plants and animals on land owned by a government, government agency, or government-owned corporation;

(2) Knowingly uses, disseminates, or detonates:

(A) A weapon of mass destruction;

(B) A toxic or poisonous chemical or its precursors;

(C) A biological agent or toxin; or

(D) Radioactive or nuclear material; and

(3) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or $500,000 or more in damage to property.

(c) *Exclusions from liability*. An actor does not commit an offense under paragraph (b)(1)(B) of this section when, in fact, the actor is:

(1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;

(2) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court;

(3) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions;

(d) *Affirmative defense.* It is an affirmative defense to liability under paragraph (b)(1)(B) of this section that the actor, in fact, reasonably believes they are acting in compliance with a current license or authority under civil law and with the effective consent of an owner of the property.

(e) *Penalties*.

(1) First degree use, dissemination, or detonation of a weapon of mass destruction is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree use, dissemination, or detonation of a weapon of mass destruction is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Merger.* A conviction for use, dissemination, or detonation of a weapon of mass destruction merges with any other weapon possession offense arising from the same act or course of conduct under Chapter 41 [Weapon Offenses and Related Provisions] of this title or Chapter

25 [Firearms Control] of Title 7 of the D.C. Code. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(f) *Definitions*. The terms "knowingly" and "intent" have the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "biological agent," "bodily injury," "effective consent," "healthcare provider," "nuclear material," "possess," "property," "serious bodily injury," "toxic or poisonous chemical," "toxin," and "weapon of mass destruction" have the meanings specified in RCC § 22E-701.

Appendix B – Redlined Text
Comparing Draft Revised Statutes with Current D.C. Code Statutes.

"Biological agent" means any microorganism, virus, infectious substance, or biological product that may be bioengineered ~~as a result of biotechnology~~, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, capable of causing:

(A) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;
(B) Deterioration of food, water, equipment, supplies, or material of any kind; or
(C) Deleterious alteration of the environment.

"Nuclear material" means material containing any:

(A) Plutonium;
(B) Uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;
(C) ~~Enriched uranium, defined as u~~Uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or
(D) Uranium 233.

"Toxic or poisonous chemical" means any chemical which, through its chemical action on life processes, can cause death, permanent incapacitation, or permanent harm to ~~humans~~ another living organism.

"Toxin" means the toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule, whatever its origin or method of production, including:

(A) Any poisonous substance or biological product that may be bioengineered ~~as a result of biotechnology~~ or produced by a living organism; or
(B) Any poisonous isomer or biological product, homolog, or derivative of such a substance.

"Unit of government" means:

(A) The office of the President of the United States;
(B) The United States Congress;
(C) Any federal executive department or agency;
(D) The office of the Mayor of the District of Columbia;
(E) Any executive department or agency of the District of Columbia, including any independent agency, board, or commission;
(F) The Council of the District of Columbia;
(G) The Superior Court of the District of Columbia;
(H) The District of Columbia Court of Appeals;
(I) The United States Court of Appeals for the District of Columbia;
(J) The United States District Court for the District of Columbia; or
(K) The Supreme Court of the United States.

"Vector" means a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host.

"Weapon of mass destruction" means:

(B) An ~~destructive device~~ explosive, incendiary, or poison gas weapon that is designed, ~~intended~~ planned for use or otherwise used to cause death or serious bodily injury to a person, or property damage, including a~~n explosive, incendiary, or poison gas~~:

(i) Bomb;

(ii) Grenade;

(iii) Rocket having a propellant charge of more than four ounces;

(iv) Missile having an explosive or incendiary charge of more than one-quarter ounce;

(v) Mine; or

(vi) Device similar to any of the devices described in the preceding ~~clauses~~ sub-sub-paragraphs (i)-(vi);

(C) ~~A mortar, cannon, or artillery piece; or~~ Any type of weapon other than a shotgun which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter;

(D) Any combination of parts ~~either~~ designed or ~~intended~~ planned for conversion ~~use in converting any device~~ into a device described in ~~sub-~~subparagraphs (~~i~~A) ~~through~~ and (~~iii~~B) of this paragraph and from which such a device may be readily assembled;

~~An object similar to or used to achieve the same destructive effect of any of the devices described in subparagraph (A) of this paragraph~~;

(E) A~~ny~~ weapon that is designed, planned for use, ~~intended,~~ or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a toxic or poisonous chemical or its precursors;

(F) A~~ny~~ weapon, including a vector, that is designed, planned for use ~~intended,~~ or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a biological agent, or toxin; or

(G) A~~ny~~ weapon that is designed, planned for use ~~intended,~~ or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material.

RCC § 22E-1701. Act of Terrorism.

(a) *First Degree.* An actor commits a first degree act of terrorism when the actor:

(1) In fact, commits murder under RCC § 22E-1101;

(2) With the purpose, in whole or part, of:

(A) Intimidating or coercing a significant portion of the civilian population of the District of Columbia or the United States; or

(B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(b) *Second Degree.* An actor commits a second degree act of terrorism when the actor:
  (1) In fact, commits:
    (F) Manslaughter under RCC § 22E-1102;
    (G) First degree assault under RCC § 22E-1202(a); or
    (H) Kidnapping under RCC § 22E-1401;
  (2) With the purpose, in whole or part, of:
    (A) Intimidating or coercing a significant portion of the civilian population of the District of Columbia or the United States; or
    (B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(c) *Third Degree.* An actor commits a third degree act of terrorism when the actor:
  (1) In fact, commits:
    (I) Arson under RCC § 22E-2501; or
    (J) First degree criminal damage to property under RCC § 22E-2503(a);
  (2) With the purpose, in whole or part, of:
    (A) Intimidating or coercing a significant portion the civilian population of the District of Columbia or the United States; or
    (B) Influencing the policy or conduct of a unit of government by intimidation or coercion.

(d) *No hate crime enhancement*. Notwithstanding RCC § 22E-608, a hate crime penalty enhancement does not apply to an offense under this section.

(e) *Penalties*.
  (1) First degree act of terrorism is a Class 1 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree act of terrorism is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree act of terrorism is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The term "purpose" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" and "unit of government" have the meaning specified in RCC § 22E-701.

~~(a) A person who commits first degree murder that constitutes an act of terrorism shall, upon conviction, be punished by imprisonment for life without the possibility of release.~~

~~(b) A person who commits murder of a law enforcement officer or public safety employee that constitutes an act of terrorism shall, upon conviction, be punished by imprisonment for life without the possibility of release.~~

~~(c) A person who commits murder in the second degree that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for life.~~

~~(d) A person who commits manslaughter that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for life.~~

~~(e) A person who commits kidnapping that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for life.~~

~~(f) A person who commits any assault with intent to kill that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 30 years.~~

~~(g) A person who commits mayhem or maliciously disfiguring another that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.~~

~~(h) A person who commits arson that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.~~

~~(i) A person who commits malicious burning, destruction, or injury of another's property, if such property is valued at $500,000 or more, that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.~~

~~(j) A person who attempts or conspires to commit first degree murder, murder of a law enforcement officer or public safety employee, murder in the second degree, manslaughter, or kidnapping that constitutes an act of terrorism may be punished by imprisonment for not more than 30 years.~~

~~(k) A person who attempts or conspires to commit any assault with intent to kill that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.~~

~~(l) A person who attempts or conspires to commit mayhem or maliciously disfiguring another, arson, or malicious burning, destruction, or injury of another's property, if such property is valued at $500,000 or more, that constitutes an act of terrorism may, upon conviction, be punished by imprisonment of not more than 15 years.~~

~~(m)~~

~~(n) A person who solicits material support or resources to commit an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.~~

RCC § 22E-1702. Material Support for an Act of Terrorism.

(a) *Offense.* An actor ~~A person who~~ commits material support for an act of terrorism when the actor:

(1) Knowingly provides, or commands, requests, or tries to persuade, any person to provide, material support or resources;

(2) With intent that such material support or resources will be used, in whole or in part:

(A) To assist the planning or commission of conduct constituting ~~for~~ an act of terrorism under RCC § 22E-1701; or

(B) To flee after committing an act of terrorism under RCC § 22E-1701 ~~may, upon conviction, be punished by imprisonment for not more than 20 years~~.

(b) *Uncommunicated criminal solicitation.* It is immaterial under subsection (a) of this section that the planned recipient of the actor's command, request, or efforts at persuasion fails to receive the message, if the actor does everything they plan to do to transmit the message to the planned recipient.

(c) *Penalties.*

(1) Material support for an act of terrorism is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Merger.* A conviction for man material support for an act of terrorism merges with any other conviction for being an accomplice to an act of terrorism under RCC § 22E-1701 or soliciting an act of terrorism under RCC § 22E-1701 arising from the same act or course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(d) *Definitions*.

(1) The terms "knowingly" and "intent" have the meaning specified in RCC § 22E-206; the term "actor" has the meaning specified in RCC § 22E-701; and

(2) In this section, "material support or resources" means:

(A) Expert services or assistance;

(B) Currency, financial securities or other monetary instruments, financial services, lodging, training, false documentation or identification, equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets; or

(C) A weapon of mass destruction.

RCC § 22E-1703. Manufacture or Possession of a Weapon of Mass Destruction.

(a) *Offense.* An actor ~~A person who~~ commits manufacture or possession of a weapon of mass destruction when the actor:

(1) Either:

(A) Knowingly manufactures or possesses a weapon of mass destruction; or

(B) With intent that it will be used to cause death or serious bodily injury to multiple persons, other than as part of a lawful medical procedure, knowingly manufactures or possesses an item that is:

(i) A toxic or poisonous chemical or its precursors;

(ii) A biological agent or toxin; or

(iii) Radioactive or nuclear material; and

(2) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or ~~massive~~ $500,000 or more in damage to property.

(b) *Exclusions from liability*. An actor does not commit an offense under paragraph (a)(1)(A) of this section when, in fact, the actor is:

(1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;

(2) Lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense;

(3) Lawfully engaging in the business of shipping or delivering the weapon involved in the offense;

(4) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court; or

(5) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions.

(c) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor possesses the weapon or item while, in fact, voluntarily surrendering the weapon or item pursuant to District or federal law.

(d) *Penalties*.

(1) Manufacture or possession of a weapon of mass destruction is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Merger.* A conviction for manufacture or possession of a weapon of mass destruction merges with any other weapon possession offense arising from the same act or course of conduct under chapter 41 [Weapon Offenses and Related Provisions] of this title or chapter 25 [Firearms Control] of title 7 of the D.C. Code. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(e) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "biological agent," "healthcare provider," "nuclear material," "possess," "serious bodily injury," "toxic or poisonous chemical," "toxin,"

and "weapon of mass destruction" have the meanings specified in RCC § 22E-701.

~~(b) A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.~~

~~(c) 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.~~

RCC § 22E-1704. Use, Dissemination, or Detonation of a Weapon of Mass Destruction.

(a) *First Degree.* An actor ~~A person who~~ commits first degree use, dissemination, or detonation of a weapon of mass destruction when the actor:

(1) With intent to cause serious bodily injury or death to multiple persons, other than as part of a lawful medical procedure;

(2) Knowingly uses, disseminates, or detonates:

(A) A weapon of mass destruction;

(B) A toxic or poisonous chemical or its precursors;

(C) A biological agent or toxin; or

(D) Radioactive or nuclear material; and

(3) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths or serious bodily injuries to multiple persons or ~~massive~~ $500,000 or more in destruction of property ~~may, upon conviction, be punished by imprisonment for life.~~

(b) *Second Degree.* An actor ~~A person who~~ commits second degree use, dissemination, or detonation of a weapon of mass destruction when the actor:

(1) With intent to cause:

(A) Bodily injury to multiple persons, other than as part of a lawful medical procedure; or

(B) Massive damage to property, including plants and animals on land owned by a government, government agency, or government-owned corporation;

(2) Knowingly uses, disseminates, or detonates:

(A) A weapon of mass destruction;

(B) A toxic or poisonous chemical or its precursors;

(C) A biological agent or toxin; or

(D) Radioactive or nuclear material; and

(3) In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or ~~massive~~ $500,000 or more in ~~destruction of~~ damage to property ~~may, upon conviction, be punished by imprisonment for life.~~

(c) *Exclusions from liability.* An actor does not commit an offense under paragraph (b)(1)(B) of this section when, in fact, the actor is:

(1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;

(2) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court;

(3) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions;

(d) *Affirmative defense.* It is an affirmative defense to liability under paragraph (b)(1)(B) of this section that the actor, in fact, reasonably believes they are acting in compliance with a current license or authority under civil law and with the effective consent of an owner of the property.

(e) *Penalties*.

(1) First degree use, dissemination, or detonation of a weapon of mass destruction is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree use, dissemination, or detonation of a weapon of mass destruction is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Merger.* A conviction for use, dissemination, or detonation of a weapon of mass destruction merges with any other weapon possession offense arising from the same act or course of conduct under chapter 41 [Weapon Offenses and Related Provisions] of this title or chapter 25 [Firearms Control] of title 7 of the D.C. Code. The sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(f) *Definitions*. The terms "knowingly" and "intent" have the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "biological agent," "bodily injury," "effective consent," "healthcare provider," "nuclear material," "possess," "property," "serious bodily injury," "toxic or poisonous chemical," "toxin," and "weapon of mass destruction" have the meanings specified in RCC § 22E-701.

~~(b) A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.~~

~~(c) (c) 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.~~

Appendix C – Special Conforming Amendments.

In addition to conforming amendments necessary to update citations to statutes in this Report, the CCRC at this time recommends the following special conforming amendments be made:

- Update the predicate offenses for temporary possession defense under RCC § 22E-502 to include RCC § 22E-1703 manufacture or possession of a weapon of mass destruction.

Appendix D – Other Background Information for Reviewers.

- The revised statutes in this Report do not codify and do not discuss repealing the current definition of "hoax weapon of mass destruction" currently in D.C. § 22–3152.[108] That definition is expected to be addressed by the RCC in conjunction with revision of other offenses concerning false reports in the winter of '21-'22.

- The revised statutes in this Report do not codify and do not discuss repealing the current jurisdiction provision in D.C. § 22–3156.[109] That provision is expected to be addressed by the RCC in conjunction with revision of other offenses concerning jurisdiction in the winter of '21-'22.

[108] D.C. § 22–3152. (""Hoax weapon of mass destruction" means any device or object that by its design, construction, content, or characteristics, appears to be or to contain, or is represented to be or to contain a weapon of mass destruction, even if it is, in fact, an inoperative facsimile or imitation of a weapon of mass destruction, or contains no weapon of mass destruction.").

[109] D.C. § 22–3156. ("There is jurisdiction to prosecute any person who participates in the commission of any offense described in this chapter if any act in furtherance of the offense occurs in the District of Columbia or where the effect of any act in furtherance of the offense occurs in the District of Columbia.").