GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2022

SUBJECT: Second Draft of Report #71 – Terrorism Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Second Draft of Report #71, Terrorism.[1]

COMMENTS ON THE DRAFT REPORT

Definitional Section

OAG recommends numerous amendments to the definition of "unit of government" in RCCA § 22A-101 to ensure that the list is comprehensive. The Second Draft of Report #71 states:

"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;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(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.

OAG would note that the definition does not include those persons elected by District voters to the Advisory Neighborhood Commissioners. In addition, though OAG believes that agencies such as the Court of Appeals for the Armed Forces, would be a federal executive department or agency, just as the Office of Administrative Hearings would be an executive department or agency of the District, despite their adjudicatory function, that the definition should be amended to avoid litigation over this fact.

Finally, OAG notes that paragraph (C) states, "Any federal executive department or agency," but paragraph (E) states, "(E) Any executive department or agency of the District of Columbia, including any independent agency, board, or commission." [emphasis added] OAG is concerned that the inclusion of the underlined portion of the definition be included in the definition concerning District executive agencies but being excluded from the definition of federal executive agencies will cause litigation over whether federal independent agencies, boards and commissions are included as units of government. Therefore, OAG suggests that these two paragraphs be made parallel.

To ensure that all units of government are included within this definition and to simplify the definition, OAG recommends that it be redrafted to say:

"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, including any independent agency, board, or commission, such as the Court of Appeals for the Armed Forces;
D. Any person elected to a District of Columbia office, including as Mayor, Councilmember, and Advisory Neighborhood commissioner;
E. Any executive department or agency of the District of Columbia, including any independent agency, board, or commission, such as the Office of Administrative Hearings;
F. Any federal or local judicial body, including the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia, the United States District Court for the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia.

The definition of Hoax weapon of mass destruction, like DC Code 22-3152(2)(C), is "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 an inoperative facsimile or imitation of a weapon of mass destruction, or contains no weapon of mass destruction." OAG recommends adding a coma after the word "contain." This way, the phrase "a weapon of mass destruction" cleanly applies to both the "appears to be or to contain" and "is represented to be or to contain" prongs.

The definition of "weapon of mass destruction" is:

(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 sub-sub-paragraphs (i)-(v) of this paragraph;
(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 that contains nuclear material.

However, in the "Relation to Current District Law" portion of the Commentary for Weapon of mass destruction," it summarizes this definition by saying, "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." OAG is concerned that the Commentary's use of the term "specifically" prior to an incomplete list of items that make up a weapon of mass destruction is misleading. OAG recommends that this sentence be expanded and modified slightly to summarize this definition more accurately as follows "The revised definition specifically includes only explosive, incendiary, or poisonous gas, or biological weapons, or those that involve radiation or nuclear material, and in the context of rockets and missiles, applies only to those with specified amounts of propellant or explosive or incendiary charges."

RCCA § 22A-2704. Use, Dissemination, or Detonation of a Weapon of Mass Destruction

The second degree version of this offense states:

(a) *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.

Paragraph (a)(1)(B) requires the actor to act "with intent to cause … (B) Massive damage to property, including plants and animals, on land owned by a government, government agency, or government-owned corporation." As formulated, the animals that reside on or are passing through government lands are "property." OAG does not believe that animals on government land are necessarily the government's or anyone else's property. Therefore OAG recommends that subparagraph (B) be amended to say, "Massive damage to property on land owned by a government, government agency, or government-owned corporation, and the plants and animals found on government land."

OAG agrees that the offense should include not only massive damage to government property, but also the plants and animals that happen to reside on or be passing through government lands. However, it is unclear how the plants and animals found on the government land should be valued when calculating whether "In fact, the weapon of mass destruction or other item is capable of causing …. $500,000 or more in damage to property." The Commentary should address this issue.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2022

SUBJECT: Second Draft of Report #72 - Obstruction of Justice Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Second Draft Report #72, Obstruction of Justice Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCCA § 22A-101. Generally Applicable Definitions

The definition of "Court Official" states that the phrase:

> means any of the following persons acting within their professional role in connection to an official proceeding:
>
> (A) Judicial officer;[2]
>
> (B) A lawyer or a person employed by or working with the lawyer;
>
> (C) An employee of any Court of the District of Columbia;
>
> (D) An employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division; or

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] In reviewing this definition, OAG assumes that the phrase "judicial officer" refers to a judge of a Court of the District of Columbia, as well as any other person who serves in a judicial capacity, for example a judge who sits on the Court of Appeals for the Armed Forces.

(E) An independent contractor or employee of an independent contractor hired by any Court of the District of Columbia.

There are a number of nonsubstantive amendments that OAG recommends be made to this definition. First, the definitions in Report #72 capitalize the second word in each phrase that is being defined (e.g., Court Official, Criminal Investigation, and Official Proceeding). However, in the Revised Criminal Code Act of 2021, the second word in the phrase being defined in RCCA § 22A-101is in lower case. The capitalization of definitions should be consistent.[3] Second, paragraph (B), above, states "A lawyer or a person employed by or working with the lawyer. [emphasis added] OAG recommends changing the word "the" to "a," since the definition is not referring to a specific lawyer. Third, both paragraphs (C) and (E) capitalize the word "court" when stating any "Court of the District of Columbia." While it is proper to capitalize the word "Court" in the definition of the phrase "Court of the District of Columbia," the word "court" should not be capitalized when used in other definitions. For example, "(C) An employee of any court of the District of Columbia." Finally, paragraph (D) uses the phrase "Family Court Social Services Division." However, that phrase is not used in Title 16 of the Code, where the role of that agency is described. In Chapter 23 of Title 16, this agency is repeatedly referred to as the "Director of Social Services."[4] By applying these suggestions to the definition of "Court official," we get:

"Court official"[5] means any of the following persons acting within their professional role in connection to an official proceeding:

(A) Judicial officer;
(B) A lawyer or a person employed by or working with a lawyer;
(C) An employee of any court of the District of Columbia;
(D) An employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Director of Social Services; or
(E) An independent contractor or employee of an independent contractor hired by any court of the District of Columbia.

RCCA-§ 22A-4303. Tampering with a Juror or Court Official.

[3] The same change in capitalization should be made the remaining definitions in this report, when required.
[4] For example, see D.C. Code §§ 16-2305, 16-2309, and 16-2311.
[5] The first sentence in the second paragraph of the Commentary for this definition is "The RCCA definition of Court of the District of Columbia is a new definition that specifies which participants are court officers under the statute." [emphasis added] Given the phrase being defined, OAG believes that this sentence should be amended to say, "The RCCA definition of Court of the District of Columbia is a new definition that specifies which participants are court officials under the statute." [emphasis added]

While this offense is entitled "Tampering with a Juror or Court Official" the lead in language in Paragraph (a) states, "An actor commits first degree tampering with a juror or court official in a judicial proceeding." The lead in language should mirror the offense title. Either this phrase should be struck from paragraph (a) or it should be added to the title and the lead in language to paragraphs (b) and (c), referring to the second and third degree versions of this offense. Because this offense uses the phrase "official proceeding" which also refers to actions by the Council[6], OAG recommends that the phrase "judicial proceeding" be added throughout the offense to be clear that this offense only applies to jurors and court proceedings.[7]

RCCA § 22A-4305. Tampering with evidence

The first and second degree versions of this offense contains elements with a mental state that, depending on the subparagraph, includes impairing, preventing or affecting something "with the purpose of" excluding or limiting its value "in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated." See subparagraphs (a)(1)(A) and (B), (a)(2)(B), (b)(1)(A) and (B), (b)(1)(B). However, neither the text nor the Commentary give guidance as to how one proves the likelihood that a criminal investigation would be initiated nor how likely the investigation must be. OAG recommends that the Commentary address these issues.

[6] The definition of "official proceeding" in Report #77 also includes "Any hearing, official investigation, or other proceeding conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, excluding criminal investigations."

[7] Paragraph (c)(3)(A) contains a typo. The sentence ends with the phrase "of a juror in the official." It should say "of a juror in the official proceeding."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2022

SUBJECT: First Draft of Report #75 – Resisting Arrest

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #75, Resisting Arrest.[1]

COMMENTS ON THE DRAFT REPORT

OAG notes that the resisting arrest offense makes it an offense for both the person who law enforcement is trying to arrest to resist and for a third party to interfere with law enforcement trying to arrest another person.[2] However, OAG believes that a lay person would not consider themselves as having resisted arrest when law enforcement was not initially trying to arrest them, but was arrested someone else. To make this offense more understandable to lay people and to clarify that the offense also applies to third parties who come to the aid of someone else, OAG suggests amending the title of the offense to "Resisting arrest or interfering with the arrest of a third party."

OAG recommends that the offense of resisting arrest be expanded beyond the current definition of law enforcement officers to include all persons who have arrest authority over juveniles.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any later hearing that the Council may have on any legislation that may result from the Report.
[2] See § 22A-4404 (a)(1) which says that the actor commits this offense "With the purpose of preventing the actor or another person from being placed in official custody." (emphasis added)

Subparagraph (a)(3)(A) requires that the actor be reckless as to the fact that "A law enforcement officer who has authority to make an arrest verbally communicated to the person under arrest that the person was under arrest." [emphasis added]

The phrase "law enforcement officer" is a defined in § 22A-101(67). That provision states that the phrase means:

> (A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;
> (B) An investigative officer or agent of the United States;
> (C) An on-duty, civilian employee of the Metropolitan Police Department;
> (D) An on-duty, licensed special police officer;
> (E) An on-duty, licensed campus police officer;
> (F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or
> (G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.

While D.C. Code § 16-2309 does not use the term "arrest" in the context of youth, the statue does provide the sole authority for law enforcement to take youth into custody. Depending upon the circumstances, these seizures are considered arrests for purposes of 4th Amendment analysis. The statute also authorizes employees of other agencies authority to seize youth. D.C. Code § 16-2309 is entitled, "Taking into custody" and paragraph (a) states:

> **(a)** A child may be taken into custody —
> **(1)** pursuant to order of the Division under section 16-2306 or 16-2311;
>
> **(2)** by a law enforcement officer when he has reasonable grounds to believe that the child has committed a delinquent act;
>
> **(3)** by any employee of the Agency authorized to do so, or a law enforcement officer, when he or she has reasonable grounds to believe that the child is in immediate danger from his or her surroundings and that the removal of the child from his or her surroundings is necessary, including when he or she has reasonable grounds to believe that the child is engaging in or offering to engage in a sexual act, as defined in [§ 22-3001(8)], or sexual contact, as defined in [§ 22-3001(9)], in return for receiving anything of value;
>
> **(4)** by any employee of the Agency authorized to do so, or a law enforcement officer, after he or she has consulted with the Director of the Agency, or his or her designee, pursuant to § 4-1301.07(b) when the employee or the officer has reasonable grounds to believe that the child is suffering from illness or injury or otherwise is endangered and that the child's removal from his or her surroundings is necessary;

(5) by a law enforcement officer when he has reasonable grounds to believe that the child has run away from his parent, guardian, or other custodian;

(6) by the Director of the Agency or his or her designee, upon written notification by the chief executive officer of a hospital located in the District of Columbia, that the child has resided in the hospital for at least 10 calendar days following the birth of the child, despite a medical determination that the child is ready for discharge from the hospital, and the parent, guardian or custodian of the child, as established by the hospital admission records, has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child;

(7) by a law enforcement officer when the officer has reasonable grounds to believe that the child, who is not in school on a day when school is in session, is of compulsory school age as required by [§ 38-202];

(8) by the Director of Social Services, pursuant to section 16-2337;[3]

(9) by a law enforcement officer when the officer has reasonable grounds to believe that the child has violated a court order; or

(10) by the Director of the Department of Youth Rehabilitation Services when a child committed to the legal custody of the Department of Youth Rehabilitation Services absconds from a community-based placement or violates any of the terms of his or her aftercare placement. For the purposes of this paragraph, the term "aftercare placement" means the placing of a child who has been committed to the legal custody of the Department of Youth Rehabilitation Services in the community under the supervision of a trained social worker.

There is no reason why employees of the agencies listed above should not be covered by the resisting arrest statute when taking a youth into custody pursuant to D.C. Code § 16-2309. Therefore, OAG recommends that this offense be amended to include these additional individuals, whether they are technically law enforcement or not. OAG suggests that 22A-4404 (a) be redrafted as follows[4]:

(a) *Offense*. An actor commits resisting arrest when the actor:
(1) With the purpose of preventing the actor or another person from being placed in official custody;

[3] Note that DC Code § 16-2309 uses the phrase "Director of Social Services." In OAG's memorandum concerning the Second Draft of Report #72, Obstruction of Justice Offenses, we suggest that the reference to "Family Court Social Services Division" be changed to Director of Court Social Services. For the same reasons noted in that memorandum, the same amendment should be made to the definition of law enforcement officer in RCC § 22A-101 (67).
[4] OAG underlined the recommended amendments.

(2) Knowingly:
  (A) Uses physical force against a law enforcement officer or other person authorized to take a child into custody pursuant to D.C. Code § 16-2309*;* or
  (B) Engages in conduct other than speech or passive resistance that either:
    (i) Creates a substantial risk of causing significant bodily injury to a law enforcement officer or other person authorized to take a child into custody pursuant to D.C. Code § 16-2309; or
    (ii) Requires substantial physical force by a law enforcement officer or other person authorized to take a child into custody pursuant to D.C. Code § 16-2309 to overcome the actor's resistance; and

(3) The actor is reckless as to the fact that:
  (A) A law enforcement officer who has authority to make an arrest or other person authorized to take a child into custody pursuant to D.C. Code § 16-2309 verbally communicated to the person under arrest that the person was under arrest;
  (B) The communication would cause a reasonable person in the actor's circumstances to believe that the actor or another person was under arrest; and
  (C) The actor was given a reasonable opportunity to:
    (I) Submit to arrest; or
    (II) Cease or refrain from using force or engaging in conduct interfering with the arrest of another person.

Page 8 of the Commentary includes footnote 18 which says, "The RCCA definition of 'law enforcement officer' includes persons who may not be empowered to place a person under arrest including employees of the Court Services and Offender Supervision Agency, Pretrial Services Agency, and Family Court Services Division." This footnote is incorrect. All three of these agencies have arrest powers. D.C. Code § 24-133 establishes CSOSA. Paragraph (d) states, "Authority of officers. — The supervision officers of the Agency shall have and exercise the same powers and authority as are granted by law to United States Probation and Pretrial Officers." Federal law, 18 USCS 3606, Arrest and return of a probationer, states:

> If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal

> may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found." [emphasis added]

Therefore, District law grants employees of the Court Services and Offender Supervision Agency arrest powers.

By virtue of DC Code § 24-133(e)(1) Pretrial Services Agency also has arrest powers. This subparagraph states, "The District of Columbia Pretrial Services Agency established by subchapter I of Chapter 13 of Title 23, District of Columbia Official Code, shall function as an independent entity within the Agency [CSOSA]." Therefore the arrest authority granted to CSOSA in paragraph (d), with reference to 18 USCS 3606, also applies to Pretrial Services Agency (PSA), as PSA employees are "supervision officers of the Agency" under paragraph (d). The employees of the Director of Social Services also have arrest powers. See discussion of D.C. Code § 16-2309, and in particular, paragraph (a)(8) which authorizes the taking of youth into custody "by the Director of Social Services, pursuant to section 16-2337."

Paragraph (a)(2)(B) states that one way to commit this offense is, in addition to when the other elements are met, when the Actor:

> Engages in conduct other than speech or passive resistance that either:
> (i) Creates a substantial risk of causing significant bodily injury to a law enforcement officer; or
> (ii) Requires substantial physical force by a law enforcement officer to overcome the actor's resistance.

OAG questions the need for the limiting clause "other than speech or passive resistance" in this sub-subparagraph. It is not that OAG thinks that it should be an offense for a person to merely use speech or passive resistance while being arrested. Rather we question the necessity of that phrase when the government has to prove that the actor engaged in conduct that either created a substantial risk of causing significant bodily injury or which would require substantial physical force by the police to overcome the actor's resistance. Therefore, OAG recommends that either the phrase "other than speech or passive resistance" be struck or that the Commentary give examples of when a person only uses speech or passive resistance and still creates a substantial risk of causing significant bodily injury (or which would require substantial physical force) and explains why the creation of the substantial risk (or need for substantial physical force) should not be enough to trigger this offense.[5]

Paragraph (b) establishes an affirmative defense to the charge of resisting arrest. It states:

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[5] If the Commission does not strike the phrase "other than speech or passive resistance," then OAG suggests that the term "passive resistance" be defined or that the Commentary give sufficient examples of what does and does not amount to passive resistance.

(b) It is an affirmative defense to liability under this section offense that the actor reasonably believes:

(1) The actor or another person is in imminent danger of significant bodily injury; and

(2) The conduct constituting the offense:

(A) Will protect against such bodily injury; and

(B) Is necessary in degree.

The Commentary on page 5 states, "Sub-subparagraph (a)(3)(A) specifies as the first required circumstance element that a law enforcement officer who has authority to make arrests has verbally communicated to the person under arrest that the person was under arrest. The sub-subparagraph does not require that a law enforcement officer verbally communicate directly to the actor that a third party is under arrest." OAG believes that footnote 6, which follows the second sentence quoted above, should be tweaked slightly to make it clearer.

Footnote 6 currently states, "For example, if an actor comes upon a scene where a uniformed officer is grappling with a third person to place the third person under arrest, it is not required that the officer verbally communicate with the actor that the person is under arrest. In such an instance, the actor could be found guilty of resisting arrest even if they were not present when the verbal communication took place if the actor disregarded a substantial risk that the third person was under arrest and the risk was of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk was a gross deviation from the standard of conduct that a reasonable individual would follow in the person's situation." OAG suggests that the first sentence by modified to say, "For example, if an actor comes upon a scene where a uniformed officer is grappling with a third person to place the third person under arrest, it is not required that the officer verbally communicate with the actor that the person is under arrest. In such an instance, the actor could be found guilty of resisting arrest even if they were not present when the verbal communication took place if the actor disregarded a substantial risk that the third person was under arrest and …."

OAG also recommends that this portion of the Commentary further explain or give examples that show how this offense works in the context of a third party who prevents another person from being placed in official custody where the third person arrives on the scene of an arrest in progress without hearing anything that the officer said to the original person being arrested. In that situation the third party would not be in a position to evaluate whether the law enforcement officer communicated to the person originally being placed under arrest that that person was under arrest.

Finally, on the bottom of page 6 of the Commentary, still referencing paragraph (b)(1), it states, "The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "immediate" or to require that the bodily injury will occur at a specific moment in time." OAG believes that this formulation will be confusing to the ordinary reader as these words are virtual synonyms. We note that neither the terms "imminent" nor "immediate" are defined terms in the RCC. So, in interpreting these terms we used Webster's dictionary to obtain the definition. Webster's defines imminent as "ready to

take place: happening soon." And "immediate" as "occurring, acting, or accomplished without loss or interval of time." Plugging these Webster's definitions in to the sentence of the Commentary we get "The word "occurring, acting, or accomplished without loss or interval of time" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "occurring, acting, or accomplished without loss or interval of time" or to require that the bodily injury will occur at a specific moment in time." OAG, therefore, recommends that the reference to "immediate" be deleted and that this portion of the Commentary be amended to say, "The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to require that the bodily injury will occur at a specific moment in time."

OAG believes that there are situations where the affirmative defense would apply when it should not. Take the following example. An officer sees a drug transaction and as the officer approaches the seller the seller takes out a gun and starts shooting at the officer preventing the arrest. The seller would be guilty of resisting arrest because the seller was "with the purpose of preventing the [seller]from being placed in official custody, knowingly engaged in conduct [shooting at the officer]… that creates a substantial risk of causing significant bodily injury to [the] law enforcement officer."

However, should a third person see the officer returning fire and then tackle the officer to prevent the seller receiving return fire, then the affirmative defense would seem to apply. Afterall, the actor sees the police officer shooting at the seller, so the seller (who started the gun fire exchange) would be in "imminent danger of significant bodily injury," by the return fire, and by tackling the officer the third party is protecting the seller (the arrestee) from the bodily injury, and the tackling is necessary in degree to stop the police officer from firing back at the seller and possibly causing bodily injury.

Paragraph (c) is entitled "Unit of Prosecution" and says, "Where conduct is of a continuing nature, the unit of prosecution is based on the arrest regardless of the number of law enforcement officers involved in the arrest." OAG believes that the statement would be clearer to the lay reader if it said, "Each instance of resisting an arrest shall constitute a single offense regardless of the number of law enforcement involved in the arrest."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2022

SUBJECT: First Draft of Report #76 – Perjury and Other Official Falsification Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #7, Perjury and Other Official Falsification Offenses.[1]

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COMMENTS ON THE DRAFT REPORT

RCC § 22A-4203. Perjury

The following is the Perjury offence as it appears in Report #76.[i]

(a) *Offense.* An actor commits perjury when the actor either:
(1) Knowingly makes a false statement in an official proceeding; and
(A) In fact:
(i) The actor makes the false statement while testifying, orally or in writing, under oath or affirmation attesting to the truth of the statement;
(ii) The oath or affirmation is administered:
(I) Before a competent tribunal, officer, or person;
(II) In a case or matter in which the law authorizes the taking of such an oath or affirmation; and

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any later hearing that the Council may have on any legislation that may result from the Report.

(iii) The false statement is material to the course or outcome of the official proceeding; or

(2) Knowingly makes a false statement in a sworn declaration or unsworn declaration; and

(A) In fact, the statement is:

(i) In a writing with a statement indicating that the declaration is made under penalty of perjury;

(ii) Delivered in a case or matter where the law requires or permits the statement be made in a sworn declaration; and

(iii) Material to the case or matter in which the declaration is delivered.

(b) *Requirement of Corroboration*. In a prosecution under this section, proof of falsity of a statement may not be established solely by the uncorroborated testimony of a single witness.

(c) *Defenses.* It is a defense to liability under section (a)(1) that, in fact:

(1) The actor retracted the false statement during the course of the official proceeding;

(2) The retraction occurred before the falsity of the statement is exposed; and

(3) The retraction occurred before the false statement substantially affect the proceeding.

(d) *Penalty.* Perjury is a Class 8 felony.

(e) *Definitions*. In this section, the term:

(1) "Competent" means having jurisdiction over the actor and case or matter;

(2) "Tribunal" means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature;

(3) "Official proceeding" has the meaning specified in § 22A-101;

(4) "Officer" has the meaning specified in D.C. Code § 1-301.45.

(5) "Sworn declaration" means a signed record given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit.

Sub-subparagraph (a)(1)(A)(ii)(II) requires that the oath or affirmation be administered before "a competent tribunal, officer, or person." Notwithstanding that this phrase is taken from the current perjury statute, see D.C. Code § 22-2402 (a)(1), OAG recommends that this sub-subparagraph be shortened to "competent tribunal" and that the definition of "tribunal" in (e)(2) be amended to substitute the term "officer" for "person."[2]

Unlike D.C. Code § 22-2402, the RCC contains a definition for the term "tribunal." The definition, in paragraph (e) states that "tribunal" "means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature." [emphasis added] So, that as drafted, the term "person" is already included in the definition of "tribunal." In addition, OAG believes that persons who

[2] A similar issue appears with the use of the phrase "competent tribunal" and the terms "officer" and "person" in § 22A-4209, Impersonation of another before a tribunal, officer, or person.

administers oaths and affirmations would be "officers" for purposes of this statute.[3] Subparagraph (e)(4) defines an "Officer," by reference to D.C. Code § 1-301.45, as including "any person authorized by law to perform the duties of the office."

Paragraph (c) establishes a defense to the charge of perjury. Paragraph (c)(1) requires that the actor, in fact "retracted the false statement during the course of the official proceeding." However, a person can make a false statement in a declaration, as required by paragraph (a)(2), and repudiate it before someone delivers it in a case or matter, as required by paragraph (a)(2)(A)(ii). To account for this possibility, OAG recommends that paragraph (c)(1) be amended to say, "The actor retracted the false statement prior to or during the course of the official proceeding."

Paragraph (e) (5) defines the phrase "sworn declaration." It states that that means "a signed record given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit." OAG believes that the requirements of this statement would be clearer if it was redrafted to say, "a signed record given under oath or affirmation attesting to its truth, which includes a sworn statement, verification, certificate, or affidavit."[4]

Paragraph (e)(6) defines "unsworn declaration." It states that that means "a declaration in a signed record that is not given under oath but is given under penalty of perjury as specified in D.C. Official Code § 16-5306 or 28 U.S.C. §1746(2)." However, D.C. Code §16-5306 is limited to unsworn foreign declarations, and contains language corresponding to that limit. The current perjury statute, however, states, "In any declaration, certificate, verification, or statement made under penalty of perjury <u>in the form specified in § 16-5306 or 28 U.S.C. § 1746(2),</u> the person willfully states or subscribes as true any material matter that the person does not believe to be true and that in fact is not true." [emphasis added] The form provided in 28 U.S.C. § 1746(2) is:

> "If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

To ensure that the scope of the proposed perjury statute is not narrowed from current law, OAG recommends that paragraph (e)(6) be redrafted to say "a statement made under penalty of perjury in the form specified in § 16-5306 or 28 U.S.C. § 1746(2)."

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[3] If OAG is incorrect in this assumption, then OAG recommends that the Commentary give examples of who these non-official persons are.

[4] OAG recommends that in the Commentary pertaining to this definition state that the term "sworn" before the phrase "statement, verification, certificate, or affidavit" modifies the entire phrase and not merely the term "statement."

Sub-subparagraph (a)(2)(A)(ii) specifies that the statement, in fact, be "Delivered in a case or matter where the law requires or permits the statement be made in a sworn declaration." On page 7, in the Commentary, it states:

> This means the government must prove that the case or matter where the false statement was delivered is a case or matter that permits or requires the statement be made under oath or affirmation. It is not sufficient that the signed statement indicates the statement is being made under oath or affirmation if the law does not otherwise so authorize or require. Per the rule of interpretation in § 22A-207, the phrase "in fact" in subparagraph (a)(2)(A) applies here, indicating there is no culpable mental state requirement as to whether the false statement is delivered in a case or matter where the law requires or permits the statement be made by sworn declaration.

OAG believes that the references to "under penalty of perjury: and "taking such a statement under threat of penalty" is misleading. The statute requires that the statement be made under oath or affirmation. Therefore, OAG recommends that the Commentary be redrafted to say:

> This means the government must prove that the case or matter where the false statement was delivered is a case or matter that permits or requires the statement be made under oath or affirmation. It is not sufficient that the signed statement indicates the statement is being made under oath or affirmation if the law does not otherwise so authorize or require. Per the rule of interpretation in § 22A-207, the phrase "in fact" in subparagraph (a)(2)(A) applies here, indicating there is no culpable mental state requirement as to whether the false statement is delivered in a case or matter where the law requires or permits the statement be made by sworn declaration.

<u>§ 22A-4204. Perjury by false certification</u>

Paragraph (a)(1) states the element that the actor "Knowingly makes a false certification of acknowledgement or of another material matter in an acknowledgment." This language is confusing when first read. OAG believes that paragraph (a)(1) can be restructured to make it clearer. We suggest that it be amended to say:

> (a) *Offense.* An actor commits perjury by false certification when the actor:
> (1) Knowingly makes a false certification of
> (i) acknowledgement or
> (ii) another material matter in an acknowledgment; and

OAG believes that the following sentence from the Commentary, on page 13 was meant to explain this reference. The Commentary states, "The revised perjury by false certification statute requires a knowingly mental state with respect to both the falsity of the certification and the materiality of a matter other than acknowledgement by a party." If OAG is correct about this assumption, then the Commentary is incorrect when it says "other than acknowledgment" because paragraph (a)(1) says, "in an acknowledgement."

§ 22A-4205. Solicitation of perjury

Footnote 44 states, "E.g., the actor sends a note to another person with a list of reasons why the other person should testify falsely at trial with without expressly requesting or commanding the person to testify false. Assuming the actor sent the note aware or practically certain that sending the note would lead another person testify falsely, this indirect attempt to persuade the other person would satisfy this element." OAG believes that there are two typos in the first sentence. First, the term "with" just before "without" should be struck. Also, "false" should be "falsely." "

The second sentence incorrectly states that the actor must be aware or practically certain that the sending of the note would lead another person to testify falsely. Paragraph (a)(1) only requires that the actor "knowingly… tries to persuade another person" to engage in conduct that would constitute perjury or false certification. There is no requirement that the actor be practically certain that the note would actually lead another person to testify falsely; trying is sufficient.[5]

§ 22A-4206. False swearing

Paragraph (b) provides the penalty for this offense. Subparagraph (b)(2) states, "The penalty classification of this offense is increased one class when the actor commits the offense negligent as to the fact that the statement was material to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person." In reviewing this sentence, OAG is unsure what is meant by the term "punishment" in this context and how it would differ from using the term "sentence." OAG believes that the enhancement should apply when the false statement affects a person's sentence. Therefore, OAG recommends that the Commission either substitute the term "sentence" for "punishment" or explain in the Commentary the scope of the term and how it encompasses a sentence.[6]

On page 20, in the Commentary for paragraph (b), it states, "Subsection (b) specifies the penalty classification for false swearing. Paragraph (b)(2) provides enhanced penalties for false swearing in cases where the false statements affect the liberty interests of another person. If the government proves the actor committed the offense negligent as to the fact that the statement was material to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person the penalty classification for false swearing may be increased in severity by one penalty class." Then on page 21 it says, "The inclusion of a penalty enhancement ensures that penalty for false swearing reflects the seriousness of the offense in cases where another person could be subjected to immediate and obvious irreparable harm." While the second statement may technically be correct, OAG believes that it is misleading. As drafted, the penalty enhancement would apply whenever the statement is material to the "the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person." A false statement, however, could be used to impede an individual's arrest, detention, etc., just as it could be used

[5] If the Commission does not accept OAG's recommendation, then the term "to" should be added between "person" and "testify" such that the sentence would read "Assuming the actor sent the note aware or practically certain that sending the note would lead another person to testify falsely, this indirect attempt to persuade the other person would satisfy this element."
[6] This recommendation also applies to other RCC offenses. E.g., § 22A-4207, False statements.

subject the person to harm. The Commentary should address how this enhancement would apply to a statement that is material to the prosecution of a person if they affected the course of that prosecution, regardless of whether they tilted it toward conviction or acquittal.

§ 22A-4207. False statements

The offense of false statements is contained in paragraph (a). It is modeled on D.C. Code § 22, 2405, false statements. The RCC offense states:

> (a) *Offense.* An actor commits false statements when the actor:
>
> (1) Knowingly makes a false statement in writing, directly or indirectly, to any District of Columbia government agency, department, or instrumentality, including any court of the District of Columbia;
>
> (2) Negligent as to the fact that the writing indicates the making of a false statement is punishable by criminal penalty; and
>
> (3) In fact, the statement is:
>
> (A) Made under circumstances in which the statement could reasonably be expected to be relied upon as true; and
>
> (B) Material to the case or matter to which it was delivered or likely to be delivered.

Paragraph (a)(1) requires that the false statement must be in writing and must be made "directly or indirectly" to the District government. However, subparagraph (a)(3)(B) requires that the statement be material to a case or mater to which it was "delivered or "likely to be delivered." It is unclear to OAG how a statement that is "likely to be delivered" can be made "directly or indirectly" to the District government. Therefore, OAG recommends, consistent with current law, that the phrase "likely to be delivered" be deleted from paragraph (a)(3)(B).[7]

Paragraph (b), consistent with the text of D.C. Code § 22-2405 (b), gives OAG jurisdiction to prosecute the offense of false statements. That said despite D.C. Code § 22-2405 (b), OAG believes that this offense falls under USAO's prosecutorial jurisdiction. First, D.C. Code § 22-2405 (like the RCC will be) was enacted by the Council and was not either directly by Congress nor through a Congressional enactment that allowed either the Council or any previous local legislative body to enact this type of offense. Second, as drafted, neither D.C. Code § 22-2405 nor § 22A-4207 appear to be regulatory in nature. Third, the penalty clause in the current law is a fine as "set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both." *See* D.C. Code § 23-101(a) that limits OAG's authority to prosecute offenses that provide for

[7] If OAG is misinterpreting the interaction between the text in paragraphs (a) and (a)(3)(B), then OAG recommends that the Commentary explain, perhaps using examples, how these two provisions operate together.

penalties of both fines and jail time to "Prosecutions for violations of all police or municipal ordinances or regulations."[8] False statements is not a police or municipal ordinance or regulation.

As a result, there is a credible jurisdictional issue with RCC § 22A-4207, especially since Congress did not give prosecutorial jurisdiction to OAG for D.C. Code § 22-2405. If OAG lacks jurisdiction to prosecute this offense, then it is a USAO offense. See D.C. Code § 23-101 (c). *See In re Prosecution of Crawley*, 978 A.2d 608, 620 (D.C. 2009) (Holding "only Congress can alter the prosecutorial authority described in Section 23-101 (c), be it for felonies, misdemeanors, or other crimes that fall within that subsection. It follows that the Council exceeded its authority by assigning to the OAG the power to prosecute violations of the false claims statute").

Paragraph (c)(2) provides a penalty enhancement. It states, "The penalty classification of this offense is increased one class when the actor commits the offense negligent as to the fact that the statement was material to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person." While OAG concurs in this enhancement, we note that the Commentary states that this "provides enhanced penalties for false statements in cases where the false statements affect the liberty of another person."[9] OAG would note that while a search may require an individual to be temporarily detained, it does not directly affect the person's liberty interest.

§ 22A-4208. False reports

Paragraph (a)(2) establishes as an element of the offense that the person gives the false information "With intent to implicate another person in the commission of a criminal offense."

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[8] It is unclear to OAG whether the incarceration penalties established by § 22A-603 and the fines established by § 22A-604 should be read as "incarceration or fine" or as "incarceration, fine, or both." Given the limitations placed by Congress on OAG's prosecutorial authority under D.C. Code § 23-101, this determination may be crucial to determining the correct prosecutorial agency for a given offense. See *In Re Prosecution of Nicco Settles*, 218 A.3d 235, (D.C. 2019) and D.C. Code § 23-101 (a) which states, "prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia [Attorney General for the District of Columbia] or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section."

[9] The Commentary on page 26 actually states, "Paragraph (c)(1) provides enhanced penalties for false statements in cases where the false statements affect the liberty of another person." It should refer to paragraph (c)(2)." Paragraph (c)(1) states that this is a Class B misdemeanor.

OAG recommends that the Commentary clarify that this element applies in two situations. First, where there was a criminal offense and the actor attempts to knowingly implicate an innocent person and, second, where no criminal offense occurred and the actor is giving the false information in an attempt to get the innocent person investigated, arrested, or prosecuted.

As noted in the Commentary, the offense of false reports replaces the false or fictitious reports to Metropolitan Police offense in D.C. Code § 5-117.05. While OAG acknowledges that under current law, and under the RCC version of this offense, it is only a crime to give false reports to the Metropolitan Police Department (MPD), OAG questions why this offense should not also apply to giving false reports to other law enforcement agencies that have arrest powers in the District. For example, an innocent person about whom the actor has given a false report is as likely to be investigated, arrested, and prosecuted whether the false report was made to MPD or to D.C. Housing Police, or METRO police.

§ 22A-4209. Impersonation of another before a tribunal, officer, or person

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[i] OAG recommends that the Perjury offense be restructured to be consistent with other RCC offenses. Both paragraphs (a) and (b) have a subparagraph (A), but no other subparagraphs. OAG believes that the RCC meant to structure paragraph (a) as follows:

(a) *Offense.* An actor commits perjury when the actor either:
(1)(A) Knowingly makes a false statement in an official proceeding; and
(B) In fact:
(i) The actor makes the false statement while testifying, orally or in writing, under oath or affirmation attesting to the truth of the statement;
(ii) The oath or affirmation is administered:
(I) Before a competent tribunal, officer, or person;
(II) In a case or matter in which the law authorizes the taking of such an oath or affirmation; and
(iii)The false statement is material to the course or outcome of the official proceeding; or
(2)(A) Knowingly makes a false statement in a sworn declaration or unsworn declaration; and
(B) In fact, the statement is:
(i) In a writing with a statement indicating that the declaration is made under penalty of perjury;
(ii) Delivered in a case or matter where the law requires or permits the statement be made in a sworn declaration; and
(iii) Material to the case or matter in which the declaration is delivered.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 4, 2022

SUBJECT: First Draft of Report #77 - Repeal of Misc. Crimes and Statutes – Property Stolen in Another Jurisdiction, 1893 Act Prosecutions, Terrorism Jurisdiction, and Case Referral

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #77 - Repeal of Misc. Crimes and Statutes – Property Stolen in Another Jurisdiction, 1893 Act Prosecutions, Terrorism Jurisdiction, and Case Referral.[1]

COMMENTS ON THE DRAFT REPORT

Except as noted below, we have no legal concerns about the repeals proposed in Report 77, including the repeal of the provision codified at D.C. Official Code 22-1809 involving OAG prosecutorial jurisdiction. The conforming amendments the report discusses may also be helpful in effectuating that repeal. We note, however, that we will need to review the proposed conforming amendments to ensure that, as the report discusses, they do not have the unintended effect of expanding or contracting the prosecutorial authority conferred on OAG by Congress. See *In re Prosecution of Settles*, 218 A.3d 235 (D.C. 2019) (interpreting that authority).

D.C. Code § 22–3204, Case Referral

The Report states the following:

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any later hearing that the Council may have on any legislation that may result from the Report.

Current D.C. Code § 22–3204 has no controlling District case law. The statute provides that:

> For the purposes of this chapter [Chapter 32 of Title 22], in cases involving more than one jurisdiction, or in cases where more than one District of Columbia agency is responsible for investigating an alleged violation, the investigating agency to which the report was initially made may refer the matter to another investigating or law enforcement agency with proper jurisdiction.

D.C. Code § 22–3204 was added in 2009 as part of the Omnibus Public Safety and Justice Amendment Act Of 2009, but there is no discussion of the provision in the Committee Report.

The Committee Report for this legislation notes that this legislation "is the product of six introduced bills" including "18-138, the "Omnibus Anti-Crime Amendment Act of 2009."[2] As noted on the first page of B18-138, that bill was submitted to the Council at the request of the Mayor. At that time, OAG was a Mayoral agency which worked very closely with the Mayor's office in drafting that legislation. What became codified as D.C. Code § 22–3204 was proposed in that legislation.[3]

In order to have a proposal included in the mayor's legislation, the mayor required that a rationale accompany each proposal. The following is the rationale for the language that was included in the mayor's bill and which is now codified in D.C. Code § 22–3204:

> Rationale: In order to prosecute cases where residents and businesses in the District of Columbia have been victimized by theft or fraud in an electronic era, Chapter 32 has a broad jurisdictional section for identity theft – and this Bill seeks to expand them for fraud, credit card fraud and insurance fraud as well. In some cases, particularly where the loss is small and the evidence is located in a distant state, the Metropolitan Police Department does not have the resources to gather the evidence necessary for arrest and prosecution. This provision would not interfere with a resident's right to file a report with the MPD for insurance or other purposes, but would permit the MPD to refer the report to another agency within the D.C. government (e.g., the Department of Insurance, Securities, and Banking), or an appropriate enforcement agency in another state).[4]

Based upon this rationale, OAG recommends that D.C. Code § 22–3204 not be repealed.

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[2] See page 2 of 49 of the Committee on Public Safety and the Judiciary Report on Bill 18-151.
[3] See page 31 of the Omnibus Anti-Crime Amendment Act of 2009.
[4] While it was the Mayor's and OAG's practice to share the rationales with the Council, the undersigned was not privy to all communications between the Mayor's office and the Council and cannot guarantee that this rationale was shared with them. All we know is that it was not made part of the Committee report.