D.C. Criminal Code Reform Commission
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Friday, December 24, 2021

The Honorable Charles Allen
Chairman, Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington DC 20004

Dear Councilmember Allen:

Below is a copy of my testimony for the December 16, 2021 hearing on the "Revised Criminal Code Act of 2021" (RCCA). The testimony includes a copy of my oral testimony and an addendum providing additional information concerning various matters raised in testimony by other witnesses that I was not able to respond to fully at the time.

In addition, by reference here, I wish to submit for the record the complete recommendations (statutory language and legal commentary) as approved by the agency's Advisory Group and submitted to the Council and Mayor on March 31, 2021, as well as the transmittal letter and various supporting materials (analysis of court statistics, references to law in other jurisdictions, etc.) that were submitted to the Advisory Group in preparation for its final vote. The complete recommendations, transmittal letter, and supporting materials submitted for the record are as follows, with links to the documents posted on the agency's website:

CCRC Executive Director Transmittal Letter to the Mayor and Council (March 31, 2021).

Recommendations:

- Revised Criminal Code (RCC) Compilation;
- Commentary on Subtitle I;
- Commentary on Subtitle II; and
- Commentary on Subtitles III-V, Statutes Outside Title 22, Statutes to Repeal.

Supporting Materials:

- Appendix A. Table of Correspondence – RCC to Current D.C. Code Statutes;
- Appendix B. Table of Advisory Group Draft Documents;
- Appendix C. Advisory Group Comments on Draft Documents;
- Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents;

- Appendix E. Table of RCC Specific Offense Classifications;
- Appendix F. District Charging and Conviction Data 2010-2019, 2015-2019 and 2018-2019;
- Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data;
- Appendix H. DC Voluntary Sentencing Guidelines Rankings;
- Appendix I. Public Opinion Data;
- Appendix J. Research on Other Jurisdictions' Relevant Criminal Code Provisions; and
- Appendix K. Future Issues to be Addressed and Known Conforming Amendments.

These materials are critical context for the bill. The RCCA presents in bill form the statutory language from the CCRC recommendations approved by the Advisory Group March 24th, 2021 and submitted to the Council and Mayor March 31st, 2021. The bill makes only non-substantive changes concerning numbering, formatting, drafting, and citations to the Advisory Group's approved statutory text. The changes for the bill were made in consultation with the Council's Office of General Counsel. A full list of the changes and a table comparing the numbering of provisions in the RCCA to the corresponding numbering of provisions approved March 24th is available on the agency's website.

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

*******Oral Testimony*******

Introduction

Good morning Chairman Allen, thank you and your staff for holding this third hearing on the "Revised Criminal Code Act of 2021" (RCCA), submitted by the D.C. Criminal Code Reform Commission (CCRC). During the first two days of hearings we heard from subject matter experts, multiple victims rights groups, people with lived experience in the incarceration system, and other public witnesses who *unanimously* gave their general support for the bill. A number of witnesses said more should be done to reduce penalties or decriminalize drug possession, and a few concerns were raised about the drafting of specific provisions and resource availability to successfully implement the reforms. The broad consensus that the bill should be passed, however, is a testament to the need for comprehensive modernization and the careful process used to assemble this bill. As the Committee looks toward finalizing the bill next summer and fall and planning for implementation, the CCRC stands ready to assist.

I also want to thank the CCRC's many former Advisory Group members testifying today for their years of work on the bill's language. Realizing the need to go beyond what piecemeal legislative efforts could accomplish in the past, the District has invested considerable time and resources to develop a plan for comprehensive reform of the criminal code. Legislation in 2006 first mandated the development of code reform legislation to the Sentencing Commission and for nearly a decade work was done with government partners there but without results. Undeterred, the Council then created the CCRC about five years ago and directed it to provide recommendations that improve the clarity, consistency, completeness, organization, and proportionality of criminal statutes. The CCRC was directed to examine model codes and best practices in other jurisdictions, as well as relevant court statistics. But the most critical aspect of the process set out in the agency's statute was the designation of an Advisory Group with connections throughout the criminal justice community to provide comments on all the agency's drafts. There were seven Advisory Group members: representatives of the District's Attorney General, the U.S. Attorney for the District, the D.C. Public Defender Service, the Deputy Mayor for Public Safety, and this Committee—as well as Professors Don Braman and Paul Butler. The Advisory Group held years of monthly meetings with staff, all open to the public, and gave hundreds of pages of written comments on drafts. Staff in turn addressed in writing how and why every comment was accepted or rejected. In the end all five voting members of the Advisory Group approved submission of the CCRC recommendations to the Mayor and the Council on March 31st. It has been a multi-year, transparent, research driven process working with the Advisory Group to develop the RCCA now before you, and I am very grateful.

On the first day of hearings, I spoke to the problems that exist in the current criminal code, the pressing need for reform, and the main features of the RCCA. Today, I want to focus more on the bill's comprehensive changes to penalties. I briefly will address: (1) how the topmost penalties were set; (2) how other penalties were ordered and set; (3) why mandatory minimums were rejected; (4) why proportionality is about all applicable penalties for behavior, not just one crime; and (5) why there needs to be a judicial review of long-term sentences to see if they still serve public safety and justice. I also want to point out some of the current research on how long imprisonment sentences affect public safety as well as data on the extreme racial disparity in incarceration in the District.

#1. How the Topmost Penalties Were Set.
No specific numbers for a criminal code's imprisonment penalties are widely accepted or expert-recommended because there are so many different values at stake. However, there is some agreement among experts about the topmost penalty. The Model Penal Code's recently revised sentencing provisions, issued by American Law Institute,[1] provides the most authoritative recommendations on the matter. They recommend that the most severe penalty in non-death penalty jurisdictions should be life *with* the possibility of release. Below that, the MPC says that the way specific penalties are assigned "are fundamental policy questions" and "questions with answers that change over time."[2] The RCCA follows the MPC recommendation by setting the penalty for the most severe crime, first degree murder, at 40 or 45 years depending on aggravating factors. The 40 or 45 year top numbers are based on the under-69 year average life expectancy of those typically convicted of murder in the District.[3] They are realistic approximations of life *with* the possibility of release.

#2. How Other Penalties Were Ordered and Set.
While there is no consensus on specific punishment numbers, commonsense logic and well-established norms do provide a relative order of penalties for offenses of the same type. There is broad agreement that along the same spectrum, a mere threat of causing bodily injury or a failed attempt to do so is not as serious as actually causing such an injury. An assault that causes a bodily injury like a simple bruise is not as bad as a deep cut requiring help from a medical professional. An injury that puts a person at risk of death is worse still, and killing someone is the greatest bodily injury. While they may differ as to the exact penalty associated with the harms, virtually all criminal codes nationally differentiate bodily injury harms and their authorized penalties from murder at the top down to the most minor unwanted touching at the bottom. The RCCA does the same. Below the most severe penalty for murder at 40 or 45 years, the bill provides lower penalties that differentiate lesser types of bodily injuries, in similar ways and with similar penalties as the current D.C. Code.

For insight on offenses other than assault-type crimes, the CCRC conducted a large, 400-person, demographically-weighted survey of District voters. Residents were presented with short scenarios, such as a person stealing $5,000, and asked how that conduct as a whole compared to various assault-type harms. In this way the agency was able to map out the public's view of the relative severity of a multitude of behaviors compared to assault-type crimes inflicting bodily injuries. I don't want to overemphasize the importance of the survey findings—D.C. Courts sentencing data and other sources also were used to develop the new penalties. But, it is notable that the commonsense rankings by today's District voters often differed sharply from those authorized in the D.C. Code.

#*3*. Why Mandatory Minimums Were Rejected.
A criminal code's authorized penalties must account for both the worst and least serious ways that prohibited conduct can be committed. When people think of a crime they may envision a specific scenario. But, in setting a code's statutorily authorized punishments, the penalty must fit the full range of ways the covered conduct can occur. Unlike sentencing guidelines that are built around typical facts, a wider range of sentences, low and high, must be authorized in statutes to account for rare scenarios. Mandatory minimum sentences that do not fit the least harmful forms of an

offense are not justifiable and, following the recommendations of the Judicial Conference of the United States,[4] the Model Penal Code,[5] and the American Bar Association,[6] and statements by U.S. Attorney General Merrick Garland,[7] the RCCA ends mandatory minimums. Conversely, statutory maximums that do not account for the most severe form of an offense also are not justifiable—which leads to my fourth point.

#*4.* Why Proportionality is About *All* Applicable Penalties, Not Just One Crime.
All of a criminal code's chargeable crimes must be considered when determining whether its penalties fit the offender's conduct. When the law authorizes multiple punishments through variously named crimes for what in reality was a single instance of conduct, prosecutors have the discretion to charge all applicable crimes. Judges then generally have the discretion then to set sentences for those crimes to run consecutive to one another, so that the imprisonment sentences for multiple convictions are additive, stacking one after another. The upshot is that looking at the penalty for just *one* of the crimes that can be charged based on the offender's behavior often is misleading as to the liability the law actually imposes. What matters is whether the *total* amount of imprisonment authorized under the criminal code as a whole, with all its overlapping ways of criminalizing behavior and various enhancements, is sufficient. The RCCA drafts offenses to minimize the possibility of multiple punishments arising for one instance of behavior and, when overlapping charges are necessary, adjust penalties to account for the overlap.

#*5.* Why There Needs To Be A Judicial Review Of Long Term Sentences To See If They Still Serve Public Safety and Justice.
Even the best designed sentencing laws implemented by the most skillful judges can still get it wrong. District judges are not infallible and cannot see into the future. They must work with imperfect information about potential threats to public safety, the likelihood of rehabilitation, and try to track ever-evolving public norms about the seriousness of criminal behavior.[8] Parole laws and regulations in most other jurisdictions provide much earlier opportunities for release for those serving long-term sentences. Unfortunately, in the District, Federal law has eliminated the District's Parole Board,[9] limited reductions in incarceration for good behavior to a maximum of 15%,[10] and deprived the Mayor of commutation and exoneration powers ordinarily available to the head of the Executive Branch.[11] Consistent with the Model Penal Code's sentencing recommendations,[12] the revised statute provides judges with an opportunity to reassess the continued justification for incarceration of an individual after at least 15 years of time served. This helps ensure the *ongoing* proportionality of punishments in the District's criminal justice system by permitting sentence modification when the court finds there is no further threat to public safety. The change mitigates some of the harm caused by federal limitations on parole in the District.

Closing
In closing, I want to say just a few things about public safety and race which are deeply entwined with what decisions the Council makes about changing imprisonment penalties.

First, any level of violent crime is too much and the current increase in homicide spike is deeply troubling.[13] But, it also is important to recognize that overall levels of violent crime in the District have been steady the last few years according to MPD data,[14] are near the lowest in decades per FBI data,[15] and are at about a third of the peak violence in the early 90s. There is no reason to believe that the moderate penalty reductions in the RCCA, as compared to current Superior Court

practice,[16] will lead to an increase in crime. As the National Research Council summarized, the evidence is clear that "long sentences have little marginal effect on crime reduction through either deterrence or incapacitation."[17] Other states have successfully lowered their incarceration rates through sentencing changes *and* seen decreases in crime.[18] The District can too.

Second, the Council's decision, whether to maintain the status quo, to follow the penalty changes in the RCCA, or to take another path on sentencing is primarily about the futures of young Black men in the District. In the 55,806 Superior Court cases with race and gender data analyzed this past decade, we found that 76.9% of the defendants were Black males even though they comprised only 20% of the population.[19] Objectively, the District has one of the highest incarceration rates in the country or world.[20] Given these facts, absent clear evidence that longer sentences are necessary for public safety, reducing authorized penalties is compelling as a matter of racial justice.

This bill does not fix all the problems or inequities in the current criminal code. The bill remains mostly based on the current system's choices about what is worthy of criminalization and still provides high incarceration penalties. It is both a major step forward and also moderate. I hope the Council will pass the RCCA but will not cease to look for further ways to improve the District's criminal laws. The CCRC is here to assist. Thank you.

*******Addendum to Oral Testimony*******

At the December 16, 2021 hearing on the "Revised Criminal Code Act of 2021" (RCCA) USAO Special Counsel Elana Suttenberg and Deputy Mayor for Public Safety& Justice (DMPSJ) Chris Geldart stated that they generally supported the RCCA but listed certain detailed concerns that I was not able to fully respond to at the time.

To fill out and clarify the record, I would respectfully note the following and, regarding concerns raised by USAO Special Counsel Suttenberg, direct the Council to prior written responses[21] the CCRC has made to many of these concerns when they were previously raised during the creation of the recommendations.

Re Testimony of USAO Special Counsel Suttenberg:

- **Re USAO recommendation to disaggregate certain so-called "procedural" provisions that are "not integrally related to the substantive criminal law."** USAO testimony stated that "there are several provisions that are not integrally related to the substantive criminal law that the CCRC was tasked with revising" and recommends these "procedural provisions" be "disaggregated" from the bill and considered "if at all" at a later time "once the criminal justice system has responded to the RCCA's impacts."
    - *First, please note that the CCRC's statutory authorization under D.C. Code § 3–152 to develop code reform recommendations was not limited to "substantive criminal law" and instead refers broadly to "criminal statutes."* In addition to the statutorily-specified goals of proportionality, etc., D.C. Code § 3–152 explicitly authorizes submission of recommendations to "propose such other amendments as the Commission believes are necessary." The CCRC's prioritization of substantive criminal law provisions reflects a pragmatic agency decision based on the vast scope of District criminal statutes in need of reform, not the fact that the agency was "tasked" with only such substantive law provisions. All of the agency's recommendations, whether labeled "substantive" or "procedural" are fully within its statutory mandate.
    - *Second, the two RCCA provisions that USAO asked to be "disaggregated" because they are "procedural provisions" are essential considerations in whether penalties authorized in the RCCA are proportionate (one of the agency's explicit mandates in D.C. Code § 3–152)*.
        - The December 16th hearing discussion about the constitutional requirements of a right to a jury noted that crimes with penalties of more than 6 months convey a constitutional right of the defendant to demand a jury.[22] However, as recognized in the recent D.C. Court of Appeals case of *Bado v. United States,*[23] a crime carrying an imprisonment penalty of 6 months or less may also be jury demandable under the U.S. Constitution if the overall "penalty" for the conduct (e.g. deportation) is sufficiently great.[24] These constitutional holdings alone should be enough to understand how jury demandability is an essential part of any statutory changes to penalties in the RCCA.

- However, beyond this constitutional law connection, recent history demonstrates that jury demandability is central to legislative decisions about substantive law because it can profoundly distort charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction may be less likely,[25] a prosecutor may be incentivized to do so—the prosecutor often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and there is no record as to the reason for choosing one charge over another.[26] Two examples of this are detailed further in the CCRC's legal commentary on the recommended statutory language: 1) the practice of USAO-DC attorneys charging non-jury demandable attempted threats (with a 180 day penalty) instead of a full, jury-demandable threats charge (with a 6 month penalty); and 2) the practice of USAO-DC attorneys charging non-jury demandable general assault charges (with a 180 day penalty) instead of a full, jury-demandable assault on a police officer (APO) charge (with a 6 month penalty).[27]
- Lastly, when the Council is determining new, proportionate penalties for the most serious crimes—crimes carrying decades-long sentences—it is critical that the Council consider whether there will be a judicial review mechanism to ensure that all those sentences continue to serve the interests of justice and public safety after a person in the distant future. As described further in the CCRC commentary,[28] this procedure (available to persons of any age at the time of their offense after they have completed at least 15 years of incarceration) has been recommended by the American Law Institute's (ALI)[29] Model Penal Code (MPC).[30] As the MPC Commentary states: "The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."[31]

- **Re USAO opposition to changing current law on jury demandability because it "will strain both court and prosecutorial resources."** Special Counsel Suttenberg stated that, besides disaggregating and postponing consideration of the RCCA's expansion of jury demandability because it is "procedural" in nature, the USAO-DC also opposes any expansion of jury access, stating: "Jury demandability requirements for misdemeanors [] should remain consistent with current law." In support of this position, Special Counsel Suttenberg said that: "Creating new rights to demand a jury in misdemeanor cases will strain both court and prosecutorial resources." Special Counsel Suttenberg said that "it

will likely take longer for misdemeanor cases to go to trial" and this "may result in delayed justice for victims, as victims will invariably need to wait longer for cases to resolve at trial, even in relatively straightforward misdemeanor cases." Further, Special Counsel Suttenberg said that: "[W]e would encourage the Council to seek testimony on this proposal from D.C. Superior Court."

- *First, as described in more detail in the CCRC Commentary on its jury demandability, the impact of the bill's expansion of jury demandability on prosecutorial and judicial resources is unclear not only because future crime rates and arrest rates are unknown, but because prosecutors themselves do not know how their charging and plea negotiations will change under the bill's reformed offenses.* The criminal justice system is not static. Any modeling of the impact of jury demandability expansion would have to make highly speculative assumptions not only about crime rates but arrest rates and prosecutorial charging and plea-bargaining patterns, which are highly discretionary matters that will be affected by the RCCA's new organization, description, and penalties for crimes. Notably, USAO itself has not provided an estimation of how its charging and plea negotiations of crimes would be affected by the RCCA even if the base crime rate and arrest rates were assumed. This lack of an estimation regarding changes to charging and plea bargaining is understandable given the lack of systematic review, even within most prosecution offices, of how such discretion is exercised. [32]
- *Second, while judicial vacancies and covid-related delays may cause a short-term challenge to judicial capacity, statistics show that, overall, the court has far greater capacity now than in prior decades.*
    - The crime rate in DC in 2020 was *less than one third* the crime rate in 1992 (990.22 vs 3154.6 per 100,00 residents). After the peak in 1992, crime rates have been gradually decreasing over the last 30 years.[33]
    - The number of cases filed with the Superior Court's Criminal Division is sharply lower in recent years. For example, according to the 2003 DC Courts Annual Report (the last available one on their website), 29,010 new cases were filed, 8,016 of which were felony cases. In 2019, 14,286 new cases were filed with 2,934 felony cases among them. This amounts to a *51% decrease* in new cases and a *63% decrease* in new felony cases in that 16-year span. Furthermore, in both 2003 and 2019, the Court was able to dispose of *more* cases than were filed that year (35,566 and 15,114 cases, respectively), efficiently tackling any backlog that could be created from reopened or reactivated cases.[34]
    - Of the 15,114 cases that were disposed in 2019, only 191 (1.3%) were via jury trial and 652 (4.3%) were via bench trial. In fact, since 2003, the highest percentage of cases going before a jury in a year was just 2.1% (2010). Likewise, the highest proportion of cases being disposed via bench trial was in 2015 when only 5.1% of the cases were tried by a judge. On average, between 2003 and 2019, *only 1.5% and 3.6%* of cases were disposed by jury or bench trial, respectively.[35]
    - Additionally, the number of associate judges serving on the Superior Court has modestly increased over this same time span. After the Court was established, Congressional Acts have added 7 (in 1984), then 8 (in 1990),

then 3 (in 2002) new associate judge seats to the Superior Court. Meaning, while caseloads and crime rates have gone down, the number of available judges has *increased*.[36]

- Lastly, while crime rates and case numbers have *decreased*, while jury and bench trials have *remained stable*, and while the number of judges has *increased*, the budget allotted to the Superior Court is *157%* of what it was in 2003. In 2020, the Court was allocated more than $125 million dollars. In comparison, it received approximately $80 million in 2003.[37] Even when taking into account inflation, the Court has an additional roughly $13 million with which to tackle a smaller workload than it had 17 years ago.[38]

- *Third,* to the extent that there may be delays in misdemeanor trials due to the greater number of jury trials as opposed to bench trials (as asserted by USAO), other changes to court processing may completely offset any delays in misdemeanor trials. Recent research by the National Center for State Courts shows that while jury trials nationally do, on average, take longer than bench trials, differences in courts' methods of case processing have a greater effect on the time a case takes.[39] The average national time for a bench trial is actually longer than the time for a jury trial in jurisdictions with the fastest case processing procedures.[40] The research suggests that following best practice court procedures may result in jury trials being as expeditious as bench trials that do not follow best practices.
- *Lastly*, *the DC Courts have been aware of the CCRC's work for years and its recommended statutory language since its release in early 2021.* The CCRC has had several communications with the current and former Superior Court Chief Judges, as well as most current and senior judges of the D.C. Court of Appeals about the recommendations in the RCCA. Over six months ago both Chief Judge Blackburne Rigsby and Chief Judge Josey-Herring received a full set of the CCRC's recommendations in April 2021 and I have subsequently presented an overview of the RCCA—including its jury demandability provisions—to a group including Superior Court Chief Judge Josey-Herring. There should be no inference that the DC Courts are unaware of the bill or this jury demandability provision, however they may or may not choose to address it.

- **Re USAO opposition to providing judges the power to defer dispositions for misdemeanors because there are no existing guidelines for implementation and may result in inconsistency with USAO guidelines.** Special Counsel Suttenberg stated that USAO has "a standardized system for identifying defendants who could benefit from diversion and then offering them the most appropriate diversion opportunity," but, "[b]y contrast, there have been no developed guidelines regarding the implementation of judicially led diversion." Special Counsel Suttenberg stated that, "[w]e want to ensure that our pre-trial diversion program is robust, allowing for the most appropriate plea agreement or diversion opportunity, and creating consistency between cases; this proposal may undermine our ability to accomplish that goal."
  - *First, detailed guidelines for judicial implementation of the deferral mechanism may not be suitable for statutory codification, but can be timely developed (if the judiciary so wishes) upon adoption of the legislation*. However, the lack of already-existing court guidelines, at most, a rationale for delaying implementation of the

RCCA a sufficient period of time to create such guidelines. The RCCA already provides a one-year delay until application (see section 501(a)) which appears to be sufficient to give opportunity for development of guidelines. If USAO were to share its internal guidelines, that might further speed the development of court guidelines.

- *Second, the RCCA creation of a judicial deferral mechanism for misdemeanors follows the recommendation of the recently updated Model Penal Code provisions on sentencing,[41] which specifically contrasts with procedures that require the approval of the prosecutor.* A judicial deferral mechanism that is entirely consistent with prosecutors' internal guidelines and goals would not reflect the need to vest dispositional authority in an independent judge who may differently the need for a conviction on record, with its attendant collateral and direct consequences. If judicial guidelines are developed, the Model Penal Code provisions may provide useful language to ensure consideration of victim and other perspectives during the process.

- **Re USAO recommendation to delay consideration of an expansion of a judicial review mechanism for long-term sentences until a review of a prior expansion is completed.** Special Counsel Suttenberg stated that, "Expanding the current IRAA to permit a universal second look would allow an additional 335 individuals in the custody of BOP who were 25 or older at the time of their offense and have served 15 years' incarceration to immediately move for release." Further, Special Counsel Suttenberg stated that, "Given that this pool of eligible individuals was so recently expanded, we encourage the Council to delay further consideration of any additional expansion. Before any additional expansion, we should review the impacts of this expansion…".
  - *An extensive record already exists of how the first IRAA legislation impacted individuals and public safety, including hearing testimony from individuals released under the IRAA legislation*. It is unclear if USAO has begun the review it describes or what length of time would address the USAO concern. As the effects of any release decision are ongoing, there is no apparent time at which an evaluation of IRAA legislation impact would be complete.

- **Re USAO opposition to lowering statutory penalties for first degree burglary and enhanced first degree burglary.**
  - *First, as defined in both the current D.C. Code and the RCCA, first degree burglary is a non-violent crime without any required proof of physical injury, threat, or damage—if violence (or theft of property or other crimes) occurs in the dwelling, those crimes can be separately charged and punished.* The gravamen of the burglary offense is an invasion of privacy and fear of a victim who (for first degree burglary) perceives a person in their dwelling. The RCCA burglary offense authorizes years of imprisonment for this harm, while also authorizing additional punishments for any predicate crimes that a person attempts or commits in the course of the burglary. Empirical research shows that violence of any kind in conjunction with a burglary is relatively rare,[42] and any such violence would merit a separate criminal charge beyond burglary. First degree burglary by a person with no prior felony convictions in the RCCA carries a 4-year maximum, or 8 years if

the person was at the time armed with a dangerous weapon.[43] An additional year (for a total of 9 years) is authorized if the person was so armed and had a prior felony conviction[44] (in addition to the years of imprisonment separately authorized for relevant weapon charges and conduct committed during the burglary). The RCCA seeks to authorize proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense and the liability for behavior must be evaluated in light of all available charges.

- *Second, the RCCA's penalties for first degree and enhanced first degree burglary appear relatively low in comparison to current D.C. Code authorized penalties, sentencing guidelines, and current District court practices, but that is because the District currently is a national outlier in the severity of its statutorily authorized penalties and court-imposed sentences.* Currently the D.C. Code authorizes a 30 year imprisonment penalty for any entry into a dwelling with intent to commit any crime inside, and an *additional* 30 years[45] (for a total maximum of 60 years) if the burglar had on their person a dangerous weapon at the time. Those are effective life and near-life sentences[46] for a crime that requires no violence or intent to commit violence.
    - In sharp contrast, a recent Bureau of Justice Statistics (BJS) report provided to Advisory Group members during the CCRC's development of the recommendations in the RCCA, found that nationally, for burglary, 78.3% of state prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when burglary was the most serious crime they committed.[47] These BJS statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon. The National Corrections Reporting Program (NCRP) data that are the basis of the BJS report further indicate that the percentage of inmates who served at least five years in prison for burglary was higher in DC than in 37 of the 43 other reporting states, and, conversely, the proportion of D.C. residents serving less than two years for a burglary charge was lower than that of 31 of the 43 other states. [48]
    - District sentencing practices likely reflect such a high punishment because nearly 99% of felony sentences in recent years are compliant with the District's Voluntary Sentencing Guidelines (VSGs),[49] and as USAO points out those guidelines set very high penalties for burglary. First degree burglary unarmed is to be punished the same under the District's VSGs as an assault with intent to kill another person, and an armed first degree burglary is to be punished the same as voluntary manslaughter while armed or first degree child sex abuse.[50] The VSGs may have set first degree burglary, a crime that requires no violence, with such extreme violent crimes because the statutory penalty is so high. Whatever the reason, however, because the VSGs punish first degree burglary so severely, District judges have followed suit.
- *Third, surveys of District voters support the RCCA penalties for burglary.* The CCRC conducted polling of 400 demographically-weighted District voters who, in

relevant part, were asked to compare the seriousness of behavior that would constitute first degree burglary or enhanced first degree burglary with various assault-type harms and death. The survey results, involving multiple questions, clearly demonstrate that while such burglaries may merit a low felony penalty, the seriousness is markedly less than an aggravated assault involving a serious bodily injury which is subject to a maximum initial sentence of 8 years (excluding backup time) under both current District law and the RCCA.[51] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC for any crime committed in the dwelling.

- **Re USAO opposition to lowering statutory penalties for carjacking and some degrees of robbery.**
    - *First, carjacking is treated as a form of robbery under the RCCA, consistent with the approach in the Model Penal Code and most other jurisdictions, as well as District practice before 1993.* Under current law, robbery and carjacking are separate offenses and a person can be charged and convicted of both for the same behavior. However, carjacking is essentially a robbery in which the property taken is a motor vehicle. There are two additional technical distinctions between robbery and carjacking. First, robbery requires "asportation," or carrying away of property, while carjacking does not. Second, carjacking only requires that the defendant "recklessly" takes a motor vehicle, whereas robbery requires that the defendant "knowingly" takes property. In practice however, virtually all carjacking cases are simply robberies in which a motor vehicle is taken. By including carjacking as a form of robbery, the revised robbery eliminates these distinctions. This approach is consistent with the Model Penal Code (MPC), which does not have a separate offense of carjacking, as well as 24 of the 29 jurisdictions surveyed by the CCRC on this issue.[52] Before the peak crime wave in the early 1990s and the passage of the District's carjacking statute in 1993, the District also treated carjacking as just a form of robbery or, where there was no threat or injury, simply theft.[53] Including carjacking in the revised robbery statute also requires that the defendant actually use force or threats to take the motor vehicle. The current carjacking statute includes taking a vehicle without force, by "stealthy seizure or snatching[.]" Under the current statute, carjacking includes sneaking into a running car and driving off while the owner is stopped at a gas station, even if no force or threats are used. By including carjacking in the revised robbery statute, this conduct of stealing without any threats of violence would constitute third degree theft instead of robbery.
    - *Second, the RCCA grades all forms of robbery according to the nature of the threat or physical injury involved—generally providing a robbery punishment that is one class more severe than if the injury had been inflicted in another context other than during a robbery.* At the low end, the RCCA third degree robbery statute authorizes up to 2 years (not including backup time) for a person who has no prior convictions for robberies or other felonies, was not armed, and did *not* inflict an injury requiring professional medical attention. That 2 year penalty (not including backup time) is equal to the current D.C. Code penalty for an unarmed assault that *does* require professional medical attention,[54] and the RCCA third degree assault offense for the

same harm and with the same penalty.[55] At the other end of the spectrum, the RCCA first degree robbery statute provides a 12 year penalty (not including backup time) for a person who has no prior convictions for robberies or other felonies, was not armed, and inflicts a serious bodily injury. That 12-year penalty (not including backup time) is nearly equal to the current D.C. Code maximum penalty for any unarmed robbery (13 years, excluding backup time),[56] and exceeds the current D.C. Code 8-year maximum penalty (not including backup time) for inflicting a serious bodily injury in other circumstances.[57]

- *Third, the USAO examples of robbery penalties committed with guns do not represent the total liability a person faces under the RCCA for use of a gun in conjunction with a robbery, because the examples do not mention the various other charges and penalties that such behavior entails.* The RCCA provides enhanced penalties if a dangerous weapon was used or displayed, with even greater penalties if the weapon caused an injury during the robbery, but the USAO appears to object particularly that these enhancements are insufficient when the weapon is brandished or fired at a person but does not cause injury. USAO stated that "under the RCCA proposal, both a defendant who held a gun to a victim's head and threatened to kill the victim in connection with a robbery and a defendant who fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim, could each be sentenced to a maximum of 4 years' incarceration for that offense." In the example, there is a terrifying threat and grave danger, but no actual bodily harm inflicted. The example appears to be offered for why the RCCA penalty of 4 years for robbery that involves the display of a gun (but not use to injure) is inadequate. It is true that a 4 year robbery maximum penalty would apply to the example, assuming the person has no prior robbery or other felony convictions (which would increase the penalty to 5 years, excluding backup time). Most importantly, however, the USAO example fails to mention the various other charges under the RCCA that could be brought (and under current law frequently are brough) in conjunction with the robbery charge. These additional charges would raise the penalty for the behavior described by USAO to at least 6 years[58] (excluding backup time) for a person *without* a felony record and *without* discharging a firearm, and at least 20 years[59] (excluding backup time) for a person *without* a felony record and *with* discharging a firearm at the victim.
    - In fact, firing a gun at a person during a robbery and missing would constitute at least attempted second degree murder under the RCCA[60] and bring an additional 12 years of imprisonment liability (assuming still that the person had no prior felonies and excluding backup time).
    - If there was proof of premeditation and deliberation, which have no minimum of time and can be completed in a moment, the person would be liable for attempted first degree murder under the RCCA[61] and bring an additional 24 years of imprisonment liability.
    - Any discharge of a gun outside (even assuming, contrary to the hypothetical, that the robber was not aiming at the other person) is punishable under the RCCA as negligent discharge of a firearm,[62] with an an additional 1 year penalty.
    - The mere fact of carrying a firearm outside one's home to commit the

robbery is punishable under the RCCA as carrying a dangerous weapon[63] with an additional 2 or 4 years penalty depending on the location in D.C..

- If the person has a prior felony conviction for robbery or another violent offense, they will face an additional repeat offender enhancement (adding an additional one year and a charge under the RCCA for possession of a firearm by an unauthorized person[64] bearing an additional 2 or 4 years depending on the nature of the prior conviction.

- *Fourth, when the behavior described by USAO is analyzed for liability under the RCCA crimes generally, not just as a "robbery" crime, the total imprisonment liability under the RCCA exceeds the sentences actually given in over 90% of recent robbery convictions.* Recent D.C. Superior Court adult statistics for 2018 and 2019 analyzed by the CCRC[65] indicate that 50% of robbery sentences were for 3 years or less, 75% were for 4.5 years or less, 90% were for 5 years or less, and 95% were for 7 years or less. Those statistics were for all robberies, including those that inflict serious injuries, those committed while armed, and those in which a weapon was used. Comparing these numbers with the minimum liability under the RCCA for the behavior described by USAO—a minimum of 6 years for robbery[66] and carrying a dangerous weapon (CDW)[67] by a person with no prior felonies—suggests that the RCCA overall penalties may vary little from those in current D.C. Court practice.[68]
- *Fifth, surveys of District voters support the RCCA penalties for robbery (including carjacking-types of robbery).* The CCRC conducted polling of 400 demographically-weighted District voters who, in relevant part, were asked to compare the seriousness of behavior that would constitute armed robberies and takings of cars from another's possession with various assault-type harms and death. The survey results, involving multiple questions, clearly demonstrate that while such behavior may merit a low felony penalty when a gun is displayed but not used, the seriousness is markedly less than an aggravated assault involving a serious bodily injury which is subject to a maximum initial sentence of 8 years (excluding backup time) under both current District law and the RCCA.[69] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "robbery" or "carjacking" specifically, and there would be additional liability for other crimes under the RCC for any crime committed in the dwelling.
- *Sixth, while it is true that the District's Voluntary Sentencing Guidelines (VSGs) provide a slightly higher (3-6 year) range of sentences for a person convicted of armed robbery without a prior felony conviction than the 6+ year total penalty available under the RCCA for such behavior, the VSG penalties may reflect deference to the high statutory penalties under current District law.* Under current District law neither the current carjacking[70] nor the current robbery[71] statutes have any gradations, although there are enhancements for committing the offenses while armed with a club, knife, firearm, or other dangerous weapon.[72] Unarmed carjacking has a mandatory minimum of 7 years and a maximum of 21 years, armed carjacking has a mandatory minimum of 15 years and a maximum of 40 years. Unarmed robbery has a 15 year maximum and armed robbery a 45 year maximum. Combined, the current code thus provides for 7-36 years liability for any unarmed

taking of a car from the immediate possession another person. Those penalties apply even if there is no bodily injury or threat, and the victim needn't be removed from the car or threatened as long as they are nearby. If the offender was armed with a dangerous weapon when engaging in the conduct, those numbers rise to a combined liability of 15 to 85 years just under the robbery and carjacking statutes. To be clear, these penalties are authorized regardless of whatever other charges may be brought for conduct occurring during the taking. If a person is kidnapped—taken in the car any distance whatsoever—another 30 years is authorized. If a person is injured there are lengthy years authorized for assaults or, should a person be killed, murder. As discussed below, the fact that so many sentences are at the mandatory minimum is strong indication that District judges believe these mandatory minimums are not proportionate.

- **Re USAO opposition to the scope of the RCCA felony murder provisions.**
  - *First, the so-called "compromise position" of an affirmative defense for accomplices to felony murder that USAO proposed in its testimony does not reflect the CCRC recommendation.* In the USAO written testimony it was stated that "creating such an affirmative defense is consistent with a previous recommendation of the CCRC." However, the CCRC has issued no recommendations regarding felony murder besides those in the RCCA. An earlier *draft* of the murder statute considered by the CCRC and its Advisory Group did provide for an affirmative defense similar to that now proposed by USAO, but that draft was ultimately rejected and was not recommended to the Council or Mayor.
  - *Second, the continuation of felony murder as provided in the RCCA constitutes a "compromise position" as compared to the broad spectrum of expert support for complete elimination of felony murder liability and the multiple states that have eliminated felony murder liability.* As described by other Advisory Group members at the December 16th hearing on the RCCA, there is widespread support for elimination of felony murder among legal experts.[73] Several U.S. jurisdictions have no exception for felony murder in their murder statutes. Hawaii, Kentucky, and Michigan have abolished the felony murder rule entirely. Courts in three other states, Arkansas,[74] New Hampshire,[75] and New Mexico,[76] have interpreted felony murder to require that the defendant acted intentionally or with extreme indifference, effectively abolishing felony murder. Other states such as Illinois and California have also taken recent action to limit felony murder.
  - *Third, the RCCA felony murder rule fairly provides liability for homicides involving multiple perpetrators.* The USAO written statement says that, "Without some form of accomplice liability, crimes committed by multiple perpetrators would escape felony murder liability, while the same offense committed by a single perpetrator could result in felony murder liability." In the scenarios it provides, USAO repeatedly stated that where two (or more) people both engage in a felony (e.g., rape, child abuse, robbery) and the government cannot prove which of the two individuals engaged in the lethal act that killed the victim, "there may be no liability for murder." Unfortunately, it is true that the limited evidence discoverable by investigators can sometimes mean that there is not proof as to who committed a lethal act, and in that case no individual can be held liable for a completed murder.

But the inability of the government to be able to prove who actually killed a person does not mean that all murder liability is avoided or that a person cannot be held accountable by convictions for other major crimes. Other theories of liability exist for murder depending on the facts of the case—e.g., *attempted*[77] *murder* liability would exist where (one of the USAO examples) "two individuals fire gunshots at a victim at the same time in the course of an armed robbery or carjacking, and it is impossible to prove which bullet caused the victim's death." Any person who meets the general requirements of accomplice liability under the RCCA[78] can be held liable for the actions of another for murder under a non-felony murder theory. Even when the government lacks proof for homicide of any sort, rape, severe child abuse, and the other crimes referenced by USAO entail decades-long penalties. In the end, the question comes down to whether the label and higher penalties for murder should attach to a person who it cannot be proven actually killed the victim, actually attempted to murder the victim, actually was an accomplice to murder (under regular liability rules) or solicited another person to commit murder. It is tragic that in some cases it cannot be proven who committed a lethal act. However, this does not legitimize punishing someone for a killing that they did not commit and would not otherwise be held liable for were it any other crime.

- **Re USAO opposition to the RCCA providing an affirmative defense to sexual abuse of a child[79] where there was no force, the actor reasonably believed the child was 16 years or older based on an oral or written statement by the child to the actor, and in fact the child was at least 14.**
    - *First, the referenced affirmative defense to sexual abuse of a child[80] does not modify prohibitions on the admissibility of past sexual behavior (i.e., "rape shield" laws) under the current D.C. Code § 22-3021(a) or the corresponding RCCA 22A-2310.* The RCCA affirmative defense prevents liability where a person may reasonably believe an affirmative representation of a person who is in fact up to two years (but no more) younger than the legal age of consent. For example, a 15-year-old who shows a fake ID at a college party to a 20-year-old actor who then engages in a sexual contact or sexual act with the underage person, without force. The testimony by Special Counsel Suttenberg does not state that persons who fall within the defense should not be liable, but instead objects on grounds that the affirmative defense could allow questions or evidence in the case that are inappropriate. However, the affirmative defense does not modify the District's rape shield law which precludes evidence of past sexual behavior. Judges remain in control of ensuring that evidence of no probative value is not admitted. More detailed CCRC responses to USAO articulation of this evidentiary concern previously were submitted to the CCRC Advisory Group.[81]
    - *Second, the reasonable mistake of age affirmative defense in the RCCA is much narrower than the Model Penal Code's recently revised child sexual abuse requirement and other states' requirements, which say that the government must prove as an element that the actor was reckless as to the child's actual age.* Unlike the MPC[82] and several other states, the RCCA does not require the government to prove as an element of its case that the actor was reckless as to the age of the child. Consistent with current District law, the RCCA makes the age of the child a matter

of strict liability (the government need not prove the mental state as to age). However, the RCCA does provide the reasonable mistake of age affirmative defense, which the person accused of the crime must prove by a preponderance of evidence. The MPC commentary to the child sexual abuse offense states that "criminality, particularly in the case of offenses involving moral turpitude, always ought to depend on awareness of wrongdoing (a mens rea of at least recklessness) proved beyond a reasonable doubt, and as much so in sexual offenses as in any others."[83] The MPC commentary states: "[R]oughly 16 states allow for a mistake-of-age defense to at least a charge of statutory rape involving an older complainant; and three states permit the defense of reasonable mistake of age for any sexual offense involving a minor.[84]

- **Re USAO opposition to the RCCA defining a "sexual contact" and part of the definition of a "sexual act" to require proof that the contact or penetration (where it is by an object other than a penis) be "sexual" in nature.**
    - *First, the referenced RCCA definitions of "sexual act"[85] and "sexual contact"[86] do not decriminalize any conduct but do clearly restrict liability for non-sexual contacts with a person's breast, buttocks, genitals, or groin area or penetration by an object other than a penis through regular assault-type charges rather than sex crimes.* Subsections of the current D.C. Code definition of "sexual act" and the current definition of "sexual contact" both require an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,"[87] and as such appear to include conduct that may be non-sexual (though improper) from the viewpoints of all parties. There is an array of situations when a person may wrongfully make contact with parts of another's body that are *typically* touched by another only in a sexual manner but aren't sexual under the circumstances. Examples of such contacts may be pushing a person away by pushing their breast, spanking a child on their buttocks, or kicking a person in their genitals. Examples of such a penetration by an object may include a medical exam that did not receive prior consent to the penetration. To convict a person of a sex crime charge versus an assault or offensive physical contact charge, the RCCA requires the prosecution to prove that the actor's contact in question was committed with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire. Understandably, it may be difficult in some situations to prove whether a person's physical contact or act is meant to "abuse" or "harass" generally or whether the abuse or harassment is sexual in nature, but in such situations intent can be proven from the surrounding circumstances.[88]
    - *Second, the RCCA change to the definition of "sexual contact" follows well-established law in a majority of jurisdictions nationally as well as recent updates to the Model Penal Code sex crimes.* In the recently updated sexual assault provisions of the Model Penal Code (MPC) "sexual contact" is defined to be sexual in nature.[89] Supporting research in the MPC commentary shows that a large majority (31) of the 43 jurisdictions surveyed definitions of sexual contact also require the contact to be sexual in nature or purpose.[90]

- *Third, the RCCA change to the definition of "sexual act" has limited support by statutes in other jurisdictions and the recent updates to the Model Penal Code sex crimes.* In the recently updated sexual assault provisions of the Model Penal Code "sexual penetration" is defined to mean "an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes."[91] Supporting research in the MPC commentary shows that about 14 jurisdictions have similar exclusions to the MPC.[92] As described in the CCRC commentary,[93] the new language that is recommended was meant to similarly exclude such non-sexual situations as in the MPC definition and comparable jurisdictions. However, the specific formulation in the RCCA is not used elsewhere. The possibility of a nonconsensual, non-sexual penetration by another with an object is rare.[94] On the one hand this suggests that the government should have little difficulty proving that a penetration was not only done with a desire to degrade, humiliate, etc., but with desire to sexually degrade, humiliate, etc. On the other hand, the rarity may suggest that the limitation in the RCCA definition of a sexual act is unnecessary.

- **Re USAO stated opposition to elimination of mandatory minimum sentences.** Special Counsel Suttenberg stated during the hearing that the legislative position of USAO in favor of the continuation of many mandatory minimums under District law was consistent with statements by Attorney General Merrick Garland on ending mandatory minimums. In her testimony, Special Counsel Suttenberg stated in written testimony that, "While we recognize and agree with the desire to reduce the number of mandatory minimums, we cannot support eliminating them all, and argue that two in particular [the current 30-year mandatory minimum sentence for first degree murder and a 5-year mandatory minimum where: (1) the underlying offense is a crime of violence; and (2) the weapon involved was a firearm or imitation firearm] should remain in light of their direct relation to serious violent crime."
    - *First, the referenced statement of Attorney General Merrick Garland calling for the limitation of mandatory minimums was specifically in response to a question about equal justice for Black Americans and the tools that the Department of Justice would use to provide equal justice.* In relevant part, AG Garland stated: "And we should do as President Biden has suggested, seek the limitation of mandatory minimums so that we, once again, give authority to District judges trial judges to make determinations based on all the sentencing factors judges normally apply and don't take away from them the ability to do justice. All of that will make a big difference in the things you are talking about."[95] AG Garland also referred in his written responses to the Senate Judiciary Committee to the "elimination of mandatory minimums.[96] The intended scope of the AG's statement is ambiguous. While the immediate questions he was responding to and his statements were not limited in context, some of the more surrounding discussion was about mandatory minimums in the context of federal drug offenses specifically. Regardless, the rationale offered by AG Garland—allowing judges to exercise their regular discretion to sentence based on all the usual sentencing factors—applies to all other offenses as well.
    - *Second, statutorily authorized mandatory minimums are fundamentally*

inconsistent with individualized sentencing by judges who know the full circumstances of a particular case, circumstances which may be highly unusual and not contemplated by the legislature when creating a criminal penalty. As a general principle, the overall penalties provided in the RCCA seek to provide proportionate penalties for the convicted person's conduct, but this means that the penalties must accommodate both the most serious and least harmful circumstances under which the criminal conduct can be committed in unusual cases. Examples of these least-harmful circumstances may include a person who commits the crime while acting under coercion from a third party in a way that does not meet all criteria for a duress defense, a person previously victimized by the person who they attacked, an accomplice who encourages the person who actually completes the crime, or a person who commits the crime at the request of the victim. In these and other unusual circumstances, not normally contemplated by the law, a mandatory minimum sentence can prevent a judge from considering the unusual circumstances and result in an unjustly high sentence.

- *Third, the rationales offered by USAO for maintaining the mandatory minimum sentences for first degree murder and an enhancement for possessing a firearm or imitation firearm when committing a crime of violence—the seriousness of the offense and the unacceptability of the offense under the community's standards—would require a dramatic expansion of mandatory minimums beyond current law and include many non-violent offenses.* Simply put, if the seriousness of the offense generally (notwithstanding the specific circumstances in a given case) or the unacceptability of criminal behavior is assumed to justify mandatory minimums, then all felony offenses in the criminal code should carry mandatory minimums. Every felony offense is, by virtue of its imprisonment penalty, deemed a serious crime which the community finds unacceptable. The USAO rationales would include felony drug crimes and property crimes which are punishable by longer imprisonment times (both in the RCCA and in the current D.C. Code) than some crimes deemed "crimes of violence."[97] The USAO rationales for mandatory minimums, if adopted, would suggest that there should be a dramatic expansion of mandatory minimum sentencing in the District. In fact, the scattered mandatory minimum sentences in the D.C. Code reflect historical happenstance and there is no consistent or principled rationale for why mandatory minimums should exist for those offenses and not others. All mandatory minimum sentences should be eliminated for the reasons described in the RCCA day 1 and 2 hearings, the CCRC commentary to its recommendations,[98] and for the many reasons described by expert bodies calling for the categorical elimination of mandatory minimums such as the Judicial Conference of the United States,[99] the American Law Institute,[100] and the American Bar Association.[101]
- *Fourth, mandatory minimums are a primary driver of unnecessary incarceration and exacerbate the very problems of inconsistency and unfairness in sentencing that they purport to redress.* The commentary to the Model Penal Code's sentencing provisions (which recommend elimination of mandatory minimums) summarizes these points as follows:
  - "Since 1962, authorized mandatory minimums have proliferated in every American jurisdiction, and have contributed to the growth in the nation's

prison populations in the late 20th and early 21st centuries. Also during this time, concerns over the role of prosecutors in the sentencing process have greatly intensified—and there is no department of the criminal law more damaging to judicial sentencing discretion, or more egregious in its transfer of sentencing power to prosecutors, than the mandatory-minimum penalty. During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and society. Empirical research and policy analyses have shown time and again that mandatory-minimum penalties fail to promote uniformity in punishment and instead exacerbate sentencing disparities, lead to disproportionate and even bizarre sanctions in individual cases, are ineffective measures for advancing deterrent and incapacitative objectives, distort the plea-bargaining process, shift sentencing authority from courts to prosecutors, result in pronounced geographic disparities due to uneven enforcement patterns in different prosecutors' offices, coerce some innocent defendants to plead guilty to lesser charges to avoid the threat of a mandatory term, undermine the rational ordering of graduated sentencing guidelines, penalize low-level and unsophisticated offenders more so than those in leadership roles, provoke nullification of the law by lawyers, judges, and jurors, and engender public perceptions in some communities that the criminal law lacks moral legitimacy."[102]

- *Fifth, CCRC surveys of District voters strongly indicate that the community does not think a person's possession of a firearm (let alone an imitation firearm) during a crime of violence necessarily categorically makes that crime much more serious—the use or display of a weapon and the resulting harms to the victim (whether or not a weapon is involved) often matter more.* CCRC Public Opinion Survey of District Voters[103] consistently shows that the involvement of a dangerous weapon (especially firearms) has an appreciable effect on the perceived severity of criminal conduct. However, District voters distinguished between mere possession and use of a weapon during the offense. Also, for use of a weapon during a crime the increase in severity was rated to be only slightly more serious than were the injury inflicted by another means—at least for felony level offenses.
- *Sixth, recent D.C. Superior Court statistics, as analyzed by the CCRC, suggest that judges frequently disagree with current mandatory minimums, including mandatory minimums for first degree murder and an enhancement for having a real or imitation firearm during a crime of violence.* If judges' sentencing decisions were not limited by existing mandatory minimum sentences, one would expect a graph of sentence length to have a gradual slope from a lowest sentence at 30 or more years to higher sentences. Instead, the distribution of sentences for offenses with mandatory minimums shows a high percentage (25% or more) at the mandatory minimum, followed by a gradual slope for higher sentences. Specifically, for the decade 2010-2019, 25-50% of adult first degree murder[104] sentences received the mandatory minimum of 30 years,[105] and 50-75% of persons convicted of possession of a firearm[106] while committing a crime of violence received the mandatory minimum of 5 years.[107] Current mandatory minimum

sentences for possession of a firearm while committing carjacking are even more clearly contrary to judicial decisions as to what is proportionate. Specifically, for the decade 2010-2019, 90-95% of adult armed carjacking[108] sentences received the mandatory minimum of 15 years.[109]

Re Testimony of Deputy Mayor for Public Safety and Justice (DMPSJ) Chris Geldart:

- In his opening statement, DMPSJ Geldart stated that, "This vast expansion of trials and hearings would strain both prosecutorial and court resources. It is the Executive's concern that this added workload on the courts will result in delayed justice for victims, as victims will need to wait longer for cases to resolve at trial. To give an idea of the potential magnitude of the shift, in 2019, only 11 out of over 600 misdemeanor trials were held before juries, where under the RCCA, approximately 300-400 of those trials would be eligible for juries."
    - Please see the above responses to the testimony of USAO Special Counsel Elana Suttenberg regarding the *relevant variables and uncertainty* of an increase in jury trials resulting from expanded access provided in the RCCA, as well as statistics on court capacity.
- In his opening statement, DMPSJ Geldart raised concern about what he referred to as the RCCA's replacement of the term "victim" with "complainant."
    - The RCCA continues to use the term "victim" in dozens of places where there is reference to a person whom it has been proven was harmed, and another review to ensure consistent use of that terminology would certainly be appropriate as the bill is considered further. However, the current D.C. Code does not use the word "victim" in offenses where the fact that a particular person was harmed has to be proven—instead, the current D.C. Code usually refers to "a person" or "another" as being the object of a crime. Similarly, the RCCA does not use the term "victim" when it must be proven (as part of an offense, penalty enhancement, defense, etc.) that another person was harmed. What the RCCA changes is that, instead of referring to the person who suffers an offense as a "person" or "another," the defined term "complainant" is typically substituted. In the RCCA the defined term "complainant"[110] "means a person who is alleged to have been subjected to the criminal offense." Conversely, the defined term "actor"[111] "means a person accused of a criminal offense." Consistent use of these terms allows the drafting of the code to avoid multiple confusing references to "persons" or "another" when the "person" could mean the accused, a victim, or a third party. These defined terms are intended to be neutral terms that concisely and clearly refer to relevant persons concerned without presuming that a crime was committed or unduly prejudicing proceedings. No change as to victim rights is intended or specified by the RCCA in conjunction with the use of this terminology. In the context of a particular case or trial, it is expected that the terminology "complainant" and "actor" may be dispensed with, as deemed appropriate by the judge, in favor of naming the particular person accused and/or the particular victim.
- A question arose during the hearing question period regarding participation of the designee of the DMPSJ to the CCRC Advisory Group's public meetings.
    - A review of CCRC records indicate that the Advisory Group held a total of 51 monthly meetings during its existence, from October 1, 2016 through March 24,

2021. Review of CCRC minutes indicates that DMPSJ Designee Helder Gil attended 1 meeting (the first meeting of the Advisory Group) on November 10, 2016. Mr. Gil did not attend further meetings. Beginning with a meeting on June 3, 2020, a DMPSJ Legislative Analyst called in to a total of 9 Advisory Group meetings in the remainder of 2020 and early 2021. No written comments on the CCRC draft work or final recommendations were received from DMPSJ.

[1] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations.

[2] American Law Institute, *Model Penal Code: Sentencing* at 157-158 (April 10, 2017), *available at* https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf ("The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets. In part this is because the Code is agnostic as to the number of felony grades that should exist in a criminal code; see § 6.01(1) and Comments *a* through *c* (Tentative Draft No. 2, 2011). Maximum penalties necessarily will be arranged in finer increments if a code creates 10 levels of felony offenses, for instance, rather than five. Further, the revised Code for the most part draws short of recommendations concerning the severity of sanctions that ought to attend particular crimes. These are fundamental policy questions that must be confronted by responsible officials within each state. They are also questions with answers that change over time. The development of new rehabilitative treatment programs for an identifiable group of offenders, for example, may change the sentencing outcomes thought most appropriate for that group. Community values about discrete forms of criminality are also constantly evolving. Acquaintance rape and marital rape, as one illustration, are offenses regarded as much more serious today than 40 years ago. Some behaviors commonly criminalized in American codes in the mid-20th century, even at the felony level (and even in the original Model Penal Code), are no longer criminal offenses at all. The revised Code would impeach its own credibility were it to pretend Olympian knowledge of condign punishments. Instead, the Code confronts problems of prison-sentence severity through numerous other means, including the adoption of a sound institutional structure for the creation and application of rational sentencing policies, with a judiciary statutorily empowered at both the trial and appellate levels to combat disproportionality in punishment. On this subject, much weight is borne by other Sections of the Code. In the 1962 Code, the statutory ceilings in § 6.06 were the sole enforceable limitations upon sentence severity for the majority 1 of prison cases. Under the revised Code's sentencing system, severity is regulated primarily through sentencing guidelines, the courts' departure power under guidelines, meaningful appellate sentence review, and invigorated statutory mechanisms (beyond the historically weak constitutional protections under the Eighth Amendment) for subconstitutional proportionality review of excessively harsh penalties.").

[3] *See* D.C. Department of Health, *District of Columbia Community Health Needs Assessment, Volume 1* at 16 (March 15, 2013); Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020). Authorities vary on what imprisonment term constitutes a *de facto* life without release (LWOR) sentence, but recent case law from state high courts indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders. *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.") Because adult offenders are older at the time of entry into incarceration, a *de facto* LWOR sentence for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) calculates persons incarcerated for a "life" sentence, including District persons in BOP custody, as serving a 470-month (39 years and two months) sentence based on their life expectancy. *See* United States Sentencing Commission, Sourcebook 2017, Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").

[4] Judicial Conference of the United States, *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf.

[5] American Law Institute, *Model Penal Code: Sentencing* at 149 (April 10, 2017), *available at* https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[6] American Bar Association, House of Delegates Resolution 10B on Mandatory Minimums at 4 (2017).

[7] Transcript of U.S. Senate Judiciary Committee, Attorney General Confirmation Hearing, Day 1 at 3:48:12 (Feb. 22, 2021), *available at* https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1 ("Senator Jon Ossoff: Thank you for your time. Thank you also for sharing your families immigrant story. It mirrors my own. My great- grandparents came fleeing anti-Semitism in 1911 in 1913 from Eastern Europe. I'm sure your ancestors

could hardly have imagined you would be sitting before this committee pending confirmation for this position. I want to ask you about equal justice. Black Americans continue to endure profiling, harassment, brutality, discrimination in policing and prosecution, sentencing and incarceration. how can you use the immense power of the also—of the Office of Attorney General to make real America's promise of equal justice for all? Can you please be specific about the tools you will have at your disposal?

Judge Garland: This is a substantial part of why I wanted to be the Attorney General. I'm deeply aware of the moment the country is in. When Senator Durbin was reading the statement of Robert Kennedy, it hit me that we are in a similar moment to the moment he was in. So, there are a lot of things the department can do and one of those things has to do with the problem of mass incarceration. The over incarceration of American citizens and its disproportionate effect on Black Americans and communities of color and other minorities. There are different ways—that is disproportion in the sense of both the population but also given the data we have on the fact that crimes are not committed by these communities in any greater number than in others and similar crimes are not charged in the same way. We have to figure out ways to deal with this.

One important way I think is to focus on the crimes that really matter, to bring our charging and arresting on violent crime and others that deeply affect our society. and not have such an overemphasis on marijuana possession, for example, which has disproportionately affected communities of color and damaged them far after the original arrest because of the inability to get jobs. We have to look at our charging policies again and go back to the policy I helped Janet Reno draft, Eric Holder drafted while he was Attorney General of not feeling we must charge every offense to the maximum, that we don't have to seek the highest possible offense with the highest possible sentence, that we should give discretion to our prosecutors to make the offense and the charge for the crime and to the damage it does to society.

That we should also look closely and be more sympathetic to retrospective reductions in sentences, which the first step act has given us some opportunity, though not enough to reduce sentences to a fair amount. Legislatively, we should look at equalizing, for example, what is known as the crack-powder ratio which has had an enormously disproportional impact on communities of color but which evidence shows is not related to the dangerousness of the two drugs. *And we should do as President Biden has suggested, seek the limitation of mandatory minimum so that we, once again, give authority to District judges trial judges to make determinations based on all the sentencing factors judges normally apply and don't take away from them the ability to do justice. All of that will make a big difference in the things you are talking about."*(emphasis added)) (text was compiled from uncorrected Closed Captioning); *see also* U.S. Senate Judiciary Committee, *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General*, *available at* https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf.

[8] *See also* Michael Serota, *Second Looks & Criminal Legislation,* 17 OHIO ST. J. CRIM. L. 495, 519–22 (2020) (arguments in favor of second look procedural mechanisms from a retributive perspective).

[9] "National Capital Revitalization and Self-Government Improvement Act of 1997", Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act"). The District of Columbia is one of only 16 American jurisdictions without a local parole opportunity of any kind. Other jurisdictions include: Arizona, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. In addition, California has a parole system that is limited to life indeterminate life sentences. *See* Prison Policy Initiative, *Failure should not be an option: Grading the parole systems of all 50 states*, Appendix A, (2019), *available at* (https://www.prisonpolicy.org/reports/parole_grades_table.html).

[10] D.C. Code § 24-403.01 ("Notwithstanding any other law, a person sentenced to imprisonment, or to commitment pursuant to § 24-903, under this section for any offense may receive good time credit toward service of the sentence only as provided in 18 U.S.C. § 3624(b).").

[11] The District's mayor does have a limited power to pardon certain "offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." D.C. Code § 1-301.76. However, the extent of mayoral power to pardon does not reach the overwhelming majority of District crimes. *See United States v. Cella*, 37 App. D.C. 433, 435 (1911) (stating "crimes committed [in the District of Columbia] are crimes against the United States"); U.S. Const. art. II, § 2, cl. 1 ("…he shall have Power to grant Reprieves and Pardons for Offenses against the United States").

[12] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017) ("§ 305.6 is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."). This draft was approved by the ALI membership at the 2017 Annual Meeting and represents the Institute's position until the official text is published.

[13] To date in 2021, there have been about 210 homicides, compared to:

2020	198	2015	162	2010	132	2005	196
2019	166	2014	105	2009	144	2004	198
2018	160	2013	104	2008	186	2003	248
2017	116	2012	88	2007	181	2002	262
2016	135	2011	108	2006	169	2001	232

Metropolitan Police Department, *District Crime at a Glance* (2021), https://mpdc.dc.gov/page/district-crime-data-glance.

[14] As of December 6, 2021, overall violent crime is only up 1% compared to 2020. Compared to 2019, violent crime decreased by 4% in 2020. *See* Metropolitan Police Department, *District Crime at a Glance* (2021), https://mpdc.dc.gov/page/district-crime-data-glance. Note that these MPD statistics do not include "unrest-related burglaries" and are slightly different than those included in FBI statistics for the District in 2020 cited in note 15.

[15] Annual violent crime rates per 100,000 residents

2020	990.22	2010	1233.92	2000	1507.22	1990	2874.57
2019	977.12	2009	1281.09	1999	1399.11	1989	2072.52
2018	942.63	2008	1402.02	1998	1515.07	1988	1889.66
2017	947.47	2007	1379.52	1997	1832.64	1987	1572.54
2016	1124.21	2006	1473.33	1996	2326.85	1986	1476.18
2015	1196.92	2005	1360.52	1995	2609.82	1985	1602.87
2014	1179.17	2004	1292.11	1994	2753.08		
2013	1211.23	2003	1554.79	1993	3137.44		
2012	1173.05	2002	1589.27	1992	3154.60		
2011	1126.98	2001	1599.99	1991	2812.48		

Federal Bureau of Investigation, *Crime Data Explorer* (2020), https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend; U.S. Census Bureau, *Intercensal Data* (1980-2020), https://www.census.gov/quickfacts/DC (2020), https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html (2010-2019), https://www.census.gov/data/tables/time-series/demo/popest/intercensal-2000-2010-state.html (2000-2009), https:// www.census.gov/data/tables/time-series/demo/popest/1990s-county.html (1990-1999), and https://www. census.gov/data/tables/time-series/demo/popest/1980s-county.html (1980-1989).

[16] *See* CCRC, Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data (available at https://ccrc.dc.gov/node/1531431).

[17] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* at 345 (2014).

[18] James Austin, Todd Clear, and Richard Rosenfeld, *Explaining the Past and Projecting Future Crime Rates,* Harry Frank Guggenheim Foundation at 11-12 (Sept. 2020), *available at* https://www.hfg.org/wp-content/uploads/2021/06/pastandfuturecrimerates.pdf ("We now have clear evidence that lowering state and federal imprisonment rates will not necessarily trigger increases in crime. As shown in Table 3, there are several states where prison populations have been lowered by over 20% and crime rates have also declined by substantial amounts. Leading the imprisonment rate reductions are New Jersey (38% reduction) and New York (32% reduction). California has had the largest numeric drop in its prison population. By 2017 it had lowered its prison population by about 45,000. As of July 2019, its prison population had dropped below 125,000 and its probation, parole, and jail populations had also declined. In total, there were 225,000 fewer people in California's prison, jail, probation, and parole populations than in 2006, when a series of reforms took place. Maryland has had more modest declines in its prison population. Despite these declines, even larger decreases have occurred in each state's crime rate, with New Jersey and New York showing

decreases of over 40%. It is fair to say that no prior research on crime rates would have forecasted substantial declines in crime rates if imprisonment rates were sharply lowered.").

[19] CCRC analysis based in part on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (CCRC analysis of Superior Court criminal charge and disposition data for adults from January 1, 2009, through December 31, 2019) CCRC analysis also based in part on 2021 District-wide race and gender data provided by the D.C. Health Matters Collaborative. *See* www.dchealthmatters.org/demographicdata.

[20] Prison Policy Initiative, *District of Columbia profile* (2018), https://www.prisonpolicy.org/profiles/DC.html; Martin Austermuhle, "District Of Corrections: Does D.C. Really Have The Highest Incarceration Rate In The Country?" *WAMU* (blog), *available at* https://wamu.org/story/19/09/10/district-of-corrections-does-d-c-really-have-the-highest-incarceration-rate-in-the-country/ (last accessed October 30, 2020).

[21] See CCRC Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents.

[22] *Baldwin v. New York*, 399 U.S. 66, 74 (1970).

[23] *Bado v. United States*, 186 A.3d 1243, 1249 (D.C. 2018).

[24] *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 543 (1989) ("Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense,[7] and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6–month incarceration line." Brief for Petitioners 16.[8]").

[25] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

[26] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

[27] CCRC Commentary on Subtitles III-V, Statutes Outside Title 22, Statutes to Repeal at pgs. 464-466, available at https://ccrc.dc.gov/page/recommendations.

[28] CCRC Commentary on Subtitles III-V, Statutes Outside Title 22, Statutes to Repeal at pgs. 513-515, available at https://ccrc.dc.gov/page/recommendations.

[29] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations on second look procedures and other matters.

[30] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

[31] Model Penal Code: Sentencing §305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017).

[32] Regarding the lack of standards or tracking systems in prosecutorial plea bargaining practices, *see, e.g.* Robin Olsen, Leigh Courtney, Chloe Warnberg, and Julie Samuels, *Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices* (Urban Institute, 2018) (survey of 158 state prosecutor's offices finding that many offices have an interest in collecting and using data, but it is "uncommon" to have any "systematic approaches for tracking compliance with office policies."); Garrett, Brandon L. and Crozier, William and Gifford, Elizabeth and Grodensky, Catherine and Quigley-McBride, Adele and Teitcher, Jennifer, *Open Prosecution (October 20, 2021) (available at http://dx.doi.org/10.2139/ssrn.3946415)* (describing the "black box" problem of plea negotiations and proposing a new, more transparent method).

[33] Annual violent crime rates per 100,000 residents

2020	990.22	2010	1233.92	2000	1507.22	1990	2874.57
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2018	942.63	2008	1402.02	1998	1515.07	1988	1889.66
2017	947.47	2007	1379.52	1997	1832.64	1987	1572.54
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2014	1179.17	2004	1292.11	1994	2753.08		
2013	1211.23	2003	1554.79	1993	3137.44		
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2011	1126.98	2001	1599.99	1991	2812.48		

Federal Bureau of Investigation, *Crime Data Explorer* (2020), https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend; U.S. Census Bureau, *Intercensal Data* (1980-2020), https://www.census.gov/quickfacts/DC (2020), https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html (2010-2019), https://www.census.gov/data/tables/time-series/demo/popest/intercensal-2000-2010-state.html (2000-2009), https://www.census.gov/data/tables/time-series/demo/popest/1990s-county.html (1990-1999), and https://www.census.gov/data/tables/time-series/demo/popest/1980s-county.html (1980-1989).

[34] DC Courts, *Annual Reports* (2003-2020), https://www.dccourts.gov/about/organizational-performance/annual-reports.

[35] *Id*.

[36] DC Judicial Nomination Commission, *FY 2017 Performance Plan* (2016), https://dccouncil.us/wp-content/uploads/2017/05/jps2.pdf.

[37] DC Courts, *Annual Reports* (2003-2020), https://www.dccourts.gov/about/organizational-performance/annual-reports. Calendar Year budgets were calculated by averaging the Superior Court budget appropriations from the two Fiscal Years that fall within the Calendar Year.

[38] According to an online calculator that uses up to date US government CPI data, $80 million dollars in 2003 would equate to approximately $112.5 million dollars in 2020. This is $13.2 million dollars below the amount allocated for the Superior Court in 2020. *Inflation Calculator* (2021), https://www.usinflationcalculator.com/.

[39] Brian Ostrom, Lydia Hamblin, and Richard Schauffler, *Delivering Timely Justice in Criminal Cases: A National Picture,* National Center for State Courts, (available at: https://www.ncsc.org/__data/assets/pdf_file/0017/53216/Delivering-Timely-Justice-in-Criminal-Cases-A-National-Picture.pdf).

[40] *Id.* at 7.

[41] Model Penal Code: Sentencing §6.02B cmt. d (Am. Law Inst., Proposed Final Draft 2017).

[42] Criminological research indicates that burglary is "overwhelmingly a non-violent offense." Phillip Kopp, *Is Burglary A Violent Crime? An Empirical Investigation Of Classifying Burglary As A Violent Felony And Its Statutory Implications* 119 (2014). In his 2014 report, Dr. Philip Kopp used data from the National Crime Victimization Survey (NCVS) and the National Incident Based Reporting System (NIBRS) to estimate rates of violence during burglaries. By drawing from the NCVS and NIBRS, he was able to assess both burglaries that were and were not reported to the police. Dr. Kopp found that "incidence of actual violence or threats of violence during a burglary ranged from a low of 0.9% in rural and suburban areas, to a high of 7.6% in highly urban areas." Furthermore, he found that a victim was only present in about a quarter of the analyzed burglaries. When a victim was present and interacted with the offender, less than half of the cases (2.7%) resulted in physical violence (as opposed to threats of violence). These low

rates of violence appear to be the result of burglars devoting substantial time and effort to avoiding encounters with their victims.
The Federal Sentencing Guidelines recently removed burglary as a listed offense in its definition of a violent crime. U.S. Sentencing Guidelines Amendment 798 (August 1, 2016) (amending the definition of "crime of violence in §4B1.2 to delete "burglary of a dwelling").
[43] RCCA § 22A-3801. Burglary.
[44] RCCA § 22A-606. Repeat offender penalty enhancement.
[45] D.C. Code § 22–4502.
[46] *See* D.C. Department of Health, *District of Columbia Community Health Needs Assessment, Volume 1* at 16 (March 15, 2013); Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020). Authorities vary on what imprisonment term constitutes a *de facto* life without release (LWOR) sentence, but recent case law from state high courts indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders. *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.") Because adult offenders are older at the time of entry into incarceration, a *de facto* LWOR sentence for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) calculates persons incarcerated for a "life" sentence, including District persons in BOP custody, as serving a 470-month (39 years and two months) sentence based on their life expectancy. *See* United States Sentencing Commission, Sourcebook 2017, Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").
[47] U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016*, November 2018.
[48] CCRC recently contacted BJS and obtained access to the underlying data. These percentages are based on CCRC analysis of the NCRP data.
[49] D.C. Sentencing Commission, *2020 Annual Report,* at ii.
[50] D.C. Sentencing Commission, *2020 Voluntary Sentencing Guidelines Manual,* at A-1.
[51] See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses). Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 8 year offense (excluding backup time) in the D.C. Code and the same in the RCCA.
[52] CCRC Appendix J. Research on Other Jurisdictions' Relevant Criminal Code Provisions at 380.
[53] *See* https://mpdc.dc.gov/page/carjacking ("Up until 1993, carjacking was reported as either armed robbery or auto theft in the District of Columbia. In response to several highly-publicized incidents, the D.C. Council passed laws providing stiffer penalties for individuals arrested and convicted of carjacking. It is critical that victims report these crimes to the police.").
[54] D.C. Code § 22-404(a)(2).
[55] RCCA 22A-2202(c).
[56] D.C. Code § 22-2801.
[57] D.C. Code § 22-404.01.
[58] Including an additional 2 years for carrying a dangerous weapon under RCCA 22A-5104.
[59] Including an additional 2 years for carrying a dangerous weapon under RCCA 22A-5104 and an additional 12 years for attempted second degree murder under RCCA 22A-2102.
[60] RCCA 22A-2102.

[61] RCCA 22A-2102.
[62] RCCA 22A-5108.
[63] RCCA 22A-5104.
[64] RCCA 22A-5107.
[65] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).
[66] RCCA 22A-2201.
[67] RCCA 22A-5104.
[68] Unfortunately, accurate data on concurrent and consecutive sentencing for CDW and robbery is not available to provide a more apples-to-apples comparison.
[69] See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses). Question 2.08 provided the scenario: "Robbing a store cashier of $50 cash by displaying a gun." Question 2.08 had a mean response of 5.4, less than one class above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.15 provided the scenario: "Displaying a gun to get the only person in a car out, causing no injury, then stealing it." Question 1.15 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.16 provided the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.." Question 1.16 had a mean response of 6.2 just barely above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.17 provided the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." Question 1.17 had a mean response of 7, exactly half-way between the 6.0 milestone corresponding to felony assault (currently a 2 year offense, excluding backup time, in the D.C. Code and the same in the RCCA) and the 8.0 milestone corresponding to aggravated assault (causing a serious injury), (currently a 8 year offense, excluding backup time, in the D.C. Code and the same in the RCCA).
[70] D.C. Code § 22–2803.
[71] D.C. Code § 22–2801.
[72] D.C. Code § 22–4502.
[73] *See, e.g.,* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. Rev. 403, 404 (2011) (Noting that the felony murder rule is "one of the most widely criticized features of American criminal law"). *See also* .g., Michael J. Roman, *"Once More Unto the Breach, Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of State v. Oimen Andstate v. Rivera*, 77 Marq. L. Rev. 785, 827 (1994); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 696 (1994).
[74] Ark. Code Ann. § 5-10-102.
[75] N.H. Rev. Stat. Ann. § 630:1-a. First degree murder includes *knowingly* causing death of another while committing or attempting to commit sexual assault, robbery or burglary while armed when the death is caused by the weapon, or arson. Second degree murder does not explicitly include accidental homicide during the course of a felony. However, second degree murder includes causing death "recklessly under circumstances manifesting an extreme indifference to the value of human life" and the statute includes a presumption of such recklessness if "actor causes the death by the use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit any class A felony." N.H. Rev. Stat. Ann. § 630:1-b.
[76] *State v. Ortega*, 817 P.2d 1196, 1204 (N.M. 1991) (holding that New Mexico's felony murder statute require "proof that the defendant intended to kill").
[77] RCCA 22A-301.
[78] RCCA 22A-210.
[79] RCCA 22A-2302.
[80] RCCA 22A-2302.
[81] See CCRC Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents, pgs. 165-167.

[82]American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5 (May 4, 2021) § 213.8. Tentative Draft No. 5 was approved at the 2021 ALI Annual Meeting. https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status.

[83] American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5 (May 4, 2021) at 333. Tentative Draft No. 5 was approved at the 2021 ALI Annual Meeting. https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status.

[84] American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5 (May 4, 2021) at 403. Tentative Draft No. 5 was approved at the 2021 ALI Annual Meeting. https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status.

[85] RCCA 22A-101(118) (""Sexual act" means: (A) Penetration, however slight, of the anus or vulva of any person by a penis; (B) Contact between the mouth of any person and another person's penis, vulva, or anus; (C) Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire;" or (D) Conduct described in subparagraphs (A)-(C) of this paragraph between a person and an animal.").

[86]RCCA 22A-101(119) (""Sexual contact" means: (A) Sexual act; or (B) Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person: (i) With any clothed or unclothed body part or any object, either directly or through the clothing; and (ii) With the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire.").

[87] D.C. Code § 22-3001(8)(C), (9). (""Sexual act" means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph. (9) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[88] These difficulties were well understood by the American Law Institute reporters and assembled experts, but still the recently updated Model Penal Code sexual assault provisions require a contact to be "sexual" in nature, as in the RCCA. *See* Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Tentative Draft 5, May 4, 2021) at 76 ("Of course, in cases involving contact with intimate parts, it is often difficult to distinguish sexual humiliation or degradation from humiliation or degradation that lacks a sexual dimension. Consider, for example, a person who, as part of a fraternity hazing ritual, spanks the buttocks of a pledge. Or consider a case in which a correctional officer intending to retaliate against a belligerent inmate deliberately spills a bucket of urine on the inmate, soaking the inmate's groin. Does the actor's motivation involve sexual humiliation or just humiliation, plain and simple? Although such cases raise difficult questions, they may be resolved with reference to added facts that indicate whether the actor's purpose was at least partly sexual in nature, such as whether the actor made sexually suggestive comments or insults during the act, whether the context of a relationship suggests a sexual motivation, and whether the contact with the intimate area was fundamental to the actor's intention in engaging in the contact. A coach who affectionately slaps the buttocks of players as they leave the field is unlikely to have a sexually motivated purpose at all. A coach who slaps the buttocks of only one player, given additional evidence that the coach also makes sexual comments while doing so and refers to that player by name or gesture while using a derogatory anti-gay slur, may be found to be acting with a sexual purpose. As is often the case with regard to mens rea requirements, the particular context and circumstances of the act will determine the sufficiency of the evidence.").

[89] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Council Draft 10, December 2021). ("Sexual contact" means any of the following acts, *when the actor's purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person*: (i) touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person with any body part or object; or (ii) touching any body part of any person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person; or (iii) touching any clothed or unclothed body part of any person with the ejaculate of any person. The touching described in paragraph (c) includes the actor touching another person, another person touching the actor or a third party, or another person touching that person's own body. It does not include the actor touching the actor's own body." (emphasis added)).

[90] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Council Draft 5, December 2021) at 67-68
[91] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Council Draft 10, December 2021).
[92] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Preliminary Draft 4, October 3, 2014) at 28.
[93] CCRC Commentary on Subtitle I at pg. 612, available at https://ccrc.dc.gov/page/recommendations. ("The requirement in subparagraph (C) [of the definition of sexual act] that the penetration be done with "the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire," excludes penetration done for legitimate medical, hygienic, or law-enforcement reasons.").
[94] It is difficult to imagine a sorority or fraternity hazing involving a penetration that is *not* meant to be sexually abusive, humiliating, harassing, degrading, arousing, or gratifying to any person. USAO Special Counsel Suttenberg stated in her testimony: "When committing a sexual offense, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused. For example, if, at a fraternity or sorority hazing, a defendant publicly penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse, humiliate, harass, or degrade the victim." However, the example does not appear to accurately describe the RCCA definition. The RCCA 22A-101(118) definition of a sexual act does not require a person to be "sexually aroused" or act with "sexual desire" as described in the USAO example—the definition in relevant part requires penetration "by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire."
[95] Transcript of U.S. Senate Judiciary Committee, Attorney General Confirmation Hearing, Day 1 (Feb. 22, 2021) at 3:48:12 (available at https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1&live=) ("Senator Ossoff: Thank you for your time. Thank you also for sharing your families immigrant story. It mirrors my own. My great friend parents came fleeing anti-Semitism in 1911 in 1913 from Eastern Europe. I'm sure your ancestors could hardly have imagined you would be sitting before this committee pending confirmation for this position. I want to ask you about equal justice. Black Americans continue to endure profiling, harassment, brutality, discrimination in policing and prosecution, sentencing and incarceration. how can you use the immense power of the also -- of the Office of Attorney General to make real America's promise of equal justice for all? Can you please be specific about the tools you will have at your disposal?
Judge Garland: This is a substantial part of why I wanted to be the Attorney General. I'm deeply aware of the moment the country is in. When Senator Durbin was reading the statement of Robert Kennedy, it hit me that we are in a similar moment to the moment he was in. So there are a lot of things the department can do and one of those things has to do with the problem of mass incarceration. The over incarceration of American citizens and its disproportionate effect on Black Americans and communities of color and other minorities. There are different ways -- that is disproportion in the sense of both the population but also given the data we have on the fact that crimes are not committed by these communities in any greater number than in others and similar crimes are not charged in the same way. We have to figure out ways to deal with this.
One important way I think is to focus on the crimes that really matter, to bring our charging and arresting on violent crime and others that deeply affect our society. and not have such an overemphasis on marijuana possession, for example, which has disproportionately affected communities of color and damaged them far after the original arrest because of the inability to get jobs. We have to look at our charging policies again and go back to the policy I helped Janet Reno draft, Eric Holder drafted while he was Attorney General of not feeling we must charge every offense to the maximum, that we don't have to seek the highest possible offense with the highest possible sentence, that we should give discretion to our prosecutors to make the offense and the charge for the crime and to the damage it does to society.
That we should also look closely and be more sympathetic to retrospective reductions in sentences, which the first step act has given us some opportunity, though not enough to reduce sentences to a fair amount. Legislatively, we should look at equalizing, for example, what is known as the crack-powder ratio which has had an enormously disproportional impact on communities of color but which evidence shows is not related to the dangerousness of the two drugs. *And we should do as President Biden has suggested, seek the limitation of mandatory minimum so that we, once again, give authority to District judges trial judges to make determinations based on all the sentencing factors*

judges normally apply and don't take away from them the ability to do justice. All of that will make a big difference in the things you are talking about." (text was compiled from uncorrected Closed Captioning) (emphasis added).).

[96] U.S. Senate Judiciary Committee, Attorney General Confirmation Hearing, *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General,* at 132-133, *available at* https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf. ("62. If you are confirmed as Attorney General and Congress chooses not to heed your call to eliminate mandatory minimum sentences, do you believe that you have the authority to unilaterally override Congress by categorically declining to bring charges that would trigger those sentences? RESPONSE: As I testified at my hearing, I support the policy I helped draft for Attorney General Reno, and that was furthered by Attorney General Holder in which prosecutors are not required to seek in every case the most serious offense with the highest possible sentence. I believe that we should give discretion to our prosecutors to make the charge fit the crime and be proportional to the damage that it does to our society. *In addition, as President Biden has suggested, we should consider the elimination of mandatory minimums so that we, once again, give authority to trial judges to make determinations based on all of the sentencing factors that judges normally apply. This would give judges the ability to do justice in individual case.*").

[97] *E.g.* assault with significant bodily injury (D.C. Code § 22-404(a)(2); RCCA 22A-22029(c)).

[98] CCRC Commentary on Subtitle I at pgs. 393-395, available at https://ccrc.dc.gov/page/recommendations.

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

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

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

[102] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 149.

[103] *See* Advisory Group Memo #27 - Public Opinion Surveys on Ordinal Ranking of Offenses available at https://ccrc.dc.gov/page/ccrc-documents.

[104] D.C. Code § 22-2101.

[105] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).

[106] D.C. Code § 22-4504(b)

[107] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).

[108] D.C. Code § 22-2803(b)(1).
[109] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).
[110] RCCA 22A-101(21).
[111] RCCA 22A-101(2).