D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrc.dc.gov

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D.C. Criminal Code Reform Commission (CCRC) Executive Director Richard Schmechel presented the following oral testimony at the December 16, 2021 hearing on the "Revised Criminal Code Act of 2021" (RCCA). This oral testimony will be part of the written testimony by Mr. Schmechel that will be submitted by December 24, 2021.

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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.

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[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).