D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety

From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)

Date: October 7, 2021

Re: Testimony for the October 7, 2021 Hearing on B24-0338, The "Redefinition of Child Amendment Act of 2021"

Introduction.

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the public hearing on B24-0338, The "Redefinition of Child Amendment Act of 2021" (hereafter "bill"). I am presenting testimony in support of the bill on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's primary mission has been to issue recommendations on reform of the District's criminal statutes. To date, the CCRC's work has been focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e., statutes that define crimes and punishments.

On March 31, 2021 the CCRC issued a comprehensive package of code reform recommendations to the Mayor and Council, with the unanimous approval of its statutorily-designated Advisory Group. Also, just last week, the CCRC submitted for Council consideration legislation to enact the agency's March 31, 2021 recommendations into law. However, these CCRC recommendations and legislation do *not* address the primary issue in the current bill which is a procedural matter—ending USAO's authorization to move certain juvenile cases to adult court without judicial review.

While the agency's work to-date has focused on substantive criminal statutes, the CCRC already has addressed several discrete procedural matters in its reform recommendations. For example, the CCRC has recommended categorically barring liability for an offense when the child committing the offense is under 12 years old. Currently in the District there is no minimum age of liability and court delinquency proceedings can be brought against very young children. In the future, the agency expects to engage in further reform recommendations regarding criminal procedures and regarding children charged with criminal or delinquent acts.

The CCRC supports the present bill based on the agency's examination of: 1) the outdated legislative rationale for the exception to the definition of a child in D.C. Code § 16–2301; 2) the

remaining mechanisms for child transfers to adult court untouched by this bill; 3) authorities on judicial review of transfer decisions; and 4) relevant social science findings on the effects of child transfers. My testimony will address each of these four considerations briefly, and also note some potential concerns with the current bill under the Home Rule Act.

I'll conclude by noting *additional* reforms related to the present bill's change to the definition of a child that may be worthy of the Council's consideration, now or in the future.

I. The legislative rationale for the definition of a "child" exception is outdated.

The current definition of a "child" in D.C. Code § 16–2301 categorically excludes any 16 or 17 year-old person charged by USAO-DC prosecutors with one (or more) of five specified felony crimes: murder, first degree sexual abuse, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense.

This exclusion to the definition of a child was first codified in District law over 50 years ago as part of the "District of Columbia Court Reform and Criminal Procedure Act of 1970" (hereafter "1970 court reform legislation").[1] Prior to that Congressional legislation, there was no such crime-specific exception to the definition of a child as a person under 18 in the District although there was a mechanism for the Family Court to waive jurisdiction and transfer a case to adult court.[2]

Although laws permitting discretionary waiver of jurisdiction by family or juvenile courts to adult courts were common before 1970, nationally, only two states—Florida and Georgia—had laws giving prosecutors the option to charge some children in criminal courts before 1970.[3] Subsequently, during the war on crime in the 1980s and 90s, the number of jurisdictions with such prosecutorial discretion laws expanded rapidly, to 15 states, as part of a large waive of state legislation aimed at transferring youth to adult criminal courts.[4]

Why did Congress create this exception in the 1970 court reform legislation? Does the rationale for this exception hold up today?

The 1970 court reform legislation was sweeping in scope, covering many topics besides changes to the definition of a child, and the final law was an amalgam of House and Senate language decided at conference. The House-passed version provided an exception to the definition of a child for a long list of what were commonly considered "violent crimes," and the Senate-passed version provided an exception for *any* crime if the juvenile had a prior delinquency finding for a felony offense.[5] The approach in the House-passed version, which was what had been originally advocated by the Department of Justice, won out, though at conference the list of crimes that triggered the exception was reduced to just five. Sole discretion was effectively placed with the U.S. Attorney as to whether to hold proceedings in Family Court or adult court.[6]

Little explanation for the USAO exception beyond the following was offered in the House report:

> Because of the great increase in the number of serious felonies committed by juveniles and because of the substantial difficulties in

> transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law, provisions are made in this subchapter for a better mechanism for separation of the violent, youthful offender and recidivist from the rest of the juvenile community.[7]

There was no apparent rationale for selecting the particular crimes in the exception, which both include non-violent burglaries and omit various violent sex crimes and serious assaults.

Historical context is critical to understanding what lay behind these sparse comments in the immediate legislative record. The legislation came on the heels of a dramatic rise in concern about District crime. The 1968 District riots following the assassination of Dr. King had resulted in 13 people killed (two by police), hundreds injured, nearly 700 dwellings destroyed, and 7,600 arrested.[8] Following the riots, the rate of murders, assaults, and robberies in the first half of 1969 doubled (or quadrupled in the case of robberies) compared to the relative calm of 1966.[9]

In attributing blame for this spike in crime, the 1969 Senate Advisory Panel Against Armed Violence ("Panel") focused heavily on juveniles which it found to have committed about 40% of all serious crime in 1968.[10] The Panel "found the juvenile criminal justice system an abomination of justice that has contributed to an increase, if anything, in juvenile crime."[11] The Panel's criticism particularly targeted delays in Family Court processing and failures in pretrial detention, and recommended reform of the Family Court.[12] The Panel decried testimony by the Chief Judge that hundreds of juveniles had been waiting 9 months or more for an initial hearing because the juvenile system was so overwhelmed.[13]

This legislative history suggests that the Congressional decision to bypass regular due process procedures in §16-2307 for select crimes was neither an evidence-based decision as to why children accused of murder or armed robbery are less able to be rehabilitated than other children, nor a principled belief that persons accused of such crimes posed greater public safety threats than all others. The exception was an ad hoc federal reaction to a crime spike and a Family Court system that was perceived to be overwhelmed and encountering an unprecedented emergency.[14]

Notably, the crimes that were chosen to be exceptions to the definition of a child were not all violent crimes. The crimes include first degree burglary, a property crime that neither requires proof of any violence or threat, just an entry into a dwelling place with intent to commit a crime—typically theft.[15] On the other hand, the list of crimes that trigger the exception to the definition of a child does not include kidnapping, manslaughter, or other serious violent crimes. The crimes listed also did not hold any discernable difference as to the possibility the child committing them might be rehabilitated. Rather, the crimes chosen simply appear to have been the most common felony charges at the time (particularly for robbery).

In conclusion, Congressional distrust of the Family Court's capacity and operation in the late 60s appears to have been the key factor in refashioning the definition of a child. The contrived exception to the definition of a child appears to be an artifact of circumstances that no longer apply. The redefinition of a child in the 1970 court reform legislation does not appear to have been

grounded in any principled or evidence-based rationale applicable to today. Over 50 years later DC Courts are entirely capable of rearranging dockets to address the change in case processing that might come its way if the exception to the definition of a child is eliminated. Moreover, despite the recent increase in homicides, crime rates in 2019 were a fraction of what they were in 1969 according to FBI UCR data—the rate of robberies in 1969 was quadruple 2019 numbers, and the rate of murders about 50% higher in 1969.[16]

II. The bill's potential effect on juvenile transfers to adult court is limited by other, pre-existing transfer statutes.

The current bill would eliminate the frequently-used[17] ability of USAO to unilaterally bypass judicial review and effect the transfer of a 16 or 17 year old juvenile accused of committing a specified offense to adult court. However, the bill does not bar such transfers of children to adult court.[18] Existing law already provides alternative mechanisms for effecting such transfers. Consequently, the future effects of the bill on child transfers are unclear.

Under the current definition of a "child" in D.C. Code § 16–2301, it is effectively up to the discretion of USAO-DC prosecutors to decide which court will decide if a 16 or 17 year-old juvenile committed a felony offense of murder, first degree sexual abuse, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense. If USAO files one of these charges against a 16 or 17 year-old child, the case is heard along with other adult proceedings. If USAO does not file one of these charges against the 16 or 17 year-old, proceedings for the conduct will be initiated in Family Court by the Office of the Attorney General (OAG).

Many consequences follow from which division of Superior Court hears the case of such a 16 or 17 year-old juvenile. In the District, courtroom procedures, applicable penalties (including where a person can be held in custody, whether in or near the District or in a Bureau of Prisons (BOP) facility nationally), and the entire orientation of the justice system as civil or criminal differ significantly depending on whether such a person is treated as a child or an adult.[19] Not surprisingly, policy arguments about whether children as a group should have their case heard in Family Court or adult court often revolve around these institutional features and how fitting they are to children. However, categorical arguments about procedures or penalties are only partially relevant to the current bill because the present bill does not preclude trying a 16 or 17 year old as an adult for murder, first degree sexual abuse, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense.

Current D.C. Code § 16–2307 already authorizes several mechanisms for transfer of children age 15-18 to adult court.[20] Consequently, all the 16 and 17 year olds that currently fall within the exception to the definition of a child in D.C. Code § 16–2301 can still have their cases heard in adult court notwithstanding the current bill. The transfer process is different though.

Transfer of a child from Family Court to adult court under D.C. Code § 16–2307 depends on two actors—OAG and a Family Court judge. To initiate the process, OAG must choose to exercise its discretion to petition the Family Court judge for transfer. Then the Family Court must hold a hearing to determine if "it is in the interest of the public welfare and protection of the public security and there are no reasonable prospects for rehabilitation of the child."[21] Legally, these are

two distinct (though interrelated) findings. In examining the evidence D.C. Code § 16–2307 requires the judge to consider the child's age and prior record, among other factors.[22] Critically, D.C. Code § 16–2307 also requires the court to assume the child *did* commit the alleged conduct.[23] Moreover, case law has established that although the plain language of D.C. Code § 16–2307(d)(2)(A) requires the court to find "there are no reasonable prospects for rehabilitation of the child," OAG meets this requirement if it shows that rehabilitation efforts are not *likely* to succeed—proof of a "chance," even "the best chance" at successful rehabilitation does not bar transfer.[24]

The burden of proof that OAG must meet for transfer under D.C. Code § 16–2307 depends on the alleged conduct. Generally, OAG must prove by a preponderance of evidence *both* the public safety and rehabilitation prongs.[25] However, relevant to the present bill, for the five felony offenses specified in the exception to the definition of a child (and other specified crimes), there is a "rebuttable presumption" in favor of transfer as to the public safety prong.[26]

Case law on the meaning and effect of this rebuttable presumption in favor of transfer has established that OAG maintains the burden of proof to show that there are no reasonable prospects for rehabilitation,[27] and, as to the public safety prong, OAG still has the burden of persuasion (though not the burden of production).[28] Yet, per case law, OAG may use the evidence regarding public safety as evidence regarding prospects for rehabilitation.[29] These legal distinctions are somewhat arcane, and at least one judge has commented that in practice the public safety and rehabilitation findings amount to the same thing notwithstanding the apparent distinctions in law.[30]

Under D.C. Code § 16–2307 there is a critical opportunity for an independent Family Court judge to evaluate whether a child transfer should proceed. For a child charged with one of the offenses that are now in the D.C. Code § 16–2301 exception to the definition of a child, the Family Court judge's evaluation is focused on whether there are "no reasonable prospects for rehabilitation." The Family Court judge must weigh six disparate factors articulated in D.C. Code § 16–2307(e)[31] and, under existing case law, the decision of that one judge can only be reviewed on appeal for an abuse of discretion, a standard that largely defers to the trial court's judgement.[32]

Yet, it bears emphasis that the review by the Family Court judge is sharply constrained by the abovementioned array of statutory rules and court precedents and is skewed toward approval of an OAG request where the allegation is murder or one of the other offenses that currently fall within the exception to the definition of a child in D.C. Code § 16–2301. The court must assume that the accused child committed the offense under subsection (e-1), and there is a rebuttable presumption for murder and other specified offenses that transfer is in the interest of public safety under subsection (e-2). The child's failure to rebut the presumption that they present a public safety risk failure also is a factor that weighs in favor of proving there are no reasonable prospects for rehabilitation. The government is not required to present proof that there is no reasonable chance for rehabilitation, rather that rehabilitation is not likely.

The CCRC does not know the exact number of times transfer requests under D.C. Code § 16–2307 have been made by OAG or been approved by Family Court judges in recent years.[33] In 2014 an OAG representative testified to the D.C. Council that a transfer under D.C. Code § 16–2307 had only been "attempted by OAG approximately six times in the last 20 years."[34] However, in at least a few cases that went on to have published appellate decisions,[35] OAG did successfully

petition for transfer of a child under D.C. Code § 16–2307(e). In one notable case, the D.C. Court of Appeals upheld the Family Court judge's finding that there were "no reasonable prospects for rehabilitation" for a 15 year-old child who was alleged to have committed first degree murder while armed[36] having previously been found delinquent and placed in a juvenile facility at age 13 for stabbing another person. Despite expert testimony that characterized the child's potential for violence as "average," the Family Court judge and DCCA noted that the expert "was unable to provide any statistical data to show that the facility where he recommended treatment for J.L.M. could curb the behavior of violent juvenile offenders."[37] The case suggests that, at least for children accused of the most serious crimes who have a prior record of delinquency, the courts are willing to approve transfer requests to adult court unless there is clear, statistical evidence establishing a path to rehabilitation.

Overall, it is not clear to what extent future OAG actions to transfer children to adult court in the future may differ from those of USAO in the past. First and foremost, because under the bill USAO would no longer be exercising its discretion to move children into adult court, OAG will have to confront transfer decisions for more difficult fact patterns (including murders) that previously were taken to adult court by USAO. Second, while OAG has said in relation to this bill that "when children are prosecuted as adults, they are set up for failure and cut off from resources,"[38] the CCRC is not aware that OAG has a new policy disavowing future transfer efforts. While the current Attorney General may be extremely cautious in seeking child transfers, that may not be the case under future leadership. Third, it is possible that, even in the near-term, the exercise of discretion by USAO in effecting child transfers may change under a newly appointed U.S. Attorney for the District of Columbia even without the present bill.[39] The past USAO use of child transfers may not be a reliable indicator of future choices. Fourth, while OAG has greater institutional expertise evaluating cases involving children, it is unclear that such institutional expertise will necessarily translate into a greater or lesser reliance on the transfer of youth to adult court. Practices have varied under past District Attorney Generals. Fifth, while there is a difference in political accountability, with the Attorney General locally-elected and the United States Attorney federally-appointed, it is not clear how differing political accountability (local or national) may affect the decision whether to try youth as adults, particularly in egregious cases to which there is a strong local call for severe penalties.

In sum, there is no certainty whether or to what extent the exercise of discretion over the choice of judicial forum by OAG under D.C. Code § 16–2307 will differ from the current USAO discretion under the D.C. Code § 16–2301 definition of a child. While the transfer procedures in § 16–2307 may have been rarely used in the past, the fact that they remain on the books allows transfers to continue. It is only because of the independent review by a Family Court judge under D.C. Code § 16–2307 that the effect of the present bill's elimination of the exception to the definition of a child is not a substitution of the judgment of one prosecutor (OAG) for another (USAO) as to whether a child should have their case heard in adult court. The Family Court judge has a critical opportunity to evaluate the rehabilitation prospects of the child. The review of the Family Court judge is limited, however, and due to an array of statutory and case law rulings proof is arguably skewed toward approval of an OAG request where the allegation is murder or one of the other offenses that currently fall within the exception to the definition of a child in D.C. Code § 16–2301.

III. Considerations as to *who* should decide which court addresses juvenile conduct.

The question of who—prosecutors or Family Court judges[40]—is best positioned to decide which court should preside over a juvenile's conduct is largely a question of procedural fairness and transparency.

One local authority that spoke out on this issue decades ago was then-Mayor Williams' Blue Ribbon Commission on Youth Safety and Juvenile Justice Reform in the District of Columbia ("Blue-ribbon Commission"). The Blue-ribbon Commission included then U.S. Attorney for the District of Columbia Roscoe C. Howard, Jr., among other District leaders.[41] The Blue-ribbon Commission's final recommendations in 2001 included the blunt recommendation that: "The Direct File authority of the United States Attorney needs to end, so that juvenile transfer hearings can determine the appropriate venue for adjudication."[42] The Commission's recommendations received support from many groups including the Council for Court Excellence, the American Bar Association's Juvenile Justice Committee, and the D.C. Bar's D.C. Affairs Section.[43]

There also are two prominent national authorities on this policy choice between prosecutorial discretion and a Family Court waiver hearing to highlight. Both call for the transfer decisions to be made by juvenile court judges.

First, the American Bar Association's (ABA) Juvenile Justice Standards ("standards")[44], arguably provide the most authoritative, early expert statement on this choice between prosecutorial discretion and a waiver hearing by a juvenile court judge. Published in 1980, the ABA standards provide a comprehensive framework for juvenile adjudications and dispositions. Regarding transfer, the entirety of the standard is focused on the existence of a juvenile court waiver hearing—there is no alternative recognizing that prosecutorial discretion is sufficient for certain crimes.

Under the standards, prosecutors determine which children will be considered for waiver into adult court, but it is up to the juvenile court to make the final decision. The Commentary to § 2.1C specifically draws attention to the USAO-DC discretion under the definition of a child in D.C. Code § 16–2301 and notes that it permits the prosecutor to select the forum by selecting a charge. Because the criminal court retains jurisdiction to try a juvenile for a lesser included offense, there is a danger that prosecutors will "abuse" the system by charging conduct over which the juvenile court would not have jurisdiction and, once in criminal court, lower the charges.[45]

But, apart from the possibility of changing charges, the standards also cite Supreme Court Justice Douglas (in a dissent joined by Justice Brennan and Marshall) as to the more basic possibility of arbitrariness and caprice in decision making:

> A juvenile or 'child' is placed in a more protected position than an adult…. In that category he is theoretically subject to rehabilitative treatment. Can he on the whim or caprice of a prosecutor be put in the class of the run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he

> is being given an invidiously different treatment than others in his group?[46]

Further, Justice Douglas specifically called out the District's definition of a child as an end-run around due process. He cited the House legislative history (referenced above) on the need to change the District's definition of a child in 1970 which referred to "the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law."[47] Justice Douglas said that "[t]he 'substantial difficulties' are obviously the constitutional rights explicated in *Kent* and in *Gault*,"[48] two prior Supreme Court cases finding due process rights of juveniles to hearings on their transfers to criminal court and detention for delinquency pending a criminal case.

While others on the Supreme Court did not join these three justices, the ABA standards found Justice Douglas' "policy argument in *Bland* [] persuasive whatever its present constitutional force."[49] The standard on transfers of juveniles sought to restore due process protections:

> This [standard] has adopted a strong presumption in favor of juvenile court jurisdiction. The presumption can properly be overcome only in a trial-type, due process proceeding in which the decision-making process is visible, based on identifiable and credible information and subject to review. The power of the prosecutor to make unreviewable waiver decisions at a low level of visibility invites capricious decisions. [50]

The second prominent authority that weighs in favor of judicial waiver hearings instead of prosecutorial discretion is the federal Juvenile Justice and Delinquency Prevention Act (JJDPA)[51] established by Congress in 1974. Just four years after Congress passed the 1970 court reform legislation that included the exception to the definition of a child for those 16 and 17-year olds prosecuted by USAO-DC in the District, Congress passed federal legislation defining a "juvenile" as any person under 18 years of age.[52] The 1974 federal JJDPA did not prevent children from being transferred to adult court but does require there to be a judicial hearing on whether the transfer would be "in the interests of justice."[53] An exception to such a hearing was made in 1984 for certain repeat offenders in accused of violent felonies, but to-date the federal statute requires a transfer hearing for all juveniles without a prior record.[54] Finally, it is notable that the JJDPA provides a statutory list of factors for judges to use in determining whether transfer is "in the interests of justice."[55]

Significantly, the JJDPA, by requiring a judicial transfer hearing, rejected the prior approach which relied solely on prosecutorial discretion. Prior to the enactment of the JJDPA, the choice of whether to charge a child as a juvenile or adult in federal court rested entirely with the Attorney General pursuant to the Federal Juvenile Delinquency Act (FJDA) of 1938.[56] The JJPDA specifically amended the (FJDA) to provide a judicial review mechanism so that the Attorney General's choice of whether to charge a child as a juvenile or adult was not necessarily determinative.[57]

While the JJDPA provisions on juvenile transfer apply only to federal courts, the JJDPA was designed as a model for state legislation. Apart from addressing juvenile procedures in federal

court, the JJDPA: 1) created institutions within the federal government that were dedicated to coordinating and administering federal juvenile justice efforts; 2) established grant programs to assist the states with setting up and running their juvenile justice systems; and 3) promulgated mandates that states had to adhere to in order to be eligible to receive certain grant funding.[58] The state-level mandates do not specifically address juvenile transfer hearings, however, and the impact of the JJDPA on state provision of transfer hearings is unclear. "From 1992 through 1997, all but six States enacted or expanded transfer provisions."[59]

In conclusion, both local and two of the most prominent, longstanding national authorities providing model legislation for states' juvenile justice legislation provide that a judicial hearing must be held before transfer of a person under 18 to adult criminal court. There are many other organizations and experts who have similarly voiced strong support for the use of a judicial hearing for transferring youth, but the ABA standards and federal JJDPA are among the most prominent models for state legislators. These models recognize that due process and court review are needed to ensure transfers to adult court are individualized, fair, and transparent. This is particularly important given that virtually all those subject to transfer to adult court in recent years, over 90%, have been black and brown youth.[60]

IV. Relevant social science findings on the effects of child transfers.

As noted above, the present bill does not prohibit or reduce the scope of District children who can or will be transferred to criminal court. The bill changes the ability of USAO-DC to move cases to adult court without review but preserves the existing OAG ability to move cases to adult court *with* judicial review. The choice between unreviewed prosecutorial discretion and a prosecutorial request reviewed by a court is a procedural choice that is primarily focused on fairness and transparency.

Yet, this procedural choice clearly can (and likely will) affect substantive outcomes—the number of kids being transferred to adult court. That possibility (or likelihood) that the bill will reduce the number of children tried as adults—almost entirely youth of color—may be the primary concern for many reviewing the legislation.

Accordingly, the CCRC would like to briefly note a few studies on the public safety effects of transferring or not transferring children to adult court. In 2010 the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention (OJJDP) Bulletin published a research article concluding that: "In terms of specific deterrence—in other words, whether trying and sentencing juvenile offenders as adults decreases the likelihood that they will reoffend—six large-scale studies have found *higher* recidivism rates among juveniles convicted for violent offenses in criminal court when compared with similar offenders tried in juvenile court" (emphasis added).[61] While research studies on general deterrence were less clear, "the bulk of the empirical evidence suggests that transfer laws have little or no general deterrent effect."[62] Other studies since then have also specifically examined the effect of child transfer and found that it produces a higher rate of recidivism.[63]

There is an ever-growing research literature on the broader question of how childrens' cognitive, behavioral, and social development affects their blameworthiness, prospects for

rehabilitation, and the possibility of harm prevention. This literature has helped drive recent changes to the age of family court jurisdiction and transfers.[64] The recently released American Law Institute (ALI)[65] recommendations regarding sentencing in § 6.11A of the Model Penal Code (MPC)[66] usefully summarized these research findings as follows:

> *Blameworthiness*. While normally developing human beings possess a moral sense of morality from their early years, important capacities of abstract moral judgment, impulse control, and self-direction in the face of peer pressure, continue to solidify into early adulthood. The developmental literature suggests that offenders under 18 may be held morally accountable for their criminal actions in most cases, but assessments of the degree of personal culpability should be different than for older offenders. This principle of reduced blameworthiness has been recognized by the Supreme Court in recent decisions under the Eighth Amendment, holding that the sanction of life without parole may not be imposed on juvenile offenders for non-homicide offenses, and that the death penalty may never be imposed.
>
> *Potential for rehabilitation*. Many believe that adolescents are more responsive to rehabilitative sanctions than adult offenders. While the evidence for this proposition is mixed, it is clear that some rehabilitative programs are effective for some juvenile offenders. Success rates are at least comparable to those among programs tailored to adults. Moreover, natural desistance rates—uninfluenced by government intervention—are higher for youths under 18 than for young adults whose criminal careers extend into their later years. Subsection (b) takes the policy view that society has a greater moral obligation to attempt to rehabilitate and reintegrate young criminal offenders, and that the benefits of doubt concerning the efficacy of treatment should normally be resolved in favor of offenders under 18.
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> *Harm prevention*. Longitudinal studies show that the great majority of offenders 15 under 18 will voluntarily desist from criminal activity with or without the intervention of the legal system. For this large subset of youthful offenders, a primary goal of the legal system should be to avoid disruption of the normal aging progression toward desistance. There is reason for concern that criminal-court interventions might derail an otherwise natural progression toward law-abiding adulthood for many youths. The research literature suggests that transfer of juvenile offenders to the adult courts can itself be criminogenic. There is reason for concern, therefore, that punishments meted out in pursuit of public safety may have the opposite of the intended effect—and that this danger arises in the ordinary case of an adolescent offender, not the unusual case.[67]

In sum, these research findings broadly support the use of the juvenile delinquency system, rather than the adult criminal system, to address wrongdoing by youth. Procedural values of fairness and transparency aside, to the extent the pending bill is likely to result in fewer transfers of children to the adult criminal system current research indicates there may be public safety and other benefits of such a change.

V. Note on the bill's status under the Home Rule Act.

While the CCRC has not conducted a full review and holds no opinion on the matter at present, it is critical to note that there are potential legal questions regarding the Council's authority to pass the present bill into law.

When Congress passed home rule legislation in 1973,[68] it placed certain restrictions on the Council's authority to pass legislation on certain matters. One of these provisions states, in relevant part, that the Council lacks authority to:

> Enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States Attorney or the United States Marshal for the District of Columbia;.[69]

This Home Rule Act language on the powers of the United States Attorney is potentially relevant to the present bill insofar as the bill strikes from the definition of "child" in D.C. Code § 16–2301 the language that excepts from the definition persons who are 16 or 17 and charged with certain specified crimes.

However, the meaning of this prohibition on laws "relating to the duties or powers of the United States Attorney" is not clear on its face. The phrase "relating to"[70] cannot be understood to preclude all changes impacting USAO-DC charging options as such a broad reading would seem to even preclude, for example, the Council from decriminalizing or newly criminalizing any conduct that is prosecuted by USAO-DC.[71] In fact, the Council has previously enacted laws that affect whether individuals can be prosecuted by USAO-DC.[72] On the other hand, case law has repeatedly held that the phrase "relating to the duties or powers of the United States Attorney" precludes the Council from assigning prosecutorial authority assigned to USAO by Congress to OAG.[73]

The legislative history discussed in the prior section leaves little or no room for doubt that Congress clearly intended in D.C. Code § 16–2301 to provide USAO-DC the ability to bring charges against 16 and 17 year-olds accused of certain crimes in adult court.[74] However, that does not resolve the legal question whether the Home Rule Act limitation on changes to the powers of the United States Attorney was intended to capture the effects of USAO-DC's charges as stated in D.C. Code § 16–2301.

Further analysis of Congress' intent for the Home Rule Act limitation on changes to the powers of the United States Attorney would be necessary to more fully delineate this question.

Ultimately, a clear answer may not be forthcoming, short of litigation. There are inherent tensions and ambiguities in the language of the Home Rule Act which limits Council action in certain general ways yet which had the predominant aim "to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters."[75]

Other provisions in the Home Rule Act also may merit review to determine if they limit provisions in the present bill or provide insight on the legislative intent for the Home Rule Act prohibition on changing the powers of the United States Attorney. For example, the Home Rule Act limits the Council's ability to alter Title 11 of the D.C. Code,[76] which deals with court organization. Yet, while Title 11 refers to "proceedings in which a child, as defined in D.C. Code § 16-2301, is alleged to be delinquent, neglected, or in need of supervision,"[77] it is not clear that this Title 11 language is a bar to changing the cross-referenced D.C. Code § 16-2301. The present bill would not require changes to any Title 11 language, and the Home Rule Act does not categorically bar Council authority to make changes to Title 16 the way it does for Title 11.

VI. Other possible changes to the definition of a child in D.C. Code § 16–2301 and transfers of children to adult court.

As part of its review of the bill, the Council may wish to consider one or more *additional* changes that may further the goals—aligning District law with scientific research on brain development, maximize chances of rehabilitating youth who violate the law, improve public safety, reduce victimization, and increase fairness for young people—articulated in the Attorney General's introduction of the present bill.[78] Below, several possible changes are briefly described. This is not intended to be a complete list.[79] The CCRC has not fully researched possible reforms in this area of law and does not specifically recommend any of these additional changes. However, the CCRC would be pleased to provide further research on these matters if the Council is interested.[80]

1. *Repeal D.C. Code § 16–2307(e-1) requiring the Family Court judge reviewing a petition for transfer of a child to adult criminal court to assume that the child committed the act alleged in the petition*.
    - Such a change may allow the Family Court judge to more accurately evaluate the potential effects on public safety and the potential for eventual rehabilitation of the accused.
    - Many other jurisdictions do not assume at transfer hearings that the child committed the alleged offense and instead require a showing of at least probable cause to believe that the child committed the act charged.[81] In at least some states, the requirement that the government establish probable cause that the child committed the offense prompting transfer extends to offenses where waiver is mandatory.[82]
2. *Repeal D.C. Code § 16–2307(e-2) the rebuttable presumption that transfer of a person accused of one of several specified crimes is "in the interest of public welfare and the protection of the public security*."
    - This change would allow the Family Court judge to more accurately evaluate the potential effects on public safety and the potential for eventual

rehabilitation of the accused. The change would eliminate the odd asymmetry in the burdens of proof for the public safety and the rehabilitation inquiries under D.C. Code § 16–2307(d)(2)(A), which at least one judge[83] has noted are practically the same inquiries for which a different burden of proof does not make sense.

- Hawaii and Missouri are examples of states that do not appear to have mandatory or presumptive waiver, direct file, or statutory exclusions based on the offense. [84]

3. *Amend the definition of a "child" in D.C. Code § 16–2301 to repeal the exception for persons age 16 or 17 accused of a traffic offense*.
   - Such a change would treat 16 and 17 year olds accused of traffic offenses as 16 or 17 year olds accused of other low-level felony and misdemeanor crimes. There is no known basis in brain development, public safety, or need for rehabilitation for treating 16 and 17 year olds accused of traffic offenses the same as other adults.
   - On average, there are about a hundred criminal convictions each year for traffic offenses that carry jail or prison time, though available data does not indicate the number of those convicted who are 16 or 17 years old.[85]
   - Ohio is an example of a statute that places jurisdiction of traffic cases involving children in the juvenile court system.[86]
4. *Amend the definition of a "child" in D.C. Code § 16–2301 to include persons under 21 years of age (or 19 or 20)*.
   - Such a change would have a broad effect of ensuring that persons age 18, 19, and 20 (or some subset if the age limit is set lower) have their cases heard in Family Court. With extension of custodial authority to the Department of Youth Rehabilitative Services (DYRS), these individuals would be provided with greater rehabilitative services and be housed outside the adult jail and prison system.
   - Vermont[87] already has raised the maximum age of juvenile court jurisdiction above that of the District by including those under 19 years of age (i.e. 18 and 19 year-olds are within juvenile court jurisdiction), though there remain various exceptions for children of all ages. Vermont phased in these changes over several years to ensure rehabilitative programming would be ready to accommodate the increase in demand in the juvenile system.
   - The District Task Force on Jails & Justice recommended this change in February 2021.[88]
5. *Codify new provisions regarding the sentencing of persons who were under 18 at the time of their offense following the recently issued recommendations of the American Law Institute (ALI)[89] regarding sentencing in § 6.11A of the Model Penal Code (MPC)*.[90] *New provisions based on the MPC could authorize or mandate the sentencing judge to impose dispositions that are available only in Family Court, bar placement of those under 18 from adult correctional facilities, and change the maximum years of incarceration for such children.*
   - The 2017 MPC Sentencing recommendations do not directly address juvenile court dispositions but, in recognition that most jurisdictions

currently permit transfer of some persons under 18 to adult court, the recommendations in § 6.11A address criminal court handling of sentencing for persons under 18 at the time of their offenses. Subsections (d)-(k) of § 6.11A[91] are most suitable for incorporation into the D.C. Code and would work three main types of change. First, the new statutory language would make all Family Court dispositions available to adult court judges sentencing those under 18. Second, the new provisions would reduce imprisonment terms for those under 18, including elimination of mandatory minimums. Third, the new language would mandate a Family Court disposition for persons under 18 that were convicted of only a misdemeanor, not convicted of the charge that served as the basis for their transfer, for those convicted of something other than murder when there is reliable evidence that they pose a low risk of violent recidivism, and for those who were convicted under a theory of accomplice liability for a minor role in the offense. Fourth, post-sentencing, the new language would bar housing persons under 18 with adults during incarceration and expand eligibility for second look procedures.[92] Underlying all the ALI recommendations in MPC § 6.11A is the "policy judgment that, no matter what road is taken to the adult courtroom, special considerations attach to the sentencing and correction of offenders below the age of 18."[93]

- Codification of the MPC sentencing recommendations would not change the jurisdiction of an adult court (Criminal Division) judge or the various evidentiary and procedural rules that apply in adult court—the new provisions would only apply to the dispositions that the court may impose after the extent of the 16 or 17 year-old's conduct and liability has been proven at trial or admitted to during acceptance of a plea.

VII. Closing.

In conclusion, the CCRC supports the current bill to repeal the District's exception to the definition of a child that allows USAO-DC to directly prosecute certain 16 and 17-year old juveniles without a hearing or other judicial review. This bill has the potential to significantly change how children are treated in the District's justice system. It is a modest proposal in that it does not eliminate child transfers to adult court. Rather, any such transfers would have to be decided by a judge, providing greater fairness and transparency to the process. There is no clear policy rationale that justifies foregoing such fairness and transparency in favor of the current process which lacks procedural protections and transparency.

Review of the legislative history behind the exception shows it was neither an evidence-based decision as to why these children are less able to be rehabilitated, nor a principled selection of those serious crimes that most threaten public safety. The exception appears to have been a crude, emergency solution to delays in court processing fifty years ago—a long outdated rationale. The bill's potential effect on transfers to adult court is uncertain since there are still other mechanisms permitting child transfers to adult criminal court at the request of OAG and with a judicial hearing and decision by a Family Court judge. However, a reduction in the number of transfers seems likely to occur, at least in the near term. Prominent authorities like the American

Bar Association support requiring a judicial hearing for any child transfers. In fact, Congress itself, just a few short years after codifying the District's definition of a child, adopted a different approach for federal court proceedings that required a judicial hearing for all children before transfer to a criminal court. Multiple social science research studies have found that transfer of children to criminal courts generally *increases* their risk of recidivism, suggesting that reducing child transfers may improve public safety.

The agency notes that the bill potentially raises concerns under the Home Rule Act's prohibition on specified Council actions. The CCRC suggests several *additional*, related reforms that the Council may wish to consider in concert with the current bill. Several of these additional reforms would not raise Home Rule Act issues.

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrc.dc.gov.

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

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[1] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, § 121(a), 84 Stat. 523 (1970). An Act to reorganize the courts of the District of Columbia and for other purposes. (July 29, 1970)

[2] Judiciary and Judicial Procedure Act, Pub. L. 88-241, 77 Stat. 498-99 (1963) (codifying former D.C. Code §11-1551. Jurisdiction of Children and Minors; retention and §11-1553. Waiver of jurisdiction in case of felony and transfer of case.).

[3] U.S. DEPT. OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 8 (2011).

[4] *Id.* at 9 ("State transfer laws in their current form are largely the product of a period of intense legislative activity that began in the latter half of the 1980s and continued through the end of the 1990s. Prompted in part by public concern and media focus on the rise in violent youth crime that began in 1987 and peaked in 1994, legislatures in nearly every state revised or rewrote their laws to lower thresholds and broaden eligibility for transfer, shift transfer decision-making authority from judges to prosecutors, and replace individualized discretion with automatic and categorical mechanisms.").

[5] H.R. REP. No. 91-358, at 226 (1970) (Conf. Rep.) ("The House amendment provided that for purposes of Family Division jurisdiction the term "child" includes persons under 18 except those 16 and older charged by the United States attorney with murder, manslaughter, rape, mayhem, arson, kidnapping, burglary, robbery, any assault with intent to commit any such offense, or assault with a dangerous weapon, or any such offense and a properly joinable offense. The Senate amendment provided that "child" includes persons under 18 except those 16 and older who have been previously either found delinquent with respect to a felony committed when 15 or older or have been subject to a consent decree and are charged by the United States Attorney for the District of Columbia with any of the offenses listed in the House amendment, or any such offense and a properly joinable offense. The conference substitute provides in section 16-2301 that the term "child" includes persons under 18 except those 16 and older charged by the United States attorney with murder, forcible rape, robbery while armed, burglary in the first degree, or assault with intent to commit one of these offenses, or any such offense and a properly joinable offense.").

[6] *District of Columbia Omnibus Crime Bill*: *Hearing on S. 2601 Pt.9 Before the S. Comm. on the District of Columbia*, 91st Cong. 2041 (1970) (list compiled by the committee staff of the major differences between the Senate-passed District of Columbia Crime Bills and the House bill, noting that the House version follows the administration proposal in providing that first offender children 16 years of age must be tried and jailed as adults if charged with a serious felony). *See also, id*. at 1159 (noting that for 15 year-old children, the pending charges were to a "large extent determinative with respect to waiver" under the scheme requiring waiver for certain charges unless the child established affirmatively that waiver was inappropriate).

[7] H.R. REP. NO. 907, 91st Cong. 50-51 (1970) ("The jurisdiction of the proposed Family Division of the Superior Court includes most of that of the present Juvenile Court which has jurisdiction of persons under 18 years of age. Under present and proposed law if the jurisdiction or supervision of the court attached in the case of a child prior to the age of 18, the child would remain subject to the jurisdiction of the court until age 21, unless sooner released. *Because of the great increase in the number of serious felonies committed by juveniles and because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law, provisions are made in this subchapter for a better mechanism for separation of the violent, youthful offender and recidivist from the rest of the juvenile community.*

Present law provides that a child age 16 and older who is charged with a felony may be transferred to adult court. Under the definitions in this bill, a person, 16 years of age or older, who is charged by the United States attorney with an enumerated violent crime is automatically subject to the jurisdiction of the adult court. However, if the United States Attorney declines to prosecute for the felony, the arresting officer will take such action as necessary to place the case within the jurisdiction of the Family Division. The case may not thereafter be transferred to the Criminal Division for adult treatment.

The pending bill, in providing for transfer for criminal prosecution (16-2307), sets the age at which a child charged with a felony may be transferred from the Family Division to the Criminal Division at age 15 rather than age 16 under present law. But the procedural safeguards in the proposed bill are such as to insure that those children who can be rehabilitated in the facilities available for care and treatment of child offenders will not be transferred to the Criminal Division for prosecution.

One additional age qualification applies to the category of traffic offenses. In the District of Columbia, a person first becomes eligible for a license to drive a vehicle at the age of 16. At this point he assumes, for this purpose, all the obligations of an adult. The bill provides that such licensee for the operation of a vehicle in the District of Columbia is subject to the jurisdiction of the adult court if charged with a traffic violation.") (emphasis added)).

[8] The Washington Post, *The Four Days in 1968 That Reshaped D.C.*, March 27, 2018, available at https://www.washingtonpost.com/graphics/2018/local/dc-riots-1968/.

[9] S. REP. NO. 91-1012 at 1 (1969) (Advisory Panel Rep.)(Committee on the District of Columbia, Report of the Advisory Panel Against Armed Violence)..

[10] *Id*. at 7.

[11] *Id*. at 1.

[12] *Id*. at 7-9, 11.

[13] *Id*. at 7.

[14] Supreme Court Justice Douglass held another perspective on the legislative change to the definition of a child, considering it to be Congressional end-run around court rulings that required as a matter of due process a court hearing prior to transferring children to a criminal court. *See Bland v. United States*, 412 U.S. 909, 911 (1973) (On denial of the petition for writ of certiorari).

[15] *See* D.C. Code § 22-801.

[16] *Compare* Department of Justice Federal Bureau of Investigations, Uniform Crime Reporting Program Data: Offenses Known and Clearances by Arrest, 1969 (https://www.icpsr.umich.edu/web/ICPSR/studies/4197) (D.C. rate of robberies 1549/100,000; rate of murders 36/100,000); *with* Department of Justice Federal Bureau of Investigations, Uniform Crime Reporting: Crime in the United States, 2019 Table 4 (https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-4) (D.C. rate of robberies 384/100,000; rate of murders 23.5/100,000).

[17] The CCRC is not aware of recent public data on the use of the USAO-DC transfer mechanism, however in the 2000s the mechanism was used for about 43 cases a year, on average. V. Noah Gimbel, *There Are No Children Here: D.C. Youth in the Criminal Justice System*, 104 GEO. L.J. 1307, 1318 (2016) ("Between 1999 and 2008, over 428 sixteen- and seventeen-year-olds were prosecuted as adults by the U.S. Attorney for D.C., 70% of them for robbery.") (citing B17-913, The Juvenile Justice Improvement Amendment Act of 2008: Hearing Before the Comm. on Public Safety and the Judiciary, Council of the District of Columbia, 6 (2008) (statement of Patricia A. Riley, Special Counsel to the U.S. Att'y for the Dist. of Columbia))).

[18] All states have laws that allow or require young offenders to be prosecuted as adults for at least some serious offenses. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, National Congress of State Legislatures (April 8, 2021) available athttps://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.

[19] *See Logan v. United States*, 483 A.2d 664, 676 (D.C. 1984) ("We have previously recognized that "the decision whether an accused is subject to juvenile or adult court is a vitally important one which affects not only the length of confinement but many collateral interests such as the loss of civil rights, the use of an adjudication in subsequent proceedings and disqualification for public employment.")(internal citations omitted).

[20] D.C. Code § 16-2307(a) ("Within twenty-one days (excluding Sundays and legal holidays) of the filing of a delinquency petition, or later for good cause shown, and prior to a factfinding hearing on the petition, the Corporation Counsel may file a motion, supported by a statement of facts, requesting transfer of the child for criminal prosecution, if—(1) the child was fifteen or more years of age at the time of the conduct charged, and is alleged to have committed an act which would constitute a felony if committed by an adult; (2) the child is sixteen or more years of age and is already under commitment to an agency or institution as a delinquent child; (3) a minor eighteen years of age or older is alleged to have committed a delinquent act prior to having become eighteen years of age; or (4) a child under 18 years of age is charged with the illegal possession or control of a firearm within 1000 feet of a public or private day care center, elementary school, vocational school, secondary school, college, junior college, or university, or any public swimming pool, playground, video arcade, or youth center, or an event sponsored by any of the above entities").

[21] D.C. Code § 16-2307(d)(2)(A).

[22] D.C. Code § 16-2307(e) ("Evidence of the following factors shall be considered in determining whether there are reasonable prospects for rehabilitating a child prior to his majority and whether it is in the interest of the public welfare to transfer for criminal prosecution: (1) the child's age; (2) the nature of the present offense and the extent and nature of the child's prior delinquency record; (3) the child's mental condition; (4) the child's response to past treatment efforts including whether the child has absconded from the legal custody of the Mayor or a juvenile institution; (5) the techniques, facilities, and personnel for rehabilitation available to the Division and to the court that would have jurisdiction after transfer; and (6) The potential rehabilitative effect on the child of providing parenting classes or family counseling for one or more members of the child's family or for the child's caregiver or guardian.").

[23] D.C. Code § 16–2307(e-1).

[24] *In re S.M.,* 729 A.2d 326, 329 (D.C. 1999) ("Appellant's position is not without force given that the statute requires the government to prove "no reasonable prospects for rehabilitation" (emphasis added). Nevertheless, for the reasons stated, we hold that the trial judge correctly determined that the issue in dispute—and on which the government had the burden of proof—was whether juvenile treatment promised only the chance (even 'the best chance') of rehabilitation of appellant, or instead offered the likelihood of success. If rehabilitation in the juvenile system was not more likely than not to succeed, then transfer could not be avoided consistently with the public welfare.").

[25] Super. Ct. Juv. R. 109(c) ("Except as provided by D.C. Code § 16-2307(e-2), the OAG shall have the burden of showing by a preponderance of the evidence that it is in the interest of the public welfare and protection of the public security that the respondent be transferred for criminal prosecution and that there are no reasonable prospects for rehabilitating the respondent within the jurisdiction of the Family Court prior to the respondent's majority.").

[26] D.C. Code § 16–2307(e-2) ("There is a rebuttable presumption that a child 15 through 18 years of age who has been charged with any of the following offenses, should be transferred for criminal prosecution in the interest of public welfare and the protection of the public security: (1) Murder, first degree sexual abuse, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense; (2) Any offense listed in paragraph (1) of this subsection and any other offense properly joinable with such an offense; (3) Any crime committed with a firearm; or (4) Any offense that if the child were charged as an adult would constitute a violent felony and the child has three or more prior delinquency adjudications.").

[27] *In re J.L.M.,* 673 A.2d 174, 182 (D.C. 1996).

[28] *In re D.R.J.,* 734 A.2d 162, 162 (D.C. 1999). The "burden of production" refers to the requirement to produce some evidence to the factfinder. The "burden of persuasion" refers to the requirement that the factfinder be convinced to the specified standard of proof (here

[29] *In re J.L.M.*, 673 A.2d 174, 182 (D.C. 1996); *In re S.M.,* 729 A.2d 326, 329 (D.C. 1999).

[30] *In re J.L.M.*, 673 A.2d 174, 184 (D.C. 1996) (J. Schwelb, concurring)("Although the statute deals with the protection of the public and prospects for rehabilitation as two separate concepts, the difference between them is more illusory than real. Logically, the focus of the inquiry must be on whether the respondent is likely to be dangerous, and whether he will probably have been rehabilitated, at the time the juvenile system has completed its treatment of him. But if the respondent is still dangerous at that time, he cannot reasonably be viewed as having been rehabilitated. If he is then no longer dangerous, on the other hand, then rehabilitation will have effectively occurred. It would be a rare case indeed in which a rehabilitated respondent remained dangerous, or an unrehabilitated one was not. Framed in non-

technical terms, the task of the judge at the transfer hearing is to make an informed prediction as to whether, if treated as a juvenile, the respondent, at the end of the road, (1) will probably no longer be dangerous, and (2) will probably have been rehabilitated. Because the two concepts are virtually indistinguishable, it makes little sense to me to place the burden on the District as to one prong and the burden on the respondent as to the other. Because the statute is written in the way that it is, however, I cannot quarrel with the majority's disposition.").

[31] D.C. Code § 16–2307(e) ("Evidence of the following factors shall be considered in determining whether there are reasonable prospects for rehabilitating a child prior to his majority and whether it is in the interest of the public welfare to transfer for criminal prosecution: (1) the child's age; (2) the nature of the present offense and the extent and nature of the child's prior delinquency record; (3) the child's mental condition; (4) the child's response to past treatment efforts including whether the child has absconded from the legal custody of the Mayor or a juvenile institution; (5) the techniques, facilities, and personnel for rehabilitation available to the Division and to the court that would have jurisdiction after transfer; and (6) The potential rehabilitative effect on the child of providing parenting classes or family counseling for one or more members of the child's family or for the child's caregiver or guardian.").

[32] *In re J.L.M.*, 673 A.2d 174, 182 (D.C. 1996).

[33] The CCRC is not aware of any public data on how often OAG previously has made petitions under D.C. Code § 16-2307 (particularly under subsection (e-2) for a child who committed one of the 5 felonies currently specified in the exception to the definition of a child), or the outcomes of such petitions.

[34] B20-825, The Youth Offender Accountability and Rehabilitation Act of 2014: Hearing Before the Comittee on the Judiciary and Public Safety, Council of the District of Columbia, 12 (October 22, 2014) (testimony of Dave Rosenthal, Senior Assistant Attorney General).

[35] *See, e.g., In re J.L.M.*, 673 A.2d 174 (D.C. 1996); *In re D.R.J.,* 734 A.2d 162, 162 (D.C. 1999); *In re S.M.,* 729 A.2d 326, 328 (D.C. 1999).

[36] *In re J.L.M.*, 673 A.2d 174, 183-84 (D.C. 1996) ("Nor did the trial court abuse its discretion in concluding that the government had met its burden of showing that J.L.M. had "no reasonable prospects for rehabilitation." D.C.Code § 16-2307(d). In making this determination, the trial court considered each of the five factors specified at the time in § 16-2307(e): J.L.M.'s age; the nature of his offense and his prior delinquency record; his mental condition; his response to past treatment efforts; and the techniques, facilities, and personnel available for his rehabilitation. The trial court specifically noted that J.L.M. was charged with committing "the most serious offense a person can commit in a civilized society"; he had previously committed a violent offense; prior treatment efforts had failed to alter J.L.M.'s violent tendencies; and the sole program identified as potentially adequate for J.L.M. could not deter his violent behavior to any certain degree. The trial court also considered J.L.M.'s failure to rebut § 16-2307(e-2) 's presumption of transfer. Based on all the foregoing evidence, the court did not abuse its discretion in concluding that the government established no reasonable prospects for rehabilitating J.L.M.").

[37] *Id*. at 183.

[38] *See* https://oag.dc.gov/release/ag-racine-introduces-legislation-reform-districts ("Treating children as children increases the chances that they will be rehabilitated and will not go on to reoffend. In the juvenile justice system, youth are provided with services, including therapy, anger management, and addiction treatment, and with educational opportunities to help them get on the right track and improve public safety. In contrast, when children are prosecuted as adults, they are set up for failure and cut off from resources.").

[39] On July 26, 2021 President Biden announced his nomination of Matthew Graves to be United States Attorney for the District of Columbia, but the nomination had not been confirmed as of late September 2021. https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/26/president-biden-announces-eight-nominees-to-serve-as-u-s-attorneys/. Channing Phillips currently serves as Acting United States Attorney for the District of Columbia.

[40] A third option, not used in the District and rarely used in other jurisdictions provides adult criminal court judges with authority to transfer children accused of certain crimes to Family Court.

[41] BLUE RIBBON COMMISSION ON YOUTH SAFETY AND JUVENILE JUSTICE REFORM IN THE DISTRICT OF COLUMBIA, FINAL REPORT at 1 (2001). Notably, Mr. Howard does not appear to have signed the final Commission recommendations.

[42] *Id.* at 21.

[43] COMMITTEE ON THE JUDICIARY, REPORT ON BILL B15-0537, "OMNIBUS JUVENILE JUSTICE, VICTIM'S RIGHTS AND PARENTAL PARTICIPATION ACT OF 2003" at 22-24 (June 22, 2004); STATEMENT OF THE D.C. AFFAIRS SECTION OF THE D.C. BAR IN SUPPORT OF THE "BLUE RIBBON JUVENILE JUSTICE AND YOUTH REHABILITATION ACT OF 2004" (March

17, 2004) available at https://www.dcbar.org/getmedia/83af71f0-42e2-4aa5-b67a-9b21efb6a3a3/2004-Blue-Ribbon-Juvenile-Justice. Bill 15-0537 originally included a provision that would have shifted the burden in transfer proceedings to juveniles charged with certain offenses to prove that they were not a danger to the community and were amenable to rehabilitation. After overwhelming opposition, the Council rejected this proposal. COMMITTEE ON THE JUDICIARY, REPORT ON BILL B15-0537, "OMNIBUS JUVENILE JUSTICE, VICTIM'S RIGHTS AND PARENTAL PARTICIPATION ACT OF 2003" at 11 (June 22, 2004) ("Based on overwhelming public testimony and a review of the available research on the issue of transferring for criminal prosecution juveniles accusing of violent crime, the committee rejected the provisions in Bill 15-537 designed to make it easier to charge juveniles in adult criminal court. Not a single witness testified in favor of the bill's original proposal. On the contrary, witnesses and experts provided evidence suggesting that juveniles who are transferred to adult criminal court recidivate more often and commit more violent crimes than those adjudicated through the juvenile system. More importantly, the original proposal would have shifted the burden of proof to the juvenile to prove that he is should not be transferred to criminal court. This provision violates the American Bar Association's Juvenile Justice Standards which state in part, 'The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one or class two juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.'").

[44] ABA, Juvenile Justice Standards Relating to Transfer Between Courts, Commentary to § 2.1C at 29 (1980).

[45] *Id.*

[46] *Bland v. United States*, 412 U.S. 909, 911 (1973) (On denial of the petition for writ of certiorari).

[47] *Id.* at 910.

[48] *Id.* at 911.

[49] ABA, Juvenile Justice Standards Relating to Transfer Between Courts, Commentary to § 2.1C at 30 (1980).

[50] *Id.*

[51] Pub. L. No. 93-415, §§ 501-02, 88 Stat. 1109, 1133-35 (1974).

[52] 18 U.S.C. § 5031.

[53] 18 U.S.C. § 5032.

[54] *Id.*

[55] 18 U.S.C. § 5032 ("Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.").

[56] Robert Mahini, *There's No Place Like Home: The Availability of Judicial Review over Certification Decisions Invoking Federal Jurisdiction Under the Juvenile Justice and Delinquency Prevention Act*, 53 VAND. L. REV. 1311, 1315-18 (2000) (explaining the history of the FJDA and JJDPA).

[57] SEN. REP. NO. 1101, 93rd Cong. (1974), *reprinted in* 1974 U.S.C.C.A.N 5283, 5320.

[58]Kristin Finklea and Emily J. Hanson, *Juvenile Justice: Legislative History and Current Legislative Issues,* CONG. RES. SERVICE RL33947 (July 14, 2015).

[59] U.S. DEPT. OF JUST., OFF. OF JUV. JUS. AND DELINQ. PROGRAMS, JUVENILE JUSTICE: A CENTURY OF CHANGE at 5 (Dec. 1999).

[60] The Blue-Ribbon Commission report in 2001 found that the juvenile justice system in the District was 100% youth of color. BLUE RIBBON COMMISSION ON YOUTH SAFETY AND JUVENILE JUSTICE REFORM IN THE DISTRICT OF COLUMBIA, FINAL REPORT at 147 (2001). ("A stark racial and social disparity in detention and commitment needs to be analyzed to discover at which point in the juvenile justice system disparities may be generated and why they may be occurring. The juvenile justice system in Washington, D.C. is 100% African American and Latino, meaning that these youth account for 100% of those confined and detained. According to the most recent report from OJJDP, the District of Columbia is the only jurisdiction with 100% minority representation in residential placement."). Roughly twenty years after the Commission's report, little has changed as statistics show that Black and Latino youth account for 99% of those committed to the Department of Youth Rehabilitative Services and more than 93% of persons sentenced for felonies in D.C. Superior Court were Black. *See* Department of Youth Rehabilitative Services, Youth

Population Snapshot, available at https://dyrs.dc.gov/page/youth-snapshot (data as of September 29, 2021); DISTRICT OF COLUMBIA SENTENCING COMMISSION, ANNUAL REPORT at 35 (2019).

[61] Richard Redding, *Juveniles Transfer Laws: An Effective Deterrent to Delinquency?* U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention (OJJDP) Juvenile Justice Bulletin, at 2 (June 2010).

[62] *Id.*

[63] *See, e.g.,* Robin Weber, Max Schlueter, Marcia Bellas, *Juvenile Recidivism Study: 2008-2011,* submitted to the Vermont Agency of Human Services Department of Children and Families (March 30, 2015) available at http://www.crgvt.org/uploads/5/2/2/2/52222091/crg_report_2015_03_analysis_juvenile.pdf.

[64] The National Conference of State Legislators has recommended as a principle of juvenile policy that the "age and scope of juvenile court jurisdiction should take into account research and evidence about youth development." Anne Teigen, *Principles of Effective Juvenile Justice Policy,* National Conference of State Legislators at 9 (Jan. 2018) ("In the past decade, states have increasingly modified the age of juvenile court jurisdiction and transfer laws. The change in approach has been spurred by a growing body of research that recognizes the relationship between delinquency and youths' psychosocial immaturity, as well as Supreme Court case law that finds these characteristics of adolescence render young people less culpable for their actions. Research has shown that understanding the implications of one's actions is an ability that evolves during the slow process of brain development, which is not complete for young people. It also indicates that that the ability to control impulses, consider consequences and alternative points of view, and take responsibility for one's actions is still developing in adolescents.").

[65] 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 to update the Model Penal Code issued by ALI in 1962.

[66] MODEL PENAL CODE: §6.11A (Am. Law Inst., Proposed Final Draft, 2017) (Sentencing of Offenders Under the Age of 18). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

[67] *Id*.

[68] 87 Stat. 813, Pub. L. 93-198, title VI, § 602.

[69] D.C. Code § 1-206.02(8).

[70] *See, e.g., In re Crawley*, 978 A.2d 608, 613 (D.C. 2009) ("After Morales, the Court held that its "prior attempt to construe the phrase 'relate to' [did] not give [the Court] much help drawing the line" in another pre-emption case involving similar language. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Accordingly, the Court went "beyond the unhelpful text and the frustrating difficulty of defining its key term, and look[ed] instead to the objectives" of the statute under review to determine the scope of pre-emption. Id. at 656, 115 S.Ct. 1671. Likewise, our holding here does not turn on the text alone, but rather is informed by the objectives of the HRA and the history of the District's government.").

[71] *See, e.g., Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016) (noting, relevant to D.C. Code § 1-206.02(4), that "the Home Rule Act does not prevent the Council from changing the District's substantive law, even if those changes do "affect the jurisdiction of the courts in a sense"); *Coleman v. District of Columbia*, 80 A.3d 1028, 1035 n.9 (D.C. 2013).

[72] The District's statute of limitations statute, which limits the time frame for commencing a prosecution, was created by the Council's "District of Columbia Statute of Limitations Act in 1982" and has been amended multiple times by Council legislation. *See* DISTRICT OF COLUMBIA STATUTE OF LIMITATIONS ACT OF 1982, 29 D.C. Reg. 1401 (1982) (codified as D.C. Code § 23-113); *see also* DISTRICT OF COLUMBIA ANTI-TERRORISM ACT OF 2002, D.C. Law 14-194, 49 D.C. Reg. 5306 (2002)..

[73] *See In re Perrow*, 172 A.3d 894, 898 (D.C. 2017). As the current bill does nothing to change the power of USAO-DC to prosecute a person under 18 who is within the adult court's jurisdiction, it is not clear whether or to what extent prior DCCA holdings of *In re Perrow* and other cases regarding prosecutorial jurisdiction apply to the present bill's change to the definition of a child.

[74] *See also Brown v. United States*, 343 A.2d 48, 50 (D.C. 1975) ("In *Pendergrast v. United States*, *supra*, we reviewed the legislative history of this portion of the Code. *See also United States v. Bland*, 153 U.S.App.D.C. 254, 256-58, 472 F.2d 1329, 1331-33 (1972), cert. denied, 412 U.S. 909, 93 S.Ct. 2294 (1973). We there decided that the Act as amended was intended to substantially contract the jurisdiction of the Family Division and automatically vest in the Criminal Division jurisdiction over those older youths charged with enumerated offenses whom the United States Attorney felt should be so treated.").

[75] D.C. Code § 1-201.02.
[76] D.C. Code § 1-206.02(4).
[77] D.C. Code § 11-101(a)(13).
[78] Attorney General Karl A. Racine, *Letter to the Honorable Phil Mendelson transmitting to the Council of the District of Columbia the Redefinition of Child* (June 30, 2021) available at https://lims.dccouncil.us/downloads/LIMS/47602/Introduction/B24-0338-Introduction.pdf.
Amendment Act of 2021 (June 30, 2021).
[79] For example, another new provision could provide a so-called "reverse-transfer" mechanism providing authority for adult (Criminal Division) transfers of cases to Family Court. Prior legislation proposed such a change. *See* Youth Offender Accountability and Rehabilitation Act of 2014, D.C. B20-0825 (2013-2014).-.
[80] D.C. Code § 3-152 (d) ("The Commission shall provide, upon request by the Council or on its own initiative, a legal or policy analysis of proposed legislation or best practices concerning criminal offenses, procedures, or reforms, including information on existing District law, the laws of other jurisdictions, and model legislation.").
[81] *See e.g.,* ARIZ. REV. STAT. § 8-327(C); ILL. COMP. STAT. § 5-805; ME ST T. 15 § 3101; OHIO REV. CODE § 2152.12; TEX. FAM. CODE § 54.02(a)(3); VT. STAT. TIT. 33, § 5204(c).
[82] *See e.g.*, N.C. Gen. Stat. § 7B-2200.5; OHIO REV. CODE § 2152.12. A comprehensive survey was not undertaken to determine how many jurisdictions do or do not assume the child committed the alleged offense in transfer hearings.
[83] *In re J.L.M.*, 673 A.2d 174, 184 (D.C. 1996) (J. Schwelb, concurring) ("Although the statute deals with the protection of the public and prospects for rehabilitation as two separate concepts, the difference between them is more illusory than real. Logically, the focus of the inquiry must be on whether the respondent is likely to be dangerous, and whether he will probably have been rehabilitated, at the time the juvenile system has completed its treatment of him. But if the respondent is still dangerous at that time, he cannot reasonably be viewed as having been rehabilitated. If he is then no longer dangerous, on the other hand, then rehabilitation will have effectively occurred. It would be a rare case indeed in which a rehabilitated respondent remained dangerous, or an unrehabilitated one was not. Framed in non-technical terms, the task of the judge at the transfer hearing is to make an informed prediction as to whether, if treated as a juvenile, the respondent, at the end of the road, (1) will probably no longer be dangerous, and (2) will probably have been rehabilitated. Because the two concepts are virtually indistinguishable, it makes little sense to me to place the burden on the District as to one prong and the burden on the respondent as to the other. Because the statute is written in the way that it is, however, I cannot quarrel with the majority's disposition.").
[84] *See* HAW. REV. ST. § 571-22; Mo. Rev. Stat. 211.071. A comprehensive survey was not undertaken to determine how many jurisdictions do or do not use rebuttable presumptions in transfer hearings based on the nature of the offense alleged.
[85] CCRC Advisory Group Memo #40: Statistics on District Adult Criminal Charges and Convictions. https://ccrc.dc.gov/page/ccrc-documents.
[86] *See* OHIO REV. CODE § 2152.02 (West) (defining "juvenile traffic offender"). A comprehensive survey was not undertaken to determine how many jurisdictions allow the transfer of 16 and 17 year olds accused of traffic offenses.
[87] 33 V.S.A. § 5201(d). For a report on the effects of Vermont's expansion of its delinquency system, see Ken Schatz, Karen Vastine, Lael Chester, Maya Sussman, Naoka Carey, and Vincent Schiraldi, *Report on Act 201 Implementation Plan Report and Recommendations* (November 1, 2019), online at http://static1.squarespace.com/static/5c6458c07788975dfd586d90/t/5dd2ebfce2b1425d33ae1ef1/1574104062934/Vermont-RTA-DCF-Report-Final_EAJP.pdf.
[88] District Task Force on Jails & Justice, *Jails & Justice: Our Transformation Starts Today, Phase II Findings and Implementation Plan* at 45 (Feb. 2021) available at http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf.
[89] 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 to update the Model Penal Code issued by ALI in 1962.
[90] MODEL PENAL CODE: §6.11A (Am. Law Inst., Proposed Final Draft, 2017) (Sentencing of Offenders Under the Age of 18). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.
[91] MODEL PENAL CODE: §6.11A(d)-(k) (Am. Law Inst., Proposed Final Draft, 2017) (Sentencing of Offenders Under the Age of 18) ((d) Rather than sentencing the offender as an adult under this Code, the court may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in

the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition.

(e)The court shall impose a juvenile-court disposition in the following circumstances: (i) The offender's conviction is for any offense other than [a felony of the first or second degree]; (ii) The case would have been adjudicated in the juvenile court but for the existence of a specific charge, and that charge did not result in conviction; (iii) There is a reliable basis for belief that the offender presents a low risk of serious violent offending in the future, and the offender has been convicted of an offense other than [murder]; or (iv) The offender was an accomplice who played a minor role in the criminal conduct of one or more other persons.

(f) The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.

(g) No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentence of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.

(h) Offenders shall be eligible for sentence modification under § 305.6 after serving [10] years of imprisonment. The sentencing court may order that eligibility under § 305.6 shall occur at an earlier date, if warranted by the circumstances of an individual case.

(i) The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, for the sentencing of offenders under this Section.

(j) No person under the age of 18 shall be housed in any adult correctional facility.

[(k) The sentencing court may apply this Section when sentencing offenders above the age of 17 but under the age of 21 at the time of commission of their offenses, when substantial circumstances establish that this will best effectuate the purposes stated in § 1.02(2)(a). Subsections (d), (e), and (j) shall not apply in such cases.]"). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

[92] The Council amended D.C. Code §16-2313(d)(2) in 2017 to required that "all persons under 18 years of age who are in the custody of the Department of Corrections" be transferred to the custody of the Department of Youth Rehabilitation Services. This provision would not apply to persons under 18 who are held in Bureau of Prisons custody on District charges.

[93] MODEL PENAL CODE: §6.11A at 217 (Am. Law Inst., Proposed Final Draft, 2017) (Sentencing of Offenders Under the Age of 18). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.