BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN

PUBLIC HEARING

on

Bill 24-0416, the "Revised Criminal Code Act of 2021"

STATEMENT OF ELANA SUTTENBERG
SPECIAL COUNSEL TO THE UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA

Thursday, December 16, 2021, 9:30 a.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenberg, and I am the Special Counsel for Legislative Affairs at the United States Attorney's Office for the District of Columbia (USAO-DC). I thank you for the opportunity to appear at today's public hearing regarding the "Revised Criminal Code Act of 2021" (RCCA).

USAO-DC supports the goal of reforming the D.C. criminal code to ensure that statutes are clear and consistent, logically ordered, and proportionate in their penalties. In many ways, the RCCA is consistent with that goal, and we appreciate the Council considering these recommendations further. The RCCA is the product of a tremendous amount of work by the D.C. Criminal Code Reform Commission (CCRC) Executive Director, CCRC staff, and Advisory Group members, and we recognize their efforts. The RCCA creates many positive reforms to the criminal code, and is an important part of criminal justice reform in the District. USAO-DC participated as a member of the CCRC Advisory Group, and we voted in favor of submitting the final recommendations to the Council and Mayor. At the time of the vote, however, we were clear that our vote was not intended to express support for all of the CCRC's recommendations. While we were supportive of moving this process forward, we believe that there are some substantial remaining issues that should be addressed before the Council takes final action.

Our most significant concerns focus on accountability for the most violent crimes (such as child sexual abuse, murder, burglary, robbery, and carjacking), and that some of the RCCA proposals are not integrally related to substantive criminal law and overlook the realities of certain resource constraints impacting Superior Court and our office. My testimony today will highlight those significant concerns, and my subsequent written testimony will address additional concerns.

Provisions that Should Be Disaggregated from the Revised Criminal Code Act

Initially, there are several provisions that are not integrally related to the substantive criminal law that the CCRC was tasked with revising. These provisions should be disaggregated from the RCCA and considered on their own merit as separate legislation. A reform of the substantive criminal laws is already a tremendous endeavor that will have a significant impact on the criminal justice system. The RCCA should focus first and foremost on these substantive criminal laws, and the Council should consider these additional procedural provisions—if at all—once the criminal justice system has responded to the RCCA's impacts. Even though we believe that these provisions should be disaggregated from the RCCA, we offer the following concerns.

Expanded Right to a Jury Trial for Misdemeanors

The RCCA proposes dramatically expanding the right to a jury trial for misdemeanor offenses, such that, within several years, all offenses punishable by any period of incarceration would be jury demandable. *See* RCCA Amendments to D.C. Code § 16-705.

We respect the right to a jury in appropriate cases, including all felony cases. Jury demandability requirements for misdemeanors, however, should remain consistent with current law. When considering any changes to the jury demandability provisions, we strongly encourage the Council to closely engage with D.C. Superior Court to understand their resources, their funding, and how any change would both directly impact cases on the criminal dockets and indirectly impact cases on other dockets through the diversion of resources. Given the import of this change, we would encourage the Council to seek testimony on this proposal from D.C. Superior Court. Under non-pandemic court operations, there are approximately 3 to 5 misdemeanor cases scheduled for trial every day in each of the 6 general misdemeanor courtrooms, and approximately 2 trials a day in each of the 2 domestic violence misdemeanor courtrooms (that is, roughly 110 to 170 misdemeanor trials per week). By contrast, there is approximately 1 felony case scheduled for trial every day in each of the 8 felony courtrooms (that is, roughly 40 trials per week), and approximately 1 felony case scheduled for trial per week for the 4 to 5 calendars that handle the most serious felony cases (including sexual abuse and murder). Creating new rights to demand a jury in misdemeanor cases will strain both court and prosecutorial resources. Jury trials typically take longer to complete than bench trials, and must be scheduled farther in advance than bench trials. Consequently, creating additional misdemeanor jury trials would require more judges, more jurors (which would result in D.C. residents being called for jury duty more frequently), and additional prosecutorial resources. Further, felony cases—especially felony cases involving a detained defendant—are typically prioritized for trials in the court system, so it will likely take longer for misdemeanor cases to go to trial. This may result in delayed justice for victims, as victims will invariably need to wait longer for cases to resolve at trial, even in relatively straightforward misdemeanor cases. To our knowledge, no one has begun to analyze what it would take to create the infrastructure to handle a two-to-four-fold increase in the number of scheduled jury trials, what constraints exist that are beyond the District's control (such as the current size of Superior Court), and what delays in justice could ensue from all of these changes. Given the consequences involved, these issues should be analyzed and discussed before any action is taken.

Deferred Dispositions for Misdemeanors

The RCCA proposes that, for *every* misdemeanor, when a defendant is found guilty of the offense, the court may defer further proceedings and place a defendant on probation before judgment for a period not to exceed one year. Under the proposal, if the defendant does not violate any of the conditions of probation, the court "shall" dismiss the proceedings. Following a dismissal, the defendant may move to seal the arrest and court proceedings. *See* RCCA § 22A-602(c).

We support the desire to expand diversion for low-level offenses, in recognition that a conviction may not be the most fair and just result in all cases. Consistent with that recognition, we have been working to expand our pre-trial diversion program with the goal of maximizing public safety, reducing recidivism, and enhancing a fair and efficient criminal justice system. The RCCA proposal, however, would allow judicially crafted diversion *after* a trial or guilty plea for *all* misdemeanor offenses—including the most serious misdemeanor offenses, such as certain sex offenses involving adult and child victims, domestic violence, stalking, and voyeurism. To guide our diversion, we have detailed internal guidelines for which defendants are eligible for

these diversions (which helps ensure similarly situated defendants are treated the same) and the types of diversion opportunities that should be available for a particular defendant. In short, we have a standardized system for identifying defendants who could benefit from diversion and then offering them the most appropriate diversion opportunity. By contrast, there have been no developed guidelines regarding the implementation of judicially led diversion, including what types of diversion may be most appropriate for a particular defendant or case. We want to ensure that our pre-trial diversion program is robust, allowing for the most appropriate plea agreement or diversion opportunity, and creating consistency between cases; this proposal may undermine our ability to accomplish that goal.

Universal Second Look

The RCCA proposes expanding the Second Look (also known as IRAA/Incarceration Reduction Amendment Act) provisions to allow any person—regardless of their age at the time of the offense—to petition the court for review of their sentence after the person has been incarcerated for 15 years. *See* RCCA Amendments to D.C. Code § 24-403.03.

We recommend that the Council delay consideration of this proposal. We recognize that the goal of a sentencing review mechanism is to offer second chances, and to ensure that people who have served their time have opportunities for rehabilitation and reentry. This proposal, however, would expand second look review from current law, which was significantly expanded by the Council earlier this year. Based on data obtained from the Federal Bureau of Prisons (BOP) this past summer, there are currently 460 people in the custody of BOP who became immediately eligible to apply for a sentence reduction as a result of the recently enacted Second Look Act, which allowed a person who was between 18 and 24 years old at the time they committed an offense and who has served 15 years' incarceration to move for release. Expanding the current IRAA to permit a universal second look would allow an additional 335 individuals in the custody of BOP who were 25 or older at the time of their offense and have served 15 years' incarceration to immediately move for release. Given that this pool of eligible individuals was so recently expanded, we encourage the Council to delay further consideration of any additional expansion. Before any additional expansion, we should review the impacts of this expansion, including offenses—particularly violent offenses—committed by people released under this provision, the impact that this expansion has had on victims and their families, the supports available to assist victims with navigating this process, and the supports available to assist individuals released under this provision with reentry and reintegration to society.

Concerns with Substantive Criminal Law Proposals Under the Revised Criminal Code Act

Burglary Penalties

The RCCA proposes creating three gradations of Burglary. First Degree Burglary—which requires that a victim directly perceive the defendant inside a dwelling—would be punishable by a maximum of 4 years' incarceration, and Enhanced First Degree Burglary—

committed with a firearm or dangerous weapon—would be punishable by a maximum of 8 years' incarceration.[1] *See* RCCA § 22A-3801.

However, the RCCA's proposed maximum penalties for First Degree Burglary and Enhanced First Degree Burglary do not adequately account for the harms and trauma that can be incurred by what is, in essence, a home invasion. A statutory maximum does not represent the legislature's sense of what the minimum amount, or even average amount, of punishment associated with a crime should entail. Rather, a statutory maximum—by definition—reflects the legislature's belief as to what a person should be sentenced to for committing the worst possible version of that offense. Homes are where people live, where they keep their children safe, where they store their most valuable and sentimental possessions, and where they feel most secure. A burglary can shatter this sense of security, sometimes irrevocably. The maximum penalty for this crime, therefore, should recognize that a burglary violates the sanctity of the home, and the maximum penalty should be increased so that it is commensurate with the harms that can be caused by this type of invasion. Notably, the District's Sentencing Guidelines categorize First Degree Burglary as a Group 5 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 3 and 7 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 7 years or more in prison. The Guidelines categorize First Degree Burglary While Armed as a Group 3 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 7.5 and 15 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 11.5 years or more in prison. The RCCA proposal represents an unwarranted departure.

Robbery and Carjacking Penalties

The RCCA proposes creating three gradations of Robbery, depending on the level of bodily injury suffered by the victim, and the type of property that was involved. A robbery that did not result in serious or significant bodily injury, and where the property taken was valued at less than $5,000, would be categorized as Third Degree Robbery, with a statutory maximum of 2 years' incarceration. Committing this offense while armed with a firearm would be categorized as Enhanced Third Degree Robbery, with a statutory maximum of 4 years' incarceration, with a higher maximum penalty if the firearm actually caused bodily injury to the victim. The RCCA also proposes subsuming the offense of Carjacking into Robbery. Unarmed Carjacking would be categorized as Second Degree Robbery, with a statutory maximum of 4 years' incarceration, and Armed Carjacking would be categorized as Enhanced Second Degree Robbery, with a statutory maximum of 8 years' incarceration. *See* RCCA § 22A-2201.

While we could support reductions in the maximum penalties for these offenses, the proposed reductions are simply too great. The maximum penalty for Carjacking should recognize that Carjacking is akin to burglary in some ways, as it may involve a traumatic intrusion into a

[1] Because the RCCA proposes removing the requirement in current law that, at the time of sentencing, a period of incarceration be reserved as back-up time under D.C. Code § 24-403.01(b-1), these RCCA maximum penalties correspond to maximums of 5 years' and 10 years' incarceration, respectively, under current law.

person's personal and presumed secure space.[2] It also results in the loss of what is often a much more significant asset than is lost in another form of robbery. Further, the proposed maximum penalties for Robbery and Enhanced Robbery are insufficient to account for the harms that can be incurred in a robbery, particularly where the robbery is committed while armed with a dangerous weapon. For example, under the RCCA proposal, both a defendant who held a gun to a victim's head and threatened to kill the victim in connection with a robbery and a defendant who fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim, could each be sentenced to a maximum of 4 years' incarceration for that offense. A maximum possible sentence of 4 years' incarceration would be woefully inadequate for such conduct. Notably, the District's Sentencing Guidelines categorize Robbery as a Group 6 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 1.5 and 5 years; a person convicted of this offense with the highest criminal history would face a guideline range of 3.5 years or more in prison. The Guidelines categorize Armed Robbery as a Group 5 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 3 and 7 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 7 years or more in prison. The RCCA's proposed departure is unwarranted.

Felony Murder

The RCCA proposes eliminating accomplice liability for felony murder. *See* RCCA § 22A-2101(g). The RCCA also proposes requiring that, for felony murder, the lethal act be committed "in the course of and in furtherance of committing or attempting to commit" the predicate offense, and proposes limiting the predicate offenses for felony murder from current law, including eliminating certain types of child physical abuse and other serious crimes as potential predicates for a felony murder conviction. *See* RCCA § 22A-2101(b)(3).

However, we recommend that, with respect to accomplice liability, the Council adopt a compromise position, and create an affirmative defense to felony murder. Under this affirmative defense, a defendant would not be liable for felony murder if the defendant could prove that they did not commit the lethal act, and either believed no participant in the predicate felony offense intended to cause death or serious bodily injury, or made reasonable efforts to prevent another participant from causing the death or serious bodily injury of another. Notably, creating such an affirmative defense is consistent with a previous recommendation of the CCRC. This compromise position recognizes that accomplice liability for felony murder is necessary in many situations because, even where it is possible to prove the identity of the perpetrators of the offense, it is often not possible to identify the specific offender who "commit[ed] the lethal act."

[2] *See, e.g.*, Dan Morse and Luz Lazo, *With Carjackings on the Rise, this Trio of Fed-Up Strangers Intervened*, Washington Post (December 4, 2021) ("For victims, the suddenness of being carjacked can extend out the trauma. One moment, they're in their car—something often associated with contentment, whether it's listening to music or smelling a fresh coffee nestled in the cup holder—the next moment there's a gun or knife stuck in their face, said Christopher Herrmann, an assistant professor at the John Jay College of Criminal Justice in New York. 'It's just as bad, really, as an armed person coming into your house,' Herrmann said. In Montgomery County, victims' advocate Greg Wims has worked with carjacking survivors for nearly 30 years. It can take days or weeks to fully realize the danger they went through. 'Then the thought really hits: I was almost killed over my car,' said Wims, founder of the Victims' Rights Foundation.").

Without some form of accomplice liability, crimes committed by *multiple* perpetrators would escape felony murder liability, while the same offense committed by a *single* perpetrator could result in felony murder liability. For example, a gang rape perpetrated by two or more individuals that resulted in the victim's death may result in no liability for murder, as it may not be possible to determine which defendant committed the lethal act. A father and mother both systematically abusing their child, resulting in the child's death, may result in no liability for murder. Where two individuals fire gunshots at a victim at the same time in the course of an armed robbery or carjacking, and it is impossible to prove which bullet caused the victim's death, there may be no liability for murder. These examples show the necessity of accomplice liability for felony murder in situations where its absence would otherwise mean that neither person responsible for killing someone in the course of what is an inherently dangerous and violent offense is held accountable for murder. In murder cases, unlike for other offenses, the murdered victim cannot provide any information about what happened during the offense. By altering liability for accomplices under a felony murder theory, the RCCA proposal would effectively remove murder liability for certain felony murders committed by groups of perpetrators. Indeed, the more people who commit the predicate offense together, the less likely it would be that liability could attach for felony murder.

Defense to Child Sexual Abuse

The RCCA proposes departing from long-standing District law that mistake of age is not a legal defense to child sexual abuse,[3] and creating an affirmative defense to felony child sexual abuse where: (1) the victim is 14 or 15 years old (or 16 or 17, in the case of sexual abuse by a person in a position of trust or authority); (2) the defendant reasonably believes the victim is 16 or older (or 18 or older, in the case of sexual abuse by a person in a position of trust or authority); and (3) the reasonable belief is based on an oral or written statement that the victim made to the defendant about the victim's age. *See* RCCA § 22A-2302(g)(2)-(3). For less severe forms of child sexual abuse, the government would be required to prove, as an element, that the defendant was reckless as to the victim's age. *See* RCCA § 22A-2304(a)(1)(A) (Sexually suggestive conduct with a minor); RCCA § 22A-2305(a)(2)(A) (Enticing a minor into sexual conduct); RCCA § 22A-2306(a)(2) (Arranging for sexual conduct with a minor or person incapable of consenting).

However, because this defense would allow for the introduction of evidence regarding the defendant's objectively "reasonable belief" as to the age of the victim, the existence of this defense could, practically, create a legally sanctioned justification for the defense to introduce evidence that would otherwise have no probative value at trial. For example, to show an objectively "reasonable belief," the defendant may seek to elicit testimony relating to the child victim's appearance, including the child victim's physical development, maturity, and clothing, or photos of how the child victim presents themselves on social media. This testimony would be elicited to show why the victim appeared to be older than the victim's true age. Allowing evidence of the defendant's "reasonable belief" would allow this type of demeaning and humiliating evidence to be deemed probative and, thus, admissible at trial. If this proposal goes into effect, a defendant may also seek to introduce evidence currently precluded by the Rape

[3] *See* D.C. Code § 22-3011(a).

Shield Law[4] regarding the victim's prior sexual behavior to validate their "reasonable belief" that the child victim was of consenting age. Such evidence could include, for example, the victim's known history of engaging in sexual acts with adults, prior pregnancies or births, involvement in prostitution and/or other sexually related behavior of an adult nature that suggested to the defendant that the victim was of a legally mature age. This evidence is the exact type that exposes the extremely intimate life of the victim (and here, a child victim) that the Rape Shield Law was specifically designed to exclude except in the most unusual cases where the probative value of the evidence is precisely demonstrated. We account for compelling fact patterns in exercising our charging discretion, where—despite the strict liability for this offense—a person may have reasonably believed that the victim was not underage. Allowing for this legal defense, however, may permit the defendant to elicit evidence at trial in a manner that is inappropriate, unnecessarily humiliating for the sexual assault victim, and directly contrary to the compelling policy reasons behind the Rape Shield Law.[5]

Requirement that Certain Sexual Conduct Have a "Sexual" Intent

The RCCA proposes adding the modifier "sexually" to certain conduct before it can constitute a "sexual act" or "sexual contact," such that certain behavior would only constitute a sexual offense if the defendant has a "sexual" intent. *See* RCCA §§ 22A-101(118)(c), 22A-101(119)(B)(ii).[6]

However, adding the modifier "sexually" would constitute an ill-advised change from current law, as it would unduly limit situations where the defendant's conduct should qualify as a sexual act or sexual contact. Sexual violence can be about power and control, *not* sex or sexual gratification. When committing a sexual offense, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused. For example, if, at a fraternity or sorority hazing, a defendant publicly penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse, humiliate, harass, or degrade the victim. This would and should constitute a sexual offense. Further, even where a victim clearly experiences a sexual violation, it is often difficult, if not impossible, to prove that a defendant committed the offense for a sexual reason. For example, if a defendant grabs the vagina, breast, or buttocks of a stranger, that victim likely will feel sexually violated, and the conduct should constitute a sexual offense. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure through words or actions—which is rare in many cases, particularly those involving sudden, brief, sexual assaults

[4] *See* D.C. Code §§ 22-3021, 3022.

[5] *See Scott v. United States*, 953 A.2d 1082, 1089 (D.C. 2008) (the purpose of the Rape Shield Law is to "safeguard against unwarned invasions of privacy" and "to exclude legally irrelevant evidence that may distract the jury or lead it to discount the complainant's injury because of societal stereotypes and prejudices").

[6] Under the RCCA proposal, a "sexual act" would include: "Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to *sexually* abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire" (emphasis added). RCCA §§ 22A-101(118)(c). A "sexual contact" would include: "Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person: (i) With any clothed or unclothed body part or any object, either directly or through the clothing; and (ii) With the desire to *sexually* abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire" (emphasis added). RCCA § 22A-101(119)(B)(ii).

of strangers—the government may not be able to prove that the defendant's actions were sexually arousing or gratifying. The government, however, would be able to show that, at a minimum, the defendant intended to humiliate, degrade, or harass the victim.

Mandatory Minimums

The RCCA proposes eliminating all mandatory minimum sentences from the D.C. Code. *See* RCCA § 22A-603. While we recognize and agree with the desire to reduce the number of mandatory minimums, we cannot support eliminating them all, and argue that two in particular should remain in light of their direct relation to serious violent crime. First, the 30-year mandatory minimum sentence for premeditated First Degree Murder should be maintained. District law has long provided for a minimum sentence for First Degree Murder, an offense that is uniformly viewed as the most serious offense. Every state has some mandatory minimum for First Degree Murder, and the concern that a mandatory minimum sentence may lead to a disproportionately harsh sentence for a less serious offense does not apply to First Degree Murder. Second, the 5-year mandatory minimum for committing a crime of violence while armed with a firearm should be maintained. Under the RCCA's proposed structure, a 5-year mandatory minimum sentence should attach to an enhancement that involves a dangerous weapon or imitation dangerous weapon, where: (1) the underlying offense is a crime of violence; and (2) the weapon involved was a firearm or imitation firearm. This would attach a mandatory minimum to offenses such as armed carjacking, armed sexual assault, armed robbery, and armed kidnapping, but would not extend a mandatory minimum to drug-related offenses. The presence of any firearm is inherently dangerous and can create a significant risk of violence—including a risk of violence to both intended and unintended victims—and the presence of that firearm during a crime of violence necessitates a proportionate sentence. A minimum sentence reflects the community and the legislature's sense that committing a crime of violence while armed is unacceptable by community standards, and will be penalized accordingly.

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USAO-DC is committed to continuously seeking to improve the criminal law and the criminal justice system in the District, and looks forward to continuing to engage the Council and the community in a discussion of how to make our criminal law more fair and just for all.