

**COUNCIL OF THE DISTRICT OF COLUMBIA  
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY  
COMMITTEE REPORT**

**1350 Pennsylvania Ave, NW 20004**

**June 25, 2009 5:11 p.m.**

**TO:** All Councilmembers  
**FROM:** Councilmember Phil Mendelson,  
Chairman, Committee on Public Safety and the Judiciary  
**DATE:** June 26, 2009  
**SUBJECT:** Report on Bill 18-151, “Public Safety and Justice Amendments Act of 2009”

The Committee on Public Safety and the Judiciary, to which Bill 18-151, the “Public Safety and Justice Amendments Act of 2009” was referred, reports favorably thereon with amendments and recommends approval by the Council.

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**I. BACKGROUND AND NEED**

**PRESENCE IN A MOTOR VEHICLE CONTAINING A FIREARM**

This provision would establish a new criminal offense for a person to be present in a motor vehicle knowing that there is a firearm in the vehicle. As proposed this would be punishable as a felony with a penalty of up to \$5,000 and five years imprisonment.

The issue that this provision seeks to address is when a car is stopped with multiple occupants and a firearm is present in the vehicle – the police are unable to prove who was in possession of the firearm. Even if the police believe they know who possessed the firearm – constructive possession with multiple occupants in the car is very difficult to prove at trial. The proposal therefore seeks to make it illegal for every occupant to be present in the vehicle as opposed to just the occupant that possessed the weapon. Testimony at the hearing by the Executive stated that, “this offense would not apply to anyone with a legally registered firearm or

to anyone transporting a firearm to a lawful activity. Nor would it be used to prosecute someone who unknowingly rides in a car with a firearm.”<sup>1</sup>

Testimony at the public hearing from the D.C. Public Defender Service (PDS) and the D.C. Association of Criminal Defense Lawyers (DCACDL), strongly condemned this proposed language. PDS stated that this offense would make it a crime to be a bystander. Further, they queried whether guns in motor vehicles are worse than guns in other places – in other words, whether this same harm would exist when one is standing near a car with a firearm and its doors wide open.<sup>2</sup> DCACDL testified that the proposed section would convict individuals of a felony based on mere knowledge and mere presence. They testified that, “[t]he reason mere knowledge and mere presence do not combine to form a crime is that there is no wrongful act on the part of the defendant.” In that sense, since the prosecution is unable to prove the requisite criminal intent they would convict all the occupants of the car despite knowing that some innocent persons will also be implicated. These witnesses further noted that, as written, this criminal penalty applies in situations with lawfully owned firearms.

It is arguable and even likely that proximity to a firearm in general should be treated similarly for purposes of alleged criminal misconduct. However, the Committee supports the intent of this provision to recognize the escalation of harm due to a combination of the presence of a firearm and the use of a motor vehicle. Vehicles are used to facilitate a quick escape or enable swift implementation of the crime. Accordingly the Committee supports adoption of this language, but proposes significant amendments recommended by DCACDL.<sup>3</sup> As introduced, the legislative language fails to even support the purported intent of the Executive. For that reason, the Committee recommends adopting wholesale changes in order to ensure that the charge will not be used against those who lawfully possess a firearm, legitimately believed the possession of the firearm was lawful, legitimately had no knowledge of the firearm’s presence, or had no ability to safely distance themselves from the firearm. In addition, the Committee’s recommended language makes it clear that there must be some deliberate decision on the part of the accused to be in a vehicle with an illegal firearm present.

This provision, as amended, would allow for prosecution of those who entered a motor vehicle knowing that an illegal firearm was within the motor vehicle. This crime would also apply to those who stay in the vehicle, knowing that an illegal firearm was present; those who allowed a person possessing an illegal firearm to enter the vehicle; and those who allow another person to stay in the vehicle when they knew they possessed an illegal firearm. It also clarifies that this offense shall be a lesser included offense of the crime of unlawfully possessing or carrying a firearm, so long as that possession or carrying was in the motor vehicle.

The Committee recommends adoption of this section with amendments.

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<sup>1</sup> Nickles March 18<sup>th</sup> page 5.

<sup>2</sup> PDS Post May 18<sup>th</sup> testimony.

<sup>3</sup> DCACDL proposes some of the legislative language adopted by the Committee, however, they state that they continue to vigorously oppose this provision because it would saddle persons who have done nothing wrong with a potentially life altering felony conviction.

### **UNLAWFUL ENTRY OF A MOTOR VEHICLE**

This provision would establish a new criminal offense for an individual who breaks into a motor vehicle, or attempts to break into a motor vehicle, when there is no breaking in the traditional sense. Specifically, this addresses situations where cars are left unlocked and the perpetrator is simply opening the door in order to steal. This provides an additional tool for law enforcement and enables their early intervention. Prior to this, law enforcement would have to wait for the perpetrator to steal something or damage something before interfering.

The Committee recommends adoption of this section with amendments.

### **TAMPERING WITH DETECTION DEVICE**

The Council approved this provision on an emergency basis December 16, 2008 and temporary legislation was enacted on January 28, 2009. Advances in technology have permitted increased use of global positioning system devices. These and other electronic monitoring equipment serve as a deterrent for monitored persons to commit new crimes, thereby protecting public safety without the necessity of incarceration. Further, GPS devices can be utilized to identify probable suspects by matching their whereabouts to the scene of the crime.

According to the USAO's anecdotal evidence, several cases involving tampering with these devices have already been brought under the Council's emergency legislation. The USAO testified in support of this provision and stated, "...that the police have been able to link defendants to crimes because they were wearing a GPS device and were able to quickly apprehend them and take them off the street. Wearing a GPS device contributes significantly to public safety."<sup>4</sup> At the time of the emergency legislation, within a five month period, eight suspected or confirmed cases of GPS tampering had occurred.

PDS testified in opposition to this provision. They expressed that this conduct is already criminalized and subject to imprisonment – creating this additional penalty is a duplication of existing law and simply adds an additional misdemeanor onto the individual's record.<sup>5</sup> PDS also recommended that the language be clarified to criminalize those who intended to avoid monitoring. This language would distinguish between individuals who intentionally acted where the result was interference versus those who intentionally acted in order to interfere.

The Committee has slightly revised the language to better clarify the intent requirement that must be present when tampering with monitoring device but declines to add intent to evade.

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<sup>4</sup> Pat Riley 3/18 hrg p. 15.

<sup>5</sup> PDS notes that if wearing the device is a condition of parole or supervised release, interference would be a violation of that parole or supervised release. If the individual is convicted under this provision then the United States Parole Commission would discount the amount of time it imposes on the parolee as a result of revocation. Therefore, in terms of punishment, this would simply result in another misdemeanor penalty on the individual's criminal record.

It is not the desire to add another element that the prosecution would be required to prove. Further, from a plain reading of the language, it already seems to clearly convey that the Committee's intent is to implicate individuals who have intentionally acted in order to evade by interfering with the monitoring. That equipment was faulty must be a consideration in whether the individual acted intentionally to interfere with monitoring.

The Committee recommends adoption of this subsection.

#### **ESTABLISHMENT OF A GANG AND CREW INTERVENTION JOINT WORKING GROUP**

The Council approved this provision on an emergency basis June 16, 2009. It implements the first two recommendations under phase one of *A Blueprint for Action: Responding to Gang, Crew, and Youth Violence in the District of Columbia*.

The Blueprint was released June 12, 2009. Funded by the Council in Fiscal Year 2009, the Blueprint offers a community based, citywide strategy to end gang and crew violence through strategic and targeted intervention and prevention methods.

MPD and gang prevention and intervention organizations estimate there are 2500 active gang and crew members in DC with up to 5000 loosely affiliated members. There is no substitute for police presence and action. However, the sheer numbers of gang and crew members tell us we cannot exclusively arrest our way out of gang violence. Gang and crew members that are not actively engaged in the ongoing violence and those who can help stop the violence need targeted intervention and immediate access to support services.

The intent is to begin addressing the root causes that make young people that target of gang and crew recruitment at the same time of increased law enforcement efforts.

The Committee recommends adoption of this section.

#### **ANTI-STALKING**

This provision would repeal the District's existing stalking law and establish a new law that is more in line with the Model Stalking Code (Model Code)<sup>6</sup> developed by the National Center for Victims of Crime. Testimony from the United States Attorney for the District of Columbia, Jeffrey Taylor, asserted that the current District statute is both confusing and too limited.<sup>7</sup> Stalking is a serious crime that often involves intimidation, psychological terror, and escalating severity. The Model Code cited that the Intimate Partner Stalking and Femicide

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<sup>6</sup> The National Center for Victims of Crime, *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, (2007),

<http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822>.

<sup>7</sup> Testimony of Jeffrey Taylor, United States Attorney for the District of Columbia, before the Committee on Public Safety and the Judiciary (March 18, 2009).

Study, which studied female murder victims who had been killed by intimate partners, found that 76 percent of femicide victims and 85 percent of attempted femicide victims had been stalked by their intimate partners in the year prior to their murders.<sup>8</sup> According to the National Violence Against Women Survey, about 1.4 million people are stalked annually in the United States.

The problem of stalking is compounded by tremendous advancements in the sophistication and availability of technology. These advances are not reflected in the District's current anti-stalking law, but are contemplated by the development of the Model Code. Current District law refers to the stalker's behavior as "following" or "harassing". Harassing behavior includes conduct either in person, by telephone, or in writing. Clearly, this language does not envision the utilization of global positioning systems (GPS), hidden cameras (spycams), internet searches, and e-mail – which allow the stalker to monitor and disturb their victims from afar.

The need for an updated anti-stalking provision is apparent, however, the challenge is to enable the justice system's intervention before stalking escalates into violence - yet avoid inadvertent criminalization of legal behaviors. A familiar example of this is when a man and a woman go on a date. After the date, the man is interested and repeatedly contacts the woman for another date. The woman meanwhile is not interested and does not respond to his communications. At what point does the man's conduct become harassing to that woman? Annoying? Alarming? Disturbing? The answer is not found in a bright line distinction between strict definitions for acceptable and alarming. Neither is it the intent of this legislation to accurately pinpoint that distinction. Instead, the purpose is to enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death. The Committee's draft clarifies that the intent is to address problematic behaviors that foreshadow more serious concerns.

The provision, as amended by the Committee, would do the following:

- Codifies stalking separately in the D.C. Official Code;
- Establishes the penalty for a first-time offense of stalking of 12 months, with no aggravating factors, so that a defendant will have a right to a jury of their peers;
- Establishes aggravating factors that will result in a maximum penalty of five years;
  - Aggravating factors mostly focus on behaviors that are high risk or evidence a problem with recidivism (a stalker who: was at the time, subject to a court, parole, or supervised release order prohibiting contact with the victim; has one prior conviction for stalking or attempting to stalk any person in the past 10 years; was four years older than the victim and the victim was under 18; or caused more than \$ 2500 in financial injury);

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<sup>8</sup> McFarlane et al., "Stalking and Intimate Partner Femicide," 308.

- Authorizes a maximum penalty of \$ 25,000 and/or imprisonment for 10 years if the stalker has two or more prior convictions for stalking any person. This requires that at least one of the cases was jury demandable in order for this penalty to apply; and
- Expands the definition of jurisdiction to allow for conduct that was initiated or had an effect on the victim in the District of Columbia. This expansion addresses situations where stalkers utilize technology to act from a distance.

A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, "[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable."<sup>9</sup>

A change that was not adopted by the Committee relates to what unanimity is required from jurors in a stalking case. PDS testified strongly that each act of stalking is an element upon which the jury must agree unanimously. In other words, if a defendant is accused of stalking because he called the alleged victim 24 times in one day – should the jury be required to unanimously find the same two acts of calling stalking or is it sufficient that each juror finds two acts sufficient? The Committee believes it is sufficient that the jury can unanimously decide that there are two acts of stalking and it is not necessary for them to agree on the same two acts. If they are able to unanimously agree that overall conduct equates to stalking beyond a reasonable doubt, it seems overly burdensome to require that they agree upon the same acts.

Another concern expressed by PDS was that identity theft and stalking should remain two distinct crimes when there is a lack of intent in identity theft to harm that person in particular because the theft was motivated solely for financial gain. The Committee agrees that it would be unfair to pile on the crime of stalking when the thief is motivated purely by financial gain. Stalking as a crime carries a stigma and should continue to carry that stigma. Clarifying the distinction between these offenses will not result in lesser penalties – as noted by the USAO, sentences for stalking and identity theft would run concurrently.

The intent of this provision is not to imply in any way that the victim should ever be encouraged or expected to provide the stalker with actual notice that their advances are unwelcome. The print of this section reflects three types of stalking that may occur: when the stalker intends to stalk; when the stalker knows that specific individual will feel stalked; and when the stalker should have known they would feel stalked. The only situation where knowledge is relevant is in the second scenario where the stalker knew that the individual would

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<sup>9</sup> PDS Supplemental May 18<sup>th</sup> page 8.

feel stalked. In that situation it is fundamental that the defendant be able to argue that he or she did not know that their actions would cause that specific individual to feel frightened.<sup>10</sup>

The Committee adopted certain changes suggested by the National Center for Victims of Crime, but also worked with the United States Attorney's Office, the Office of the Attorney General, and the Public Defender Service in order to develop amendments that clarify the legislative intent, provide adequate protections, and sharpen the focus of this proposal.

The Committee recommends adoption of this provision with amendments.

### **PROTECTION OF CAMPAIGN MATERIAL**

This provision would establish a misdemeanor for individual's who unlawfully remove or deface campaign materials. Criminalizing this misconduct is supported by the ACLU, they stated, "[f]ree elections depend upon voters being able to evaluate competing messages, but this can be easily defeated by persons who tear down or deface their competitors' material. Making this misconduct a misdemeanor offense is an appropriate response."<sup>11</sup> ACLU recommended certain amendments to clarify timeliness of the unlawful conduct, which the Committee adopts.

USAO testified in support of this provision but recommended that the penalty be decreased from a misdemeanor offense to a civil infraction punishable by a fine. They further clarified that each act would be a separate violation and each would carry the maximum fine. Because the court is likely to take into account the frequency, nature, and extent of the conduct – a series of violations could result in a significant fine. PDS testified in support of the USAO's recommended changes.

The Committee adopts the recommendation of the USAO and PDS to change this to a civil infraction. It seems an appropriate and sufficiently clear message that campaign materials play an important role in elections, referendums, and initiatives. Interference with this legally sanctioned method of communicating with voters is detrimental to the democratic process.

The Committee recommends adoption of this subsection with amendments.

### **SENTENCING AND CRIMINAL CODE REVISION COMMISSION**

This provision would amend D.C. Official Code § 3-101(2a)(b) to extend the deadline for completion of criminal code reform. The Committee had tasked the Sentencing and Criminal Code Revision Commission in 2006 with revising the language of criminal statutes to be clear and consistent, organizing existing criminal statutes, assessing the proportionality of criminal

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<sup>10</sup> An example is where a man sends a woman flowers and the woman is deathly afraid of flowers. He continues to send her flowers and he is then charged with stalking. The man must have the ability to defend himself by saying that he did not know that she was deathly afraid of flowers.

<sup>11</sup> ACLU March testimony page 21.

penalties, proposing a system for classifying misdemeanor statutes, identifying common law crimes that should be codified, identifying unconstitutional criminal statutes in the code, and enabling the adoption of Title 22 as an enacted Title of the code.

The Committee recommends adoption of this subsection.

#### **OFFICE OF THE CHIEF MEDICAL EXAMINER**

This provision would amend D.C. Official Code § 2903(c)(3) to waive the requirement for certification or eligibility for certification in forensic pathology by the American Board of Pathology for the individual appointed as Chief Medical Examiner for the duration of their term beginning on May 1, 2007 and ending on April 30, 2013. Emergency legislation on this issue has already been approved by the Council.<sup>12</sup>

Permitting the Mayor to waive this certification will allow the incumbent, Dr. Marie Pierre-Louis, to continue to serve as Chief Medical Examiner.

The Committee recommends adoption of this subsection.

#### **DISCLOSURES REQUIRED FOR CRIMINAL JUSTICE PURPOSES**

This provision would amend D.C. Official Code § 7-1201.01 *et seq.* to allow for the disclosure of protected mental health information within various criminal justice settings. This would affect persons in custody, disclosures on an emergency basis, the duration of an individual's authorization for disclosure, and court-ordered disclosures for monitoring compliance with mental health conditions of release.

Currently, an authorization for release of information remains in effect for a period of up to sixty days. This proposal would extend that authorization period to 365 days. Testimony at the hearing expressed that renewing this authorization is easily accomplished. That speaks to the need to establish more efficiencies in how this authorization is administered.

The Committee recommends adoption of this proposed subsection with amendments.

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<sup>12</sup> **Error! Main Document Only.** On November 26, 2008, the Chairman, at the request of the Mayor, introduced the Bill 17-1040, "Appointment of the Chief Medical Examiner Amendment Act of 2008". The bill was referred to the Committee on Public Safety and the Judiciary. On December 2, 2008, the emergency version of this legislation, Bill 17-1038, was approved by the Council and the temporary version, Bill 17-1039, passed first reading. Bill 17-1039 was approved on December 16, 2008.

(b) Bill 17-1038, the "Appointment of the Chief Medical Examiner Emergency Amendment Act of 2008" became effective December 12, 2008, but it was made retroactive to October 1, 2008.

### **GUN OFFENDER REGISTRY**

This provision would strengthen supervision of convicted gun offenders once they are released back into the community by establishing a gun offender registry. Convicted gun offenders, as defined in the legislation, would be required to register with the Metropolitan Police Department on an annual basis for two years following their release from prison, parole, or probation. It would operate as an affirmative requirement for the gun offender and punish violators with strict criminal penalties should they fail to comply. This registry is based off of similar models from Baltimore, Maryland and New York City, New York. The purpose of this registry is twofold – first it sends a message to gun offenders that the District is keeping tabs on their status and their conduct was bad enough that it warrants such monitoring. Second, MPD is able to strengthen supervision of gun offenders at a time when they are likely to recidivate (following release from imprisonment or termination of supervised release). OAG testified at the public hearings on this issue that gun offenders pose a high risk of recidivism and their subsequent arrests are more likely to involve crimes of violence.

Testimony at the public hearing from the D.C. Association of Criminal Defense Lawyers asserted that the proposal, as introduced, was significantly broader than the Baltimore model. Differences noted by DCACDL’s testimony include the: effective date, covered offenses, notice, residency, and detention.

In Baltimore, gun registry requirements only apply to offenses committed after the effective date of the legislation. The proposed legislation is retroactive. DCACDL argues that retroactive application could raise ex post facto issues (imposing conditions on persons who have already served their sentences) and would raise notice problems and registrations problems as thousands of offenders would be required to register within a 48 hour period. Amendments to the proposal clarify that the registry requirements will not be retroactive. They shall apply to offenses that are committed after the effective date of the legislation. Further, the legislation provides that requirements to register as a gun offender shall not run concurrently with requirements of supervised release. In other words gun offenders should not be required to simultaneously comply with two parallel monitoring systems.

Baltimore provides an exclusive list of offenses that are considered gun offenses and trigger registration requirements. The proposed legislation fails to provide a list of specific offenses and instead speaks to general violation of laws involving guns. As stated by DCACDL, some gun offenses are not so easily determinable. “[T]he Mayor’s proposal covers virtually every conceivable offense, here and elsewhere, that involves a gun ... a defendant may be charged with a conspiracy in which another co-defendant was alleged to have possessed a gun, but there is no allegation that the defendant did so and the jury need not return a finding on the truth of the gun allegation.”<sup>13</sup> Amendments to this provision provide an exclusive list of District offenses under Titles 7 and 23 that constitute gun offenses.

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<sup>13</sup> DCACDL p.5 supplemental statement.

Notice is another area of concern. Baltimore requires the court to notify a defendant of the registration requirement and also requires the defendant to formally acknowledge his obligation. Although the proposed language requires notification, it also explicitly states that lack of notice is not a defense. Therefore an individual can be criminally penalized regardless of whether they were afforded notice. Amendments to this provision require that individuals be afforded this defense and state that violations of the gun registry requirements must be done knowingly. This is consistent with sex offender registration requirements.

The proposed language by the Executive would require anyone who works in the District, attends school or training in the District, or who stays overnight in the District to register as a gun offender. Those in the District “intermittently” would also be subject to these requirements. The term “intermittent” allows presence in the District for any part of a day to constitute a day - and either 14 consecutive days or 30 aggregate days is sufficient to subject an individual to these requirements. DCACDL testified that, “[a]lthough the requirements to register under the Baltimore legislation would seem to apply to residents and non-residents, the verification requirements, which require a registrant to periodically report and to keep his or her information up to date, apply only to Baltimore residents.” Amendments to this provision narrow the individuals that will be required to register. Three categories of individuals will be required to register: 1) residents of the District convicted of gun offenses, 2) those convicted in the District of a gun offense, and 3) non-residents convicted of a gun offense outside the District where MPD has reached an agreement that District registration is a requirement of their supervised release.<sup>14</sup>

Focusing the types of individuals subject to these requirements increases the likelihood that this registry will be implemented consistently, fairly, and successfully.

Detention provisions established by the proposed legislation would remove the discretion of judicial officers to determine release conditions in three circumstances: detention until completion of the gun registry case when suspects are under court or parole supervision; rebuttable presumption of detention in any new case, regardless of the offense, or compliance with registration requirements; and detention without bond pending sentencing for any conviction of this proposed section. This language does not exist in Baltimore and are heavy handed conditions that provide less flexibility for the court to tailor detention.

The Committee agrees with the intended purpose of this proposed gun registry. As stated by the Executive, studies conclusively demonstrate that gun offenders pose a high risk of recidivism, and their subsequent arrests are more likely to involve crimes of violence. They cited that 42 percent of defendants charged with felony gun crimes in Baltimore have prior gun arrests. Further, in New York City, previous gun offenders are four times more likely to be

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<sup>14</sup> The intent of the third category of “gun offender” is to enable MPD to enter into agreements with neighboring jurisdictions such as Prince Georges County and monitor individuals who are neither residents of the District nor convicted of gun offenses in the District but nonetheless spend time in the District. The proviso that requirements to register in the District will be part of supervised release ensures that these individuals, who would otherwise lack sufficient contacts with the District, have sufficient notice of these legal requirements. However, the penalty for violation of these requirements must be left to other jurisdiction and should be contemplated by MPD and the other jurisdiction when crafting these agreements.

arrested for homicide than other offenders. The Committee also believes that convictions for gun offenses necessitate an imprimatur of gravity that is conveyed by this gun registry.

In order for this concept to be useful and fairly implemented, the Committee agrees with many of the concerns expressed by DCACDL and adopts those changes in the committee print. In crafting the amendments described above, the intent was to preserve MPD's interest in obtaining this information and recognize that overloading the administrative burden on gun offenders would be unfair and counter-productive. No one is interested in bootstrapping criminal penalties onto convicted gun offenders by creating hurdles for compliance. Onerous registration requirements would discourage compliance and could be interpreted as the District piling on criminal convictions based on largely technical violations. The purpose of this provision is to have a functional and rich registry – streamlining these requirements will help achieve that goal.

The Committee recommends adoption of this section with amendments.

#### **SPOUSAL/DOMESTIC PARTNER PRIVILEGE**

This provision would amend D.C. Official Code § 14-306 to expand the exceptions where spousal privilege otherwise applies. The law currently asserts that in civil and criminal proceedings – a spouse or domestic partner is competent but not compellable to testify for or against their spouse or domestic partner. Further, that a spouse or domestic partner is not competent to testify as to any confidential communications made during the marriage or domestic partnership. Case law has established two exceptions to this statute – 1) a spouse may testify against the other, even about confidential communications, regarding crimes committed against the testifying spouse; and 2) a spouse may testify against another, even about confidential communications, regarding crimes committed by one spouse against their child.

This proposal as written would allow compelling a spouse or domestic partner to testify against their spouse or domestic partner when they are either suspected or charged in the following situations:

- Where one spouse/partner commits a crime against the other;
- Where one spouse/partner commits a crime against a child, minor, or vulnerable adult who is in the household of in the care of one of them;
- Where the spouses are adverse parties in civil proceedings;
- Where the spouse/partners are accused of committing a crime jointly; and
- Where a crime occurred before the marriage/domestic partnership.

Testimony by the USAO stated that 43 states have no privilege where one spouse is accused of committing a crime against the other; and all 50 states have no privilege where one spouse is accused of committing a crime against the child of one of them (30 states) and/or any child (33 states).

Both PDS and DCACDL testified in opposition to this proposal.<sup>15</sup> They stress the importance of preserving the spousal privilege – spouses and domestic partners should feel free to confide in each other – to seek comfort and guidance. Although this will not inhibit partners from confiding in each other, PDS notes that it will likely adversely affect the relationship. Particularly since the USAO would be wont to compel testimony by the spouse or domestic partner frequently in order to gather additional information.

The D.C. Coalition Against Domestic Violence (DCCADV) and the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) also testified in opposition to this provision.<sup>16</sup> They expressed that dilution of this privilege would: re-victimize battered women; increase their safety risks and those of their children; disempower them; and potentially have a chilling effect on the willingness of victims to report violence to the authorities. Re-victimization is a possibility because oftentimes repeat abuse is heightened by batterers blaming the victim for their incarceration. Disempowerment is a concern because the system is effectively overruling the victim's decision making ability. Finally, there is a possibility that victims will be less inclined to report abuse because they are aware that they will not have a choice in the subsequent legal proceedings.

All opponents to this proposal agreed that there are alternative methods of prosecution that would place less emphasis on the victim's participation. DCCADV cited "victimless prosecutions" where taking photographic evidence at the scene; interviewing neighbors; seizing weapons; and taking evidence of clothing worn by the victim that may contain evidence – contribute to successful prosecutions without necessarily depending on the involuntary testimony of the victim.

The balancing test when analyzing this proposal is between protecting the sanctity of the spousal privilege and protecting certain individuals. This should be limited to situations where the prosecution has met a certain threshold in order to necessitate negation of these time-honored privileges. Simple suspicions or allegations are insufficient. The first examination is the privilege in the context of spousal or domestic partner abuse. After discussions with the various stakeholders, the Committee is recommending a modified approach similar to the model in Maryland. Spouses or domestic partners will be able to invoke the privilege and refuse to testify in only one proceeding where their spouse or domestic partner is charged with an intrafamily offense. This will not include grand jury investigations. Once the privilege is utilized they will no longer be able to re-assert the privilege in subsequent proceedings. In this way, the privilege is maintained – but not to the extent where repeat abuse by the same spouse or domestic partner is protected.

The second inquiry is when the charge involves a child, minor, or vulnerable adult in the household. In this situation, the Court has already recognized an exception to the spousal

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<sup>15</sup> Arguments regarding preservation of the spousal privilege were similar to arguments to preserve the doctor patient privilege that is amended in Section [REDACTED] of this legislation.

<sup>16</sup> DV LEAP clarified that they do support the elimination of spousal privilege in cases where the marriage occurs after the charged incident – where the marriage appears to be a fraudulent end run around the prosecution we have no problem with making the privilege unavailable.

privilege but it is limited to crimes committed by one spouse against their child. As a matter of public policy, if a child, minor, or vulnerable adult is living in the household they should similarly receive the protection of this exception. For this reason, the Committee adopts this expansion; however declines to expand it further to apply to spouses or domestic partners entrusted with the health, welfare, or supervision of the victim. Dilution of the privilege to the point where spouses or domestic partners of teachers, doctors, or neighbors would be compelled to testify would go too far.

The third consideration is spouses or domestic partners in adverse civil proceedings. According to the USAO, this reflects an existing statutory limitation.

Fourth are situations where spouses or domestic partners are charged with committing a crime jointly. Testimony by DCACDL expressed concern that this may violate the Fifth Amendment right against self-incrimination. The Committee's understanding is that only in situations where the right against self-incrimination is not implicated may the prosecution pursue this avenue.

Finally, the fifth issue is when a crime occurred before the marriage or filing of the domestic partnership. In this situation, the understanding is that once a marriage or domestic partnership is effective, prior information shared gains the imprimatur of protection. The Committee amends the provision to clarify that an exception to the marital privilege would only apply to communications that took place prior to the marriage or domestic partnership. Those shared afterwards must remain protected.

The Committee recommends adoption of this subsection with amendments.

### **PHYSICIAN PATIENT PRIVILEGE**

This provision would amend D.C. Official Code § 14-307(b)(1) and (4) to expand the exceptions where the physician patient privilege would otherwise apply. The law currently allows the following exceptions:

- Criminal cases where the accused is charged with causing the death of or inflicting injuries where disclosure is required in the interests of public justice;
- Criminal cases where mental competency or sanity of the accused is at issue;
- Certain family court proceedings where mental competency or sanity of a child is at issue; or
- Criminal or civil cases where the person is alleged to have defrauded the government involving Medicaid.

The proposal would expand these exceptions to include grand jury proceedings where the person is either suspected or charged with (in addition to the current exceptions) attempts or threats to kill or injure; charges of violating fleeing from the scene of an accident, driving under the influence, or fleeing from law enforcement in a motor vehicle; and fraud against a health care

benefit program. Finally the term “injury” is defined to include physical damage as well as sexual acts or contacts.

In this context, the ability of the prosecution to explore evidence better justifies an exception to the privilege between doctor and patient. For this reason, the Committee retains the exception as applied to grand jury investigations – however, the individual whose information is being sought must be alleged to have committed the act. This necessitates a higher degree of interest in the individual and provides protection against potential “fishing expeditions” by the prosecution.

The Committee recommends adoption of this subsection with amendments.

### **DISORDERLY CONDUCT**

This provision would amend D.C. Official Code § 22-1321 to revise the current law on disorderly conduct. In a report titled “Disorderly Conduct Arrests Made by Metropolitan Police Officers,” November 19, 2003 (Report), the Citizen Complaint Review Board made certain findings including that the disorderly conduct statutes were subject to abuse by arresting officers. The proposed language would do much to eliminate vagueness in the language of the statute and enable the true intent of disorderly conduct laws.

The Report stated the following when describing disorderly conduct statutes:

Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance.<sup>17</sup>

This distinction is critical to examining this law because there is no need to create layers of penalties in order to “catch” the individual for their act, punish them, and inhibit recidivism. Instead, all that is needed is a tool in order to disrupt and defuse the situation.

The USAO testified about their concern that conduct currently covered by the disorderly conduct statute would no longer be given these proposed changes. They listed nine examples: nighttime noise; fighting; jostling; loud and boisterous behavior; peeping toms; disturbances on a public conveyance; urinating in public; screaming profanities at citizens; and blocking sidewalks and entries. The only instances where it could be argued that existing laws and the proposed disorderly statute may conceivably not apply were jostling and disturbance on a public conveyance. Amendments have been made to the proposal in order to address those potential concerns.

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<sup>17</sup> Page 3.

The Committee recommends adoption of this proposed subsection with amendments.

### **CHRONIC OFFENDERS**

This provision would amend D.C. Official Code § 22-1804a and 22-1805a to establish a minimum maximum sentence for individuals who repeatedly violate criminal laws. This is not a mandatory minimum where the judicial officer's discretion is removed. Instead, it is a strong and unequivocal message of legislative intent to the judiciary that repeat offenders are to be punished severely.

The Committee recommends adoption of this proposed subsection with amendments.

### **CONTRABAND IN CORRECTIONAL FACILITIES**

This provision would amend D.C. Code § 22-2603 to broaden and identify specific items than cannot be introduced into a District correctional facility. The current statute bans illegal items such as drugs and weapons, as well as "any other contraband article or thing, or any contraband letter or message intended to be received by an inmate." The presence of contraband can endanger the safety and security of the correctional facilities.

Testimony on both sides of the issue admits that the current law contains a number of vague terms and should be amended. The need for an updated law prohibiting the possession of contraband in correctional facilities is apparent. The challenge exists in balancing the need to protect the safety and security of the correctional facilities with the inadvertent criminalization of legal behavior – possessing items that are legal to possess outside of a correctional facility but pose a danger to the safety and welfare within.

The current law does not define the word contraband. The amendment classifies contraband into three categories – Class A encompasses the most serious types of contraband which includes drugs and dangerous weapons, carrying the most serious penalty; Class B encompasses less serious types of contraband with a less severe penalty; and Class C encompasses minor contraband. The Committee feels that possession of Class C contraband, items such as cigarettes, should be dealt with administratively in a disciplinary hearing. The Committee also wants to clarify that an object or substance is not contraband if it is lawfully possessed in the correctional facility in the form or quantity for which it was lawfully obtained. The amendment also broadens the law to cover penal institutions as well as secured juvenile residential facilities.

With the advent of new technology, drugs and weapons are no longer the only types of contraband in prisons today. While other contraband items are seized more often, cell phones have become very valuable to prisoners. Cell phones can be used as a type of underground currency for prisoners. In many instances, inmates use cell phones to keep in touch with family members and friends – collect calls made from inside the prison are notoriously expensive.

However, some prisoners are using cell phones to orchestrate crimes to intimidate witnesses, run gangs, or organize escapes. This provision would amend the law to include cell phones as contraband within a correctional facility.

Testimony at the public hearings on this matter expressed three primary objections to the proposed change. First, the D.C. Public Defender Service (PDS) and the D.C. Prisoners' Project (Prisoners' Project) testified that neither the current law nor the proposed change required a *mens rea*, a state of mind, such as knowingly or intentionally introducing contraband into the correctional facility. With a lack of intent, a person who accidentally introduces contraband, either because they forgot they had a cigarette in their pocket or was just unaware that it was deemed contraband within the facility would be liable. There should be no ban on bringing legal items into a correctional facility without a corresponding intent to give or transmit it to an inmate; especially when the items are considered contraband only insofar as they are given to inmates. There is no need to set criminal penalties for bringing legal items to a correctional facility if there is no intent to give them to an inmate. Also, if visitors are in possession of items that are illegal to possess, whether under District or federal law, they should be punished for the possession under that law. There is no need to set new criminal penalties to punish behavior that is already illegal. However, the Committee wanted to make certain that the mere possession of contraband by an inmate, without prior authorization or legal exception, does not require a *mens rea*.

Second, PDS and the Prisoners' Project testified that the term "upon the grounds" of the penal institution needed to be clarified. There were concerns that visitors would be held criminally liable for introducing contraband if they were to park in the correctional facility's parking lot and had items such as a cell phone or bottle of wine in the trunk of their car. It is not the intent of the Committee to penalize legal behavior. It was also noted that the Department of Corrections has an inadequate amount of lockers for visitors to store their property while visiting inmates. The Department of Corrections should work on installing additional lockers for visitors to store their property to reduce the chance of inadvertently introducing "contraband" into the facility.

Third, PDS was also concerned about the lack of exception for attorneys conducting legal visits to clients inside the correctional facility. They were concerned about materials defense attorneys may bring into the jail to assist in the representation of their clients. The proposed bill prohibited bringing laptops into the jail. However, attorneys use laptops to play for their clients electronically recorded statements kept on DVDs. The United States Attorney's Office did not feel that the proposed changes would bar legal materials. Nevertheless, it was important to the Committee to clearly allow for an exception for attorneys during the course of a legal visit.

The Committee recommends adoption of this section with amendments.

#### **PROSTITUTION – CHRONIC OFFENDER**

This provision would amend D.C. Official Code § 22-2701 to establish a third conviction for prostitution or solicitation for prostitution as a felony offense. Heightening the consequence for repeated violations of this law is consistent with other parts of this legislation where crimes with high recidivism and seemingly indeterminate consequences are being targeted.

The Committee recommends adoption of this proposed subsection with amendments.

### **PROSTITUTION FREE ZONES**

This provision would amend D.C. Official Code § 22-2731 to increase the number of hours that the Chief of Police can declare a prostitution free zone. Increasing this number is responsive to testimony received by the Committee at an oversight hearing focused on strategies to combat prostitution in the District. In particular, witnesses from neighborhoods actively engaged in the fight against prostitution spoke about the usefulness of these prostitution free zones and their impact on dispersing prostitutes. This does not mandate that the CoP declare the prostitution free zone remain in effect for the full 480 hours, it simply gives the CoP discretion to declare the zone up to the full 480 hours.

The Committee recommends adoption of this proposed subsection.

### **SEXUAL ASSAULT**

This provision would amend D.C. Official Code § 22-3007 to eliminate the affirmative defense of consent in sexual abuse offenses where consent is an allowable defense. An element of certain sexual abuse offenses is that the defendant used force and violence. The USAO testified that the intent behind establishing an affirmative defense was to remove the victim's conduct from consideration of these elements and instead focus on the defendant's conduct. However, the Court of Appeals held that evidence of consent should be considered in determining the element of force. The confusing result is that juries are required to assess consent as an element of force (to be proved beyond a reasonable doubt) but then to consider whether the defendant proved consent by a preponderance of the evidence. The USAO recommends either eliminating the affirmative defense or clarify that consent is not a consideration in assessing force.

PDS and DCACDL testified as to their support for this provision. PDS expressed that in the sexual abuse context – evidence of consent may cause a jury to doubt whether the defendant used force – an element that the government must prove in every case. Further, that it is unconstitutional to require that the defendant raise this doubt by a preponderance of the evidence, yet the defense of consent currently requires the defendant to establish consent by a preponderance of the evidence.

This proposal is supported by the USAO, PDS, and DCACDL. The Committee recommends approval of this subsection.

### **WHITE COLLAR INSURANCE FRAUD**

This provision would amend D.C. Official Code § 22-3201 *et seq.* to: amend definitions to include the full range of property and services that can be stolen (including debit and credit); ensure that businesses and other entities that may be victimized are contemplated by the law; expand the definition of value to encompass what can be obtained with the instrument as opposed to the cost of the instrument itself; prohibit unauthorized use of lawfully obtained credit or debit cards; pay for property or services already obtained is covered; amend jurisdictional provisions to account for advances in technology; and clarify identity theft.

Amendments to this section of the D.C. Official Code also streamlines the existing language for unlawful use of a vehicle; adds a new penalty associated with the use of a stolen car in the course of or to facilitate a crime of violence; explicitly allows a person to be convicted of both theft and receiving stolen property for the same conduct/items; and adds “threatening to injure a person” to the obstruction of justice statute as it relates to retaliation.

These measures were adopted by the Council on an emergency basis on June 16, 2009. The provisions as amended are consistent with that legislation.<sup>18</sup>

The Committee recommends approval of this subsection.

### **REPEAL OF THE VAGRANCY STATUTE**

This provision would repeal D.C. Official Code § 22-3301 *et seq.*, the District’s vagrancy statute, in light of the ruling by *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) where certain sections of the District’s vagrancy statute were held to be unconstitutional. Dictum in the *Ricks* decision stated, “[w]e are also aware that our ruling, as a matter of stare decisis, undercuts the validity of other sections of both the general vagrancy statute and narcotic vagrancy legislation. Our silence as to the validity of these sections does not indicate any reservation about extending our holding to cover them in appropriate cases.”<sup>19</sup> It is therefore clear that the rest of the statute is similarly unconstitutional and necessitates repeal.

The Committee recommends adoption of this section.

### **HOMELESSNESS AS A BIAS-RELATED CRIME**

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<sup>18</sup> The emergency legislation did not include the re-write of language for unlawful use of a vehicle. That language was in the introduced version of the legislation and has been further revised by the USAO. The Committee adopts that revised language in this recommendation.

<sup>19</sup> *Ricks*, 414 F.2d at 1110.

This provision would amend D.C. Official Code § 22-3701 to establish homelessness as a protected class. The law currently provides for the protected classes of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, or gender identify or expression, family responsibility, physical disability, matriculation, or political affiliation. The effect of this amendment would be to enable data collection pursuant to D.C. Official Code § 22-3702, enhanced penalties under D.C. Official Code § 22-3703, and civil relief against the perpetrator. This proposal is supported by the National Law Center on Homelessness and Poverty, Washington Legal Clinic for the Homeless (WLCH), and the National Coalition for the Homeless.<sup>20</sup>

The purpose of this amendment is twofold. First it condemns violence towards the District's homeless – certainly some of our most vulnerable residents. Second it empowers individuals and the government to study and combat this violence.

Testimony at the public hearing cited harsh statistics on the violence suffered by the District's estimated homeless population of 6,228. 25 percent of the District's homeless individuals had been violently attacked by non-homeless individuals within the last four years.<sup>21</sup> The Department of Human Services surveyed 2859 homeless individuals and found that one third of the participants reported being victims of violent crime at least one. WLCH expressed that conversations with people who are homeless, who have been victimized, validate that they have been selected due to their homeless status – and that status also increases the risk of victimization.<sup>22</sup>

These escalations in violence cannot be disregarded. Just in the past year, one homeless man was brutally murdered and four more were violently assaulted – all while they were sleeping. It seems apparent that these attacks are based on hate and motivated by the individuals' vulnerability. Amending the law to include homeless persons as a protected class triggers data collection and enables civil action as recourse against perpetrators. MPD would be required to afford homeless people the opportunity to submit information supporting that the act was bias-related. This information will then be incorporated into an annual summary prepared by the Mayor and submitted to the Council – along with recommendations. Amending this provision will also include the potential for punitive damages against the perpetrator. Civil suits can simultaneously punish the violator as well as send a strong message that hate crimes against the homeless will result in very tangible consequences.

The USAO testified in support of adding a definition of homelessness which is adopted by the Committee.

The Committee recommends approval of this section with amendments.

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<sup>20</sup> The National Coalition for the Homeless testified that these changes are also supported by Congresswoman Eleanor Holmes Norton, ACLU of the National Capital Area, Greater Washington Urban League, Inc., Japanese American Citizens League, National Center for the Victims of Crime, and the Southern Poverty Law Center.

<sup>21</sup> Testimony of Tony Taylor, National Coalition for the Homeless.

<sup>22</sup> Testimony of Mary Ann Luby, Washington Legal Clinic for the Homeless.

### **DNA SAMPLE COLLECTION**

This provision would amend the D.C. Official Code § 22-4151(1) which authorizes the collection of DNA from every person convicted of a crime of violence in the District of Columbia and certain misdemeanors. Currently, the federal government and 13 states require collection of DNA samples from anyone convicted of *any* felony. The government and these 13 states can also compel the collection of DNA samples from both persons who have been convicted and those under arrest. This provision would put the District in line with the federal government and the 13 states – compelling DNA samples from everyone *convicted of any felony* and certain misdemeanors.

Persons who commit violent crimes may have prior arrests or convictions for lesser offenses. The DNA samples can be used as an investigative tool that might help identify the perpetrator of other crimes, past or present. However, expanding the government's net of DNA collection may lead to "low stringency" or "familial" searching of DNA databanks, in which known DNA profiles in the databases are used to identify parents, children, siblings, and relatives whose profiles are not in the genetic databanks. DNA is inherited, thus family members share a common gene pool and are likely to have similar profiles. Some governments are permitting DNA database searches for near matches between DNA profiles contained in DNA databases and DNA profiles collected at crime scenes. This leads to a slippery slope of expanding genetic surveillance beyond those individuals whose DNA is contained in the database, to wholly innocent family members.

The Committee believes that privacy rights of the innocent should be preserved. The testing of DNA samples should be limited and should not be searched for the purpose of identifying a family member related to the individual from whom the sample was acquired.

The Committee recommends adoption of this section with amendments.

### **FELON IN POSSESSION OF A FIREARM**

This provision would increase the mandatory minimum sentence for felons previously convicted of crimes of violence who are in possession of a firearm. Under both federal and District law, felons are not legally permitted to possess a firearm.

In 2006, the Council enacted the Omnibus Public Safety Amendment Act of 2006, which included a provision to establish a mandatory minimum sentence of one year for previously convicted felons in possession of a firearm.

This mandatory minimum was deemed necessary based on the assumption that these convicted felony offenders were clearly not rehabilitated and posed a serious danger to the community. The Executive's testimony supporting an increase to this newly minted proposal to further increase this new mandatory minimum cited a 12-year study by the Department of Justice

that found 38 percent of violent felons had a previous felony conviction and 14 percent had a previous conviction for a violent felony.<sup>23</sup> To support the effectiveness of mandatory minimums they cite the experience of Virginia's two-year mandatory minimum sentence for felons in possession of a firearm, which increases to five years if the previous felony conviction was for a violent crime. Richmond is cited as an example of tough and certain sentences for gun offenses reducing violent crime. "Homicides in Richmond have dropped in each of the past five years, from 93 in 2003 to 32 in 2008 – a two-thirds reduction overall. In 2008, violent crime decreased 14 percent."<sup>24</sup>

The Committee received extensive testimony in opposition to this proposed increase to the mandatory minimum. The purpose of a mandatory minimum is to remove discretion from the judges and ensure certainty in sentencing. This certainty in sentencing is what is used to prevent future offenders (or re-offenders) because they are less likely to violate the law if they are certain of severe punishment. This removes judicial discretion and prevents disparity in sentencing. As expertly detailed in the testimony received by the Committee, there are a number of issues with these assumptions. Crimes with mandatory minimums may not be ultimately used in convicting a defendant; they can be reduced through plea bargains. Certainty in sentencing through mandatory minimums can be unfairly used when there are mitigating circumstances that are necessarily ignored. Sentencing disparity has not been proven problematic in the District.

The proposed increase to the mandatory minimum would affect individuals previously convicted for a crime of violence. However, as stated by DCACDL, this fails to take into account many relevant factors: how long ago was the prior conviction, was the defendant in sole possession, what was the purpose of the possession? DCACDL cites, "[l]iterally, the felon-in-possession statute encompasses both the felon who intentionally arms himself to rob a bank and the felon who frustrates the robbery by snatching the gun out of the robber's hand."<sup>25</sup> The ACLU, citing the American Bar Association, stated "Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant's mitigating circumstances at the charging stage of a case."<sup>26</sup>

Also expressed was the fact that the Council established a [Commission on Sentencing] (Commission) to comprehensively study the district's sentencing scheme. This Commission successfully promulgated voluntary sentencing guidelines for use by the D.C. Superior Court. This aimed to reduce sentencing disparity for individuals convicted of similar crimes yet allowed for sentencing judges to factor in mitigating circumstances. According to testimony from the Commission, compliance with the sentencing guidelines has remained extremely high. This also speaks against the need for removing discretion from judicial officers.

The Committee recommends adoption of this subsection with amendments.

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<sup>23</sup> Reaves, Brian. Bureau of Justice Statistics Special Report: Violent Felons in Large Urban Counties. US Department of Justice. July 2006.

<sup>24</sup> March 18<sup>th</sup> Nickles testimony page 4.

<sup>25</sup> United States v. Leahy, 473 F.3d 401, 408 (1st Cir. 2007).

<sup>26</sup> Available at [http://www.abanet.org/poladv/letters/crimlaw/2007jul03\\_minimumsenth\\_1.pdf](http://www.abanet.org/poladv/letters/crimlaw/2007jul03_minimumsenth_1.pdf).

### **POST-CONVICTION PROCEEDINGS**

This provision would amend the D.C. Official Code § 23-110(b) to allow dismissal of a motion for relief if the government has been prejudiced by a delay in filing – unless the movant shows that the grounds could not have been raised before the government was prejudiced. The USAO testified that this mirrors existing language in the law and encourages prompt filing of motions, judicial economy, and the finality of judgments.

Testimony at the public hearing expressed support for the purpose of this provision, but stated that the prosecution's burden should be clearer. Specifically, PDS requested the language be clarified to state that the prosecution must demonstrate prejudice and the prejudice demonstrated must be material. PDS expressed that a limited number of cases would allow the movant to show that they could not have filed earlier – and thus would create an impossible burden for the movant to meet.

The Committee adopts the amendments recommended by PDS. After discussion with the USAO it appears clear that these clarifications are consistent with the current implementation of this provision as it appears elsewhere in the D.C. Official Code. To ensure consistency, the Committee also recommends amending D.C. Official Code § 22-4135 in the same manner.

The Committee recommends adoption of this subsection with amendments.

### **WARRANT SERVICE**

This provision would amend D.C. Official Code § 23-523(b) to define daylight hours as the period of the day between 6:00 a.m. and 11:00 p.m. The effect of this amendment would be to allow execution of search warrants (without express authorization) during this time period.

The USAO testified that the current limitation does not apply in the District to search warrants for drugs – further, that this limitation does not exist in federal cases, Maryland, or Virginia. PDS and DCACDL strongly objected to this proposal because of the potential danger to both law enforcement and the public. Specifically, that execution of search warrants in the dark increase the likelihood of “jumpiness” and exacerbates tense and dangerous situations.

Clarification of the specific times where express authorization is not needed seems prudent. The Committee slightly limits the proposed hours of blanket authority to last from 6:00 a.m. to 9:00 p.m. This will necessarily allow such search warrants to be executed in the dark – however, it seems burdensome to require the government to seek express authorization when this is not the norm and there is no evidence of elevated violence from broadening this authority outside of daylight hours. The Committee would expect that MPD utilize this expanded authority carefully through its training of police officers to ensure the safety of law enforcement as well as citizens.

The Committee recommends adoption of this section.

### **PROBABLE CAUSE MISDEMEANORS**

This provision would amend D.C. Official Code § 23-581 and add destruction of property and voyeurism to the list of misdemeanors not committed in an officer's presence that do not require an arrest warrant. These "probable cause misdemeanors" require the officer to have probable cause to believe that the person has committed the offense and unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence. The USAO testified that the nature of these two offenses makes it likely that they will fall into one of these categories.

There was no testimony in opposition. The Committee recommends adoption of this section.

### **PRE-TRIAL DETENTION**

This provision would amend the D.C. Official Code to make two changes. First, it would lower the burden of proof from its current standard of "substantial probability" to "probable cause" and second it would add additional crimes to the list of factors that trigger a rebuttable presumption to detain.

In 2006, the Council approved emergency legislation as part of the government's response to an upward trend in violence and crime.<sup>27</sup> This emergency legislation was later proposed as permanent amendments to the law and included changes to the rebuttable presumption to detain juveniles and adults. Bill 16-895, the "Rebuttable Presumption to Detain Robbery and Handgun Violation Suspects Amendment Act of 2006", was introduced by Chairman Cropp at the request of the Mayor on September 29, 2006. This legislation was unanimously enacted by the Council on December 19, 2006. Pertaining to adult offenders, Bill 16-895 added offenses related to robbery and gun possession to the list of crimes that trigger the rebuttable presumption to detain defendants prior to their trial. At that time, the Council made a policy determination that certain crimes were dangerous enough that they warranted a presumption of detention.

PDS' testimony explains the mechanics of the preventive detention statute and the different evidentiary standards being discussed:

Pursuant to hearing at which hearsay is admissible, the trial court must make a finding of "dangerousness" based on clear and convincing evidence. The court must also find probable cause to believe that the charged offense was committed by the defendant. The statute provides a

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<sup>27</sup> Enhanced Crime Prevention and Abatement Emergency Amendment Act of 2006 (L16-308; 54 DCR 942) effective May 3, 2007.

rebuttable presumption of dangerousness under certain circumstances ... In order to apply the rebuttable presumption, the court must find the relevant factor by a substantial probability.<sup>28</sup>

It is also important to understand what the different evidentiary standards are. The lowest standard is “reasonable articulable suspicion.” This is a suspicion for which an officer can articulate a reason; it is more than hunch. Probable cause, the standard as proposed as sufficient to trigger the rebuttable presumption, could be described as a reasonable probability the defendant has committed the crime but it is less than more-likely-than-not. If there is only probable cause, it is statistically more likely that the defendant did not commit the crime. Preponderance is the more-likely-than-not standard ... Substantial probability, the current standard necessary to trigger the rebuttable presumption, is more than a preponderance (more than 51%) but less than clear and convincing.

The Committee notes that in 2006, the Council made a unanimous determination that possession charges related to guns (the offense of carrying a pistol without a license) warranted the rebuttable presumption to detain. Because the determination that possession alone was sufficient to warrant such detention, the Committee adopts this change without amendment. This would add several gun related charges, including carrying a rifle or a shotgun, possession of a firearm during a crime of violence, and unlawful possession of a firearm to the provision that would permit pretrial detention.

The first matter of decreasing the standard of proof is significantly more complicated. Testimony at the public hearings on this legislation expressed strong opposition to this proposed change. Legislative history, as detailed by PDS is also instructive on this issue. The Court of Appeals held the District’s initial preventive detention statute constitutional in 1981. They cited the legislative history’s provision of ample support for a compelling state interest in the pretrial detention of the narrow class of persons covered by the statute. They considered: (1) the alarming increase in street crime in the District since 1966; (2) statistical studies involving recidivism by person while on pretrial release; (3) recommendations by the President’s Commission on Crime in the District of Columbia and the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia; and (4) pretrial release and detention practices in England and other countries. Further, in 1991 the Committee rejected this same proposal to lower the burden of proof – stating that, “it would be too great an erosion of constitutional safeguards. The ‘probable cause’ standard is too low and thus, would lead to detention in many cases where there is not threat to the safety of the community.”<sup>29</sup>

The Committee recommends adoption of this section with amendments.

### **PROTECTION OF POLICE DOCUMENTS**

This provision would amend D.C. Official Code § 5-113.06 to make nonpublic the names and addresses of complainants and witnesses in initial police reports. Currently, the law states that records required to be kept by the Metropolitan Police Department (MPD) shall be open to

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<sup>28</sup> PDS testimony June 2, 2009 page 29.

<sup>29</sup> Committee on the Judiciary, Report on Bill 9-360, The Bail Reform Amendment Act of 1991 at 6.

public inspection when not in actual use. Its intent is to protect those who report crimes of violence, threats, stalking, assault, and obstruction of justice.<sup>30</sup> The United States' Attorney's Office (USAO) testified in support of this change in order to take steps to protect complainants from being identified and found by persons who would do them harm or threaten harm in order to reduce their chances of being successfully prosecuted. The USAO testified that in virtually every violent crime case they handle, the victims and witnesses express concern about being identified publicly.

Testimony at the public hearings on this matter expressed three primary objections to this proposed change.<sup>31</sup> First, the D.C. Public Defender Service (PDS) testified that an effective adversarial process requires that the defense have an opportunity to test the allegations, which can only be done effectively if the defense has done its own investigation of the allegations. Nondisclosure of this information would hamstring the ability of defense attorneys to investigate and interview the complainants. PDS expressed that no one would want to face a criminal charge, even one as minor as a 180-day misdemeanor assault charge, represented by a lawyer who did no investigation and only learned the facts of the case by listening to government witnesses during the trial itself. Nondisclosure fundamentally impairs the ability of PDS to fulfill their ethical and Sixth Amendment responsibility to investigate a case thoroughly.

Second, the Maryland-Delaware-DC Press Association (MDDC) testified that nondisclosure of this public information adversely impacts the public's interest in this information. Their testimony referenced the tragic murder of Alan Senitt in 2006. Hours after his throat was slashed, detectives apprehended two of the attackers at an apartment in Southeast Washington. On July 18<sup>th</sup> the Washington Post published a story by Allison Klein and Henri Cauvin reporting that detectives had been provided with the address of the suspects three weeks before Senitt was slain by the victim of a robbery in the same neighborhood, but the police did not apprehend anyone at the address provided until hours after Senitt was killed. The reporters had found this information only by interviewing one of the earlier victims, whose name they discovered in the police complaint file.

Third, both PDS and MDDC challenged the government's ability to demonstrate a relationship between witness retaliation problems and the disclosure of documents at issue in this proposal. PDS challenged that of the two examples used by the government of witness

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<sup>30</sup> Testimony submitted by the D.C. Public Defender Service asserts that this list includes virtually every felony, and many misdemeanors, that would have a victim or witness. They challenge that there was no intent to tailor this provision to cases where overt intimidation or retaliation would exist. Further, they note that crimes such as drug offenses and possessory weapons offenses usually have only police witnesses, and the victim is listed in the initial police report, if at all, as "society". p.13.

<sup>31</sup> To address concerns about access to information raised at the public hearing, the legislation was revised by the Executive before resubmission to the Council in February. This revision allowed for the public to petition the Chief of Police (CoP) to view restricted documents. However, it allowed for the CoP to deny such a request upon determination that the release may result in harm to certain individuals. The legislation states that the CoP may deny such request upon determination that the release of information may result in harm to the investigation of the alleged crime, the victim or witness, a member of the victim's or witness' family, or a friend or associate of the victim or witness. It provided no further guidance on the procedure by which this determination would be made or administered.

intimidation – one was unknown to their colleagues and the other was completely unrelated to the availability of complaint forms. They state that witness retaliation cases are rare, but when they do occur, the defendant already knows the witness.

In analyzing this provision, it is critical to precisely identify the problem that this legislation is intended to address versus a similar but unaddressed problem. The distinction must be drawn between a witnesses' general reluctance to participate and a witnesses' particularized fear that complaint documents maintained by the MPD with their information will be utilized by the defendant in order to inflict harm.

A witnesses' reluctance to testify is discussed throughout the Executive's testimony, but is not at issue here. If a complainant expresses concern about being identified publicly, does it matter to them at what stage of the process they are identified? The USAO testified that, "many victims of and witnesses to crimes are afraid. They are afraid of re-victimization or retaliation if they report the crime, cooperate with the police, testify in court, or otherwise aid in the investigation or prosecution of both violent and non-violent crimes."<sup>32</sup> They go on to state, "[t]here is no way to tell how a complainant is identified by a person who later threatens or harms him or her ... in some cases, the person who commits the crime knows the victim ...; in some cases, a defendant learns the victim's name from court papers; and in some cases, the complainant's name and address are obtained from publicly available police records."<sup>33</sup> Witness reluctance - the fear to participate, is clear, but that fear is neither limited to nor addressed by the nondisclosure of these documents. Their identifying information continues to be publicly available at other points in the process - in court papers, during trial, or (under the Executive's revised language) at the discretion of the CoP.

A witnesses' particularized fear that the public complaint documents will reveal their identity to the defendant is less established. Another way to refer to this situation is a stranger case – where the defendant otherwise did not know the complainant and had to utilize police reports in order to learn their identity. Only two examples were discussed by the USAO at the Committee's public hearings. The first involved an old case that was unknown to other witnesses and therefore not shown to be a situation where police reports were utilized. The second was simply not a stranger case.

In balancing the need and usefulness of this provision, the public interest in this information and the interest in an effective adversarial process take precedence. The provision as drafted, primarily impacts the ability of defense attorneys and the media to access these documents. The problem of defendants bent on retaliation in stranger cases is not evident and the general reluctance of witnesses is not aided by this provision.

The Committee recommends striking this subsection.

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<sup>32</sup> USAO p. 8-9 December 5, 2008.

<sup>33</sup> P.9 (USAO December)

### **MASSAGE ESTABLISHMENTS**

This provision would amend D.C. Official Code § 47-2811 to update legal restrictions that are no longer appropriate. In particular, requiring that masseuses be the same sex as their client and eliminating various un-utilized licensing requirements. The USAO testified that massage parlors are sometimes used as a front for prostitution. That licensure is necessary in that it aids in rooting out this illegal activity, so long as it doesn't interfere with legitimate business practices.

The Committee recommends adoption of this section.

### **CATHINONE**

This provision would amend D.C. Official Code § 48-902.04 to add Cathinone, the more powerful version of khat, to Schedule I of the drug schedules. Testimony from the USAO stated that this drug is illegal under federal law and the failure to schedule this drug was apparently an oversight. Additional testimony from the USAO expressed concern about Cathine. Cathine already appears on Schedule IV of the drug schedules. It was scheduled by the Mayor in 1992 based on the federal designation of Cathine as a Schedule IV controlled substance. However, recent court cases have challenged the federal designation of cathine and therefore the local designation. The USAO recommended striking and then reinserting the term Cathine in this legislation. The Committee does not reflect that in its recommended print, however the intent here is clear that Cathine should appear on Schedule IV as a local designation.

The Committee recommends approval of this subsection.

### **DRUG FREE ZONES**

This provision would amend D.C. Official Code § 48-1002 to extend the period for a drug free zone from 240 consecutive hours to 480 consecutive hours.

Amendments to this recommended provision eliminate expanding the period to 480 consecutive hours, and instead expand the basis by which the Chief of Police can declare a drug free zone. To simultaneously expand the period and bases for declaring a zone would err too far to the side of impinging on constitutional rights. In particular, the Committee received testimony from the Executive and concerned residents that law enforcement is not able to do enough to address rashes of violence in the District. Changes to this proposal as introduced would add disproportionately high number of arrests for crimes of violence and dangerous crimes as justification for the Chief of Police to declare a drug free zone. These crimes need not be related to drug activity.

The Committee recommends approval of this subsection with amendments.

### **DRIVING WHILE IMPAIRED**

This provision would amend D.C. Official Code § 50-2201.01 *et seq.* to make it possible to impose an enhanced penalty on a drunk driver if the second offense occurs within 15 years of the first conviction. The current law permits an enhanced penalty only if the second conviction occurs within 15 years of the first conviction and allows a person to avoid enhanced penalties by simply delaying sentencing.

The Committee made additional amendments to these provisions that are consistent with the Committee's comments and recommendations in 2005 to Bill 16-843, the "Anti-Drunk Driving Clarification Amendment Act of 2005". These amendments clarify the standards of measurement for blood alcohol content (BAC) and strengthens the government's ability to prosecute drunk driving when there is a BAC of 0.051 to 0.08.

The Committee recommends approval of this subsection with amendments.

### **SECTION 213 – IMPLIED CONSENT**

This provision would amend D.C. Official Code § 50-1903 to require medical professionals, at the request of the Metropolitan Police Department, to withdraw or urine from suspects despite their grant or denial of consent. It contemplates civil penalties for non-compliant health care providers and blanket immunity for their services. Drivers in the District are assumed to have consented to providing a blood sample to determine the level of alcohol or controlled substance(s) present. These tests are required to be administered at the direction of a police officer upon a finding of probable cause that the driver was impaired, drunk, or high. The USAO testified that for multiple reasons, medical personnel are reluctant to draw blood at the direction of an officer and this thwarts the collection of evidence necessary to successfully prosecute drunk driving and related cases. The USAO stated that these blood samples are the most reliable measurement of alcohol content and the only measure of drug content. Impairing their ability to obtain these blood samples hinder their prosecutions.

Testimony at the public hearings on this issue asserted that the certain health care providers and the Executive reached compromise to amend this provision and exclude situations where the suspect refuses to provide express consent. However, this would still require medical personnel to withdraw samples from suspects who provide express consent. Additionally, this provision provides medical personnel acting in this capacity with blanket immunity for performing these blood tests. This would allow for medical personnel who would otherwise be guilty of negligence or gross negligence to escape any liability.

This proposed section provides insufficient information supporting the need for this legislative change. It is unclear why the District would want to engage in the practice of drafting private health professionals to assist in investigative work when employees or contractors of the District may be better situated to conduct these medical procedures. For example, utilizing the

Fire and Emergency Medical Services Department's medical personnel, training MPD officers, or utilizing other District health care professionals. These professionals are already part of the District government's payroll, are well-qualified to conduct these tests, and are oftentimes readily available to conduct these procedures. It seems burdensome to legislate dependence on private health care professionals and summarily provide them with blanket legal immunity. For these reasons, the Committee believes that this section requires additional study.

The Committee recommends striking this proposed section.

### **FALSE ALLEGATIONS OF ABUSE**

This provision would amend D.C. Official Code § 4-1301.06(d) to establish criminal penalties for a false report of child abuse. It is currently illegal to make a false report of child abuse – to make a report in bad faith.

This amendment seems to be logical; however, the Committee received testimony in strong opposition to this change from multiple stakeholders in the domestic violence arena. There were three primary concerns about this change: first, the integrity of the determination of bad faith; second, that criminalization will become a tool for abusers; and third, the potential chilling effect.

The government has a strong interest in encouraging good faith reports of child abuse. The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) expressed concern about the child welfare agencies that make the determination of good or bad faith. At issue is the theory of parental alienation syndrome (PAS) where mothers and children alleging abuse in custody litigation are doing so falsely – as a result of a “syndrome” which causes mothers to make false accusations as part of a vendetta against the father. Professor Joan Meier testified on behalf of DV LEAP that, “... children's disclosures of abuse and expressions of terror about seeing their fathers is routinely dismissed by family courts and ancillary professionals on the theory that mothers can convince children to believe that they were abused – and to fear their fathers – when in fact they were not and they have nothing to fear.”<sup>34</sup> The feared effect is that child protection agencies reject allegations of abuse simply because the mother is a custody litigant and the father was able to persuade the agency that she is a liar.

Criminalizing false reports can be used by abusers to further victimize protective parents. One example noted by the DC Coalition Against Domestic Violence (DCCADV) was that mothers frantic for government protection of their child may repeatedly contact the child welfare system in an attempt to draw attention to the alleged abuse.

DCCADV testified about the potential chilling effect on mandatory reporters, well-intentioned individuals, and even parents to make reports out of fear that they will be criminally

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<sup>34</sup> Meier, march 18 p.5-6.

sanctioned. False reports unfairly implicate the innocent and are a waste of governmental and judicial resources. They should be discouraged, but not at all costs.

The Committee received limited testimony in support of this provision. It is not clear that there is a serious problem with false reporting in the Child and Family Services Agency. Further, it is unclear that the problem with false reporting is best addressed by this proposal. In light of the high potential for problems associated with this proposal and scant evidence of a problem that would justify inviting these problems this proposal needs additional work.<sup>35</sup>

The Committee recommends striking this proposed section.

### **HOLIDAY COURT CLOSURES**

This provision would amend D.C. Official Code § 16-2312, which requires a charged juvenile to have a detention hearing, at which a judge will decide whether to release or detain the juvenile, by the next day after the juvenile's arrest, excluding Sundays. Currently, D.C. Superior Court (Court) is open for arraignments and presentments six days a week and is closed on Sundays. This provision would add three days, New Year's, Thanksgiving, and Christmas to the current 52 days that the Court is already closed. Children held during that time would then be held for an additional day, except if that holiday falls on a Monday.

The Committee believes that the presumption of innocence outweighs the desire to close the Courts for three additional holidays. The Committee had approved a one-time exception when it allowed for the Court to close during the 2009 inauguration day. This exception was made because the Court was located approximately one block from the inaugural parade route and given the estimated crowds it would have been impractical to expect that parties could travel throughout the District without great difficulty.<sup>36</sup>

It is important to stress that this proposed section relates to children that have not yet had access to a hearing before a judge. Children, who would otherwise get to go home if only a prosecutor and a judge would review their case, would sit in jail on a holiday.

The Committee recommends striking this proposed section.

### **LEGISLATIVE TIMELINE**

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<sup>35</sup> In its March 18, 2009 testimony on this provision, the USAO offered an amendment to exclude from the criminal penalties "the child or his parent, guardian or custodian." This would limit the penalties to person who were not and not likely to be engaged in other litigation. The Committee declines this proposed amendment at this time because a serious problem with false reporting has not been demonstrated and its causes have not been identified. Further, PDS submitted testimony in response to this proposal that they would object to the unequal application of these proposed penalties. Further, if exempting from the penalty, those who are likely responsible for a large number of these false reports, seems to argue against the need for this provision in the first place.

<sup>36</sup> JUVENILE ARRAIGNMENTS ON INAUGURATION DAY EMERGENCY ACT OF 2008 (Act 17-643; 56 DCR 680).

On October 26, 2008, Chairman Gray, at the request of the Mayor, introduced Bill 17-951, the “Omnibus Anti-Crime Amendment Act of 2008”. The legislation was introduced close to the end of Council Period 18 and movement on a permanent basis was not feasible. However, the Executive was asked to identify the critical components of the bill so that a public discussion could be had immediately. Within days, the Committee had scheduled a public roundtable for November on key provisions of the legislation as identified by the Executive. However, at the request of the Attorney General’s Office, due to the Attorney General being unavailable, the Committee re-scheduled the roundtable for December 5, 2008.

The Committee understood that the Executive intended to re-introduce Bill 17-951 in Council Period 18. The legislation was not re-introduced and circulated to the Council until February 10, 2009. That same day, the Committee filed notice of a public hearing on Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009 (Omnibus). Purportedly, the Executive was re-tooling the legislation given the plethora of criticisms and concerns expressed by public witnesses at the public roundtable in December. However, few stakeholders, and certainly not the Committee, were asked to participate in composing the Executive’s revised draft.

The reason for the painstaking chronology of the Omnibus bill is to address calls for urgency on the Omnibus provisions. The Committee has moved diligently and swiftly to engage in the legislative process regarding the Omnibus bill. However, what the Committee has not done is ignore the legislative process itself. Although the Executive appears to have satisfied itself in the drafting of its own legislation, the need for public participation and the public process will not be ignored by this Committee. The Committee has worked quickly to assemble stakeholder meetings intended to encourage free discussion of the Omnibus and attempt to resolve its various infirmities. This work has resulted in legislation that is stronger and more focused. Given the Executive’s agenda, it is unfortunate that stakeholder input, including the input of the legislative branch, was not invited earlier. Disjointed and haphazard attempts to address crime will neither be swift nor effective.

## II. LEGISLATIVE CHRONOLOGY

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| October 6, 2008  | Bill 17-951, the “Omnibus Anti-Crime Amendment Act of 2008” is introduced by Chairman Gray at the request of the Mayor and referred to the Committee on Public Safety and the Judiciary. |
| October 17, 2008 | Notice of intent to act on Bill 17-951 is published in the <i>D.C. Register</i> .  |
| December 5, 2008 | The Committee on Public Safety and the Judiciary holds a public roundtable on key provisions of Bill 17-951.   |
| February 6, 2009 | Bill 18-138, the “Omnibus Anti-Crime Amendment Act of 2009” is introduced by Chairman Gray at the request of the Mayor and referred to the Committee on Public Safety and the Judiciary. |

- February 17, 2009 Bill 18-151, the “Public Safety and Justice Amendments Act of 2009” is introduced by Councilmember Mendelson and co-sponsored by Councilmember Wells. Bill 18-151 is referred to the Committee on Public Safety and the Judiciary.
- February 20, 2009 Notice of intent to act on Bill 18-138 is published in the *D.C. Register*.
- February 27, 2009 Notice of intent to act on Bill 18-151 is published in the *D.C. Register*.
- March 18, 2009 The Committee on Public Safety and the Judiciary holds a public hearing on Bills 18-138 and 18-151.
- May 18, 2009 The Committee on Public Safety and the Judiciary holds a continuation of the public hearing on March 18, 2009.
- June 26, 2009 The Committee on Public Safety and the Judiciary marks-up Bill 18-151.

### **III. POSITION OF THE EXECUTIVE**

On behalf of the Executive Office of the Mayor, Cathy Lanier, Chief of the Metropolitan Police Department and Peter Nickles, Attorney General of the District of Columbia, testified in support of Bills 18-138 and 18-151 on March 18, 2009.

Executive witnesses declined to participate in the Committee’s panel presentations for the continuation of the March hearing on May 18, 2009.

### **IV. POSITION OF THE ADVISORY NEIGHBORHOOD COMMISSION**

### **V. SUMMARY OF TESTIMONY**

The Committee on Public Safety and the Judiciary held a public hearing on Bills 18-138, the Omnibus Anti-Crime Amendment Act of 2009 (Anti-Crime Bill) and 18-151, the Public Safety and Justice Amendment Act of 2009 (Public Safety Bill) on March 18, 2009 and May 18, 2009. The testimony summarized below is from those hearings:

*Cathy Lanier, Chief, Metropolitan Police Department and Peter Nickles, Attorney General for the District of Columbia*, testified on both the Anti-Crime Bill and the Public Safety Bill. They emphasized the need to modernize certain laws and expand the tools available to law enforcement to protect the safety of the residents of the District.

**Jeffrey Taylor, United States Attorney for the District of Columbia**, testified on both the Anti-Crime Bill and the Public Safety Bill. Mr. Taylor stated that both bills encompass a number of important measures to improve public safety in the District of Columbia – both by amending existing statutes and proposing brand new measures. They also submitted recommended amendments to Bill 18-138.

**Kristopher Baumann, President, Fraternal Order of Police, MPD**, testified in support of the Anti-Crime Bill. Mr. Baumann expressed the need for additional mandatory minimums and increasing the tools available for police officers.

**Robert Pittman, Co-Coordinator, PSA 102 Neighborhood Public Safety Committee**, testified on both the Anti-Crime Bill and the Public Safety Bill. Mr. Pittman expressed the need for change through policy and legislation when regulations and law are insufficient to meet the goals of our neighbors and police.

**Stephen M. Block, Legislative Counsel, ACLU of the National Capital Area**, testified in opposition to the Anti-Crime Bill and supported certain sections of the Public Safety Bill and opposed certain sections of the Public Safety Bill. In particular, Mr. Block opposed civil gang injunctions, limiting the public's access to police complaint documents, mandatory minimums, expanding the definition of daylight for purposes of search warrants, expanding pre-trial detention, and gun registration requirements. He supported the protection of campaign materials, revising disorderly conduct statutes, repealing the vagrancy statute, and adding homelessness as a protected class under the Bias-Related Crimes statute.

**Reverend Sandra Butler-Truesdale, Campbell Heights Residents Association, Inc.**, testified in support of the Hot Spot No Loitering legislation.

**Stephen Mercer, Public Witness**, testified on the Anti-Crime Bill's DNA collection provision. Mr. Mercer expressed his concern about the racial implications of this provision. He testified that African Americans were more likely to be in a genetic surveillance web as these DNA searches are loosely construed to allow for "familial searches". In that sense, a sibling who has not been legally added to the database will also be subject to these searches if they have a sibling who is added to the database. Mr. Mercer recommended amending the bill to prohibit these types of familial searches.

**Robert Malson, President, District of Columbia Hospital Association**, testified on the Anti-Crime Bill's provision on implied consent. Mr. Malson expressed his support for the idea but testified about a number of concerns if health care professionals are required to withdraw blood from individuals without their consent.

**Eric Lieberman, Maryland-Delaware-DC Press Association**, testified in opposition to the Anti-Crime Bill's provision on restricting public access to police complaint documents. Mr. Lieberman stated that the Executive had not provided a compelling reason for prohibiting access, the provision as written is overbroad, and that there is a strong public interest in access to this information.

**Catherine Easterly, Staff Attorney, D.C. Public Defender Service**, testified in opposition to the provisions on civil gang injunctions. Ms. Easterly stated that the flaws of this provision fall into three primary categories, inadequate process, definitional defects, and ambiguities with respect to the proof required to deprive individuals of their full rights as citizens of this city.

**Laurie Davis, Staff Attorney, D.C. Public Defender Service, Mental Health Division**, testified in opposition to the Public Safety Bill's provision on mental health disclosure. Ms. Davis stated that the current statutory scheme provided adequate authority for needed disclosure.

**Laura Hankins, Special Counsel, Public Defender Service**, testified in opposition to certain provisions of both the Anti-Crime and Public Safety Bill. In particular, Ms. Hankins opposed the Anti-Crime Bill's provisions on restricting public access to police complaint documents – citing that this will be detrimental to a defense attorney's ability to thoroughly investigate; expanding exceptions to marital privilege; certain amendments to property crimes; denying children access to a judge on New Year's, Thanksgiving, and Christmas; and the provision on illegal presence in a motor vehicle with a firearm. She also spoke in opposition to the Public Safety Bill's provision on contraband within correctional facilities.

**Bernard Grimm, public witness**, testified about the need to improve visiting procedures at the jail. He expressed his concern about the Public Safety Bill's provision on contraband and that as written it would prohibit attorney documents and materials.

**Joan Meier, Director, Domestic Violence Legal Empowerment and Appeals Project, and Professor of Clinical Law, George Washington University Law School**, testified in opposition to the Public Safety Bill's provision on interspousal immunity. She also testified in opposition to the Anti-Crime Bill's provision on establishing criminal penalties for false reports of child abuse and its expanding exceptions to marital privilege.

**Michelle Garcia, Director, Stalking Resource Center, National Center for Victims of Crime**, testified in support of the Anti-Crime Bill's provision on stalking. Ms. Garcia expressed the need to modernize the District's stalking laws – especially in light of advances in technology.

**Rebecca O'Connor, Policy Director, and Amy Loudermilk, Policy and Research Specialist**, testified in opposition to the Anti-Crime Bill's provision to expand exceptions to marital privilege. They expressed that this proposal would, in practice, re-victimize battered women; increase their safety risks and those of their children; disempower them; and potentially have a chilling effect on the willingness of victims to report violence to the authorities. They also spoke in opposition to criminalizing false reports of child abuse and amending the interspousal immunity law.

**Elisabeth Olds, Co-Executive Director, SAFE, Inc.**, testified about the need to strengthen sentencing enhancements for repeated violations of the Intrafamily Offenses Act and two specific types of assault that are of particular concern to victims and advocates alike.

**Susan Howley, National Center for Victims of Crime**, testified in support of the Anti-Crime Bill's stalking provision. Ms. Howley also provided a suggested amendment.

**Mai Fernandez, Legal and Strategic Director of the Latin American Youth Center**, testified in opposition to the provisions on civil gang injunctions. Ms. Fernandez talked about the success of the Gang Intervention Partnership (GIP) which brought together police, community organizations, school officials, and the USAO for the purpose of reducing gang violence. She expressed that legislation should provide resources for activities for young people.

**Tony Taylor, National Coalition for the Homeless**, testified in support of the Public Safety Bill's provision on homelessness as a protected class under the Bias-Related Crime's Act. Mr. Taylor recommended that the language clarify that homeless individuals be afforded a civil right of action.

**Tulin Ozdeger, Civil Rights Director, National Law Center on Homelessness and Poverty**, testified in support of the Public Safety Bill's provision on homelessness as a protected class under the Bias-Related Crime's Act. Ms. Ozdeger also supported clarifying that homeless individuals have a civil right of action under the Act.

**Mary Ann Luby, Outreach Worker, Washington Legal Clinic for the Homeless**, testified in support of the Public Safety Bill's provision on homelessness as a protected class under the Bias-Related Crime's Act. Ms. Luby also supported clarifying that homeless individuals have a civil right of action under the Act. Ms. Luby testified in opposition to the Public Safety Bill's provision on disclosure of mental health information.

**David Pirtle, public witness**, testified in support of the Public Safety Bill's provision on homelessness as a protected class under the Bias-Related Crime's Act. Mr. Pirtle spoke about the problem of violence against homeless.

**Reginald Addison, public witness**, testified against the civil gang injunctions and the Public Safety Bill's provision on mental health provisions. He stated that he finds the gang provisions the most offensive.

**Paul Kraney, Executive Director, D.C. Republican Committee**, testified in support of the Anti-Crime Bill. Mr. Kraney recommended increasing mandatory minimums for six criminal offenses.

**Gable Barmer, Deputy Director of Programs for the East of the River Clergy Police Community Partnership**, testified about the provisions on civil gang injunctions. Mr. Barmer expressed his concern that the bill could potentially have families arrested for simply spending quality time together in their front yards.

**Ronald Moten, Co-Founder, Peaceaholics**, testified in opposition to the proposed mandatory minimums, but expressed that something needed to be done to check youth transgressors.

**Mike Hooper, Public Witness**, testified about the operations of OAG and MPD.

**Richard Gilbert, Chair, Legislative Committee, District of Columbia Association of Criminal Defense Lawyers**, testified in opposition to certain provisions of the Anti-Crime and Public Safety Bills. In particular, Mr. Gilbert opposed any and all proposed mandatory minimum sentences and the provisions on civil gang injunctions, spousal privilege; doctor patient privilege, DNA collection; weapons offenses; gun registry; guns in cars; and interspousal immunity.

**Deborah Fleischaker, Director of State Legislative Affairs, Families Against Mandatory Minimums**, provided written testimony in opposition to mandatory minimum provisions.

**Bob Summersgill, public witness**, submitted written testimony in opposition to the Anti-Crime Bill's provision on mandatory HIV testing. Mr. Summersgill expressed that it would fail to help the victim, adds stigma to HIV, and violates the rights of the defendant.

**Jabriel Simmonds Ballentine, public witness**, submitted written testimony in opposition to the civil gang injunction provisions. She expressed that this language – if left to the whims of the Executive Branch – could lead to criminalizing youthful activity.

**Robert Thomas Richards, Ward 7 resident**, testified in support of the Anti-Crime Bill's provision on stalking and in opposition to the civil gang injunctions. He expressed that the civil gang injunctions did not differentiate between national criminal gangs engaged in major criminal activity and in groups of neighborhood youth who have banded together in youthful activities.

**The Honorable Lee Satterfield, Chief Judge, Superior Court of the District of Columbia**, submitted written testimony on the Anti-Crime Bill's provision to treat every unlawful entry cases as a 180 day offense. He stated that this would decrease the burden of these cases on the already beleaguered jury pool in the District of Columbia. Regarding the Public Safety Bill, he expressed that the gang provision should clarify its requirement for review of the injunction list and stated that changing the penalty for disorderly conduct to 180 days would reduce the burden on the jury pool.

**Donald Blanchon, Chief Executive Officer, and Daniel Bruner, Director of Legal Services, Whitman-Walker Clinic**, submitted written testimony regarding their concerns with the Anti-Crime Bill's provision to expand HIV testing. In particular, that the proposed changes would extend compulsory HIV testing to situations that are medically unwarranted; this is bad public health policy; individuals should be tested for Hepatitis B as well; and appropriate counseling and referral for medical care and supportive services should be provided for those who test positive.

**Allan Siegel, President, James Taglieri, Legislative Chair, and James Nathanson, Legislative Counsel**, submitted written testimony in opposition to the Anti-Crime Bill's

provision on immunity for medical personnel required to remove specimens at the direction of a police officer. In addition, they recommended that the provision on the expansion of testing for the accused must be balanced with increased court oversight.

## V. IMPACT ON EXISTING LAW

## VI. FISCAL IMPACT

The Committee adopts the -- fiscal impact statement by the Office of the Chief Financial Officer stating that funds are sufficient in the FY 2009 through FY 2012 budget and financial plan to implement the proposed resolution.

## VII. SECTION BY SECTION ANALYSIS

### TITLE I

- Section 101    Correctional facilities.
- Section 102    Establishes a new crime for presence in a motor vehicle containing a firearm.
- Section 103    Establishes a new crime for unlawfully entering a motor vehicle and provides for penalties.
- Section 104    Establishes a crime for tampering with a monitoring device that is required as a condition of supervised release.
- Section 105    Provides that within 180 days a gang and crew intervention joint working group shall be established.
- Section 106    Establishes a new statute on stalking (repealer of the current statute is in Title III).

### TITLE II

- Section 201    Provides that destruction of campaign material during a certain time period around the election, referendum, or initiative, shall result in a civil infraction.
- Section 202    Extends the deadline for the Sentencing and Criminal Code Revision Commission to complete the criminal code reform from 2010 to 2012.

- Section 203 Enables the Mayor to waive the certification requirement for the current Chief Medical Examiner.
- Section 204 Provides for the disclosure of certain mental health information for criminal justice purposes.
- Section 205 Creates a gun offender registration system whereby residents of the District convicted of gun offenses, individuals convicted in the District of a gun offense, and certain individuals in other jurisdictions – not convicted in the District, shall be subject to the registration requirements for a certain period of time.
- Section 206 Broadens exceptions to the spousal privilege.
- Section 207 Broadens exceptions to the physician patient privilege.
- Section 208 Repeals a disorderly conduct statute.
- Section 209 Revises the disorderly conduct statute to ensure clarify and deter abuse.
- Section 210 Establishes a minimum maximum sentence for repeat offenders.
- Section 211 Establishes a minimum maximum sentence for individuals who are convicted for crimes of violence multiple times.
- Section 212 Provides that the third penalty for prostitution or solicitation shall result in a felony.
- Section 213 Provides that it is unlawful to possess or introduce contraband into or upon the grounds of a penal institution or secured juvenile residential facility.
- States the penalties.
- Provides the warden or designated agent with the power to detain an individual who violates this act for not more than 2 hours, pending surrender to a police officer.
- Section 214 Extends the number of consecutive hours that a prostitution free zone can be in effect from 240 to 480.
- Section 215 Eliminates the affirmative defense of consent in sexual abuse cases.
- Section 216 Amends certain definitions related to white collar crimes.

Enables combinations of convictions for certain crimes out of the same act or course of conduct.

Provides that for purposes of enhance penalties, convictions from the same act or course of conduct shall only count as a single violation.

Provides that the third penalty for theft shall result in a mandatory minimum of one year.

Establishes a penalty for unauthorized use of a vehicle to commit a crime a violence.

Provides a minimum maximum sentence for multiple convictions of unauthorized use of a motor vehicle.

Section 217 Repeals the vagrancy statute.

Section 218 Adds homelessness as a protected class for purposes of the bias-related crimes law.

Section 219 Provides that the District can compel the collection of DNA samples from all persons convicted of any felonies and certain misdemeanors within the District.

States that DNA samples cannot be tested for the purpose of identifying family members related to the individual from whom the DNA sample was taken.

Section 220 Creates a mandatory minimum for a felon in possession of a weapon who was convicted of a crime of violence.

Adds new factors that disqualify individuals from legally possessing a firearm in the District.

Section 221 Enables the government to demonstrate that they have been prejudiced in its ability to respond to a motion attacking a sentence.

Section 222 Defines daylight for purposes of blanket authorization for search warrants as 6:00 a.m. to 9:00 p.m.

Section 223 Adds malicious destruction and voyeurism to the list of offenses where arrests can be made without a warrant.

Section 224 Adds three crimes that trigger the rebuttable presumption to detain a defendant pre-trial.

Section 225 Revises the licensure for massage establishments.

- Section 226 Adds “Cathinone” to the Districts schedule of drugs.
- Section 227 Expands the basis by which the Chief of Police can declare a drug free zone.
- Section 228 Changes the blood alcohol content level required in order to determine level of intoxication and establishes that certain criteria will constitute prima facie evidence of intoxication.

### **TITLE III**

#### Conforming Amendments

### **TITLE IV**

- Section 401 Amends the law pertaining to the parentage rights of a donor of semen for the purposes of artificial insemination. This amendment provides that a donor of semen is not a parent of the resulting child unless the donor is the spouse or domestic partner of the mother, or the donor and the mother agree in writing that the donor is to be a parent.
- Section 402 Clarifies the self-support reserve amount that is to be deducted from a non-custodial parent’s adjusted gross income before the child support obligation is set in order to permit the non-custodial parent to maintain his or her own subsistence. This amount is indexed to federal poverty guidelines and, under District law, should have been automatically updated on April 1, 2009. This amendment is the permanent counterpart to clarifying language the Council adopted on an emergency basis on June 16, 2009.
- Section 403 Amends the Anti-Sexual Abuse Act of 1994 (D.C. Code § 22-3001 *et seq.*) to provide a defense to sexual abuse for the domestic partner of a ward, patient, or client to mirror the defense that currently exists in the law for a spouse.
- Section 404 Amends section 3(h) of the Health Care Benefits Expansion Act of 1992 to clarify that employees of the federal government are eligible to register as domestic partners in the District of Columbia.

### **TITLE V**

- Section 501 Fiscal impact statement.

Section 502 Effective date.

## VIII. COMMITTEE ACTION

## IX. ATTACHMENTS

1. Bills 18-138 and 18-151 as introduced.
2. Written testimony and statements.
3. -- fiscal impact statement from the Chief Financial Officer
4. Committee print for Bill 18-151.