

3/15/09

*Title 1.*

**Sec. 102. Anti-Stalking Act of 2008.**

(a) Repeals current law

~~(b) Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking and shall be fined not more than \$500 or be imprisoned not more than 12 months, or both. Constitutionally protected activity, such as conduct by a party to a labor dispute in furtherance of labor or management objectives in that dispute, is not included within the meaning of this definition.~~

~~(c) Any person who violates subsection (b) of this section when there is in effect a court order imposing a temporary restraining order, an injunction, a temporary protection order, civil protection order, stay away or no contact order, civil restraining order, or any combination thereof, prohibiting contact between that person and the individual who is the victim of the conduct described in subsection (b) of this section shall be subject to the penalties set forth therein and in addition shall be required to give bond, for a period not exceeding 1 year, to ensure compliance with the provisions of this section.~~

~~(d) A second conviction occurring within 2 years of a first conviction for an offense under subsection (b) or (c) of this section, or for a similar offense under the law of any other jurisdiction, shall result in a fine of up to 1 ½ times the maximum fines authorized for the offenses in subsections (b) and (c) of this section and imprisonment for a term of up to 1 ½ times the maximum term of imprisonment authorized for the offense. If such person was previously convicted more than once of an offense described in subsection (b) or (c) of this section, such person may be subject to a fine of up to 3 times the maximum fines authorized for the offenses in subsections (b) and (c) of this section and imprisonment for a term of up to 3 times the maximum term of imprisonment authorized for each offense. No conviction with respect to which a person has been pardoned on the grounds of innocence shall be taken into account in applying this section.~~

~~(e) For the purpose of this section, the term "harassing" means engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person, or engaging in a course of conduct either in person, by telephone, or in writing, which would cause a reasonable person to be seriously alarmed, annoyed, frightened, or tormented.~~

See Bill 18-138 for new text.

**Rationale:** This section repeals D.C. Official Code § 22-404(b) and replaces it with a new stalking statute. The model statute drafted by the National Center for Victims of Crime was used as a template for the proposed new stalking statute – although it has been altered to remain faithful to the principles enunciated in *United States v. Smith*, 685 A.2d 380 (D.C. 1996.). This bill is a significant improvement over the current law which is awkwardly written, difficult to understand, and outdated. The most confusing aspects of the current law are:

- the necessity of proving both “repeatedly” and “on more than one occasion,” both of which mean two or more times;
- the use of terms like “harassing” and “maliciously”;
- the absence of references to modern means of stalking through the internet, GPS, and similar media;
- clarifying that the stalking can be accomplished through others whether wittingly or not; and
- its construction.

### **Sec. 103. Anti-Gang Civil Enforcement**

See Bill 18-138 for text

**Rationale:** This is a new statute. The purpose of the gang injunction is to initially use the civil system to change the behavior of the gang’s members in ways that reduces and interrupts their ability to engage in criminal and nuisance activities, intimidate neighborhood residents, and recruit others into the gang, to control turf. The key to this enforcement tool is that it prevents and enjoins identified gang members from associating in groups within the defined boundaries of public space or within view of that public space. It would prohibit gang members from engaging in a limited amount of activities that are considered a nuisance to the community or which have been proven to be precursors to the gang’s criminal and nuisance behavior. Within a very narrowly defined geographic area gang members may be prohibited by a civil court judge from doing the following:

Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, or assaulting any person;

Possessing or knowingly remaining in the presence of anyone who is in possession of any firearm, ammunition, or other weapon;

Possessing or knowingly remaining in the presence of anyone who is in possession of any controlled substance or drug paraphernalia;

Being present on any private property within a defined geographic area without the written consent of the owner;

Defacing any public or private property;

Possessing graffiti material; and

Violating a court-defined curfew.

## *Title II*

### **Sec. 201. D.C. Official Code § 5-113.06. Records open to public inspection.**

#### **§ 5-113.01. Records--Required.**

The Mayor of the District of Columbia shall cause the Metropolitan Police force to keep the following records:

(1) General complaint files, in which shall be entered every complaint preferred upon personal knowledge of the circumstances thereof, with the name and residence of the complainant;

#### **§ 5-113.06. Records open to public inspection.**

(a) Except as provided in subsections (c) and (d) of this section, the records to be kept by paragraphs (1), (2), and (4) of § 5-113.01 shall be open to public inspection when not in actual use, and this requirement shall be enforceable by mandatory injunction issued by the Superior Court of the District of Columbia on the application of any person.

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(b) A new subsection (d) is added to read as follows:

**“(d)(1) The name and address or residence of a complainant who is alleged to be the victim of or witness to a crime of violence as defined in D.C. Official Code § 23-1331, obstruction of justice in violation of D.C. Official Code § 22-722, threats in violation of D.C. Official Code § 22-1810 or § 22-407, stalking, assault, or assault with significant injury in violation of D.C. Official Code § 22-404, or an attempt or conspiracy to commit any of the foregoing offenses, shall not be open to public inspection.”**

**“(2) A member of the public may submit a request to the Chief of the Metropolitan Police Department to inspect information that is not open to public inspection pursuant to paragraph (1). The Chief may deny such a request upon a 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.”**

***Rationale:*** Victims and witnesses have a real and persistent fear of re-victimization or retaliation if an assailant or his friends can identify them. This is true of many crimes, but particularly crimes of violence, threats, assault, stalking and obstruction of justice. For sexual assault victims, there is the additional fear of public exposure. Nevertheless, by statute, a complainant’s name and residence are public. This amendment seeks to protect this information.

Retaliation or fear of retaliation is a significant feature on the landscape of modern crime. Witnesses have been threatened and assaulted, sometimes fatally, to deter them from testifying against perpetrators of crime. We need to do everything we can to protect those who come forward and protecting their names and addresses is a small, but significant step in that direction. After an arrest, a defendant in a criminal case is entitled to know who the victim is and this proposal would not deny that right. Amending D.C. Official Code § 5-113.06 would not bar disclosure of that information to him/her, if need be under a protective order. Federal law also prohibits the disclosure of the names and other information about child victims and witnesses in public documents. 18 U.S.C. § 18-3509(d). Finally, a victim has the statutory right to be “treated with fairness and with respect for [his/her] dignity and privacy” and to be “reasonably protected from the accused.” D.C. Official Code §§ 23-1901(b)(1) and (2); 16-2340(a)(1) and (d). This amendment is a part of ensuring that these rights are accorded to the victims of crime.

In FY 2008, the U.S. Attorney’s Office placed 145 victims and witnesses – along with 420 of their relatives – into an emergency witness protection program. It is costly for the government and burdensome of the victims and witnesses who must cut all ties with friends, family and community at least during the pendency of a case. Because of funding limits, relocation cannot be offered in every case, and even when it is, not everyone can accept it or abide by the rules. Thus, witness security programs are not enough. We need to do whatever we can to give these some degree of protection and peace of mind. This is one small piece of that effort.

There is no way to document whether public police records have been used in connection with threats against or harm to witnesses. It is as important to be able to tell complainants that their identity will not be revealed publicly at least until a charging document is filed in court.

Bill 18-138 adds a provision that was not in Bill 17-951 that will permit the Chief of Police to disclose information that is not otherwise available to the public if no harm will result. This should adequately protect other interests, such as those of the media, while remaining true to the purpose of protecting victims and witnesses.

**Sec. 202. D.C. Official Code § 14-306. Spouse or domestic partner.**

(a) 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.

(b) In civil and criminal proceedings, a spouse or domestic partner is not competent to testify as to any confidential communications made by one to the other during the marriage or the domestic partnership.

**“(c) Notwithstanding subsections (a) and (b), a spouse or domestic partner is both competent and compellable to testify against his or her spouse or domestic partner as to both confidential communications made by one to the other during the marriage or domestic partnership and any other matter in:**

**“(1) A criminal or delinquency proceeding where one spouse or domestic partner is suspected of or charged with:**

**“(A) an intrafamily offense as defined in D.C. Official Code § 16-1001(8);**

**“(B) an offense against a child, minor, or vulnerable adult who is in the custody of or resides temporarily or permanently in the household of one of the spouses or domestic partners, or is related by blood, marriage, domestic partnership or adoption to one of the spouses or domestic partners, or whose health, welfare, or supervision is entrusted to one of the spouses or domestic partners at the time of the alleged offense; or**

**“(C) the violation of a temporary protection order, a civil protection order, a stay away order or a no contact order;**

**“(2) a civil proceeding involving the abuse, neglect, abandonment, custody, or dependency of a child, minor or vulnerable adult, who is in the custody of or resides temporarily or permanently in the household of one of the spouses or domestic partners, or who is related by blood, marriage, domestic partnership or adoption to one of the spouses or domestic partners, or whose health, welfare, or supervision is entrusted to one of the spouses or domestic partners at the time of the alleged offense;**

**“(3) a criminal or delinquency proceeding where one spouse or domestic partner is suspected of or charged with committing a crime jointly with the other spouse or domestic partner; or**

**“(4) a criminal or delinquency proceeding where the crime occurred prior to the marriage of the spouses or prior to the filing of a domestic partnership agreement, and one spouse or domestic partner is suspected of or charged with committing the crime.**

**“(d) The burden is upon the person asserting a privilege to establish that it exists.”.**

**(e) For the purposes of this section, the term:**

**(1) “Domestic partner” shall have the same meaning as provided in § 32-701(3).**

**(2) “Domestic partnership” shall have the same meaning as provided in § 32- 701(4).**

***Rationale:*** “The marital privilege in the common law ‘sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.’” *Johnson v. U.S.*, 616 A.2d 1216, 1221 (D.C.1992) (*quoting Trammel v. U.S.*, 445 U.S. 40, 44 (1980)). As these principles of law changed, the privilege nevertheless remained and “[t]he modern rationale for the privilege is its ‘perceived role in fostering the harmony and sanctity of the marriage relationship.’” *Id.* at 1221-1222.<sup>2</sup>

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<sup>2</sup> The spousal/marital privilege has been amended to include domestic partnerships. For ease of reference, we continue to use the term “spouse.”

The privilege consists of two parts: the first part, which can be asserted by the testifying spouse, pertains to what that spouse has seen or heard. The second part, which can be asserted by the non-testifying spouse, pertains to what he has told the other in confidence. A witness spouse can elect whether to testify or not with respect to what s/he has seen or heard but the non-testifying spouse can prevent him/her from testifying about private conversations.

Both Congress and the Council have made policy decisions with respect to the scope of this privilege and these decisions have been extended in some circumstances by the Courts. The proposed amendments will require the Council to consider the relative importance of the “harmony and sanctity of the marriage relationship” to other societal interests.

The “harmony and sanctity of the marriage relationship” has already been disrupted in cases where one spouse has committed a crime against the other or one spouse reports that the other has committed a crime against him/her, where one spouse is seeking a civil protective order against the other, or where such a civil protective order has been violated. In some situations, current law eliminates the privilege entirely so that the witness can be compelled to testify and the other spouse cannot prevent him/her from disclosing confidential communications. *See, e.g.*, D.C. Official Code § 16-1005(b) (civil intrafamily offense);<sup>3</sup> § 16-2388(e) (permanent guardianship); § 16-2359(e) (termination of parental rights). In other situations, current law eliminates the confidential communications portion of the instruction so that one spouse can testify about what the other said but cannot be compelled to testify at all. *See, e.g.*, D.C. Official Code § 22-3024 (sex offenses). Given the nature of domestic violence<sup>4</sup> and the interest society has in condemning it and preventing more serious harm to its victims, the marital privilege should be eliminated entirely in the situations described above.<sup>5</sup> It does not make sense to require an arrest, but permit the victim to erect an impenetrable barrier to prosecution in a situation where the relationship is at least strained if not broken. In one case, a victim

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<sup>3</sup> While eliminating the privilege in Family Court, D.C. Official Code § 16-1005(b) states that “testimony compelled over a claim of a privilege . . . shall be inadmissible in evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.”

<sup>4</sup> During the honeymoon period, the victim may be convinced that it was not so bad and won't happen again and does not want to testify. During the build-up phase, the abuser may threaten her with further harm if she testifies against him. Time and time again, where the spousal privilege cannot be claimed or is waived earlier, victims who have begged prosecutors to dismiss charges are extremely grateful after a conviction.

<sup>5</sup> Over 28,000 911 calls per year are labeled domestic violence. Of these, nearly 75% are to repeat addresses. Because many addresses are apartment buildings, it is not possible to discern the percentage that involve the same family. One apartment building in southwest had 158 DV calls in two years; another in northwest had 132; a third in southeast had 131.

refused to testify twelve times. On the thirteenth occasion, she was beaten so badly that she lost an eye.

It is difficult to conceive how society's interest in a marital relationship can be considered stronger than its interest in the health and well-being of any child. *Cf. Croom v. U.S.*, 546 A.2d 1006, 1009 n. 4 (D.C. 1988). Children have to be protected. Too often they are not. Given both the nature of households today, where a child may not be the child of either spouse, and the situations in which children are harmed, the only witness to a crime may be the spouse of the perpetrator. If the child is too young or too traumatized to testify, this means there is no one to testify at all. If the child has a record of being “bad,” which is a common sequel to physical or sexual abuse, his/her testimony may need corroboration by an adult.

D.C. Official Code § 22-3024 eliminates the confidential communication portion of the privilege in a case involving *any* child who alleges sexual abuse. It is an unfortunate reality that a parent may be more interested in his/her spouse than his/her own child, much less any other child. In one recent case, for example, where a young boy saw his stepfather molesting his sister, the mother refused to believe his report and permitted the stepfather to beat him black and blue. The common law “necessity exception,” permits a willing spouse to testify as to both conduct and confidential communications for offenses against him/herself or against a child of one of them. *Johnson v. United States*, 616 A.2d 1216, 1225 (D.C. 1992). It does not, however compel such testimony, nor has it been held to apply to other children. The amendment addresses this problem by not allowing spouses to refuse to testify in cases involving crimes against children. *See* D.C. Official Code § 4-1321.05 (privilege not a ground for excluding evidence in neglect proceedings in Family Court if the judge “determines such privilege should be waived in the interest of justice.”).

It also is difficult to conceive how society's interest in a marital relationship can be considered stronger than its interest in the health and well-being of a vulnerable minors or vulnerable adult,. The latter is defined as “a person 18 years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection,” D.C. Official Code § 22-932, and would include persons like “a thirty-three year old male who suffers from explosive disorder and schizophrenia, and has been diagnosed as moderately retarded.” *See Poole v. U.S.*, 929 A.2d 413, 415 (D.C. 2007). There is no definition of vulnerable minor in the current Code, but it would likely be construed as a person under 18 years of age who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. Given the number of family placements and group homes for persons with developmental disabilities, mental illness, and extreme physical disabilities, the only witnesses to abuse may be the spouse of the perpetrator. The perpetrator should not get away scot-free because his/her spouse cannot be compelled to testify.

Sham marriages entered into for the purpose of preventing testimony – often in the most serious cases – should not be given official sanction in this context. Although it does not happen often, from time to time, particularly in homicide cases, the defendant marries a

key witness against him in order to prevent her testimony. Society should not countenance or condone such a subterfuge that impedes a conviction in a murder case or other serious violent crime.

Subsection (d) codifies the principle that the burden of proving that a privilege exists falls on the person asserting it.

**Sec. 203. D.C. Official Code § 14-307. Physicians and mental health professionals.**

(a) In the Federal courts in the District of Columbia and District of Columbia courts a physician or surgeon or mental health professional as defined by § 7-1201.01(11) or a domestic violence counselor as defined in § 14-310(a)(2) may not be permitted, without the consent of the client, or of his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.

(b) This section does not apply to:

(1) evidence in a **grand jury, criminal, delinquency, family or domestic violence proceeding** ~~eases~~ where ~~the accused a person~~ is **suspected of or charged with causing the death of, or inflicting injuries upon, injuring a human being, or with attempting or threatening to kill or injure a human being or with a violation of D.C. Official Code §§ 50-2201.05, -2201.05b, or -2203.01, or a report has been filed with the police pursuant to D.C. Official Code § 7-2601** and the disclosure is required in the interests of ~~public~~ justice;

(2) evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity or where the court is required under prevailing law to raise the defense sua sponte, or in the pretrial or post trial proceedings involving a criminal case where a question arises concerning the mental condition of an accused or convicted person;

(3) evidence relating to the mental competency or sanity of a child alleged to be delinquent, neglected, or in need of supervision in any proceeding before the Family Division of the Superior Court; or

(4) evidence in a **grand jury, criminal, delinquency or civil proceeding** where a person is alleged to have defrauded the District of Columbia or federal government in relation to receiving or providing services under the District of Columbia medical assistance program authorized by title 19 of the Social Security Act, approved July 30, 1965 (79 Stat. 343; 42 U.S.C. § 1396 et seq.), **or where a person is suspected of or charged with having defrauded a health care benefit program. For purposes of this section, “health care benefit program” means any public or private plan or contract under which a medical benefit, item, or service is or may be provided to an individual, and includes an individual or entity who provides a medical benefit, item, or service for which payment may be made under the plan or contract.**

(c) For purposes of this section, “injury” includes, in addition to physical damage to the body, a sexual act or sexual contact prohibited by D.C. Official Code Title 22, Chapter 30.

**Rationale:** This section would expand the exceptions to the physician-patient privilege so that evidence could be obtained and used, not only when a person is charged in a criminal case, but

also in grand jury, delinquency, family, and domestic violence proceedings where it is equally important. Note, the proviso that exists in current law that “the disclosure is required in the interests of justice” is retained. Thus, before the evidence could be obtained or used in court, a judge would have to determine that it was required for a just disposition of the matter before it.

This section also expands the kinds of cases where the privilege would not necessarily apply to include cases involving an attempt or threat to kill or injure a human being, drunk driving violations where blood, breath or urine samples are collected as evidence, D.C. Code §§ 50-2201.05, -2201.05b, or -2203.01, and cases where hospitals and medical personnel are required to inform the police about a gunshot wound or an injury caused by a dangerous weapon in the commission of a crime, D.C. Code § 7-2601.

The exception to the privilege also would apply in any case involving an alleged fraud on any health care benefit program and not just Medicaid. The language is patterned on the definition in 18 U.S.C. § 24(b).

Finally, the amendment would make it clear that sexual abuse is covered along with physical damage to human beings.

#### **Sec. 204. Assault with intent; UE; Conspiracy**

**(a) D.C. Official Code § 22-401. Assault with intent to kill, ~~rob~~, to steal or ~~poison~~, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse to engage in or cause another person to engage in or submit to a sexual act, and poisoning-**

**A** ~~Every~~ person convicted of **an** assault with intent to kill, ~~or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery,~~ **to steal, or to engage in or cause another person to engage in or submit to a sexual act, or, being at least four years older than a child or being in a significant relationship with a minor, to engage in or cause the child or minor to engage in or submit to a sexual act or contact, or a person convicted of mingling poison with food, drink, or medicine with intent to kill, or willfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than 2 years or more than 15 years.**

***Rationale:*** This amendment is proposed to simplify the elements of the enumerated crimes other than assault with intent to kill. Each of the enumerated offenses already has an element of force in it. Thus, an assault with intent to rob, for example, may be characterized as an attempt or effort, with force and violence, to take and carry away the property of another by force and violence. The actual instructions given to juries are more complicated than this. But repeating force and violence does not make sense. Just as the statute penalizes an assault with intent to kill (as opposed

to an assault with intent to murder), the statute should penalize an assault with intent to steal rather than assault with intent to rob;<sup>6</sup> assault with intent to engage in or cause another person to engage in or submit to a sexual act, rather than assault with intent to commit first or second degree sexual abuse and so forth. The current statute prohibits assault with intent to commit child sexual abuse. In addition to the change in language, the statute should also prohibit a person from assaulting a minor in a significant relationship with intent to engage in or cause the minor to engage in a sexual act or contact.

As originally drafted, the title of this section was “Assault, with intent to kill, rob, rape, or poison.” The text of the statute, however, makes it clear that the use of poison – either with an intent to kill or simply to contaminate the water supply – does not require an assault. When the title was amended by the Anti-Sexual Abuse Amendment Act of 1994 “poison” was erroneously moved ahead of the commission of enumerated sexual offenses. The title should be amended as indicated to reflect the two different ways of violating this section.

**(b) D.C. Official Code § 22-3302. Unlawful entry on property.**

(a) Any person who, without lawful authority, shall enter, or attempt to enter, any ~~public or~~ private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine ~~not exceeding \$100 or imprisonment in the Jail for not more than 6 months,~~ **of not more than \$1000 or imprisonment for not more than 180 days,** or both. ~~– in the discretion of the court.~~ The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie evidence that any person found in such property has entered against the will of the person in legal possession of the property. **For purposes of this section “private dwelling” includes, but is not limited to, a privately owned house, apartment, condominium or any building used as living quarters, or cooperative or public housing, as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by Department of Housing and Urban Development, or in or around housing that is**

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<sup>6</sup> “To steal means to take away from one in lawful possession without right with the intention to keep wrongfully.” *Morissette v. United States*, 342 U.S. 246, 271 (1952) (Citations omitted), *cited in United States v. Owens*, 332 A.2d 752, 754 (D.C. 1975). “According to WEBSTER’S NEW INTERNATIONAL DICTIONARY(2d Ed.1947), the primary meaning of the word is: To take, and carry away feloniously and, usually, unobserved; to take or appropriate without right or leave, and with intent to keep or make use of wrongfully; as, to steal money or another’s goods . . . .” *Id.* at n. 4.

owned, operated, or financially assisted by the District of Columbia Housing Authority.

**(b) Any person who, without lawful authority, shall enter, or attempt to enter, any public building, or other property, or part of such building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof or his/her agent, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof or his/her agent, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than \$1000 or imprisonment for not more than 6 months, or both.**

***Rationale:*** When the Council enacted the Misdemeanor Streamlining Act of 1994 (Title I of the Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151), several misdemeanors with a maximum penalty of 6 months were not included on the list of offenses for which the new penalty was to be 180 days.<sup>10</sup> Thus, a difference in the maximum penalty of 2.5 days made the difference in whether a case was jury-demandable or non-jury-demandable. Many people believe that, on a graduated scale, this offense would fall below other offenses for which the maximum penalty is 180 days. The most common violation is entering or refusing to leave vacant houses or residential buildings from which a person, often suspected of selling or using illegal drugs, has been barred. In some buildings, unlawful entry is a persistent and recurring problem that affects the quality of life of the other residents and/or neighbors. Yet, because these cases are jury demandable, they take longer to get to trial and the trials take many times longer than a non-jury trial.

There has been some reluctance to change the penalty on the part of those who believe that people who engage in civil disobedience are entitled to a jury trial.<sup>11</sup> Unlawful entry on the part of those engaging in civil disobedience is rare, at most a few cases a year, compared with scores of unlawful entries committed by those who simply want to be where they are not entitled to be. Thus, scores of cases that should be handled expeditiously on the non-jury calendar are held hostage to a handful or less of cases that some believe should be on the jury calendar. The proposed amendment to D.C. Official Code § 22-3302 would go a long way toward solving this problem. If the unlawful entry were in a public building, a defendant would be entitled to a jury trial; for an unlawful entry into a private or residential building – including public housing – a defendant would be entitled to a non-jury trial.

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<sup>10</sup> Title I includes only offenses with a penalty of 1 year. We suspect that omitting misdemeanors with a penalty of 6 months was an oversight.

<sup>11</sup> “It is no defense to a charge of unlawful entry . . . that the crime was committed out of a sincere personal or political belief, however genuine, in the rightness of one's actions. *United States v. Dougherty*, 154 U.S.App.D.C. 76, 100-101 & n. 54, 473 F.2d 1113, 1137-1138 & n. 54 (1972); see *Arshack v. United States*, 321 A.2d 845, 852-853 (D.C.1974) (acts of conscience, civil disobedience, and proclaimed allegiance to higher law are not acceptable defenses).” *Hemmati v. United States*, 564 A.2d 739, 745 (D.C.1989).

Thus, for example, the protester who sat on the ledge of the Wilson Building and the demonstrators who broke into the Randall School in 2004 would be given a jury trial.<sup>12</sup>

By distinguishing between private buildings on the one hand and public buildings on the other, the law would establish a bright-line test that is not attached in any way to the motive of the person accused of unlawful entry. Although some people who enter or refuse to leave public buildings for reasons other than civil disobedience will be entitled to a jury trial, this is a small price to pay for moving the bulk of the unlawful entry cases to the non-jury calendar.

(c) **D.C. Official Code § 22-1805a. Conspiracy.**

(a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.

**(2) If 2 or more persons conspire to commit a crime of violence as defined in D.C. Official Code § 23-1331, each is punishable by imprisonment or fine or both that may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy.”**

***Rationale:*** The maximum penalty for conspiracies in the District of Columbia does not reflect the seriousness of the crime – except for drug offenses where the penalty for conspiracy is the same as that for the underlying crime. See D.C. Official Code § 48-904.09. A person who conspires to murder another human being, for example, faces a maximum of 5 years’ imprisonment even though, if the conspiracy were successful, s/he would be facing a maximum term of imprisonment of life. Similarly a person who conspires to commit a robbery while armed faces a maximum of 5 years’ imprisonment even though, if the conspiracy were successful, s/he would be facing a maximum term of imprisonment of 30 years. By contrast, persons who conspire to commit a drug felony face the same maximum as the offense that is the object of the conspiracy. D.C. Official Code § 48-904.09.

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<sup>12</sup> See *In Brief*, THE WASHINGTON POST, B3 (April 30, 2005) (“Six protesters were convicted of breaking into a District homeless shelter last year to protest the city government’s decision to close it. . . .”); *In Brief*, THE WASHINGTON POST, B3 (December 25, 2004) (“An activist who had commanded an outer fifth-floor ledge of the John A. Wilson Building for nearly four days was escorted to safety yesterday . . .”).

D.C. Official Code § 22-1805a is used most frequently to prosecute conspiracies to commit murder. A maximum term of imprisonment of five years (and the possibility of probation or, at most, a 12-months' imprisonment under the voluntary sentence guidelines) is not enough for this offense or other crimes of violence. This is particularly true when the conspiracy is not successful because of the intervention of an outside force and not because of a desire by the participants to abandon its objective or when a conspirator, removed from the scene of the crime, is found guilty only of conspiracy and not of the underlying crime, even though s/he was the instigator.

The proposed amendment follows the language in § 48-904.09.

### **Section 205. D.C. Official Code 22-3007. Defenses to sexual abuse**

Consent by the victim is a defense, ~~which the defendant must establish by a preponderance of the evidence,~~ to a prosecution under §§ 22-3002 to 3006, prosecuted alone or in conjunction with charges under § 22-3018, or §§ 22-401 and 22-403.

***Rationale:*** When the Council enacted the Anti-Sexual Abuse Act of 1994, it specifically removed the element of consent from the elements of the offense. Rape was defined as “carnal knowledge of a female forcibly and against her will.” The new statute referred only to force in the elements of the offense and created the affirmative defense of consent. The reason for this change was to “plac[e] the emphasis on the defendant’s rather than the complainant’s conduct in sexual abuse cases”. Report of the Committee on the Judiciary on Bill 10-87, the Anti-Sexual Abuse Act of 1994 (September 28, 1994). However, the statute did not explicitly exclude consent as an element of the offense. Accordingly, in *Russell v. United States*, 698 A.2d 1007, 1015-1016 (D.C. 1997), the Court reversed a conviction, stating:

at least when the legislature has not specified otherwise, . . . the jury should be expressly instructed that it may consider the affirmative defense evidence when it determines whether the government has met its burden to prove all the elements of the offense beyond a reasonable doubt.

The current jury instruction therefore informs the jury that it may consider consent on the issue of force and, if the government has proven all of the elements of the sexual abuse beyond a reasonable doubt, may consider whether the defendant has proven consent by a preponderance of the evidence. Criminal Jury Instructions for the District of Columbia, No 4.61. This does not make sense. If the jury considers consent on the issue of force and nonetheless finds the defendant guilty beyond a reasonable doubt, it must have found the absence of consent beyond a reasonable doubt. At that juncture, it would be impossible for the jury to find consent by a preponderance of the evidence and there is no point in revisiting the issue. Thus, the current instruction, based on the statute, is confusing.

The problem can be fixed in one of two ways: (1) the Council could make it clear that consent is not relevant to force;<sup>7</sup> or (2) the Council can repeal the affirmative defense. The D.C. Court of Appeals has not expressed an opinion on “whether the affirmative defense provision would withstand constitutional scrutiny if the Council had expressly excluded consideration of consent evidence on the issue of [force] . . . .” *Id.* at 1016, n. 13, although legislatures appear to have considerable latitude, *see Montana v. Egelhoff*, 518 U.S. 3, 55 (1996) (no due process violation where statute prohibits taking voluntary intoxication into account in determining a mental state that is an element of the crime); *Martin v. Ohio*, 480 U.S. 228 (1987) (when a defendant raises an affirmative defense of self-defense, and evidence has been presented by either the defendant or the government which is relevant to that defense, the jury must be free to consider that evidence, unless the legislature has properly provided otherwise). Nevertheless, the easier solution, and one that is unlikely to raise no appellate issues, is to simply repeal the provision that makes consent an affirmative defense.

## **Section 206. Theft, Fraud, Stolen Property**

### **(a) § 22-3201. Definitions.**

For the purposes of this chapter, the term:

- (1) "Appropriate" means to take or make use of without authority or right.
- (2) "Deprive" means:

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<sup>7</sup> If the Council did so, in a case where a man pinned a woman to the ground so that she could not move or escape and engaged in a sexual act with her, for example, he would have used “such physical strength . . . as is sufficient to . . . restrain” her and there would be sufficient evidence to prove first degree sexual abuse beyond a reasonable doubt without considering consent. *See* D. C. Official Code § 22-3001(5) (definition of force). The burden would then shift to the man – through cross examining the woman or his own testimony – to prove by a preponderance of the evidence that they were wrestling and when he had her pinned, she was laughing and encouraging him. Thus, even though the man used force, the woman consented.

(A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or

(B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

(3) "Property" means anything of value. The term "property" includes, but is not limited to:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property; ~~and~~

(C) Services;

**(D) Credit;**

**(E) Debt; and**

**(F) A government-issued license, permit or benefit.**

(4) "Property of another" means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.

(5) "Services" includes, but is not limited to:

(A) Labor, whether professional or nonprofessional;

(B) The use of vehicles or equipment;

(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;

(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;

(E) Admission to public exhibitions or places of entertainment; and

(F) Educational and hospital services, accommodations, and other related services.

(6) "Stolen property" includes any property that has been obtained by conduct previously known as embezzlement.

**(7) "Person" means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.**

**(8) "Value," with respect to a credit card, check or other written instrument means the amount of money, credit, debt or other tangible or intangible property or services that has**

been or can be obtained through its use, or the amount promised or paid for anything of value.

**Rationale:** The prosecution of theft, identity theft, fraud and credit card fraud cases has been made more difficult by limitations in the definitions that we do not believe were intended by the Council or that do not take into account modern methods of committing financial crimes. Three changes to the definitions are proposed.

- First, the definition of property should be expanded to include debt, credit and government-issued licenses, permits or benefits. Very often credit cards or checks are used, not to obtain property, but rather to obtain credit or to discharge debt. In addition, there is no specific law that addresses obtaining government licenses, permits or benefits. Even though the list of things of value is non-inclusive, in conjunction with the substantive provisions, it should be clear that these three categories of property are within the scope of our financial crimes statutes.
- Second, businesses in the District of Columbia are being victimized both by credit card fraud and by identity theft. We believe that the drafters of the original Theft and White Collar Crime Act used the word “person” to mean both individuals and legal entities, but there is a more restrictive definition in the Identity Theft Ac. To make sure there is no ambiguity, it is important to define “person” in the statute to include businesses, unions, and government agencies. This definition is based on D.C. Official Code §§ 1-302.121 1-801.02, and 2-301.07.
- Third, there is confusion about the value of pieces of paper. Some – like currency – have amounts on their face; others – like blank checks or credit cards – do not. However, the value of the latter is what they can be used to obtain, not the value of the paper. They are quite unlike blank stationery. A check is not stolen for the value of the paper, but for the funds it can command when uttered; a credit card is not stolen for the value of the plastic, but for the items that can be purchased or the debt that can be discharged by its use. The law should recognize this reality and treat it accordingly.

**(b) D.C. Official Code § 22-3203. Consecutive sentences.**

(a) No person shall be consecutively sentenced for the same act or course of conduct for the following:

- (1) Theft and fraud;
- (2) Theft and unauthorized use of a vehicle;
- (3) Theft and commercial piracy;
- (4) Identity theft and theft; ~~or~~

- (5) Identity theft and fraud;
- (6) **Theft and receiving or possessing stolen property; or**
- (7) **Receiving or possessing stolen property and unauthorized use of a vehicle.**

**(b) A person may be convicted of any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, and possessing stolen property for the same act or course of conduct.**

***Rationale:***

~~New subsection (a)(6) codifies the opinion in *Byrd v. United States*, 598 A.2d 386, 393 (D.C. 1991) (“given the intimate relationship between theft and RSP (receiving stolen property) . . . , most notably demonstrated by the ‘rule of priority,’ the provisions of § 22-3803 should be interpreted as a manifestation of legislative will to prohibit consecutive sentences for convictions of RSP and UUV arising out of the ‘same act or course of conduct’”).~~

Under current law, a person cannot be convicted of both theft and receiving stolen property because they are considered to be inconsistent offenses, *Franklin v. United States*, 392 A.2d 516, 518 (D.C. 1978), although the same evidence would support both **and even though possession of recently stolen property – as opposed to receiving stolen property – is not inconsistent with theft.**<sup>8</sup> New subsection (b) permits a person to be convicted of any combination of theft, fraud and other property offenses arising out of the same act or course of conduct. This subsection recognizes that each of these offenses constitutes a separate crime that may be separately prosecuted while subsection (a) also recognizes that consecutive punishments are not necessary for these offenses because they are so closely intertwined. *See Byrd v. United States*, *supra*, 598 A.2d at 393. It does not, of course, bar consecutive sentences for separate crimes against one victim or crimes against separate victims.

**(c) New D.C. Official Code § 22-3204. Case referral.**

**“For purposes of this chapter, in cases involving more than one jurisdiction, or in cases where more than one District of Columbia agency is responsible for investigating an alleged violation, the investigating agency to which the report was initially made may refer the matter to another investigating or law enforcement agency with proper jurisdiction.”.**

***Rationale:*** In order to prosecute cases where residents and businesses in the District of Columbia have been victimized by theft or fraud in an electronic era, Chapter 32 has a broad jurisdictional section for identity theft – and this Bill seeks to expand them for fraud, credit card fraud and insurance fraud as well. In some cases, particularly where the loss is small and the evidence is located in a distant state, the Metropolitan Police Department does not have the resources to gather the evidence necessary for arrest and prosecution. This provision would not interfere with a resident’s right to file a report with the MPD for insurance or other purposes, but would permit the

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<sup>8</sup> Possession of stolen property is not inconsistent with theft. Receiving stolen property – like theft – can be proven by the possession of recently stolen property.

MPD to refer the report to another agency within the D.C. government (e.g., the Department of Insurance, Securities, and Banking), or an appropriate enforcement agency in another state .

**(d) D.C. Official Code § 22-3215. Unauthorized use of motor vehicles**

(b) A person commits the offense of unauthorized use of a motor vehicle under this subsection if, without the consent of the owner, ~~that the person takes, uses, or operates a motor vehicle, or removes—~~ **a motor vehicle** to be taken, used, **or** operated, ~~or removed, a motor vehicle from a garage, other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, enclosure, or space, and operates or drives or causes the motor vehicle to be operated or driven~~ for his or her own profit, use, or purpose, **or during the course of or to facilitate a crime of violence.**

\* \* \*

~~(d)(1) Any person convicted of unauthorized use of a motor vehicle under~~ **who violates** subsection (b) of this section shall be fined not more than \$1,000 or imprisoned for not more than 5 years, or both **if the person takes, uses, or operates the motor vehicle, or causes the motor vehicle to be taken, used, or operated, for his or her own profit, use, or purpose.**

**(2) Any person who violates subsection (b) of this section shall, if the person takes, uses, or operates the motor vehicle, or causes the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, be fined not more than \$50,000 or imprisoned for not more than fifteen years, or both, in addition to the penalty provided for such crime of violence, and shall, if serious bodily injury results, be imprisoned for not less than 5 years.**

(3) Any person convicted of unauthorized use of a motor vehicle under subsection (c) of this section shall be fined not more than \$1,000 or imprisoned for not more than 3 years, or both.

***Rationale:*** It appears that an increasing number of violent crimes are being committed either from stolen cars (e.g., drive-by shootings) or through the use of a stolen car (e.g., armed robberies). The use of a stolen car makes it more difficult to identify, apprehend, and prosecute the people who commit these serious offenses. The new provision of unauthorized use of a vehicle to commit a crime of violence, permits the court to impose an additional 15 years, with a non-mandatory minimum of five years for such conduct. The Council may want to consider whether the additional penalty must be imposed consecutively to that for the crime of violence so there will be no question that using a stolen car to commit a crime of violence will result in additional time in prison.

The language of the UUV statute has been streamlined to eliminate extraneous and unnecessary verbiage as well.

**(e) D.C. Official Code § 22-3223. Credit Card Fraud**

(a) For the purpose of this section, the term "credit card" means an instrument or device, whether known as a credit card-plate, debit card, or by any other name, issued by a person for use of the cardholder in obtaining **or paying for** property or services.

(b) A person commits the offense of credit card fraud if, with intent to defraud, that person ~~obtains property of another~~ **obtains or pays for property or services or attempts to obtain or pay for property or services** by:

(1) Knowingly using a credit card, or the number or description thereof, which has been issued to another person without the consent of the person to whom it was issued;

(2) Knowingly using a credit card, or the number or description thereof, which has been revoked or cancelled;

(3) Knowingly using a falsified, mutilated, or altered credit card or number or description thereof;  
~~or~~

(4) Representing that he or she is the holder of a credit card and the credit card had not in fact been issued; **or**

**(5) Knowingly using for the employee's or contractor's own purposes, a credit card, or the number or description thereof, issued to or provided to an employee or contractor by or at the request of an employer for the employer's purposes.**

(c) A credit card is deemed cancelled or revoked when notice in writing thereof has been received by the named holder as shown on the credit card or by the records of the issuer.

(d)(1) **Except as set forth in paragraph (2) of this subsection**, any person convicted of credit card fraud shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both. ~~, if the value of the property obtained is less than \$250.~~

(2) Any person convicted of credit card fraud shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both, if the value of the property **obtained or paid for or attempted to be obtained or paid for** is \$250 or more.

(Note: sections have been placed in reverse order)

**Rationale:** First, to be consistent with the new definition of "property," this section contains amendments that would make it unlawful not only to "obtain" property, but to "pay for" property. This would make it clear that the use of a credit card to clear an existing debt, for example, falls within the purview of credit card fraud. Second, it substitutes "property" for "property of another." Unlike theft, fraud requires the government to prove an "intent to defraud." It is unnecessary to prove also that the object of the fraud was "property of another." Moreover, with respect to businesses, the definition of "property of another" currently is limited to corporations

“established pursuant to an interstate compact.” Given the new definition of “person,” the definition of “property of another” should not be used to diminish the scope of protection for businesses in our community. A significant issue for businesses, unions and governments is the misuse of credit cards issued to employees. In such a situation, the employee has the card lawfully, but uses it for unauthorized purchases, often in another jurisdiction, thus defrauding the business, union or governmental entity. In some instances, the fraudulent use is concealed by the employee either alone or in collaboration with others. (A recent example of this is found, of course, in the Washington Teachers’ Union case which was prosecuted under federal mail fraud statutes.) Our businesses, unions and governmental agencies should have the protection of statute that unambiguously includes employee frauds within its scope. Adding the new subsection (b)(5) should achieve this goal.

**(f) New D.C. Official Code § 22-3224.01. Jurisdiction (Fraud; Related Offenses).**

**An offense under this subchapter shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:**

- (1) The person to whom a credit card was issued or in whose name the credit card was issued is a resident of, or located in, the District of Columbia;**
- (2) The person who was defrauded is a resident of, or located in, the District of Columbia;**
- (3) The loss occurred in the District of Columbia; or**
- (4) Any part of the offense takes place in the District of Columbia.**

***Rationale:*** This new section, which would apply to both fraud and credit card fraud, follows generally D.C. Official Code § 22-3227.06 (jurisdiction for identity theft) and is proposed for the same reasons that the jurisdiction section of the identity theft law was enacted: (1) in a computer era, it is often difficult to tell where a credit card was actually used or where a fraud actually took place; (2) if the victim – whether an individual or a business or organization – is here, then the harm is here; (3) other jurisdictions do not necessarily have an interest in investigating or prosecuting cases involving harm to D.C. residents and businesses; and (4) it would facilitate prosecution of cases where a credit card is stolen/taken/issued here and used in another jurisdiction. (See also proposed change in definition of value.) Adding the definition of person to clarify that it includes businesses and organizations along with the addition of this jurisdictional section, will ensure that these entities, as well as individuals, can have their interests vindicated here, particularly since other jurisdictions may have little or no interest in cases that do not affect their own citizens.

**(g) New § 22-3225.15. Jurisdiction (Insurance Fraud).**

**An offense under this subchapter shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:**

**(1) The insured, insurer, claimant or applicant is a resident of, or located in, the District of Columbia;**

**(2) A District of Columbia address is used on an application, policy, or claim for payment or benefit;**

**(3) The services for which a claim is made were provided or alleged to have been provided in the District of Columbia;**

**(4) Payment of a claim or benefit was made or was to be made to an address in the District of Columbia;**

**(5) The loss occurred or is alleged to have occurred in the District of Columbia; or**

**(6) Any part of the offense takes place in the District of Columbia.**

***Rationale:*** For the same reasons articulated in the previous section, a jurisdictional section for insurance fraud should be added as well. With respect to insurance fraud, however, most cases involve an insured who has submitted a false claim to the insurance company. In an era of modern communications, it is often difficult to tell where the insured was when the claim was submitted. Cell phones, email, and websites are not restricted to a given jurisdiction. Without a record of where the claim was made, jurisdiction is difficult to prove. It requires either an enormous expenditure of resources that could be more productively spent elsewhere or a declination of the case. Making it clear that jurisdiction lies in the District of Columbia as set forth in the proposed new section would facilitate the prosecution of these cases. All of our citizens suffer when insurance rates rise because of false claims. Efficient and effective prosecution is a necessary component of deterring such offenses.

**(h) D.C. Official Code § 22-3227.01 Definitions (Identity Theft)..**

For the purposes of this subchapter, the term:

(1) "Financial injury" means all monetary costs, debts, or obligations incurred by a person as a result of another person obtaining, creating, possessing, or using that person's personal identifying information in violation of this subchapter, including, but not limited to:

(A) The costs of clearing the person's credit rating, credit history, criminal record, or any other official record, including attorney fees;

(B) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person that arose as a result of the violation of this subchapter, including attorney fees;

(C) The costs of repairing or replacing damaged or stolen property; ~~and~~

(D) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages resulting from a violation of this subchapter; **and**

**(E) Lost time or wages, legal fees, and other expenses incurred as a result of a false accusation of, or arrest for, committing a crime because of the use, without permission, of one's personal identifying information by another.**

~~(2) "Person" means an individual, whether living or dead.~~

(3) "Personal identifying information" includes, but is not limited to, the following:

(A) Name, address, telephone number, date of birth, or mother's maiden name;

(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;

(C) Savings, checking, or other financial account number;

(D) Social security number or tax identification number;

(E) Passport or passport number;

(F) Citizenship status, visa, or alien registration card or number;

(G) Birth certificate or a facsimile of a birth certificate;

(H) Credit or debit card, or credit or debit card number;

(I) Credit history or credit rating;

(J) Signature;

(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;

(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(M) Place of employment, employment history, or employee identification number; and

(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.

(4) "Property" shall have the same meaning as provided in § 22-3201(3) and shall include credit.

**Rationale:** A number of people who are arrested each year use another person's name, address, social security number or other information to identify themselves. There are also cases where a person uses another person's identity to avoid detection, arrest and prosecution. In both situations, the person whose identity is used is at risk of being arrested or identified as a criminal. The costs to the victim are high: possible arrest and detention, public censure and disgrace, loss of a job, and the costs of restoring his or her good name. Identity theft is at least as harmful when a person is falsely identified as a criminal as it is where a person's financial security is damaged. Yet, the D.C. Code does not currently prohibit this serious offense. In the following section, we propose adding the use of personal identifying information at the time of arrest or to avoid detection, arrest, and prosecution. In this section, therefore, the definition of financial injury is expanded to include the costs associated with such identity theft.

The definition of "person" in this subchapter is deleted because of the new definition of "person" that applies to the whole chapter.

**(i) D.C. Official Code § 22-3227.02. Identity Theft**

A person commits the offense of identity theft if that person knowingly:

(1) Uses personal identifying information belonging to or pertaining to another person to obtain, or attempt to obtain, property fraudulently and without that person's consent; or

(2) Obtains, creates, or possesses personal identifying information belonging to or pertaining to another person with the intent to:

(A) Use the information to obtain, or attempt to obtain, property fraudulently and without that person's consent; or

(B) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the information by that third person to obtain, or attempt to obtain, property fraudulently and without that person's consent; **or**

**(3) Uses personal identifying information belonging to or pertaining to another person to identify him/herself at the time of his/her arrest, to facilitate or conceal his/her commission of a crime, or to avoid detection, apprehension, or prosecution for a crime.**

**Rationale:** For the reasons stated in the preceding section, a criminal who uses another's identity to avoid detection, arrest or prosecution for a crime or following an arrest has committed identity theft and should be punished accordingly. The horrifying story of Elias Fishburne illustrates the consequences that can flow from having one's name used by another in the criminal justice

system. Mr. Fishburne was stopped for a traffic violation in Maryland, a wanted criminal had used his name as an alias, and Mr. Fishburne was arrested. His fingerprints were not taken. Thinking it would be beneficial to him, he waived extradition and languished in custody for 19 days in Prince George's County before being transported to Georgia where it took 36 hours for correctional authorities to figure out that they had the wrong man. Tamara Jones, *The Wrong Man; Mistaken for a Fugitive, an Innocent Hairdresser Landed in Jail*, WASHINGTON POST, Section A1 (June 25, 2006). This is not an isolated example. People have been arrested in the District of Columbia or had security clearances delayed or lost benefits because a friend or relative has used their name and/or other identifying information in an earlier run-in with the law. For example, one 100% disabled veteran lost all his benefits when his brother was arrested and used the veteran's name and social security number. When the brother went to prison, the veteran's benefits were cut off because people in prison are not entitled to benefits. It took considerable effort to establish that the man in prison was not the veteran and to have his benefits restored. The Council should recognize that identity theft is no less harmful to the victim whose identity is used in the criminal justice system than it is in financial systems and amend the identity theft statute accordingly.

**(j) D.C. Official Code § 22-3227.06. Jurisdiction (Identity Theft).**

The offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

- (1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of **or located in** the District of Columbia; or
- (2) Any part of the offense takes place in the District of Columbia.

**(k) D.C. Official Code § 22-722(a)(4) and (5)). Obstruction of Justice**

(a) A person commits the offense of obstruction of justice if that person:

\* \* \*

(4) Injures **or threatens to injure** any person or his or her property on account of the person or any other person giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia;

(5) Injures **or threatens to injure** any person or his or her property on account of the person or any other person performing his official duty as a juror, witness, or officer in any court in the District of Columbia;

**Rationale:** A person may be charged with and convicted of threatening to injure another person or to damage another person's property. D.C. Official Code § 22-1810. The offense takes on a more sinister aspect, however, when such threats are made in retaliation for assisting the police in a criminal investigation or serving as a witness or juror in Superior Court (whether in a civil or a criminal case). Nevertheless, the obstruction of justice statute, D.C. Official Code § 22-722, does not cover retaliatory threats. Because such threats are equal to the other ways of undermining our

judicial and criminal justice systems, they should be treated as an obstruction of justice. See 18 U.S.C. § 1513. These kinds of threats are made from time to time, and terrify the recipients who perceive that the defendant can execute his threat either directly when released or through associates who are not in jail.

At a time when some members of the community are already afraid to come forward or are intimidated into silence because of the code of the street, those who are courageous enough and civic-minded enough to do their duty should not be threatened with retaliation. This section amends D.C. Official Code § 22-722 to add threats to injure a person or his or her property to the existing section of the obstruction of justice statute that covers retaliatory injuries. It would elevate threats of this nature from Group 8 in the voluntary sentencing guidelines to Group 5 where obstruction of justice has been ranked.

**Sec. 207. D.C. Official Code § 22-4151(1). Qualifying offenses (DNA Collection).**

The following criminal offenses shall be qualifying offenses for the purposes of DNA collection under the DNA Analysis Backlog Elimination Act of 2000, approved December 19, 2000 (Pub. L. No. 106-546; 114 Stat. 2726):

- (1) ~~§ 22-301 (arson);~~
- (2) ~~§ 22-302 (burning of one's own property with intent to defraud or injure another);~~
- (3) ~~§ 22-303 (malicious burning, destruction, or injury of another's property);~~
- (4) ~~§ 22-401 (assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse);~~
- (5) ~~§ 22-402 (assault with intent to commit mayhem or with dangerous weapon);~~
- (6) ~~§ 22-404.01 (aggravated assault);~~
- (7) ~~§ 22-405 (assault on member of police force, campus or university special police, or fire department using a deadly or dangerous weapon);~~
- (8) ~~§ 22-406 (mayhem or maliciously disfiguring);~~
- (9) ~~§ 22-1101 (cruelty to children);~~
- (1) Any felony;**
- (2) Any offense for which the penalty is greater than one year imprisonment;**
- ~~(10) 3) § 22-1312(b) (lewd, indecent, or obscene acts (knowingly in the presence of a child under the age of 16 years));~~
- (11) ~~§ 22-801 (burglary);~~
- (12) ~~§ 22-1901 (incest);~~
- ~~(13) 4) § 22-2201 (certain obscene activities involving minors);~~
- ~~(14) 5) § 22-3102 (sexual performances using minors);~~
- (15) ~~§ 22-2001 (kidnapping);~~

(16) ~~§ 22-2101 (murder in the first degree);~~  
(17) ~~§ 22-2102 (murder in the first degree—obstructing railroad);~~

(18) ~~§ 22-2103 (murder in the second degree);~~  
(19) ~~§ 22-2105 (voluntary manslaughter only);~~  
(20) ~~§ 22-2106 (murder of a law enforcement officer);~~  
(21) ~~§ 22-2704 (abducting, enticing, or harboring a child for prostitution);~~  
(22) ~~§ 22-2705 (pandering; inducing or compelling an individual to engage in prostitution);~~(23) ~~§ 22-2706 (compelling an individual to live life of prostitution against his or her will);~~  
(24) ~~§ 22-2708 (causing spouse to live in prostitution);~~  
(25) ~~§ 22-2709 (detaining an individual in disorderly house for debt there contracted);~~  
(37 6) ~~§ 22-3006 (misdemeanor sexual abuse) where the offense is committed against a minor;~~  
**(7) § 22-3010.01 (misdemeanor sexual abuse of a child or minor);**  
(27) ~~§ 22-2801 (robbery);~~  
(28) ~~§ 22-2802 (attempted robbery);~~  
(29) ~~§ 22-2803 (carjacking);~~  
~~(33) § 22-3002 (first degree sexual abuse);~~  
(34) ~~§ 22-3003 (second degree sexual abuse);~~  
(35) ~~§ 22-3004 (third degree sexual abuse);~~  
(36) ~~§ 22-3005 (fourth degree sexual abuse);~~  
(38) ~~§ 22-3008 (first degree child sexual abuse);~~  
(39) ~~§ 22-3009 (second degree child sexual abuse);~~  
(40) ~~§ 22-3010 (enticing a child);~~  
(41) ~~§ 22-3013 (first degree sexual abuse of a ward);~~  
(42) ~~§ 22-3014 (second degree sexual abuse of a ward);~~  
(43) ~~§ 22-3015 (first degree sexual abuse of a patient or client);~~  
(44) ~~§ 22-3016 (second degree sexual abuse of a patient or client);~~  
(45) ~~§ 22-3018 (attempts to commit sexual offenses);~~  
~~(45A) § 22-3152(1) (act of terrorism);~~  
~~(45B) § 22-3154 (manufacture or possession of a weapon of mass destruction);~~  
~~(45C) § 22-3155 (use, dissemination, or detonation of a weapon of mass destruction) and;~~  
**(8) Attempt or conspiracy to commit any of the offenses listed in paragraphs (1) through (7) of this section.**

**Rationale:** In 2000, Congress enacted the DNA Analysis Backlog Elimination Act of 2000. Under its provisions, the Bureau of Prisons and the Court Services and Offender Supervision Agency are to collect blood samples from those D.C. Code offenders designated by the District of Columbia government for analysis and entry into the federal DNA database. 42 U.S.C. § 14135b. The purpose of the database is to help solve crimes by identifying the source of DNA left at the crime scene or on the victim. Virginia, which covers all felony offenses, has had significant success in closing cases as a result of DNA hits. The DNA Analysis Backlog Elimination Act of 2000 limited the federal crimes for which the government would collect a DNA sample. When it enacted the companion DNA Sample Collection Act of 2001, the Council would go no further. Congress has now expanded the list to all felonies.<sup>9</sup> The Council should follow suit. As was noted during the hearings in 2001, it is not only those people who previously have been convicted of serious violent crimes who will commit serious violent crimes in the future. Experience has shown that people who commit serious violent crimes such as rape and murder have varied criminal histories which often consist of lesser violent offenses or non-violent offenses. In fact, seven rape cases in the District of Columbia were solved by a hit in the Florida data base of a person who had been convicted previously only of a drug offense. And four rape-murder cases in the District of Columbia were solved when the DNA of a suspect in the last case matched that and the earlier cases. This defendant's prior convictions were for breaking and entering and larceny. Had their DNA been in the database, some of these victims would have been spared. Currently, 45 states collect DNA samples from all convicted felons. In addition, 13 states take DNA samples from defendants at the time of their arrest. Therefore, this provision will put the District of Columbia into the mainstream with respect to the collection of DNA samples from convicted offenders.

**Sec. 208.**

**(a) § 22-4502. Additional penalty for committing crime when armed.**

(a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle,

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<sup>9</sup> “The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses, as determined by the Attorney General:

“(1) Any felony.

“(2) Any offense under chapter 109A of Title 18.

“(3) Any crime of violence (as that term is defined in section 16 of Title 18).

“(4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).”

42 U.S.C. § 14135a(d).

dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles):

\* \* \*

(2) Shall, if such person is convicted more than once of having so committed a crime of violence, or a dangerous crime in the District of Columbia **an offense in any other jurisdiction that would constitute a crime of violence or dangerous crime if committed in the District of Columbia, or conduct that is substantial similar to that prosecuted as a crime of violence or dangerous crime under the District of Columbia Official Code**, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment of not less than 5 years and, except for first degree murder while armed, second degree murder while armed, first degree sexual abuse while armed and first degree child sexual abuse while armed, not more than 30 years, and shall, if convicted of such second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 10 years.

**Rationale:** This amendment equalizes the penalty for recidivists who committed their offenses in multiple jurisdictions. It is more in the nature of a technical amendment than a substantive one. It does not make sense to penalize a recidivist only if his/her prior crimes were committed in the District. As it stands, if a person is convicted for the second time in the District of Columbia of committing a crime of violence while armed, s/he is subject to five-year mandatory minimum if s/he was armed with any weapon and a ten-year mandatory minimum if s/he was armed with a firearm. However, if the same person had been convicted for the first time in Prince George's County and for the second time in the District, s/he would not be subject to the same sentences. If the purpose of this law is to punish recidivists more severely, the place where they committed their first crime of violence should make no difference. We do not believe the Council intended this result when this provision was first enacted and would not now.

**(b) § 22-4503. Unlawful possession of firearm. –**

“(a) No person shall own or keep a firearm, or have a firearm in his or her possession or under his or her control, within the District of Columbia, if:

~~(1) Such person is a drug addict;~~

“(1) Such person has been convicted in the District of Columbia or elsewhere of a felony;

~~(3) Such person has been convicted of violating § 22-2701, § 22-2722, or §§ 22-3502 to 22-3506; or~~

“(2) Such person is not licensed under § 22-4510 to sell weapons, and such person has been convicted of violating this chapter.

**“(b) A person who violates subsection (a)(1) of this section shall be sentenced to a term of**

**imprisonment of not more than 10 years and shall be sentenced to a mandatory minimum term of 1 year, unless she or he has a prior conviction for a crime of violence other than conspiracy, in which case she or he shall be sentenced to a term of imprisonment of not more than 15 years and shall be sentenced to a mandatory minimum term of imprisonment of 5 years. A person sentenced to a mandatory minimum term of imprisonment shall not be released from prison or granted probation or suspension of sentence prior to serving the mandatory minimum sentence.**

**“(c) A person who violates subsection (a)(2) through (a)(9) of this section shall be sentenced to not less than one year nor more than 10 years or fined not more than \$10,000, or both.**

**“(d) The term “crime of violence” as used in this section means a crime of violence as defined by D.C. Official Code § 23-1331, or a crime under the laws of any other jurisdiction that is defined as a crime of violence in that jurisdiction, or that involved conduct that would constitute a crime of violence if committed in the District of Columbia or prosecuted under the District of Columbia Official Code, or conduct that is substantially similar to that prosecuted as a crime of violence under the District of Columbia Official Code.”**

***Rationale:***

Section 208(b) amends what is colloquially called the “felon in possession” statute, D.C. Official Code § 22-4503, in several ways. First, it amends the list of persons who cannot possess a firearm. Second, it increases the mandatory minimum to five years if the person has been convicted previously of a crime of violence. These increased penalties are sought in an effort to achieve the same reductions in violent crime that Virginia has achieved through Project Exile that imposes severe sentences on convicted criminals who are caught in possession of a firearm. Va. Code Ann. § 18.2-308.2 (prohibiting all adult felons; juveniles who were adjudicated delinquent for murder, rape and robbery; and all persons under 29 years of age who were adjudicated delinquent for a felony committed when they were 14 years of age or older, from possessing firearms and certain other weapons; five-year mandatory minimum if prior felony violent; two-year mandatory minimum for all other felonies, to be served consecutively to any other sentence).

Section 208(b) also reduces the penalties for persons other than convicted felons who are prohibited from possessing firearms. Prosecutions of such person are rare but should an appropriate case be investigated and prosecuted, that rationale for applying mandatory minimums to convicted felons does not apply to the other classes. Instead, the bill has a non-mandatory minimum that the court must impose, but can suspend executive of.

Section 208(b) also defines crime of violence so that it includes not only those offenses under the D.C. Code but crimes of violence in other jurisdictions, so that a person previously convicted of a crime of violence in Virginia, for example, would be subject to the enhanced penalties just as s/he would if s/he had been convicted previously of the same or a substantially similar offense in the District.

**Sec. 209. D.C. Official Code § 23-110. Remedies on Motion Attacking Sentence.**

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b)(1) A motion for such relief may be made at any time.

**(2) A motion for such relief may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the movant could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.**

\* \* \*

***Rationale:***

Section 209 amends D.C. Code § 23-110 by adding a provision that authorizes a judge to dismiss a motion that is filed long after the conviction was final if there is no justifiable reason for the delay and the government is prejudiced in responding to the motion because of the delay. This provision is identical to those in D.C. Official Code § 22-4135(f) (Innocence Protection Act); D.C. Official Code § 16-803(k) (Criminal Record Sealing Act), and Rule 9(a) of the Superior Court Rules Governing Proceedings Under D.C. Code § 23-110.

This provision would serve several beneficial purposes. First, Section 209 may benefit defendants by encouraging them to raise claims under Section 23-110 while the evidence concerning those claims is still relatively fresh. Second, Section 209 also will serve the interests of judicial economy by allowing a judge to dismiss a motion, rather than use limited court time and resources for an evidentiary hearing, in cases where the filing of the motion has been unjustifiably delayed and the government cannot properly respond to the motion because of the delay. Third, Section 209 promotes the finality of judgments and the proper administration of justice, including the interests of victims in not having to return to court long after a defendant's conviction has become final, and limits the possibility that a defendant may be able to overturn a valid conviction solely because the defendant's delay in filing the motion has hampered the government's ability to rebut the defendant's claims. There are many reasons why delay may be harmful, the loss or destruction of evidence, files and transcripts; the death or other unavailability of witnesses or their loss of memory due to the passage of time. As the District of Columbia Court of Appeals has noted, delayed motions pose several risks to the administration of justice – they make it difficult for the participants to accurately recollect the relevant events, they make it harder for the court to properly

evaluate the defendant's claims, and they cause the case to “bristle with potential prejudice to the government.” *Dobson v. United States*, 711 A.2d 78, 84 (D.C. 1998).

Furthermore, it should be noted that Section 209 would not deny deserving defendants their day in court. Rather, the provision would simply authorize judges to dismiss an unjustifiably delayed motion where the government was prejudiced by the delay except when the defendant had a good reason for the delay.

Finally, Section 209 fits well within the existing legal framework in District of Columbia law and harmonizes Section 23-110 with other post-conviction remedies recently enacted by the Council, that is, Innocence Protection Act of 2001 and the Criminal Record Sealing Act of 2006 that contain identical provisions authorizing judges to dismiss unjustifiably delayed motions filed under those statutes. *See* D.C. Code §§ 22-4135(f), 16-803(k). In addition, on April 3, 2000, the Superior Court Board of Judges adopted Rule 9(a) to allow a judge to dismiss a delayed section 23-110 motion if there was no good reason for the delay and the delay prejudiced the government’s ability to respond to the motion. This rule mirrored the corresponding federal rule (Rule 9(a) of the Rules Governing Section 2254 and 2255 Proceedings and was the basis for later Council legislation on the subject. However, in *United States v Arnold*, 133 D.W.L.R. 211 (D.C. Super. Ct. Oct. 27, 2004), Judge Canan held that Rule 9(a) exceeded the authority of the Board of Judges because it was inconsistent with existing DCCA case law, and that the rule had to be adopted legislatively, rather than by court rule. While Judge Canan’s ruling is not binding on other judges, how these motions are handled should not depend on the judge before whom they are litigated. Uniformity and harmony with other post-conviction proceedings will be advanced by this amendment

**Sec. 210.** D.C. Official Code § 23-523. Time of execution of search warrants.

(a) A search warrant shall not be executed more than ten days after the date of issuance and shall be returned to the court after its execution or expiration in accordance with section 23-521(f)(6).

(b) A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant pursuant to section 23-521(f)(5), shall be executed only during the hours of daylight. **Daylight means the hours between 6:00 a.m. and 11:00 p.m.**

***Rationale:*** There are four reasons to make the proposed change in the time for execution of search warrants. First, limiting the execution of search warrants to hours of daylight may have made sense before the electric light bulb was in widespread use, but it does not now when most adults are up and about from about 6:00 a.m. to 11:00 p.m.. Second, “hours of daylight” is ambiguous and subject to different interpretations. Is it measured, for example, by first light? or sunrise? A “bright line” test gives explicit guidance to law enforcement. Third, the length of days, measured solely by sunrise and sunset, shifts considerably throughout the year from about 9 ½ hours on the winter solstice to about 15 hours on the summer solstice.<sup>15</sup> In mid-winter, only the day shift at the

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<sup>15</sup> On December 22, 2007, the sun rose 7:23 a.m. and set at 4:50 p.m. (9h 26m 22s). On June 21, 2008, the sun will rise at 5:43 a.m. and set at 8:37 p.m. (14h 53m 48s).

police department could execute a search warrant without special authorization. Fourth, under the federal rules, warrants can be executed from 6:00 a.m. to 10:00 p.m. Federal Rules of Criminal Procedure, Rule 41(a)(2)(b).<sup>16</sup> We suggest an hour later. Although it might make sense to strike the phrase “the hours of daylight” and insert “from 6:00 a.m. to 11:00 p.m.” in its place, Superior Court Rules of Criminal Procedure, Rule 41 refers to “daylight.”<sup>17</sup> Accordingly, a change in the rule would be necessary to conform it to the statute. Rule changes can take some time. Permitting the police to execute warrants without special authorization at least from 6:00 a.m. to 11:00 p.m. is consistent with modern life and practices and will facilitate effective law enforcement without impinging on the rights of citizens. It also brings the general search warrant authority into closer alignment with the authority to execute a search warrant for drugs that can be served at any time during the day or night. D.C. Official Code § 48-921.02.

**Sec. 211. D.C. Official Code § 23-581. Arrests without a warrant by law enforcement officers.**

(a)(1) A law enforcement officer may arrest, without a warrant having previously been issued therefor --

- (A) a person who he has probable cause to believe has committed or is committing a felony;
- (B) a person who he has probable cause to believe has committed or is committing an offense in his presence;
- (C) a person who he has probable cause to believe has committed or is about to commit any offense listed in paragraph (2) and, unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence; and

\*\*\*.

(2) The offenses referred to in subparagraph (C) of paragraph (1) are the following:

(A) The following offenses specified in the Act entitled “An Act to establish a code of law for the District of Columbia”, approved March 3, 1901, and listed in the following table:

Offense:	Specified in—
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<sup>16</sup> Neither Maryland nor Virginia limits the time of day in which a warrant may be executed without special authorization. See Maryland Criminal Procedure § 1-203; Va. Code Ann. § 19.2-56 (“The warrant shall command that the place be forthwith searched, either in day or night, and that the objects or persons described in the warrant, if found there, be seized.”).

<sup>17</sup> Because of § 23-523, Rule 41 “does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made.” Rule 41(h). See Comment, Rule 41 (“Paragraph (h) modifies the Federal Rule by specifically excluding the Federal Rule definition of “daytime” and other definitions which are not applicable to Superior Court practice. See D.C. Code § 23-523.”).

Assault,.....section 806 (D.C. Official Code, sec. 22-404).

**Malicious burning, destruction**

**or injury of another’s property .....Section 848 (D.C. Official Code, sec. 22-303).**

Unlawful entry .. section 824 (D.C. Official Code, sec. 22-3302).

~~(B) Attempts to commit burglary as specified in section 823 of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (D.C. Official Code, sec. 22-801).~~

**(B)The following offense specified in the Omnibus Public Safety Amendment Act of 2006:**

**Offense: Specified in:**

**Voyeurism..... Section 105 (D.C. Official Code § 22-3531).**

\* \* \*

**Rationale:** Pursuant to D.C. Official Code § 23-581(a)(1), a police officer is prohibited from arresting a person for a misdemeanor without a warrant if the officer has not witnessed the crime him/herself unless there is “probable cause to believe [the person] has committed or is about to commit any offense listed in paragraph (2) and, unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence.” Section 23-581(a)(2) lists the “probable cause” misdemeanors. Section 211 adds two misdemeanors to the list: destruction of property, and voyeurism. Failure to immediately arrest a person for each of these offenses risks the consequences in paragraph (a)(2). For example, a person who has been angry enough or drunk enough to destroy property may continue on a rampage if the police leave without an arrest; another example, if a person is not arrested when an upskirting victim points out person to a police officer whom, she says, has been taking photographs of her intimate areas, both the perpetrator and evidence (e.g., a camera or other device) may walk away. Because people are not required to prove their identity to the police, even if the evidence is seized, the perpetrator may never be arrested.<sup>18</sup> For these three offenses, in particular, the potential for further harm or the necessity of holding a person to account for the harm already done, warrants an immediate arrest. The statute should be amended accordingly.

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<sup>18</sup> Pursuant to D.C. Official Code § 50-2303.07(a), a person who has committed a pedestrian infraction is required to give his or her “true name and address” to the police, but is not “required to possess or display documentary proof of his or her name or address.” No other provision of the Code requires a person to identify himself to the police or to possess or display identification. If the camera is in plain view, the police may be able to seize it; or, if it is not in plain view, a container in which the police believe it is concealed may be seized under the principle of “exigent circumstances” and a warrant obtained to search further. If the camera is seized, but the photographer is not immediately arrested, however, he may never be arrested if he presented false identification, if any at all, or lives outside of the District. See Section 212 *supra*. This amendment would remedy that problem.

Other probable cause misdemeanors include theft, receiving or possessing stolen property, shoplifting, and various traffic offenses.

**Section 212. D.C. Official Code § 23-1322. Detention prior to trial.**

\* \* \*

(c) There shall be a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by a ~~substantial probability~~ **probable cause** that the person:

(1) Committed a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, while armed with or having readily available a pistol, firearm, imitation firearm, or other deadly or dangerous weapon;

(2) Has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding;

(3) Committed a dangerous crime or a crime of violence, as these terms are defined in § 23-1331, and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense;

(4) Committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense;

(5) Committed 2 or more dangerous crimes or crimes of violence in separate incidents that are joined in the case before the judicial officer;

(6) Committed a robbery in which the victim sustained a physical injury; or

(7) ~~Committed CPWL, carrying a pistol without a license.~~ **Violated D.C. Official Code § 22-4504(a) (carrying a pistol without a license); D.C. Official Code § 22-4504(a-1) (carrying a rifle or shotgun); D.C. Official Code § 22-4504(b) (possession of a firearm during a crime of violence); or D.C. Official Code § 22-4503 (unlawful possession of a firearm);”**

***Rationale:***

In order for a person to be held pending trial, the court must find by clear and convincing evidence that there is no conditions or combination of conditions that will reasonably protect any other person or the community or that will assure the appearance of the defendant in court. D.C. Code § 23-1322(b)(2). There is also a rebuttable presumption that there are no such conditions where the court finds, for example, a crime was committed with a dangerous weapon, where there was an attempt to obstruct justice, etc. D.C. Code § 23-1322(c). Currently, the court must make that finding by “a substantial probability.” Section 212 amends that so the finding can be made by probable cause, a lower standard. The purpose is to facilitate detention in these serious cases.

In an effort to curb gun violence, in 2006 the Council enacted legislation to add carrying pistol without a license to the list of offenses to which the rebuttable presumption applied. Bill 18-138 adds three other gun crimes: carrying a rifle or shotgun, possession of firearms during a crime of violence, and unlawful possession of a firearm. Unlawful possession of a firearm, as discussed in

section 208(b) currently includes possession of a firearm by a convicted felon and should be amended to include others who are not legally able to register firearms or are prohibited by federal law from possessing firearms.

**Sec. 213. D.C. Official Code § 50-1903. Blood tests; physician or nurse to withdraw blood; a additional test by private physician.**

**§ 50-1902. Implied consent to blood-alcohol content or blood-drug content tests; administration; accidents.**

(a) Any person, other than one described in subsection (b) of this section, who operates a motor vehicle within the District shall be deemed to have given his or her consent, subject to the provisions of this chapter, to 2 chemical tests of the person's blood, urine, or breath, for the purpose of determining blood-alcohol content or the blood-drug content. The arresting police officer or any other appropriate law enforcement officer shall elect which chemical test shall be administered to the person; provided, that the person may object to a particular test on valid religious or medical grounds. The tests shall be administered at the direction of a police officer who, having arrested such person for violation of law, has reasonable grounds to believe the person [is operating under the influence].

(b) Any person who operates or who is in physical control of a motor vehicle within the District and who is involved in a motor vehicle accident shall submit, subject to the provisions of this chapter, to 2 chemical tests of the person's blood, urine, or breath for the purpose of determining blood-alcohol content or blood-drug content whenever a police officer arrests such person for a violation of law and has reasonable grounds to believe such person to have been operating or in physical control of a motor vehicle within the District while that person's alcohol concentration is 0.08 grams or more either per 100 milliliters of blood . . . hile under the influence of an intoxicating liquor or any drug or any combination thereof, or while the ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor . . . The arresting police officer or other appropriate law enforcement officer shall elect which chemical test shall be administered to the person; provided, that the person may object to a particular test on valid religious or medical grounds.

**§ 50-1903. Blood tests**

~~(a) Only a physician or registered nurse acting at the request of a police officer may withdraw blood for the purpose of determining the alcoholic content or the drug content thereof.~~ **At the direction of a police officer, medical personnel (a physician, physician's assistant, nurse practitioner, registered nurse, licensed practical nurse, phlebotomist or other person who is qualified to administer such tests) shall collect blood or urine for the purpose of determining the alcohol content or the drug content thereof and for the purposes of determining whether there has been a violation of law for driving while impaired. Medical personnel must take specimens even if the person has not given express consent. Blood specimens may be taken only by medical personnel.** This limitation shall not apply to the taking of a breath or urine

specimen. The person tested may, in addition to submitting to the 2 tests administered at the direction of a police officer, also submit to a chemical test or tests administered to him by a physician, registered nurse, or other person of his own choosing who is qualified to administer such test or tests. The failure or inability to obtain an additional test by a person shall not preclude the admission of the tests taken at the direction of a police officer.

**(b) Any person, hospital, or institution participating in good faith in collecting a blood, urine or breath sample pursuant to this chapter shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed with respect to taking of such sample. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report.**

**(c) (1) Civil fines, penalties and costs may be imposed against a hospital, institution, physician, physician's assistant, nurse practitioner, registered nurse, licensed practical nurse, phlebotomist or other person who is qualified to collect a blood sample who refuses to do so at the direction of a police officer.**

**(2) Procedures for adjudication and enforcement and applicable civil fines, penalties, or costs shall be those prescribed for a Class 1 civil infraction, pursuant to Chapter 18 of Title 2.**

***Rationale:*** Under current law, “[a]ny person . . . who operates a motor vehicle within the District shall be deemed to have given his or her consent, subject to the provisions of this chapter, to 2 chemical tests of the person's blood, urine, or breath, for the purpose of determining blood-alcohol content or the blood-drug content.” D.C. Official Code § 50-1902. Nevertheless, sometimes a hospital or doctor is reluctant to collect a blood sample and critical evidence is lost. *See Schmerber v. California*, 384 U.S. 757, 770 (1966) (“Alcohol content is measured at the time the blood sample is taken and the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system”). Subsection (a) makes it clear that a hospital or medical personnel cannot refuse to collect a blood sample when directed to do so by a police officer. Subsection (b) gives those who participate in the collection of a blood, urine, or breath sample immunity from liability. The language in this subsection is taken from D.C. Official Code § 7-2603, which relieves “[a]ny person, hospital, or institution” of liability for “participating in good faith in the making of a report” of a gunshot wound or injuries caused by a dangerous weapon.

It bears repeating that when a police officer has probable cause to believe a person is under the influence of alcohol or drugs, it is constitutionally permissible for him/her to direct medical personnel to collect a blood sample without a search warrant. *See id.* at 772. “Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. *See Breithaupt v. Abram*, 352 U.S., 432, 436, n. 3 (1957). Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.” *Id.* at 771.

#### **Sec. 214. D.C. Official Code § 4-1301.06. Investigation.**

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(c)(1) Within 5 business days after the completion of the investigation, the Agency shall complete a final report of its findings.

(2) The Agency shall provide a copy of a report regarding suspected abuse or neglect that addresses possible criminal activity to the Metropolitan Police Department, the Office of the Attorney General, and the United States Attorney for the District of Columbia.

~~(d) If the Agency determines that a report was made in bad faith, the Agency shall refer the report to the Office of the Attorney General, which shall determine whether prosecution of the person making the report in bad faith is warranted.~~

**(d)(1) The Agency, or any employee or contractor thereof, or the police shall inform the Office of the Attorney General if it suspects that a person has violated paragraph (2) of this subsection.**

**(2) It is unlawful to:**

**(A) make or cause to be made to the Agency, or any employee or contractor thereof, or to the police, a false or fictitious report of the abuse or neglect of a child within the District of Columbia, or a false or fictitious report of any other matter or occurrence of which the Agency or the police are required under Subchapter I Part A to receive reports, or in connection with which the Agency or the police are required under Subchapter I Part A to conduct an investigation, knowing such report to be false or fictitious; or**

**(B) communicate or cause to be communicated to the Agency, or any employee or contractor thereof, or to the police any false information concerning the abuse or neglect of a child within the District of Columbia or concerning any other matter or occurrence of which the Agency or the police are required under Subchapter I Part A to receive reports, or in connection with which the Agency or the police are required under Subchapter I Part A to conduct an investigation, knowing such information to be false.**

(e) Nothing in this section shall be read as abrogating the responsibility of the Metropolitan Police Department for criminal investigations.

**(f) A violation of subsection (d)(2) of this section shall be punished by a fine not exceeding \$300 or by imprisonment not exceeding 30 days.**

**(g) A violation of subsection (d)(2) of this section shall be prosecuted by the Attorney General of the District of Columbia.**

***Rationale:***

D.C. Official Code § 4-1301.02 et seq. sets forth the procedures that CFSA must follow when investigating abuse and neglect reports and in determining when children should be removed from their parents' custody. Pursuant to § 4-1301.04(b) :

“The investigation shall commence:

(1) Immediately upon receiving a report of suspected abuse or neglect indicating that the child's safety or health is in immediate danger; and

(2) As soon as possible, and at least within 24 hours, upon receiving any report not involving immediate danger to the child.”

Of course, false allegations of abuse and neglect redirects attention away from investigating situations where the health and safety of a child may truly be in jeopardy, wastes scarce agency resources, subjects the targets of the false reports to a possibly wrongful criminal prosecution and/or inclusion in the abuse and neglect registry, and undermines the public confidence in the integrity of child welfare reporting system in general.

The current law fails to criminalize the making of false reports of abuse and neglect to CFSA or the police. Section 4-1301.06 (d) states, “If the Agency determines that a report was made in bad faith, the Agency shall refer the report to the Office of the Attorney General, which shall determine whether prosecution of the person making the report in bad faith is warranted.” The problem is that even if the Office of Attorney General concurs that a report was made in bad faith, there are no criminal charges associated with this referral. The proposed amendment removes the bad faith referral language contained in the statute and substitutes language that is modeled on D.C. Official Code § 5-117.05. That provision criminalizes the making of false or fictitious reports to the Metropolitan Police Department.

**Sec. 215.. D.C. Official Code § 16-2312. Detention or shelter care hearing; intermediate disposition.**

(a)(1) When a child is not released as provided in section 16-2311 and the child is alleged to be abused or neglected:

(A) A guardian ad litem shall be appointed to represent the child's best interest within 24 hours (excluding Sundays **and New Year's Day, Thanksgiving Day, and Christmas Day, when those holidays are observed on a day other than a Monday**) of the child having been taken into custody;

(B) A shelter care hearing shall be commenced not later than 72 hours (excluding Sundays) after the child has been taken into custody; and

(C) A petition shall be filed at or prior to the shelter care hearing.

(2) When a child is not released as provided in section 16-2311 and the child is alleged to be delinquent or a child in need of supervision:

(A) A detention hearing shall be commenced not later than the next day (excluding Sundays **and New Year's Day, Thanksgiving Day, and Christmas Day, when those holidays are observed on a day other than a Monday**) after the child has been taken into custody or transferred from another court as provided by section 16-2302; and

(B) A petition shall be filed at or prior to the detention hearing.

**Rationale:** Persons arrested in this jurisdiction generally are presented to the court within twenty-four hours of their arrest, well in advance of the forty-eight hour time frame found to be Constitutional in *Riverside v. McLaughlin*, 500 U.S. 44 (1991). An exception to the practice of presenting defendants and respondents within twenty-four hours currently exists for those arrested on Saturdays, as presentments, arraignments, and juvenile initial hearings do not occur on Sundays, when the Court's operations are closed entirely. D.C. Official Code § 16-2312(a)(2)(A), which requires that juvenile detention hearings "be commenced not later than the next day (excluding Sundays) after the child has been taken into custody..." is in accord with this practice. Because the Court must be open for juveniles, it is open for adults as well, even there is no statutory requirement that adults be presented or arraigned within twenty-four hours of their arrest.

The Court, the United States Attorney's Office, the Office of the Attorney General for the District of Columbia, the Metropolitan Police Department, the Pretrial Services Agency, the United States Marshal Service, the Public Defender Service, the private defense bar, and a large number of other law enforcement agencies devote enormous human and financial resources to the intake and presentment of criminal and juvenile cases on weekends and holidays. The added costs of these operations, including overtime pay, holiday pay, compensatory time off, and extra leave, severely impact each agency's ability to fulfill other necessary functions. In addition, and equally important, the employees who are required to work these days do so at enormous expense to themselves and to their families. Under the current system, victims of juvenile crime are twice victimized: first by the initial offense and then again because they must appear for case papering and be interviewed on a holiday.

This amendment would permit the Court to close entirely on New Year's Day, Thanksgiving Day, and Christmas Day if those holidays are observed on any day other than a Monday. *See* 5 U.S.C. § 6103 and Executive Order 11582(3)(a) (February 11, 1971). Although the Court's closure on these days would mean that those who are arrested and detained the day before one of these legal holidays may be subject to detention for a slightly longer period than otherwise would be the case, this is no different from the circumstance that now happens on a weekly basis for those arrested and detained on Saturday who do not make "cut off" and are, therefore, not presented or arraigned prior to the Court's closing entirely on Sunday. Nor does this circumstance justify the considerable resources, expense, and personal sacrifice that must be dedicated by countless individuals at a large number of agencies throughout the criminal and juvenile justice system.

This legislation would continue to provide reasonably prompt and constitutional first appearances for those who are arrested and detained, as well as provide for the safety of the citizens of the District of Columbia. It would also show that the District is committed to providing the dedicated employees of each of the impacted agencies – and the victims of juvenile crime who, in some cases must appear for a hearing and the victims of adult crimes who, in some cases, must at least be available to provide information – an opportunity to be with their

families on a small number of non-Monday holidays. Closing the Court on a few holidays is a legally permissible and appropriate way to address our resource, employee, and victim concerns while also assuring the fair and efficient administration of justice.

## **Sec. 216. D.C. Official Code §§ 22-3901 et seq. HIV Testing of Certain Criminal Offenders**

### **(a) § 22-3901. Definitions.**

For the purposes of this chapter, the term:

~~(1) "Convicted" means having received a verdict, or a finding, of guilt in a criminal proceeding, adjudicated as being delinquent in a juvenile proceeding, or having entered a plea of guilty or nolo contendere.~~

**(1) "Defendant" means the defendant in a criminal case or a person against whom a statement has been filed alleging that she or he is a sexual psychopath.**

(2) "HIV test" means blood testing for the human immunodeficiency virus ("HIV") or any other identified causative agent of the acquired immune deficiency syndrome ("AIDS").

(3) "Mayor" means the Mayor of the District of Columbia, or his or her designee.

~~(4) "Offense" means any prohibited activity involving a sexual act that includes contact between the penis and the vulva or the penis and the anus, however slight, or contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus. violation of D.C. Code Title 22, Chapter 30, and any offense where there is a possible transmission of bodily fluids.~~

~~(5) "Victim" means a person injured by the commission of an offense, who alleges that an offense defined in paragraph (4) has been committed against him or her and includes the parent or legal guardian of a victim such a person, if the victim person is a minor, or the spouse, domestic partner, or parent, child, or legal representative of a victim the person, if the victim person is deceased, incompetent, or incapacitated.~~

### **(b) D.C. Official Code § 22-3902. Testing and counseling.**

~~(a) Upon the request of a victim, the court shall order any individual convicted of an offense, as defined by § 22-3901, (1) Upon the request of the prosecutor or victim, or an eye witness to the offense who may have been put at risk for the HIV/AIDS virus, at any time after a finding of probable cause to believe a defendant has committed an offense defined in D.C. Code § 22-3901(4), the court shall order the defendant to furnish a blood sample to be tested for the presence of HIV. A finding of probable cause may be satisfied by the filing of an indictment, or finding of probable cause at a preliminary hearing in a criminal case, or by the waiver by the defendant of a preliminary hearing or indictment in a criminal case. If the initial test is negative, the court shall order follow-up testing as appropriate.~~

**(2) When the defendant has been placed at the Department of Corrections within one month prior to the finding of probable cause and has previously furnished a blood sample to be tested for the presence of HIV, the Court may order the Department of Corrections to provide the results of any HIV tests it has conducted in lieu of collecting and analyzing a new blood sample.**

(b) The court shall promptly notify the Mayor of any court order for an HIV test. Upon receipt of a court order for an HIV test, the Mayor shall promptly collect a blood sample from the ~~convicted individual~~ **defendant** and conduct an HIV test on the blood sample.

(c) After conducting the HIV test, the Mayor shall promptly notify the victim and the ~~convicted defendant individual~~ **defendant individual** of the results of the HIV test. The Mayor shall not disclose the results of the HIV test without also providing, offering, or arranging for appropriate counselling and referral for appropriate health care and support services to the victim and the defendant.

(d) The victim may disclose the results of the HIV test to any other individual to protect the health and safety of the victim, the victim's sexual partner, or the victim's family.

(e) The result of any HIV test conducted under this section shall not be admissible as evidence of guilt or innocence in any criminal proceeding.

***Rationale:***

In 1995, the Council authorized HIV testing of adults convicted of sex offenses. D.C. Official Code § 22-3901. A decade later, in 2005, the Council authorized HIV testing when there was probable cause to believe that a respondent's alleged delinquent act may have put the victim or an eyewitness at risk for contracting the HIV/AIDS virus. D.C. Official Code § 16-2315(f). The later statute affords much greater protection to victims and witnesses to crime. The most important feature of the juvenile statute is that it authorizes testing upon a finding of probable cause at the time of arrest and not proof beyond a reasonable doubt at the time of conviction, months or sometimes years after the contact involving bodily fluids. Second, the juvenile statute applies to any offense that involves a risk of transmitting HIV, and not just sex offenses.

Unless an adult defendant voluntarily agrees to HIV testing, the victim of his/her alleged crime who fears he or she may have been exposed to HIV faces the unenviable choice of deciding whether or not to proceed with a prophylactic course of treatment which should begin as soon as possible after exposure. Early medical attention can slow the growth of HIV. The slower the virus spreads, the longer the body will be able to ward off the illnesses and life-threatening

conditions. In making this decision, the HIV status and risk behavior history of the defendant is an important consideration. *See, e.g., FAMILY HEALTH INTERNATIONAL, Is HIV Treatment Practical after Exposure*, vol. 21, no. 1 (2001), <http://www.fhi.org> (“Before offering HIV prophylaxis treatment after unprotected sex, providers should consider the HIV status and risk-behavior history of the reported source of contact”). If the treatment itself were benign, it might not make a big difference. But it is not. Although the frequency and severity of side effects vary, they include nausea, fatigue, malaise, headache, and vomiting.<sup>20</sup> In one study, over half of the people who discontinued treatment did so because of the side effects. *Id.* n.12. The issue is more acute for pregnant women who must take the health of their fetuses into account. The consequences to the victim are too great to countenance a delay of weeks or months.

While it is true that, because of the incubation period, a person who tests negative might actually be positive, it is up to the victim and his or her medical doctors to factor this in to their treatment decision. It also augurs for repeat testing of the defendant at regular intervals throughout the period in which HIV usually can be first detected. Testing the defendant after conviction, which occurs much later, may provide some solace or reassurance to the victim if the results are negative, but will not be helpful to medical decision-making.

It is important to note that the current statute does not permit the HIV testing results to be used in any prosecution -- and we are not seeking to amend this provision. Thus, no further criminal liability will result from providing a blood sample. Measuring the anguish to the victim of not knowing his or her assailant’s HIV status against the minimal intrusion of taking a blood sample from the defendant, the scales should weigh heavily in favor of early HIV testing of an adult defendant, as is now permitted for a juvenile respondent.

**Sec. 217. D.C. Official Code § 48-902.04(5). Schedule I enumerated.**

The controlled substances listed in this section are included in Schedule I, unless and until removed therefore pursuant to § 48-902.11:

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(5) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances

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<sup>20</sup> Wang SA, Panillio, AL, Dol PA, *et al.*, *Experiences of healthcare workers taking postexposure prophylaxis after occupational HIV exposure; findings of the HIV Postexposure Prophylaxis Register*, *Infect Control Hosp Epidemiol* 2000; 21(2) 780-785. *See also* National Institute of Allergies and Infectious Diseases, National Institutes of Health, [www.niaid.nih.gov/healthscience/healthtopics/HIVAIDS](http://www.niaid.nih.gov/healthscience/healthtopics/HIVAIDS) (last updated January 9, 2008) (discussing side effects of various inhibitors ranging from death to skins rashes).

having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

- (A) Fenethyline; ~~and~~
- (B) N-ethylamphetamine; **and**
- (C) **Cathinone.**

***Rationale:***

Cathinone is a popular stimulant that is both used and sold in the District of Columbia primarily by immigrants from Somalia, Ethiopia, and Yemen, but increasingly by others in the community at large. When cathinone breaks down, it becomes cathine. Both cathinone and cathine go by the street name “khat” and are also known as “catha edulis,” and “qat.” Khat is cultivated in East Africa and the Arabian Peninsula and smuggled into the United States in passenger luggage, overnight express mail, or air cargo falsely labeled as “vegetables.”

When fresh, khat leaves are glossy and crimson-brown in color, resembling withered basil. Khat leaves typically begin to deteriorate 48 hours after being cut from the shrub on which they grow. The only way to slow this deterioration process is to refrigerate the khat leaves. Deteriorating khat leaves are leathery and turn yellow-green in color.

Khat typically is ingested by chewing the leaves – as is done with loose tobacco – to achieve an effect similar to but less intense than that produced by cocaine. Khat leaves also can be brewed in tea or cooked and added to food.

Under federal law, cathinone is a Schedule I controlled substance. See 21 C.F.R. § 1308.11(f)(3). This provision would add cathinone as a Schedule I controlled substance.

**Sec. 218. D.C. Official Code § 50-2201.05. Fleeing from the scene of an accident; driving under the influence of liquor or drugs.**

~~(B) Upon conviction for the second offense, or for the first offense following a previous conviction for a violation of paragraph (2) of this subsection, within a 15-year period, an individual shall be fined an amount not less \$ 1,000 and not more than \$ 5,000 and sentenced for a period of imprisonment of not less than 5 days, which must be imposed and not suspended, and not more than one year, or required to perform at least 30 days of community service in accordance with [D.C. Code § 16-712](#). In addition, if the person's alcohol concentration was at least 0.20 grams per 100 milliliters of blood or per 210 liters of breath, or was at least 0.25 grams per 100 milliliters of urine, but was not more than 0.25 grams per 100 milliliters of blood or per 210 liters of breath, or was not more than 0.32 grams per 100 milliliters of urine, the person shall be imprisoned for an additional minimum mandatory period of 10 days or if the person's alcohol concentration was more than 0.25 grams per 100 milliliters of blood or per 210 liters of breath or more than 0.32 grams per 100 milliliters of urine, the person shall be imprisoned for an additional mandatory minimum period of 20 days; which additional mandatory minimum periods~~

shall not be suspended by the court.

~~—(C) Upon conviction for the third or any subsequent offense, or for the second offense following a previous conviction for a violation of paragraph (2) of this subsection, within a 15-year period, an individual shall be fined an amount not less than \$ 2,000 and not more than \$ 10,000 and either sentenced for a period of imprisonment of not less than 10 days, which must be imposed and not suspended, and not more than one year, or required to perform at least 60 days of community service in accordance with § 16-712. In addition, if the person's alcohol concentration was at least 0.20 grams per 100 milliliters of blood or per 210 liters of breath, or was at least 0.25 grams per 100 milliliters of urine, but was not more than 0.25 grams per 100 milliliters of blood or per 210 liters of breath, or was not more than 0.32 grams per 100 milliliters of urine, the person shall be imprisoned for an additional minimum mandatory period of 15 days, or if the person's alcohol concentration was more than 0.25 grams per 100 milliliters of blood or per 210 liters of breath or 0.32 grams per 100 milliliters of urine, the person shall be imprisoned for a mandatory minimum period of 25 days, which additional mandatory minimum periods shall not be suspended by the court.~~

~~—(D) In addition to the penalties otherwise authorized by this section, any person convicted for a violation of paragraphs (1) and (2) of this subsection while transporting a person 17 years of age or younger shall be fined an additional minimum of \$ 500 and not more than \$ 1000 and sentenced to perform 48 hours of community service benefiting children or, for a subsequent offense, 80 hours of community service in such program.~~

~~—(2) No person shall, while the person's ability to operate a vehicle is impaired by the consumption of intoxicating liquor, operate or be in physical control of any vehicle in the District. Any person violating any provision of this paragraph, upon conviction for the first offense, unless the person has previously been convicted for a violation of paragraph (1) of this subsection, shall be fined not less than \$ 200 and not more than \$ 300 and may be imprisoned for not more than 30 days; upon conviction for the second offense, or for the first offense following a previous conviction for a violation of paragraph (1) of this subsection, within a 15-year period, shall be fined an amount not less than \$ 300 and not more than \$ 500 and either sentenced for a period of imprisonment of not less than 5 days, which must be imposed and not suspended, and not more than one year or required to perform at least 30 days of community service in accordance with § 16-712; and, upon conviction for the third or any subsequent offense, or for the second offense following a previous conviction for a violation of paragraph (1) of this subsection, within a 15-year period, shall be fined an amount not less than \$ 1,000 and not more than \$ 5,000 and either sentenced for a period of imprisonment of not less than 10 days, which must be imposed and not suspended, and not more than one year or required to perform at least 60 days of community service in accordance with § 16-712.~~

See Bill 18-138 for text

***Rationale:***

Under current law, a person who is a convicted as a repeat DWI, DUI, or OWI offender is subject to an enhancement penalty if the subsequent conviction occurs within 15 years of a

previous conviction. By running the fifteen year period from conviction to conviction, defendants have successfully avoided a sentencing enhancement by stalling the second conviction until after the 15<sup>th</sup> anniversary of their prior conviction. Enhancement penalties should never be subject to manipulation by the timing of court hearings. To correct this problem, this section would amend each reference to a 15 year enhancement period so that the enhancement period would apply if the subsequent offense date, as opposed to conviction date, occurs within 15 years of the date of the prior conviction. In addition, the amendment makes technical changes to D.C. Official Code § 50-2201.05 by breaking out each enhancement provision into its own subparagraph thereby making the sentencing provisions more understandable.

### **Sec. 219. Gun Offender Registry.**

See Bill 18-138 for text.

***Rationale:*** This is a new statute. The purpose of the gun offender registry is to address the very high risk of recidivism posed by those who commit gun offenses, a threat that is particularly grave given that subsequent arrests are more likely to involve crimes of violence. Perhaps most notably, studies have shown that gun offenders are four times more likely to be arrested for homicide than other offenders.

The statute requires defendants convicted of specified gun crimes to register their addresses, other personally identifiable information, and work or school location with the police; verify the information annually; and promptly notify the police if they change addresses for two (2) years after the expiration of any time being served on probation, parole, supervised release, or conditional release, or two (2) years after unconditional release, whichever is latest. While such information would not be made to individuals through the Freedom of Information Act, it would be available to other local, state or federal government agencies, including those District agencies with a rehabilitative interest in the offender.

Those who are on probation, parole, supervised release, or conditional release, and violate the statute must be detained pending an appropriate status review. The statute creates a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person or the community for those who violate the statute and requires detention pending sentencing of those convicted of violating the statute. The concept is modeled after sex offender registries, and similar gun registries have had success in New York City and Baltimore.

### **Sec. 220. Illegal Presence in a Motor Vehicle with a Firearm.**

See Bill 18-138 for text.

***Rationale:*** This is a new statute. Currently, when guns are found in motor vehicles, successful prosecution of an occupant requires proof that the person both knew the gun was there and intended to exercise dominion or control over it. Section 220 eliminates the requirement for

proof of dominion and control in the confined space of a motor vehicle. As a result, the new statute should reduce the number of cases where criminals are successfully able to defeat prosecution in cases involving the operation of a vehicle where the operator and occupants knew that the gun was in the vehicle.