BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER BROOKE PINTO, CHAIRWOMAN

PUBLIC HEARING

on

Bill 25-0479, the "Addressing Crime through Targeted Interventions and Violence Enforcement ("ACTIVE") Amendment Act of 2023"

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

Wednesday, November 8, 2023, 10:00 a.m.

Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

Chairwoman Pinto and Members of the Council:

My name is Elana Suttenberg, and I am the Special Counsel for Policy and Legislative Affairs at the United States Attorney's Office for the District of Columbia (USAO-DC). I thank you for the opportunity to appear at today's public hearing to share the Office's views on the proposed legislation.

USAO-DC strongly supports Bill 25-0479, the "Addressing Crime through Targeted Interventions and Violence Enforcement ("ACTIVE") Amendment Act of 2023." Our Office is using every available tool to combat the violent crime crisis we are experiencing in the District. This bill provides critical additional tools to hold violent offenders and gun offenders accountable and enable our Office to prosecute cases that are harming our communities, filling legal gaps that will make our residents safer.

Searches of Gun Offenders Under Post-Conviction Supervision

This bill is focused on people who are on post-conviction supervision for a gun offense, who are required to register as gun offenders under the D.C. Code. The bill provides that a person who is required to register as a gun offender who is on probation, supervised release, or parole following a conviction for a gun offense shall be required to submit to a search when they are in a public place.

In the District, people charged with illegally possessing a firearm are typically released pending trial—even when they have previously been convicted of a felony. While there is a presumption in the D.C. Code that these individuals will be detained pending trial due to the inherent dangerousness of firearms offenses, most are released.

Moreover, a majority of the people convicted of carrying a pistol without a license in the District are sentenced to a period of probation, which is permitted under the D.C. Sentencing Guidelines. Put simply, the typical result of a prosecution for illegally carrying a firearm is that the person charged will be in the community pending the resolution of his or her case and, if convicted of carrying a pistol without a license, will be sentenced to a period of probation. Our criminal justice system needs to reflect the reality that many individuals found with guns are being released back into our community after having served little to no time in jail.

This bill is narrowly tailored to work to stop people who are given the opportunity to remain in the community despite having been convicted of gun offenses, or people given the opportunity to be released pending trial—notwithstanding a presumption of pretrial detention—from re-arming themselves while they are under supervision.

This will allow law enforcement to search a limited category of people for—among other things—guns that they are carrying in public places in violation of their conditions of release. This provision recognizes that swift and certain apprehension is an effective deterrent to criminal activity, and draws from research from the U.S. Sentencing Commission showing that people convicted of gun offenses have higher rates of recidivism.

Our Office has reviewed similar legislation from California and other states, and the court decisions affirming their constitutionality, including decisions from the U.S. Supreme Court. Based on judicial precedent, we are confident that the legislation complies with the Fourth

Amendment, and if this legislation is enacted, we are prepared to defend the statute's constitutionality in court.

In 2019, the U.S. Sentencing Commission issued a report titled *Recidivism Among Federal Firearms Offenders*. The report found that firearms offenders recidivate at a higher rate, more quickly, and for more serious offenses than non-firearms offenders. Specifically, the report's key findings included:

> Firearms offenders recidivated at a higher rate than non-firearms offenders. Over two-thirds (68.1%) of firearms offenders were rearrested for a new crime during the eight-year follow-up period compared to less than half of non-firearms offenders (46.3%).
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> Firearms offenders recidivated more quickly than non-firearms offenders. Of the firearms offenders who recidivated, the median time from release to the first recidivism event was 17 months. Comparatively, the median time from release to the first recidivism event for non-firearms offenders was 22 months.
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> A greater percentage of firearms offenders were rearrested for serious crimes than non-firearms offenders. Of the firearms offenders who recidivated, assault was the most serious new charge for 29.0 percent, followed by drug trafficking (13.5%) and public order crimes (12.6%). Of the non-firearms offenders who recidivated, assault was the most common new charge for 21.9 percent, followed by public order crimes (19.4%) and drug trafficking (11.1%).
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> Firearms offenders have higher recidivism rates than non-firearms offenders in every Criminal History Category. The difference in recidivism rates between firearms and non-firearms offenders is most pronounced in Criminal History Category I, the lowest Criminal History Category, where firearms offenders recidivated at a rate approximately 12 percentage points higher than non-firearms offenders (45.0% compared to 33.2%).
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> Firearms offenders recidivated at a higher rate than non-firearms offenders in every age group at the time of release from custody. Firearms offenders recidivated at nearly twice the rate of nonfirearms offenders among those released after age 50 (39.3% compared to 20.6%).[1]

This bill is similar to a longstanding California statute, which provides that a person on parole "shall be given notice that he or she is subject to terms and conditions of his or her release from prison"; that notice must include, among other things, "[a]n advisement that he or she is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause."[2]

The United States Supreme Court has upheld searches under this California provision, and held that, in the context of parole, "the Fourth Amendment does not prohibit a police officer

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[1] Matthew J. Iaconetti, Tracey Kyckelhahn, and Mari McGilton, *Recidivism Among Federal Firearms Offenders*, U.S. Sentencing Commission (June 2019), *available at* https://www.ussc.gov/research/research-reports/recidivism-among-federal-firearms-offenders#:~:text=Firearms%20offenders%20recidivated%20at%20a,%2Dfirearms%20offenders%20(46.3%25).

[2] Cal. Penal Code § 3067.

from conducting a suspicionless search of a parolee."[3] In *Samson v. California*, petitioner Samson's conditions of parole required a mandatory condition, consistent with California Penal Code § 3067, that petitioner Samson "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." In holding that the search of Samson was reasonable under the Fourth Amendment, the Supreme Court stated:

> As we noted in *Knights*,[4] parolees are on the "continuum" of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, parole is an established variation on imprisonment of convicted criminals. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements.
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> California's system of parole is consistent with these observations: A California inmate may serve his parole period either in physical custody, or elect to complete his sentence out of physical custody and subject to certain conditions. Under the latter option, an inmate-turned-parolee remains in the legal custody of the California Department of Corrections through the remainder of his term, and must comply with all of the terms and conditions of parole, including mandatory drug tests, restrictions on association with felons or gang members, and mandatory meetings with parole officers. General conditions of parole also require a parolee to report to his assigned parole officer immediately upon release, inform the parole officer within 72 hours of any change in employment status, request permission to travel a distance of more than 50 miles from the parolee's home, and refrain from criminal conduct and possession of firearms, specified weapons, or knives unrelated to employment. Parolees may also be subject to special conditions, including psychiatric treatment programs, mandatory abstinence from alcohol, residence approval, and any other condition deemed necessary by the Board of Parole Hearings or the Department of Corrections and Rehabilitation due to unusual circumstances. The extent and reach of these conditions clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone.
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> Additionally, as we found "salient" in *Knights* with respect to the probation search condition, the parole search condition under California law—requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer "at any time" was "clearly expressed" to petitioner. He signed an order submitting to the condition and thus was "unambiguously" aware of it. In *Knights*, we found that acceptance of a clear and unambiguous search condition significantly diminished Knights' reasonable expectation of privacy. Examining the totality of the circumstances pertaining to petitioner's status as a parolee, an

[3] *Samson v. California*, 547 U.S. 843, 857 (2006).

[4] *United States v. Knights*, 534 U.S. 112 (2001).

established variation on imprisonment, including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.

The State's interests, by contrast, are substantial. This Court has repeatedly acknowledged that a State has an "overwhelming interest" in supervising parolees because parolees are more likely to commit future criminal offenses. Similarly, this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.

The empirical evidence presented in this case clearly demonstrates the significance of these interests to the State of California. As of November 30, 2005, California had over 130,000 released parolees. California's parolee population has a 68– to 70– percent recidivism rate. *See* California Attorney General, Crime in California 37 (Apr. 2001) (explaining that 68 percent of adult parolees are returned to prison, 55 percent for a parole violation, 13 percent for the commission of a new felony offense); J. Petersilia, Challenges of Prisoner Reentry and Parole in California, 12 California Policy Research Center Brief, p. 2 (June 2000), available at http:// www.ucop.educ/parole.pdf854 (as visited June 15, 2006, and available in Clerk of Court's case file) ("70% of the state's paroled felons reoffend within 18 months—the highest recidivism rate in the nation"). This Court has acknowledged the grave safety concerns that attend recidivism.

As we made clear in *Knights*, the Fourth Amendment does not render the States powerless to address these concerns effectively. Contrary to petitioner's contention, California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids, rather than hinders, the reintegration of parolees into productive society.[5]

On the continuum of state-imposed punishments, supervised release is akin to parole, and is therefore subject to a similar special needs search analysis. *See Samson*, 547 U.S. at 850 (citing to *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002) ("[F]ederal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration.")).[6]

In the context of probation, the Supreme Court has held that a warrantless search of a probationer, supported by reasonable suspicion and authorized by a condition of probation, is

[5] *Samson*, 547 U.S. at 850-54 (most internal citations and quotations omitted).

[6] *See also United States v. Libby*, 495 F. Supp. 2d 49, 52 n.2 (D.C. 2007) ("[A] sentence of supervised release is related to, but wholly distinct from, a sentence of probation. *Compare* 18 U.S.C. § 3561 *et seq.* (2000) (probation) with 18 U.S.C. § 3583 (supervised release). Most notably, "[f]ederal supervised release, in contrast to probation, is meted out *in addition to, not in lieu of, incarceration*." *Samson v. California*, 547 U.S. 843, 850 (2006) (internal quotation marks, ellipsis, and citation omitted) (emphasis added). As a result, like parole (which preceded it as a post-confinement term of supervision in federal sentencing), supervised release "is more akin to imprisonment than [is] probation." *Id.*; *see United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) (stating that "on the continuum of supervised release, parole, and probation, restrictions imposed by supervised release are the most severe")." (emphasis in original)).

reasonable under the Fourth Amendment.[7] In *Knights*, "[a] California court sentenced respondent Mark James Knights to summary probation for a drug offense. The probation order included the following condition: that Knights would '[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.' Knights signed the probation order, which stated immediately above his signature that 'I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.'"[8] The Supreme Court held that "the search of Knights was reasonable under our general Fourth Amendment approach of examining the totality of the circumstances, with the probation search condition being a salient circumstance."[9]

Following the *Knights* opinion, several federal courts of appeals have also upheld *suspicionless* searches of people on probation. In 2016, the U.S. Court of Appeals for the Sixth Circuit resolved "an issue that was left open by the Supreme Court" in *Knights*: "Whether, under the Fourth Amendment, a probationer whose probation order contains a search condition may be subjected to a search in the absence of reasonable suspicion."[10] In that case, the Sixth Circuit upheld the suspicionless search of a person on probation under the Fourth Amendment, following imposition of a " 'standard' search condition that applies to all probationers in Tennessee: 'I agree to a search without a warrant of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time.'"[11] In 2013, the U.S. Court of Appeals for the Ninth Circuit held: "The question that we must answer is whether the Fourth Amendment permits a suspicionless search of a probationer's residence. We hold that such a search is permissible when, as here, a violent felon has accepted a suspicionless-search condition as part of a probation agreement."[12]

In addition, the D.C. Court of Appeals has held that "CSOSA's imposition of GPS monitoring on [a person on probation] without judicial authorization was a constitutional 'special needs' search; it was constitutional because his reasonable expectation of privacy as a convicted offender on probation was diminished and was outweighed by the strong governmental interests in effective probation supervision to deter and detect further criminal activity on his part and encourage his rehabilitation."[13] In so holding, the D.C. Court of Appeals summarized the Supreme Court's recognition of the "special needs" exception to the warrant requirement as follows:

> In sum, under the "special needs" analysis of *Griffin*, the Fourth Amendment permits probation supervision to intrude significantly on probationers' privacy without judicial approval or probable cause in order to determine whether they are

[7] *United States v. Knights*, 534 U.S. 112 (2001).

[8] *Id.* at 114 (internal citations omitted).

[9] *Id.* at 117 (internal citations and quotations omitted).

[10] *United States v. Tessier*, 814 F.3d 432, 433 (6th Cir. 2016).

[11] *Id.*

[12] *United States v. King*, 736 F.3d 805, 806 (9th Cir. 2013).

[13] *United States v. Jackson*, 214 A.3d 464, 467 (D.C. 2019).

> abiding by the law and the conditions of their probation, because probationers' reasonable privacy expectations are diminished and are outweighed by the heightened governmental interests in deterring them from re-offending and promoting their rehabilitation.

Jackson, 214 A.3d at 475 (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).[14]

Further, a person on probation must consent to the terms of probation, so a search of a probationer under this provision would be deemed consensual. D.C. Code § 16-710(a) provides, in pertinent part: "A person may not be put on probation without his consent." *See also Jamison v. United States*, 600 A.2d 65, 71 (D.C. 1991) (Consistent with the plain language of D.C. Code § 16-710(a): "Where counsel or the defendant fairly manifests an apparent objection to the probation, as plainly was the case here, the trial court cannot proceed to impose probation without obtaining an explicit consent on the record, to ensure compliance with the command of the statute. *See Clayton v. United States*, 429 A.2d 1381 (D.C. 1981) (court has no authority to impose sentence of a nature or in manner not authorized by statute)."); *Jones v. United States*, 560 A.2d 513, 516 n.3 (D.C. 1989) ("We note that under D.C. Code § 16-710 persons may not be put on probation without their consent. Thus, the court has authority to impose conditions only by the probationer's consent. This does not mean that once a convicted person agrees to probation the conditions imposed are optional and probationers are free to violate them. A convicted defendant, however, may decline probation and its conditions, and choose to complete whatever non-probationary sentence the judge imposes within the statutory limits for the offense."). Because the imposition of probation must be consensual, the defendant's agreement to the terms of such probation—including submitting to a search—are consensual as well.[15]

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[14] The court in *Jackson* also recognized that: "While probation supervision is a 'special need' permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large, that permissible degree is not unlimited." 214 A.3d at 477.

[15] *See, e.g.*, *California v. Bravo*, 738 P.2d 336, 341 (Cal. 1987) (en banc) ("A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege. If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence. A probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain. Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose. We see no basis for denying a defendant the right to waive his Fourth Amendment rights in order to accept the benefits of probation." (internal citations and quotations omitted)); *see also California v. Sandee*, 222 Cal. Rptr. 3d 858, 865 n.6 (Cal. Ct. App. 2017) ("In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term. For nearly three decades, this court has upheld the legality of searches authorized by probation terms that require probationers to submit to searches of their residences at any time of the day or night by any law enforcement officer with or without a warrant." (internal citations and quotations omitted)); *Illinois v. Absher*, 950 N.E. 2d 659, 667-68 (Ill. 2011) ("Faced with the possibility of imprisonment and a complete loss of freedom and privacy rights, defendant opted to avoid incarceration and agree to probation, including a year of the more restrictive 'intensive' version and its greater invasion of privacy. This bargain was advantageous to defendant, as he avoided jail time and gave up nothing by agreeing to probation and its restrictions. The bargain was also advantageous to the State, in that it assured that defendant was required to comply with the more restrictive conditions of intensive probation for the first year. It is undisputed that the agreement was explained

Consistent with the California statute, several other states require people convicted of certain offenses to be subject to suspicionless searches as a mandatory condition of post-conviction supervision, either through legislation,[16] or as a condition of probation or parole.[17]

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to defendant, he understood its provisions and he freely signed the form. . . . We therefore hold that under the specific facts in this appeal, defendant's agreement to the suspicionless search condition in article 10(c) of his probation order constituted prospective consent."); *accord United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005).

[16] Arkansas law provides: "A person who is placed on supervised probation or is released on parole under this chapter is required to agree to a waiver as a condition of his or her supervised probation or parole that allows any certified law enforcement officer or Division of Community Correction officer to conduct a warrantless search of his or her person, place of residence, or motor vehicle at any time, day or night, whenever requested by the certified law enforcement officer or division officer. A warrantless search that is based on a waiver required by this section shall be conducted in a reasonable manner but does not need to be based on an articulable suspicion that the person is committing or has committed a criminal offense." Ark. Code Ann. § 16-93-106(a); *see also Clingmon v. Arkansas*, 620 S.W. 3rd 184 (Ct. App. Ark. 2021) (upholding constitutionality of statute).

Illinois law provides: "The conditions of every parole and mandatory supervised release are that the subject: . . . consent to a search of his or her person, property, or residence under his or her control." Ill. Comp. Stat. Ann. § 5/3-3-7(a)(1); *see also Illinois v. Wilson*, 885 N.E. 2d 1033 (Ill. 2008) (upholding suspicionless search of the residence of a parolee on mandatory supervised release with this statutory condition of release).

Kansas law provides: "Parolees and persons on postrelease supervision are, and shall agree in writing to be, subject to searches of the person and the person's effects, vehicle, residence and property by a parole officer or a department of corrections enforcement, apprehension and investigation officer, at any time of the day or night, with or without a search warrant and with or without cause. Nothing in this subsection shall be construed to authorize such officers to conduct arbitrary or capricious searches or searches for the sole purpose of harassment." Kan. Stat. Ann. § 2203717(k)(2); *see also Kansas v. Toliver*, 417 P.3d 253 (Kan. 2018) ("[A]n authorizing state statute (or administrative regulation) presents one way in which a suspicionless search can withstand Fourth Amendment scrutiny. But it is not the only way. . . . [A] parole or probation condition in an agreement signed by the defendant can also establish a diminished privacy right.").

Michigan law provides: "The parole order must require the parolee to provide written consent to submit to a search of his or her person or property upon demand by a peace officer or parole officer. . . . The prisoner shall sign the written consent before being released on parole. . . . Consent to a search as provided under this subsection does not authorize a search that is conducted with the sole intent to intimidate or harass." Mich. Comp. Laws Ann. § 791.236.

New Hampshire law provides: "The following conditions shall be imposed for all parolees: . . . Permitting the parole officer to visit parolee's residence at any time for the purpose of examination and inspection in the enforcement of the conditions of parole and submit to searches of his person, property, and possessions as requested by the parole officer." N.H. Code Admin. R. § 401.02(b)(9).

[17] Colorado requires as a standard condition of parole that a person "allow a [community parole officer] to search your person, residence, or premises under your control, vehicle, and/or property under your control, including all electronic devices such as cell phones, computers, and pagers." *See* Colorado Parole Directives, *available at* https://drive.google.com/file/d/1OCZW4RmnB25vmvEqrRWkuVlE_4ZcrVyY/view; *see also* Colorado Department of Corrections, Parole, *available at* https://cdoc.colorado.gov/parole-and-re-entry-services/supervision/parole#:~:text=Parolees%20must%20complete%2050%25%20of,29%2C%20Early%2FEarned%20Discharge.

Georgia requires, as a standard condition of parole, that a person agree that: "My community supervision officer or any other community supervision officer may, at any time, conduct a warrantless search of my person, papers, and place of residence, automobile, or any other property under my control." *See* Georgia State Board of Pardons and Paroles, Parole Conditions, *available at* https://pap.georgia.gov/parole-population-georgia/parole-

In sum, the United States Supreme Court, the D.C. Court of Appeals, and other jurisdictions have recognized that, in the context of probation, supervised release, and parole, a person's privacy interests may be impinged upon, given the government's strong interest in deterring recidivism and promoting desistance from criminal activity. Notably, there are other onerous conditions that may be imposed as conditions of probation, supervised release, or parole, such as GPS monitoring, submitting to polygraph examinations as part of sex offender therapy, prohibitions on accessing a computer with access to the internet (for example, for people convicted of child pornography offenses), restrictions on locations that may be visited (for example, for a person convicted of a sex offense involving a child, a condition that a person not coming within a specified distance of a school, playground, or other area where children congregate). The provisions in this bill are tailored to ensure that people who are on post-conviction supervision for gun offenses can be swiftly detected and apprehended when they have committed a new crime in public spaces.

Finally, a conforming amendment would be needed to D.C. Code § 23-526, which imposes limits on consent searches, to provide that searches executed pursuant to a "court order, or term or condition of release"—like searches executed pursuant to a search warrant—would not be subject to the statutory limitations imposed by this provision.

Definitions of "Significant Bodily Injury" and "Serious Bodily Injury"

The D.C. Code has a three-tiered classification system for assaults, which turns on the level of injury that the victim suffered:

	Maximum Sentence	**Injury Required**
Simple Assault	180 days	None

conditions#:~:text=Standard%20conditions%20which%20apply%20to,fee%20or%20victim%20compensation%20fee.

Idaho requires as a standard condition of parole that: "A parolee will submit to a search of person or property, or both, to include residence and vehicle, at any time and place by the supervisory authority or at the direction of the Commission, and the parolee waives the constitutional right to be free from such searches." Idaho Commission of Pardons and Parole, Rules of the Commission of Pardons and Parole, *available at* https://adminrules.idaho.gov/rules/current/50/500101.pdf.

Alaska courts have upheld a suspicionless search of probationer where suspicionless searches were a condition of probation; held "that if a probationer's conditions of probation authorize suspicionless searches of the probationer's person, a probation officer who wishes to exercise this authority has the concurrent right to stop and temporarily detain the probationer in order to conduct the search (subject to the limitations expressed in [case law]: that the search must be conducted at a reasonable time and in a reasonable manner, and that the search must not be conducted for the purpose of harassing the probationer;" and held that probation officer's "decision to enlist the aid of the police in effecting the stop [] did not alter the legality of the stop"). *Brown v. Alaska*, 127 P.3d 837 (Alaska Ct. App. 2006).

Compare Murry v. Virginia, 762 S.E. 2d 573 (Va. 2014) ("a probation condition requiring [defendant] to submit to warrantless, suspicionless searches of his person, property, residence, and vehicle at any time by any probation or law enforcement officer . . . is not reasonable in light of the offenses for which [defendant] was convicted, his background, and the surrounding circumstances," noting that defendant "objected to this probation condition, arguing that the Fourth Amendment waiver was 'not really necessarily appropriate' because the [rape] convictions did not involve illegal substances or firearms").

Assault with Significant Bodily Injury ("Felony Assault")	3 years	"Significant" Bodily Injury
Aggravated Assault	10 years	"Serious" Bodily Injury

Particularly since the intermediate-level of "Felony Assault" was created by statute in 2006,[18] courts have struggled to define the exact parameters of each level of assault, resulting in extensive litigation and numerous appellate opinions. As one D.C. Court of Appeals judge described, the Court of Appeals' "opinions have offered various formulations or examples in recent years in an effort to differentiate between the types of assault," which "frequently arise out of the facts of a particular case before the court." *Wilson v. United States*, 140 A.3d 1212, 1222 (D.C. 2016) (Belson, J., dissenting). This bill's clarifications will help avoid this piecemeal approach and provide much-needed clarity to courts, jurors, prosecutors, defense attorneys, and the community as to which injuries qualify as "significant bodily injury"—required to prove assault with significant bodily injury in violation of § 22-404(a)(2)—and "serious bodily injury"—required to prove aggravated assault in violation of § 22-404.01(d).

First, this bill provides that "a gunshot wound" qualifies as a "serious bodily injury" for the felony offense of aggravated assault. This common-sense change makes clear that being shot by a gun is a severe assault that should be treated as the serious bodily injury that it is.

Under current law, a gunshot wound is not always even a *significant* bodily injury—a lower injury threshold than serious bodily injury. The D.C. Court of Appeals has held that "wounds created by a bullet are not *per se* significant bodily injuries." *Nero v. United States*, 73 A.3d 153 (D.C. 2013) (holding that one of the gunshot wounds in this case was not a "significant bodily injury," because the victim "was approximately nineteen feet away from appellant when he was shot and did not even realize that he had been injured until a paramedic had him remove his jacket," the record was "unclear whether the bullet actually penetrated his skin or merely grazed it," and "[t]he only medical treatment [the victim] received was diagnostic tests, pain medication, and wound care," and holding that the second gunshot wound in this case was a "significant bodily injury," because the victim "was shot at close range and the bullet traveled through his bicep, causing obvious pain and bleeding"; had he not been treated, he "probably would have had a higher chance of wound infection, which demonstrates that there was a risk of long-term damage or complications"). This bill would ensure that, under the D.C. Code, a gunshot wound is a *per se* serious bodily injury. In July, Colorado also made this statutory change, modifying its definition of "serious bodily injury" to include a "penetrating gunshot wound" or a "penetrating knife wound."[19]

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[18] "The Council of the District of Columbia enacted the statute in 2006 in order to fill the gap between simple assault, a misdemeanor that requires no physical injury and carries a maximum penalty of 180 days imprisonment, and aggravated assault, a felony that requires 'serious bodily injury' and provides for a maximum term of ten years imprisonment. In its committee report describing this new intermediate level of assault, the D.C. Council explained that it intended to provide a penalty for assault that results in significant (but not grave) bodily injury." *Wilson v. United States*, 140 A.3d 1212, 1217 n.8 (D.C. 2016) (cleaned up).

[19] *See* "An Act Concerning the definition of serious bodily injury in section 18-1-901, Colorado Revised Statutes," Bill 23-034 (effective July 1, 2023), *available at* https://leg.colorado.gov/bills/sb23-034; Co. St. § 18-1-901(p). Colorado's full definition of "serious bodily injury" now provides: " 'Serious bodily injury' means bodily

Second, this bill modifies the definition of "significant bodily injury" to include "[a]n injury where medical testing, beyond what a layperson can personally administer, was performed to ascertain whether there was an injury described" elsewhere in the subsection. There is precedent in existing case law that *testing* for serious injuries may qualify as a "significant bodily injury," even if the ultimate injury did not *require* medical treatment beyond testing, but its parameters are unclear in existing law. Therefore, this bill simplifies the definition by clarifying that medical testing for *any* of the injuries delineated in the statute qualifies as a "significant bodily injury"—meaning the injury would result in the intermediate charge of "assault with significant bodily injury," which carries a maximum of three years' incarceration.[20]

Illustrating the difficulty in interpreting the current statute, and the need for this bill's clarification, judges have been unable to agree amongst themselves whether a certain level of injury was sufficient *on the same facts*. In *Wilson*, a passenger in a taxicab attacked a taxi driver. As described by the dissenting opinion in that case: "Incensed by what he considered the driver's failure to take him and his fellow passengers to the desired location, [the passenger-defendant] viciously attacked [the taxi driver-victim]. In the course of that attack, [the defendant] choked [the victim] and then struck him above his left eye, causing very severe bleeding. The blow made [the victim] dizzy. [The defendant], who is much larger than his victim, then leapt upon [the victim's] back, wrapped his own legs around [the victim's] legs, and drove him face forward to the ground. [The victim] hit the ground so hard, according to [the defendant's] fellow passenger, that it caused a 'dull thud' that 'sounded like it hurt.'" *Wilson v. United States*, 140 A.3d 1212, 1221 (D.C. 2016) (Belson, J. dissenting). When police arrived, they found the victim with cuts all over his face and profuse bleeding pouring down. *Id.* at 1215, 1221. The victim taxi-driver was unable to speak well, appeared in great pain, and his jaw appeared potentially broken. *Id.* Paramedics treated the victim in the ambulance for about a half-hour, then transported him by ambulance to the hospital, where they placed a brace around his neck, a cuff on his arm, and electrodes on his chest. *Id.* A jury unanimously convicted the defendant of Felony Assault, but the majority opinion reversed that conviction, holding that "[h]owever bad the injuries may seem," they did not qualify as "significant bodily injury." *See id.* at 1218. The third judge on the panel disagreed, concluding that felony assault was "supported by evidence about the beating, the bleeding, the pain, the dizziness, as well as [the victim's] inability to move his jaw, which a medical technician thought was broken, the subsequent decision by trained medical personnel to

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injury that, either at the time of the actual injury or at a later time, involves a substantial risk of death; a substantial risk of serious permanent disfigurement; a substantial risk of protracted loss or impairment of the function of any part or organ of the body; or breaks, fractures, a penetrating knife or penetrating gunshot wound, or burns of the second or third degree."

[20] The D.C. Court of Appeals has held: "Although a 'significant bodily injury' is usually one calling for professional medical treatment to prevent long-term physical damage or avert severe pain, it may also be an injury that poses a manifest risk of such harm and requires diagnostic testing to evaluate the danger and need for treatment—even if the testing reveals that treatment is unnecessary." *Cheeks v. United States*, 168 A.3d 691 (D.C. 2017) (a "prolonged beating that included repeated blows to his head" accompanied by a doctor's order for "CAT tests to determine whether [the victim] had sustained brain damage, broken bones, or other serious internal injures" qualified as a "significant bodily injury" given that the injuries "demanded immediate medical attention in the form of diagnostic testing to evaluate [the victim's need for medical treatment to prevent grave long-term physical damage"). The D.C. Court of Appeals made a similar finding in *Blair v. United States*, 114 A.3d 960 (D.C. 2015) ("where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury").

seek further medical treatment at the hospital after tending to [the victim] for a half-hour at the scene, and the medical decision to fit [the victim with a neck brace." *Id.* at 1221. Under this bill, injuries such as these would unquestionably be sufficient to meet the definition of "significant bodily injury."

Third, consistent with the "Safer Stronger Amendment Act of 2023," this bill provides that "any loss of consciousness" would constitute a "significant bodily injury" for the felony offense of assault with significant bodily injury.[21] Using force sufficient to cause a victim to lose consciousness—regardless of the length of the loss of consciousness—is serious conduct that should result in felony liability. Requiring the unconsciousness last a certain amount of time creates a potentially impossible barrier if the victim is the only witness to the loss of consciousness: the victim may not be able to ascertain how long they were unconscious. Under this bill, no medical testimony or eyewitness testimony would be needed to establish the loss of consciousness required to establish that the victim had a loss of consciousness, and this level of "significant bodily injury" could be established by the victim's testimony that the assault resulted in a loss of consciousness.

Carjacking

In a decision this summer, *McKinney v. United States*, the D.C. Court of Appeals reversed the appellants' convictions for armed carjacking because the court found that, as a matter of statutory interpretation, the evidence was insufficient to establish that the car was in the victim's "immediate actual possession" at the time the car was taken.[22]

This bill ensures liability for carjacking in two ways: (1) consistent with federal law, the taking of a motor vehicle "from the person or presence of another," and (2) the taking of a person's car keys from the immediate actual possession of another, with the purpose and effect of taking the motor vehicle of another.

In *Sutton v. United States*, the D.C. Court of Appeals relied on federal court decisions interpreting the federal carjacking statute when interpreting the District's carjacking statute.[23] Federal court decisions have repeatedly found the "presence" element under the federal carjacking statute, 18 U.S.C. § 2119, satisfied without focusing on specific distances. Instead, federal courts have adopted what the D.C. Court of Appeals referred to in *Sutton*[24] as the "*Lake/Kimble* formulation." That formulation focuses on whether a person could have regained control of his property had he not been "overcome by violence or prevented by fear," which

[21] Although the aggravated assault statute includes "unconsciousness" as a basis for "serious bodily injury," the D.C. Court of Appeals has held that a brief loss of consciousness of approximately a minute or less does not qualify as a "significant bodily injury." *In re D.P.*, 122 A.3d 903, 913 (D.C. 2015). In a separate case, the D.C. Court of Appeals has questioned, but not decided, whether any loss of consciousness, however brief, could amount to the requisite serious bodily injury to sustain an aggravated assault conviction. *Vaughn v. United States*, 93 A.3d 1237, 1269 n.39 (D.C. 2014) (*cited in D.P.*, 122 A.3d at 913 n.10)).

[22] *McKinney v. United States*, 299 A.3d 1283 (D.C. Aug. 24, 2023).

[23] *See Sutton v. United States*, 988 A.2d 478, 487-88 (D.C. 2010).

[24] *Id.*

"does not merely require proximity to the car."[25] In fact, various circuit courts have found victims to be in the presence of their vehicles under factual circumstances similar to the facts in *McKinney v. United States*.[26] To ensure that the District's carjacking statute is interpreted in the same manner as the federal carjacking statute, this bill adopts the federal language of "person or presence of another."[27]

Further, there are situations where a person's key to a car is taken by force, violence, or putting in fear, with the purpose and effect of taking that person's motor vehicle, which should be included as a basis for liability in the carjacking statute. There are multiple factual scenarios where this would ensure liability for carjacking. First, this would clearly encompass the factual scenario in *McKinney*.[28] In that case, the victim parked his car in the apartment building's parking lot, and walked with five companions down a sidewalk around to the side of the building. When they got to the building's entrance, appellant Baham walked up to the victim, pulled out a gun, and told him to "drop everything." The victim testified that appellant McKinney then patted down his pockets and took his wallet, phone, and car keys. The victim, still afraid of being shot, "ducked off behind some bushes" and did not see in which direction his assailants walked off. When he came out from the bushes several minutes later, he saw that his car was gone. Because of his location in relation to the building's parking lot, the victim did not actually see anybody take his car. Second, this would encompass a situation where, for example, a person has left a child in a car, but taken their keys with them, and the defendant forcefully steals the keys from the person and drives off with the child in the car. Third, this would encompass a situation where, for example, a person is lured away from their car under false pretenses, and the person's keys are then forcefully taken with the purpose of stealing the car.

Endangerment with a Firearm

We strongly support the Council's creation of a new felony offense of Endangerment with a Firearm through the "Prioritizing Public Safety Emergency Amendment Act of 2023."

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[25] *Id.* at 487.

[26] *See United States v. Soler*, 759 F.3d 226, 235 (2nd Cir. 2014) (defendants took vehicle from victim's presence where victim was robbed of keys inside her home, vehicle was at the curb outside her home, and victim did not see defendants leave her home or enter her vehicle); *United States v. Kimble*, 178 F.3d 1163, 1168 (11th Cir. 1999) (victim was in the immediate presence of his vehicle when victim, whose car was parked outside of a restaurant, was robbed indoors of keys that were then used to steal the car, because victim could have prevented the taking of his vehicle had he not been fearful of defendant); *United States v. Lake*, 150 F.3d 269, 273 (3rd Cir. 1998) (car was close enough for victim to have prevented its taking had fear of violence not caused victim to hesitate, where victim was robbed of keys that were used to steal a car that was up a steep hill and out of sight). *See also People v. Raper*, 563 N.W.2d 709, 712-713 (Mich. 1997) (removing keys from victim's body in order to steal his car, which was 200 yards away, constituted taking car from victim's "presence" under Michigan carjacking statute).

[27] *See* 18 U.S.C. § 2119.

[28] In the *McKinney* decision, while citing to the "*Lake/Kimble*" framework and declining to formally express a view on whether the facts in the *McKinney* case would have created liability under the federal framework, the D.C. Court of Appeals noted that the facts in *McKinney* may lead to a "strained interpretation" under the federal carjacking statute. *See* 299 A.3d at 1290 n.6. The D.C. Court of Appeals in *McKinney* noted, however, that this interpretation may be contrary to the interpretations adopted by the U.S. Court of Appeals for the Third Circuit in *United States v. Lake*, 150 F.3d 269 (3d Cir. 1998), and the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Kimble*, 178 F.3d 1163 (11th Cir. 1999). *See id.*

This bill makes several targeted modifications to this new offense to enhance its applicability and utility.

First, this bill increases the maximum penalty for endangerment with a firearm to 5 years' incarceration. This would create the same maximum penalty as carrying a pistol without a license (CPWL), and half the maximum penalty of unlawful possession of a firearm (FIP). The harms caused by discharging a firearm as described in the statute are *at least* as great as the harms caused by CPWL, if not more so. Further, as a general matter under the D.C. Code, the maximum sentence under a statute does not reflect the maximum sentence that a judge may impose at the time of initial sentencing for a felony offense. Under current law, the judge cannot impose the maximum penalty for a felony offense at the time of initial sentencing, and must reserve a period of time—which is subtracted from the maximum sentence—that may later be imposed if the defendant violates supervised release. For example, where there is a 5-year statutory maximum, 2 years must be reserved, so the judge may only impose a maximum of 3 years at the time of the initial sentencing. Where there is a 3-year statutory maximum, 1 year must be reserved, so the judge may only impose a maximum of 2 years at the time of the initial sentencing. When there is a 2-year statutory maximum, 1 year must be reserved, so the judge may only impose a maximum of 1 year at the time of the initial sentencing. To enable a judge to impose a 3-year sentence at the time of the initial sentencing—and to create penalties proportionate to CPWL—this offense should carry a maximum of 5 years' incarceration. Finally, with a 2-year maximum, this offense was categorized as a Group 9 offense within the D.C. Voluntary Sentencing Guidelines—the lowest possible category for a felony offense. At a minimum, consistent with CPWL, this offense should be categorized as a Group 8 offense within the D.C. Voluntary Sentencing Guidelines. A Group 9 offense means that, for a person with no criminal history, the guidelines permit a probationary sentence, with a range of only 1 month to 1 year suspended incarceration, which can later be imposed if the defendant violates probation.[29] For a person with the most serious criminal history, the guidelines create a range of only 9 months' incarceration or more. A Group 8 offense similarly permits a probationary sentence for a person with no criminal history, but creates a range of 6-24 months' incarceration. For a person with the most serious criminal history, the guidelines create a range of 22 months' incarceration or more. If this offense had a 5-year statutory maximum, it would be appropriate to categorize this offense as a Group 8 offense, rather than a Group 9 offense.

Second, this bill creates enhanced penalties for discharging a firearm under certain circumstances. In the same manner as CPWL, this bill creates heightened liability where a person commits this offense having been previously convicted of a felony offense. Further, this bill creates heightened liability where a person commits this offense by firing 5 or more bullets. This reflects the heightened danger to the community from firing more bullets, as each bullet represents an opportunity to hit another person and kill or wound them. Notably, if the firearm is a "machine gun," that could be prosecuted separately and "stacked" on top of this offense.

[29] The time that must be reserved from the maximum sentence would not allow additional time for violation of *probation*; rather, it would only allow additional time for violation of *supervised release*. Supervised release is typically suspended when a probationary sentence is imposed. If the defendant later receives a sentence of incarceration-only for violating their probation (rather than another term of probation), then the term of supervised release is imposed. The time that was reserved at the time of initial sentencing could later be imposed only if the defendant later violated the term of *supervised release* that followed the incarceration that was imposed for violating probation.

Creating enhanced penalties would also mean that this enhanced conduct could be treated more seriously in the D.C. Voluntary Sentencing Guidelines, and ranked at a higher level than the unenhanced conduct.

Machine Guns

The "Safer Stronger Amendment Act of 2023" proposed creating felony liability for possession of a machine gun or a "ghost gun," reflecting the potential increased danger to the community caused by possession of a machine gun—which includes possession of a "switch" that can convert a semi-automatic firearm into an automatic firearm—or a "ghost gun" that is not traceable. USAO-DC supports that provision.[30] This bill builds upon that proposal by requiring, where the weapon is a "machine gun," that sentence be "stacked" on top of any other sentence, which reflects the additional harms caused by possessing a machine gun.

Discarding Firearms and Ammunition

This bill would fill a gap in liability by criminalizing unsafe discarding of firearms and ammunition. Discarding a firearm or ammunition creates the possibility of a child or a member of the general public finding that gun or bullets and harming themselves or others. Discarding or disposing a gun in public leaves it unsecured and increases the likelihood of crime and violence occurring through an unauthorized person gaining access. When a person throws a firearm in a public space, an untrained person might find it and harm themselves or another. Abandoned guns are left to be found by any passerby, and an improperly discarded firearm could leave a ready-to-use weapon accessible to the public at large. Abandoned firearms and ammunition may be diverted to the underground market, increasing the supply of weapons available and facilitating their use in violent crimes.

In addition to the potential for other individuals to find and use the firearms and ammunition, the act of throwing either a firearm or ammunition is inherently dangerous, as it could result in bystanders being hit or harmed by expelled projectiles from the firearm or from the ammunition discharging. This is particularly true when individuals throw a firearm or ammunition while running in an attempt to escape law enforcement. Several federal courts of appeals have recognized these inherent dangers when interpreting a sentencing enhancement under the U.S. Sentencing Guidelines.[31] These courts have held that the act of discarding a firearm satisfies the requirement that "the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." *See, e.g., United*

[30] USAO-DC presented the following testimony to the D.C. Council in support of this provision: Under current law, possession of a machine gun is generally punishable as misdemeanor possession of a prohibited weapon (PPW), with a statutory maximum of 1 year incarceration. If a person "carries" a machine gun without a license outside their home or business, that conduct can be prosecuted as CPWL, as the machine gun is a type of "pistol" or "deadly or dangerous weapon," with a statutory maximum of 5 years' incarceration. *See* D.C. Code § 22-4504(a)(1). Possession of a machine gun can often be prosecuted as CPWL, except where the person possesses the machine gun in their home, in the truck of their car, or in a similar location where they would not be "carrying" the machine gun. In those situations, possession of a machine gun would be subject to the 1-year maximum for PPW(a). Felony liability for this conduct, however, is proportionate to the severity of the conduct.

[31] *See* U.S. Sentencing Guideline 3C1.2.

States v. Carter, 817 Fed. App'x 132, 134 (6th Cir. 2020) ("The idea that a discarded gun, especially a loaded gun, creates a substantial risk of serious bodily harm to another person is well supported by caselaw." (internal quotations omitted)); *United States v. Gray*, 942 F.3d 627, 632 (3d Cir. 2019) ("[T]he record shows, and Gray does not dispute, that he threw a *loaded* firearm down a street in a residential neighborhood in the vicinity of a police officer and at least one civilian. This act alone is sufficient to create a substantial risk of serious bodily injury since the loaded firearm could have been picked up and fired by one of the people in the vicinity or discharged when thrown."); *United States v. Slaughter*, 386 F.3d 401, 404 (2d Cir. 2004) ("The District Court applied the enhancement after finding recklessness based on defendant's throwing the loaded handgun in an area where children were playing. . . . Such conduct undoubtedly created a substantial risk of death or serious bodily injury to those children and to the other bystanders around the complex, and was certainly a gross deviation from the standard of care that a reasonable person would exercise in such a situation." (*citing United States v. Brown*, 314 F.3d 1216, 1221 (10th Cir. 2003))).

Current District law contains several criminal offenses related to the irresponsible use of firearms but does not contain a criminal offense for unsafe discarding of a firearm in public. D.C. Code § 7-2507.02 requires a person to keep a firearm safely stored on premises under their control, if a minor could gain access to that firearm. Likewise, District law criminalizes possession of a firearm by certain unauthorized people,[32] and prohibits firearms to be carried without a license.[33] These laws are designed to encourage responsible gun ownership and prevent deadly weapons from falling into the wrong hands. However, current District law only criminalizes the unsafe storage of a firearm when the defendant has control over the premises.[34] As a result, the District's safe storage law does not apply to the unsafe disposal of a firearm when it occurs *outside* of premises under the defendant's control, including in public areas. This bill would create liability for this conduct.

Finally, this offense criminalizes conduct that is distinct from the original possessory offense (such as CPWL), as different dangers are created by possessing a firearm (where the possessor may fire the gun) and discarding a firearm (where it may be found by a passerby or harm bystanders). The public safety implications for this offense are thus different from the public safety implications involved in possessing, carrying, or transporting a firearm.

Prearrest Diversion

This bill proposes creating a Prearrest Diversion Task Force, which would be charged with developing recommendations for prearrest diversion, and implementing those recommendations.

The purpose of prearrest diversion is to identify—at the earliest opportunity during a contact with law enforcement—the people whose root causes of criminality are not being addressed through the traditional criminal justice system. Prearrest diversion focuses on people who are committing low-level, non-violent misdemeanor crimes that are driven by certain root

[32] *See* D.C. Code § 22-4503(a)(1).

[33] *See* D.C. Code § 22-4504(a).

[34] *See* D.C. Code § 7-2507.02(b).

causes, including mental and behavioral health issues, and substance use disorders. Although there are also opportunities in the District for post-charging diversion—including drug court and mental health court in D.C. Superior Court—there are some people who would be better served by earlier diversion interventions in the community, outside of the court system. By addressing the root causes driving criminality at an earlier opportunity, there is a greater likelihood that those root causes will be addressed and treated. These people will then receive the supports that they need to desist from criminal activity, leading to greater public safety.

There are several notable models of prearrest diversion in other jurisdictions, though they would need to be tailored to respond to the needs and structures of the District. By bringing this group of stakeholders together, the Task Force is in a position to work collaboratively to identify the structures that are needed to optimize prearrest diversion in the District.

Enhancing Pretrial Detention for Violent Crimes

Courts should have additional authority to detain adults charged with certain felony crimes pretrial when they pose a danger to the safety of another person or the community. In the District, there is a general statutory presumption that a person charged with a criminal offense will be released pending trial, except under limited circumstances. Thus, prosecutors can only request that a person be detained in jail pending trial when authorized by statute. We support this bill, which incorporates and builds on the provisions in the "Prioritizing Public Safety Emergency Amendment Act of 2023." This bill creates a rebuttable presumption of detention where a judge has found probable cause to believe that the person committed any "crime of violence," creates greater transparency to the community where a judge decides to release a person and a rebuttable presumption of pretrial detention exists, and provides judges additional discretion to extend the 100-day trial clock when there is good cause to do so. Further, this bill expands the court's ability to detain people pretrial who are charged with the most serious sexual crimes—first degree sexual abuse and first degree child sexual abuse—and aligns the standard of proof for a presumption of detention for the most serious crimes with the standard of proof for most serious felonies.

Rebuttable Presumption of Pretrial Detention for a Crime of Violence

Under current law, when a person is charged with a crime and makes their first appearance in court, there are certain statutes that authorize prosecutors to request pretrial detention, including: (1) where the person is charged with first or second degree murder, or assault with intent to kill while armed; (2) where the person is charged with a crime of violence or a dangerous crime; (3) where the person poses a risk of flight; or (4) where the person is on release in a pending case or is under post-conviction supervision.

When the court authorizes pretrial detention at that first appearance, the court holds a detention hearing, typically several days later. At the detention hearing, the court determines if there is probable cause to move forward with the case and whether the person should be detained pending trial. At this point, unless a statutory rebuttable presumption of pretrial detention applies, there is a presumption that a person will be released. The government must show by clear and convincing evidence that no condition or combination of conditions will reasonably

assure the appearance of the person as required or the safety of any other person in the community.

There are certain situations, however, where there is a statutory rebuttable presumption that a person should be detained pending trial, and to release a person, the court must find evidence to rebut that presumption. The statute contains a rebuttable presumption of pretrial detention where, for example, the court finds probable cause that the person committed a crime of violence while armed with a firearm, threatened a witness or juror, or committed a crime of violence while on release pending trial.

Before the passage of the "Prioritizing Public Safety Emergency Amendment Act of 2023," *there was no general presumption of detention when the court found probable cause to believe that a person committed a crime of violence*. Consistent with the provisions of the "Prioritizing Public Safety Emergency Amendment Act of 2023," this bill would create a rebuttable presumption of detention where the person is charged with committing a "crime of violence," as defined in D.C. Code § 23-1331(4).

This bill would also create more transparency and accountability to the community by requiring a judge to issue written findings of fact and a written statement of the reasons for the release when a rebuttable presumption applies, setting forth the evidence that it found had rebutted the statutory presumption. (Where there is *not* a presumption of pretrial detention, this bill would *not* require any written findings when a person is released pretrial.) These written orders are akin to the orders that judges are required to issue pursuant to § 23-1322(g) when finding that a person should be detained pretrial. Notably, in a very recent opinion, the D.C. Court of Appeals held that a Superior Court judge is *required* to issue a *second* set of written findings when detaining a person pretrial in certain situations. Specifically, the D.C. Court of Appeals held that "where, as here, the preliminary hearing has been reopened for the presentation of additional evidence (not simply proffers) bearing on probable cause and dangerousness, the trial court is obliged to issue written findings as 'a means of ensuring a thoughtful decision and facilitating expedited appellate review.'" *Johnson v. United States*, 2023 WL 6300018 (D.C. Sept. 28, 2023). This creates a new requirement for Superior Court judges when a judge decides to continue to detain a person after that second hearing, which raises a starker contrast to the lack of written findings required (even on one occasion) when the judge decides to release an individual notwithstanding a rebuttable presumption of detention.

This change would retain the general presumption of pretrial release for crimes that are not considered "crimes of violence" (including many felonies and all misdemeanors), but would provide a judge more discretion to protect the community where they have found probable cause to believe that the person committed any crime of violence, and where that person has been found to be a danger to the community. Notably, § 23-1322(c) only creates a *presumption* of detention, and does not require detention. Therefore, the court retains discretion to find that the presumption of detention has been rebutted, and to decide not to detain a person.

Enhanced Pretrial Detention for Serious Sexual Offenses

This bill would align pretrial detention for the most serious sexual offenses—first degree sexual abuse (rape) and first degree child sexual abuse (non-forced sexual abuse of a child)—with the pretrial detention provisions for murder and assault with intent to kill while armed.

Under current law, if a defendant is charged with first degree sexual abuse or first degree child sexual abuse and is detained pretrial, the case must be indicted within 90 days, and a trial must commence within 100 days.[35] By contrast, if a defendant is charged with first degree murder, second degree murder, or assault with intent to kill while armed, and is preventatively detained pretrial, the case must be indicted within 9 months.[36]

Given that the government must indict these serious sex offenses within 90 days and go to trial within 100 days of arrest, the government is limited and often rushed in its investigations and trial preparation. The government has just over three months to investigate the offense, build trust with the victim(s) and witness(es), conduct DNA testing, and collect and review evidence. Although a 100-day case may be continued for good cause, continuances are typically limited.

Sexual assault cases are unique in that they often require more time to build trust with the victims, who are often very vulnerable. This is particularly true when the victim is a child. Moreover, many serious sexual offenses involve serial offenders, so the government must work with multiple victims as it investigates and prepares for indictment and trial. It is difficult to build so many meaningful relationships and fully investigate the allegations in the short span of 100 days, even if there are limited extensions of time granted. Further, as with homicide cases, multiple rounds of DNA testing are often needed. Allowing nine months to indict the most serious sexual offense cases allows the government time to ensure that it completes a comprehensive investigation of these serious allegations that disproportionately affect women and children.

Further, these offenses are recognized as some of the most serious offenses in other parts of the criminal justice system. The D.C. Sentencing Commission, for example, has recognized the seriousness of certain sexual offenses, aligning them with other serious offenses delineated in § 23-1325(a) in the voluntary sentencing guidelines. Second degree murder and first degree sexual abuse are both categorized as Group 2 offenses in the sentencing guidelines, which means that they are subject to the same sentencing guideline ranges. Likewise, assault with intent to kill while armed and first degree child sexual abuse are both categorized as Group 3 offenses, so they are also subject to the same sentencing guideline ranges. (First degree murder is categorized as a Group 1 offense.) Because first degree sexual abuse and first degree child sexual abuse are subject to the same guideline ranges as second degree murder and assault with intent to kill while armed, respectively, they should be treated comparably for purposes of pretrial detention.

Rebuttable Presumption Standard Under § 23-1325(a)

Consistent with and building on the provisions of the "Prioritizing Public Safety Emergency Amendment Act of 2023," this bill would create, in § 23-1325(a), a rebuttable presumption of detention for murder, assault with intent to kill where armed, and serious sexual offenses where a judge finds "probable cause" that the person committed the offense "while armed with or having readily available a pistol, firearm, or imitation firearm, or other deadly or dangerous weapon," rather than, as current law provides, "substantial probability" to believe that the person committed the offense while armed with a pistol, firearm, or imitation firearm. This

[35] *See* D.C. Code § 23-1322(h).

[36] *See* D.C. Code § 23-1325(a); D.C. Code § 23-102; D.C. Sup. Ct. Rule of Crim. Pro. 48(c).

bill would align the standard of proof that leads to a presumption of detention under § 23-1325(a) (which applies to the most serious crimes, including murder while armed, and allows up to 9 months to indict) with the standard of proof that leads to a presumption of detention under § 23-1322(c) (which applies to all other rebuttable presumptions, and allows 100 days for a trial). That is, if a judge finds "probable cause" to believe that the defendant committed the charged crime under § 23-1325(a) while armed, there would be a presumption of detention pretrial. Judges would still retain the ultimate decision as to whether the presumption has been rebutted, which could include consideration of the strength of the government's evidence.

Under current law, for example, there would be a presumption of pretrial detention under § 23-1322(c)(1) if a judge found probable cause that a person committed a carjacking while armed with a firearm. However, if a judge found probable cause that a person *murdered someone* while committing a carjacking while armed with a firearm, there would be *no* presumption of pretrial detention under § 23-1325(a), because this statute requires a substantial probability finding, not probable cause. This change would create parity between the standards in these provisions. (Likewise, before the passage of the "Prioritizing Public Safety Emergency Amendment Act of 2023," if a judge had found probable cause that a person committed an unarmed carjacking, there would have been no rebuttable presumption of detention under § 23-1322(c), because there was no general presumption of detention for commission of a crime of violence.)

100-Day Trial Clock

When a person is detained pretrial for any offense other than an offense listed in § 23-1325(a), the trial must begin within 100 days of the initial detention. When the government is requesting more time to prepare for trial, the 100-day clock may be extended only in 20-day increments, for good cause shown.

This bill would eliminate the requirement that extensions to the 100-day clock be granted only in 20-day increments. Rather, it would provide a judge discretion to approve an extension for the time that the judge believes is appropriate. If the judge believes that a 20-day continuance is appropriate, the judge may continue to impose a 20-day continuance, but this bill would also provide a judge discretion to continue the trial beyond 20 days. The 20-day limitation means that, in practice, even if there is no expectation that either the government or the defense will be ready for trial in 20 days, the judge is limited to continuing the case in 20-day increments. This is inefficient for court and government resources, but also a burden on witnesses, who must be prepared for a new trial every 20 days and prepare to travel and take off work to testify at trial. For example, even if an essential witness were out of the country for 40 days on military duty, the trial could only be continued in 20-day increments. Notably, before any continuance at the government's request, the government would still need to show "good cause" to the judge as to the need for an extension of the 100-day clock.

Further, this bill would create a presumption of good cause where the government requests additional time for trial due to forensic analysis of evidence that was requested within a reasonable time after the preliminary hearing or delayed due to defense motions. Forensic testing has expanded significantly since this statute was written, and this statute should be amended to recognize the modern realities of forensic testing, which include the significant time required to conduct testing in light of the expectation and desire for such testing in almost all serious cases.

Searches of People Released Pretrial Notwithstanding a Presumption of Detention

For many of the same reasons as discussed above with respect to mandatory search conditions for people convicted of firearms offenses, this bill proposes creating a *discretionary* rebuttable presumption that a person released in a case where there is a rebuttable presumption of pretrial detention shall be required to consent to the condition that they be subject to a search when in a public place.

The U.S. Court of Appeals for the First Circuit has upheld the constitutionality of a similar provision under Maine state law, where the condition of pretrial release was discretionary for the court to impose.[37] The U.S. Court of Appeals for the Ninth Circuit has held that a provision that *mandated* that the judge impose a similar condition of pretrial release was unconstitutional,[38] but courts have distinguished these holdings by noting that the law at issue in the First Circuit required that the judge make an *individualized* determination when setting bail conditions, and while it permits the judge to require that a defendant consent to a search, it does not *mandate* that a judge impose that requirement.[39] The language in this bill is akin to the language upheld by the First Circuit.

Moreover, a 2011 opinion from the U.S. District Court for the Eastern District of New York held:

> An indictee may also be subject to pre-trial release conditions that infringe upon his constitutional rights, provided that there has been an independent judicial determination that such conditions are necessary. *Compare, e.g.*, 18 U.S.C. § 3142(c)(1)(B)(xiv) ("If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person . . . subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person ... satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."); *and Berry v. District of Columbia*, 833 F.2d 1031, 1036 (D.C. Cir. 1987) (stating that drug testing and treatment as a condition of pre-trial release would likely be constitutional if "there is an individualized determination that an arrestee will use drugs while released pending trial"); *with United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) (holding that a pretrial release condition imposed under state law requiring that the defendant consent to random drug testing and the searching of the defendant's home violated the Fourth Amendment in the absence of any judicial determination that such condition was necessary); *United States v. Polouizzi*, 697 F. Supp. 2d 381, 394–95 (E.D.N.Y.2010) (holding that the Adam Walsh Child Protection and Safety Act of

[37] *United States v. Gates*, 709 F.3d 58 (1st Cir. 2013).

[38] *United States v. Scott*, 450 F.2d 863 (9th Cir. 2006).

[39] *See United States v. Kissh*, 433 F. Supp. 3d 1 (D. Me. 2020).

2006's requirement that individuals under arrest for child pornography charges be required to undergo electronic monitoring as a condition of pre-trial release unconstitutional); *United States v. Smedley*, 611 F. Supp. 2d 971, 976 (E.D. Mo. 2009) (same); *United States v. Merritt*, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009) (holding that requirement of electronic monitoring and imposing a curfew as a condition of pre-trial release unconstitutional); *United States v. Torres*, 566 F. Supp. 2d 591, 598 (W.D. Tex. 2008) (same); *United States v. Arzberger*, 592 F. Supp. 2d 590, 607 (S.D.N.Y.2008) (striking down the Adam Walsh amendment's curfew and electronic monitoring requirements; restrictions on firearms possession; and restrictions on associating with witnesses); *United States v. Crowell*, Nos. 06–M–1095, 06–CR–291, 06–CR–304, 2006 WL 3541736, at *10 (W.D.N.Y. Dec. 7, 2006) (holding the Adam Walsh amendment's mandatory imposition of pretrial release conditions unconstitutional).[40]

Definitions of "Dangerous Crime" and "Crime of Violence"

"Dangerous Crime" Definition

First, this bill modifies the definition of "dangerous crime" in D.C. Code § 23-1331(3) to include all felony sex offenses under Title 22, Chapter 30. This would, among other things, expand a court's ability to detain a person pretrial when they are charged with felony sex offenses—such as first/second degree sexual abuse of a minor; first/second degree sexual abuse of a ward, patient, client, arrestee, detainee, or prisoner; and first/second degree sexual abuse of a patient or client—that are not in the "crime of violence" or current "dangerous crime" definitions. This change would allow USAO-DC to seek an initial pretrial hold under § 23-1322(b)(1)(A) at the defendant's initial appearance, and would also lead to a rebuttable presumption of detention under § 23-1322(c) where, among other options, 2 or more dangerous crimes in separate incidents are joined (for example, when the case involves multiple victims). Finally, this language aligns § 23-1331(3)(H) with the other provisions of this subsection, which designate "any felony offense" under other chapters of the D.C. Code as "dangerous crimes."

"Crime of Violence" Definition

First, this bill designates "strangulation" as a crime of violence, which the Council created as a new felony offense in the "Prioritizing Public Safety Emergency Amendment Act of 2023." This reflects the seriousness and violent nature of the offense of strangulation. In addition, this would make strangulation eligible for pretrial preventative detention under D.C. Code § 23-1322(b)(1)(A), and for the newly created rebuttable presumption of pretrial detention under D.C. Code § 23-1322(c). Allowing pretrial preventative detention will in turn help to protect victims who have been strangled. This is particularly important given the elevated lethality risk to the victim following strangulation. Further, categorizing strangulation as a crime of violence will allow certain penalty enhancements to attach, in appropriate circumstances, including where a crime of violence is committed against a minor under D.C. Code § 22-3611, or where a crime of violence is committed while armed under D.C. Code § 22-4502.

[40] *United States v. Laurent*, 861 F. Supp. 2d 71, 91-92 (E.D.N.Y. 2011)

Second, building on the proposed modifications to the misdemeanor sexual abuse statute in the "Accountability and Victim Protection Amendment Act of 2023," this bill designates the proposed felony offenses of "misdemeanor sexual abuse pursuant to D.C. Code § 22-3006(b)" and "misdemeanor sexual abuse of a child or minor pursuant to D.C. Code § 22-3010.01(b)" as "crimes of violence." For reasons similar to the categorization of "strangulation" as a "crime of violence," this would mean that, among other things, a person charged with this offense could be preventatively detained pending trial to protect the community.

* * *

We appreciate the Council's consideration of this legislation, which will create stronger enforcement mechanisms for people who commit violent crime and gun crime, while also facilitating targeted interventions for people who commit the lower-level, non-violent crime that our community is experiencing. We look forward to continuing to work with the Council, our partners, and the community to combat the scourge of gun violence that our community is facing.