



U.S. Department of Justice

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VIA ELECTRONIC MAIL

The Honorable Charles Allen
Chairman
Committee on the Judiciary & Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 110
Washington, D.C. 20004

Dear Chairman Allen:

We are pleased to have an opportunity to discuss the work of the United States Attorney's Office for the District of Columbia (USAO-DC or Office) in protecting our community from bias-related crimes.

Prosecuting bias-related crimes is critical to keeping our community safe. When one member of a group is the victim of a bias-related crime, all members carry with them a fear that they, too, may be targeted because of who they are. The Office, in partnership with law enforcement, uses all appropriate prosecutorial tools to hold the perpetrators of such crimes accountable.

The title of today's Committee hearing — "Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney" — is based on a misapprehension of certain raw data and the process by which these crimes are addressed by the Office. In fact, USAO-DC is not failing to prosecute

defendants who may have committed bias-related crimes. Rather, our dedicated career prosecutors file criminal charges on the underlying offense in almost all arrests presented to us as potentially involving bias.

The Committee's hearing notice states: "Although there were 204 bias-motivated crimes reported in the District in 2018, the U.S. Attorney's Office for the District of Columbia ("USAO") prosecuted only three cases as hate crimes. Similarly, in 2017, of the 178 reported hate crimes, the USAO charged only two cases as such, and both were ultimately dismissed." It is important to recognize, however, that many of these reports did not result in arrests, which means they were never presented to the Office for possible prosecution. More often than not, the police concluded that a reported incident either did not constitute a crime or that the evidence of the offense, including evidence of the perpetrator's identity, did not support making an arrest. Thus, of the 204 alleged bias-related crimes that were reported to the Metropolitan Police Department in 2018, only 59 resulted in an arrest that was presented to the Office for prosecution. Similarly, of the 178 alleged bias-related crimes that were reported to the Metropolitan Police Department in 2017, only 55 were presented for prosecution. Although both the Metropolitan Police Department and USAO-DC take every report of a potential bias-related crime seriously, not every such report can or should result in a prosecution.

Furthermore, the hearing notice gives the inaccurate impression that USAO-DC is not prosecuting alleged bias-related crimes *at all* unless it charges the bias-related enhancement. As you know, the D.C. Code does not have a stand-alone "bias-related crime" provision. Rather, it creates an enhanced offense when an underlying crime is bias-related, which allows, but does not require, a judge to impose a higher sentence upon conviction for the enhancement.¹ In the vast majority of the alleged bias-related arrests in 2017 and 2018 presented to USAO-DC for prosecution, the

¹ D.C. Code § 22-3701(1) defines a "bias-related crime" as follows:

a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.

D.C. Code § 22-3703 increases the maximum penalty for a criminal offense to 1½ times the maximum otherwise authorized by statute when the underlying crime is found to be "bias-related," as defined in D.C. Code § 22-3701.

Office charged the underlying crime, often D.C. Code offenses such as assault or threats. Specifically, of the 59 alleged bias-related crimes in 2018 presented for prosecution, we charged the underlying offense in 52 cases; of the 55 alleged bias-related crimes in 2017 presented for prosecution, we charged the underlying offense in 49 cases.

There are good reasons why a prosecutor may not charge the enhanced “bias-related” version of an underlying offense that is presented by the police for potential prosecution. Most fundamentally, police and prosecutors evaluate alleged offenses under different standards. Police make arrests based on probable cause, the same standard used, for example, in obtaining a search warrant. But prosecutors must prove each charged offense beyond a reasonable doubt, the highest threshold in the legal system. In some cases, the facts may create probable cause, but fall short of proof beyond a reasonable doubt. Not surprisingly, in some cases, the evidence will give rise to reason to believe that the crime was motivated by bias, but will not meet the exceptionally stringent beyond-a-reasonable-doubt standard. Moreover, to obtain a conviction on the bias enhancement, it is not enough that the victim identifies with, or is perceived to identify with, a protected status. It is also not enough that the perpetrator may be prejudiced against individuals identifying with such a status. Rather, prosecutors must prove, beyond a reasonable doubt, a causal nexus between the underlying crime and the perpetrator’s prejudice or bias.

One of the 2018 cases in which the Office charged a bias-related enhancement illustrates this point. In that case, the victim, a black male from Cameroon, was driving in his vehicle through Georgetown after a social gathering when he encountered the defendant, a white male, on a bicycle in the middle of the street. The victim honked his horn, and the defendant responded with expletives. The victim then passed the defendant and, while doing so, heard a thump on the back of his car. Assuming that the defendant had struck his car with an object, the victim pulled over to call the police. The defendant then shouted at the victim, “Are you really calling the police?” and directed a racial slur at him. Subsequently, the defendant hit the victim on the head with a metal u-lock while yelling racial slurs at him. The victim required 21 stitches as a result of the assault. The Office charged assault with a dangerous weapon and assault with significant bodily injury with bias-related enhancements. The jury convicted on these underlying offenses, but hung on the enhancements.²

² In another case, stemming from an incident that occurred in 2016, the defendant slashed the face and neck of the victim, an Hispanic woman, while yelling several times, “I don’t like Hispanic women.” Both the defendant and the victim had children at the same school. The Office charged aggravated assault while armed, with a bias-

There is an open question as to whether, to convict a defendant of a bias-related crime, the jury must conclude that the defendant's bias was a *but-for* cause of the offense, or whether it need conclude only that the defendant's bias was a *contributing* factor. The D.C. Code defines a bias-related crime as a crime that "demonstrates an accused's prejudice based on the victim's actual or perceived" race, sex, sexual orientation, gender identity or expression, or other protected status. The standard jury instruction states that the government must prove that the defendant committed the crime "because of prejudice," but also that "it does not matter" if the defendant "had additional motives for doing what he did, such as personal anger or revenge." This language is a potential source of confusion. USAO-DC has taken the position that the statute requires that the government prove only that the defendant's bias was a contributing factor to the crime. In contrast, the Public Defender Service for the District of Columbia has argued that D.C. law requires a but-for causal relationship between bias and a criminal act to support a conviction for a bias-related offense. The issue is currently before the D.C. Court of Appeals.

It is important to note that in cases where USAO-DC does not charge an offense as being bias-related, the court can still consider credible evidence of that aspect of the perpetrator's conduct when determining the sentence for the underlying crime. Thus, in the bicycle-lock assault case described above, the Office asked the judge to consider the defendant's motivation for the crime when fashioning an appropriate sentence, even though the jury declined to convict on the enhancement. Courts can impose a sentence up to the maximum allowed for the underlying offense. Even where the evidence may be insufficient to prove the enhancement beyond a reasonable doubt, we can and do ask the court to consider credible evidence of bias at sentencing.

Moreover, pursuant to the Crime Victims' Rights Act, every victim has the right to be present at sentencing and to submit to the court a victim impact statement "containing information concerning any emotional, psychological, financial, or physical harm done to or loss suffered by the victim."³ This is true even when the enhancement is not charged or where the jury does not convict on the enhancement. Even so, D.C. law does not require judges to sentence bias-related crimes differently from any other crimes, and it is relatively rare for courts to impose an enhanced sentence (that is, a sentence above the statutory maximum available for the unenhanced offense) even when the jury convicts on the bias-related enhancement. As the *Washington Post* reported, defendants have served additional jail time

related enhancement, for that attack. The jury convicted on the underlying offense, but acquitted on the enhancement.

³ D.C. Code § 23-1904.

pursuant to enhanced sentences in only four of the 42 cases since 2008 in which they were convicted of a bias-enhanced offense.

Your hearing notice also quotes the *Washington Post*'s assertion that "hate-crime prosecutions and convictions are at their lowest point in at least a decade." Since the publication of the *Post*'s article, some commentators have suggested that the purported decline in the prosecution of bias-related crimes could be attributable to a change in policy or personnel – specifically, in the transition from my predecessor, Channing D. Phillips, to me in late September 2017. The facts do not support such a conclusion. First, there has been no change in policy with respect to the investigation and prosecution of bias-related crimes at USAO-DC between 2012 (the first year for which the *Post* provided statistics) and 2019. Rather, experienced career prosecutors continue to seek justice for victims on a case-by-case basis, as they always have done. Indeed, in the months after I took office, the Office added a bias-related enhancement to two cases that originally had been charged in 2016 and 2017 without the enhancement. Second, a downturn in the rate at which the Office charges the bias-related enhancement is first discernable in 2016, well before any transition in USAO-DC leadership. From 2012 to 2015, this Office charged the bias-related enhancement in between 40 and 50 percent of cases presented by the Metropolitan Police Department for prosecution as potential bias-related crimes, but that figure dropped to about 10 percent in 2016 and fell into the single digits in 2017 and 2018. We are seeking to understand why that occurred, but it is not the result of a change in policy or Office leadership.

We welcome all opportunities to improve our ability to protect the community and enforce its laws. In response to community feedback and to enhance our ability to achieve justice for victims, we have made several changes to our procedures for reviewing potential bias-related crimes. For example:

- We have created a new Early Case Assessment Section that increases stability and consistency in our intake process. That Section is headed by an experienced prosecutor who previously served as the Assistant Section Chief for juvenile papering at the District of Columbia Office of the Attorney General.
- We have appointed a second hate-crimes coordinator to review potential bias-related crimes and assist in their investigation and prosecution.
- We have issued specific charging guidance to Assistant United States Attorneys in potential bias-related cases to ensure that we will charge the enhancement when it is in the interests of justice to do so.

- We have implemented improved record-keeping mechanisms that will enable us to track potential bias-related crimes more effectively.
- We have set up monthly meetings with the Metropolitan Police Department's Special Liaison Branch to discuss bias-related incidents in the city.
- We have set up internal monthly meetings to discuss potential bias-related crimes and our Office's handling of those matters.

We also remain committed to assisting the victims of potential bias-related crimes and to engaging with the community about bias-related incidents. We currently have approximately 17 victim advocates on our staff, who are an excellent source of support and are knowledgeable resources about the forms of assistance available to all crime victims.

In addition, we are deeply involved in community outreach. For example:

- We host a quarterly meeting of the Hate-Bias Task Force, a collaboration of agency and community partners in the District who focus on addressing the needs of affinity groups in the city and combating bias-related crimes. I was pleased to join the Task Force's meetings in July and October 2019.
- We participate in the District of Columbia's Violence Prevention and Response Team (VPART). VPART's mission is to address, reduce, and prevent crime within and against the LGBTQ community in the District of Columbia. VPART seeks to achieve this by creating a strong partnership between the community and government, which enables it to focus on coordinating a community response to violence.
- We have conducted senior abuse and financial exploitation seminars for LGBTQ members at the Metropolitan Community Church of Washington, D.C., and at the Turkey Thicket Recreation Center as part of our overall efforts to protect senior citizens.
- We recently met twice with the ANC Rainbow Coalition and remain committed to engaging with them on the issue of bias-related crimes in the District of Columbia.
- We have a strong line of communication with Casa Ruby, a non-profit that serves LGBTQ youth.

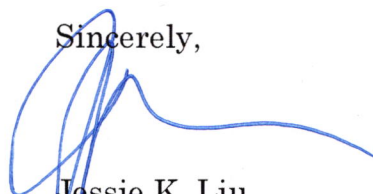
- We are working with a number of groups to plan for and help host a LGBTQ youth summit during the spring of 2020.

Recently, I also was privileged to join members of the LGBT Liaison Unit of the Metropolitan Police Department's Special Liaison Branch on a ride-along, which allowed me a first-hand glimpse of the work they do and to hear directly from community members. This was the first of a series of ride-alongs that my team and I plan to do.

Finally, we also are committed to participating in and providing training on bias-related crimes. For example, the Mayor's Office on LGBTQ Affairs conducted a cultural sensitivity training at USAO-DC in June 2018, and our Assistant United States Attorneys in turn have provided presentations and training on bias-related crimes to the Metropolitan Police Department and to a citizen advisory council. This fall, members of my senior staff, the Office's hate crimes coordinators, and I met with representatives of the Anti-Defamation League (ADL); I also invited them to speak at the most recent meeting of the Law Enforcement Task Force, a group comprising senior local and federal law enforcement leaders in the District of Columbia that I host each month. At that meeting, ADL representatives gave a well-received presentation on recognizing and combating bias-related crimes and white nationalist/white supremacist ideology.

In all these things, we remain committed to seeking justice in bias-related crimes. We look forward to continuing to work with all community partners, including the Council, to protect D.C. residents from bias-related crimes.

Sincerely,



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for the District of Columbia

cc: The Honorable Anita Bonds, Councilmember, Judiciary Committee
The Honorable Mary M. Cheh, Councilmember, Judiciary Committee
The Honorable Jack Evans, Councilmember, Judiciary Committee
The Honorable Vincent C. Gray, Councilmember, Judiciary Committee