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

PUBLIC HEARING

on

Bill 25-0345, the "Accountability and Victim Protection Amendment Act of 2023"
Bill 25-0167, the "Wheel-Lock Help Incentive Program Act of 2023"
Bill 25-0343, the "Private Security Camera System Incentive Program Small Business Expansion Amendment Act of 2023"
Bill 25-0348, the "Ensuring Safe Forensic Evidence Handling for Sexual Assault Survivors Amendment Act of 2023"

STATEMENT OF ELANA SUTTENBERG
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Monday, September 18, 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 am accompanied today by my colleague, Sharon Marcus-Kurn, Chief of the Sex Offense and Domestic Violence Section, who is available to assist in answering the Committee's questions. 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 25-0345, the "Accountability and Victim Protection Amendment Act of 2023." USAO-DC supports this bill because it will provide additional tools to protect some of the most vulnerable members of our community and hold accountable those who harm them. Our Office is committed to aggressively prosecuting all forms of violence, including sexual assault and domestic violence against adults, teens, and children, and to protecting our community from these often life-changing acts of violence.

Enhancement to Criminal Statute of Limitations

This bill makes several common-sense, and needed, updates to the criminal statute of limitations, which are consistent with the Council's previous expansions of the statute of limitations.

First, this bill removes the statute of limitations for any offense that is "properly joinable" with an offense listed in subsection (a)(1). Under current law, there is no statute of limitations for the offenses listed in subsection (a)(1)—including murder and certain felony sexual abuse—so those offenses can be prosecuted at any time, regardless of the offense date. Offenses that would be "properly joinable" would be offenses that could be charged in the same charging document (or joined for trial) as the murder or sexual abuse listed in subsection (a)(1). Under Superior Court Rule of Criminal Procedure 8(a), offenses may be joined in an indictment or information "if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." This would include, for example, the charge of burglary where a person raped or murdered the occupant of the home during the course of a burglary. Under current law, the statute of limitations for burglary would expire within 6 years. Thus, if 10 years had passed since the offense, a person could be charged with the offense of first degree sexual abuse or murder, but not the charge of burglary that would otherwise be "properly joinable" in the indictment.

The Council's passage of the Sexual Abuse Statute of Limitations Amendment Act of 2018 was a significant expansion of the statute of limitations for felony sexual abuse, removing the statute of limitations for those offenses in response to the evidence of the substantial challenges that survivors of sexual abuse can face following their victimization, including tremendous barriers to promptly reporting their crimes.[1] Elimination of the statute of limitations

[1] *See* Report of the Committee on the Judiciary and Public Safety on B22-0021, the Sexual Abuse Statute of Limitations Amendment Act of 2018, at 9 (Council of the District of Columbia October 4, 2018) ("It is in this context that the Committee carefully considered B22-0021 and B22-0028. The Committee was deeply moved by the testimony of many public witnesses regarding their experiences and the psychology behind victimization and trauma. Survivors face tremendous barriers to reporting their crimes: barriers to identifying as a victim, shame or

for felony sexual abuse also recognizes that a survivor may promptly report a sexual assault to law enforcement, but that it may take many years for a suspect to be identified as the perpetrator of that offense, such as where the suspect is identified through DNA evidence through a "match" in the Combined DNA Index System (CODIS) years later. When this law was changed, however, to expand the statute of limitations for these felony sexual abuse offenses, the law was not also changed to modify and include the "properly joinable" language in subsection (a)(1), as is standard for offenses covered by other statutes of limitations. Notably, before the passage of this legislation, the charges of first degree sexual abuse, second degree sexual abuse, first degree child sexual abuse, second degree child sexual abuse, *and any offense that was properly joinable* had a 15-year statute of limitations.[2] Likewise, under current law at D.C. Code § 23-113(a)(3), certain offenses *and any offense that is properly joinable* with one of those offenses have a 10-year statute of limitations. Thus, the only offenses that do *not* allow the inclusion/joinder of properly joinable offenses are the most serious offenses—including murder and the most serious forms of sexual abuse. To rectify this inconsistency, this bill modifies the language of subsection (a)(1) to eliminate the statute of limitations for offenses that are "properly joinable" with the offenses listed in subsection (a)(1).

Second, this bill eliminates the statute of limitations for an "attempt, conspiracy, solicitation, or assault with intent to commit an offense" listed in subsection (a)(1). Under current law at D.C. Code § 23-113(a)(1), there is no statute of limitations, for example, for the completed offense of first degree murder. Attempted first degree murder, conspiracy to commit first degree murder, solicitation of first degree murder, and assault with intent to commit murder, however, are subject to the general statute of limitations for felonies in D.C. Code § 23-113(a)(4), and therefore carry a 6-year statute of limitations. This is similarly the case for other forms of murder, first degree sexual abuse, first degree child sexual abuse, and other serious sexual offenses. An attempt to commit a serious sexual offense can result in severe and often permanent physical or psychological harms to a victim that the statute of limitations should recognize. For example, attempted first degree sexual abuse may include an extremely violent assault and threat to rape a victim by, for example, forcibly incapacitating the victim, removing the victim's clothing, and brandishing a weapon at the victim, and attempted penetration even if the assailant ultimately did not penetrate the victim's vagina, anus, or mouth. Sometimes the only difference between a completed first degree and an attempted first degree sexual abuse is the victim's successful fight to thwart the defendant's attempt, or the unexpected intervention by a witness to the assault. Likewise, an attempted murder can result in serious physical or psychological harms to a victim, including permanent paralysis or disfigurement. Sometimes the only difference between a completed first degree and an attempted first degree murder is the medical care that a victim receives that allows them to survive an attempt to kill them. To ensure

humiliation related to the abuse itself, and a fear—and, clearly, a reality—of being disbelieved or retraumatized. If survivors do come forward, the opportunity to seek justice should not be arbitrarily foreclosed. The Committee has thoughtfully weighed the interests at stake in both bills' proposals and concludes that the District's statute of limitations must be expanded.").

[2] *See id.* at 6.

consistency and proportionality in the statute of limitations, the Council should expand the statute of limitations to include this category of offenses.[3]

Prohibition on Firearms Possession After Stalking Conviction

Certain categories of people are prohibited from owning or keeping a firearm, or having a firearm in their possession or under their control pursuant to D.C. Code § 22-4503. These include, for example, people convicted of felony offenses and people convicted of misdemeanor intrafamily offenses. This bill adds stalking convictions to those convictions that would bar people from possessing firearms under § 22-4503. This category of convictions represents particularly dangerous behavior that may be indicative of future lethality in domestic violence and other situations. "Attempted murders of women are often preceded by stalking incidents: In one study, in nearly nine out of 10 cases there had been a stalking incident in the year leading up to the attempted murder."[4] Currently, 20 states prohibit people with stalking convictions from having firearms.[5]

People convicted of stalking are already prohibited from *registering* a firearm pursuant to D.C. Code § 7-2502.03, and pursuant to D.C. Code § 7-2502.01, with certain limited exceptions, a person in the District is not permitted to possess or control a firearm unless the person holds a valid registration certificate for the firearm. The provisions of § 22-4503, however, should align with the provisions of § 7-2502.03, however, and ensure proportionate felony liability for people who possess a firearm following a conviction for stalking.

Analogues to Federal Evidentiary Rules in Sexual Abuse Prosecutions

This bill adds new local evidentiary rules equivalent to Federal Rules of Evidence ("FRE") 413 and 414. FRE 413 allows admission of evidence of similar crimes in sexual assault cases, and FRE 414 allows admission of evidence of similar crimes in child molestation cases. These rules would provide a court discretion to admit evidence of previous similar crimes in sexual abuse and child sexual abuse cases, but would not require the court to admit the evidence. The admission of this evidence would be subject to the general evidentiary principle that

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[3] RAINN (Rape, Abuse & Incest National Network) recommends that an effective statute of limitations eliminate the criminal statute of limitations for felony-level sex crimes. *See* https://www.rainn.org/sites/default/files/import/Recommendations-Effective-Sex-Crime-Statutes-of-Limitations.pdf.

Further, if the Council expands the statute of limitations to exclude "assault with intent to commit" liability, the "properly joinable" language would allow for the charge of "assault with intent to kill" to be joined with the offense of "assault with intent to commit murder," which would create proportionate liability for this serious, violent conduct that does not result in death. Under current law, the offense of assault with intent to kill is punishable by a maximum of 15 years' incarceration. *See* D.C. Code § 22-401. The offense of assault with intent to commit murder, however, is punishable by a maximum of 5 years' incarceration. *See* D.C. Code § 22-403. Similarly, under current law, the offense of attempted first degree murder is only punishable by a maximum of 5 years' incarceration. *See* D.C. Code § 22-1803. To ensure proportionate liability for this violent conduct in other contexts, including in the Title 16 context, the offense of assault with intent to kill is typically joined with the offense of assault with intent to commit murder as a "properly joinable" offense. *See* D.C. § 16-2301(3)(A).

[4] Everytown for Gun Safety, https://everytownresearch.org/rankings/law/stalker-prohibitor/.

[5] *Id.*

evidence may be excluded if the court finds that the probative value of the evidence is substantially outweighed by a danger of unfair prejudice, but this bill explicitly incorporates the balancing language from FRE 403. This bill also clarifies that the evidence may only be introduced where the court finds clear and convincing evidence that the defendant committed the other sexual abuse.

A substantial number of states—at least 19 states—have a local analogue to all or part of FRE 413 and/or 414.[6] Of those 19 states, 5 only permit similar crimes related to child sexual abuse to be admitted.[7] Of those 19 states, 4 states also permit similar crimes related to domestic violence to be admitted.[8]

In 2019, Maryland adopted a rule of evidence providing that, in "prosecutions for sexually assaultive behavior," "evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admitted" consistent with a Maryland law enacted in 2018. Md. R. Evid. 5-413. That 2018 Maryland law provides, in part, that: "(e) The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that: (1) The evidence is being offered to: (i) Prove lack of consent; or (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense; (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior; (3) The sexually assaultive behavior was proven by clear and convincing evidence; and (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Md. Code, Courts and Judicial Proceedings § 10-923. In 2019, California adopted a rule of evidence providing that, in a "criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [the general rule excluding evidence of a person's character or a trait of his or her character when offered to provide his or her conduct on a specified occasion], if the evidence is not inadmissible pursuant to [the general rule providing that the court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury]." Cal. Evid. Code §§ 1108; 1101; 352.

There is some precedent for this evidentiary rule that has already been established by the common law in the District through the "unusual sexual preference" doctrine. The D.C. Court of Appeals has consistently recognized a narrowly drawn exception allowing evidence of previous sexual acts to be admitted in sex offense cases involving similar sexual misconduct in order to demonstrate that the defendant has an "unusual sexual preference" or compulsion to engage in the specific type of sexual act with a child or minor which he is charged. *See e.g.*, *Koonce v. United States*, 993 A.2d 544 (D.C. 2010); *Howard v. United States*, 663 A.2d 524 (D.C. 1995); *Feaster v. United States*, 631 A.2d 400 (D.C. 1993); *(Tyrone) Johnson v. United States*, 610 A.2d 729 (D.C. 1992); *Pounds v. United States*, 529 A.2d 791 (D.C. 1987); *Adams v. United States*, 502 A.2d 1011 (D.C. 1986); *Dyson v. United States*, 97 A.2d 135 (D.C. 1953).

[6] Those states are: Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Missouri, Nebraska, Nevada, Oklahoma, Tennessee, Texas, and Utah.

[7] Those states are: Indiana, Missouri, Tennessee, Texas, and Utah.

[8] Those states are: Alaska, Illinois, Louisiana, and Michigan.

Where "other crimes" evidence falls within a recognized exception—such as the "unusual sexual preference" for children exception—such evidence is admitted when: (1) there is clear and convincing evidence that the defendant committed the other act; (2) the proffered evidence is directed to a genuine, material, and contested issue in the case; (3) the evidence is logically relevant to prove this issue for a reason other than its power to demonstrate general criminal propensity; and (4) the evidence is more probative than prejudicial. *Legette v. United States*, 69 A.3d 373, 379 (D.C. 2013); *see also Howard*, 663 A.2d at 529 & n.10 (internal citations omitted). "Regarding the last factor, the appropriate balancing test is whether the prejudicial impact of the evidence 'substantially' outweighs its probative value." *Legette*, 69 A.3d at 479 (citing *Bacchus v. United States*, 970 A.2d 269, 273 (D.C. 2009)). In addition, in the context of a charge involving a *forced* sexual act or sexual contact, the D.C. Court of Appeals has permitted "other crimes" evidence to be admitted as proof of the defendant's intent to use force, which went to the victim's lack of consent. *See Legette*, 69 A.3d at 381-82 ("Because appellant's defense was a denial of the use of force and an assertion that [the victim] consented to the charged sexual acts, the government's burden was to prove [the victim's] lack of consent, or, put another way, to prove appellant's intent to use force in his sexual encounter with her." (internal citations omitted)).

FRE 413, 414, and 415 (allowing admission of similar sexual acts in civil cases) were added to the federal rules by statute.[9] As summarized by a primary author of the statute, there were several justifications for the statute. First, where a defendant claims mistaken identity or that the victim consented, evidence that the defendant committed sexual assaults on other occasions makes it more probable that the defendant committed a sexual assault on the charged occasion. Second, a defendant who has previously committed an act of sexual abuse or child sexual abuse "provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him," providing greater plausibility to a current charge of sexual abuse. Third, there is "public interest in admitting all significant evidence of guilt in sex offense cases," reflecting in part "the typically secretive nature of such crimes, and resulting lack of neutral witnesses in most cases; the difficulty of stopping rapists and child molesters because of the reluctance of many victims to report the crime or testify; and the gravity of the danger to the public if a rapist or child molester remains at large."[10]

An opinion piece in The New York Times recently set forth an argument in support of New York adopting a similar rule:

> Disagreements over how much a jury should know about a defendant aren't new. The American legal system has long checked prosecutors' wish to share negative history about the accused. Prosecutors pursue crimes, not people, and we are supposed to hold people accountable for their bad acts, not their bad reputation. As such, courts rarely allow prosecutors to present evidence of the defendant's "prior bad acts." There are exceptions — for example, if that evidence helps to establish a motive, or to undermine a claim that something happened by accident. Even then, courts must decide beforehand that this evidence is important enough to outweigh any prejudicial effect it might have on

[9] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 2135 (1994).

[10] David J. Karp, *Evidence of Propensity and Probability in Sex Offenses Cases and Other Cases*, 70 Chi.-Kent L. Rev. 15 (1994), *available at* https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss1/3/.

> the jury. But limitations have their limits. As former prosecutors who handled cases involving many types of serious crimes, including sexual assault, we think trials for sex crimes are different from other trials, and these differences must be reflected realistically in the rules of evidence. The federal government and at least 16 states, including California, agree. These jurisdictions have decided that the traditional prohibitions don't make sense when a jury must ascertain whether a sex crime took place. In these cases, the jury needs to know more about the defendant — particularly what other victims would say about him under oath. New York does not have this special evidentiary rule for sex crime trials. We hope that reflecting on the California and New York trials of the same man, for similar crimes, under two different legal regimes, offers a lesson for legislatures here in New York and across the country.[11]

Within the D.C. Code, these new evidentiary rules may be placed with the other evidentiary rules related to sexual offenses in Title 22, Chapter 30, Subchapter III ("Admission of Evidence in Sexual Abuse Offense Cases"). Although this bill only includes rules that would apply in criminal cases, it may also be appropriate to create a local equivalent of FRE 415, which would permit admission of evidence of similar acts in *civil* cases involving sexual assault or child molestation.

Access to HIV Information for Crime Victims

The health of crime victims is paramount, and we strive to take every step to protect their health. When a victim may have been exposed to HIV through the commission of a crime, the victim needs to have access to information that can inform their medical decisions and their ability to protect themselves from being infected with HIV. This bill makes several changes to current law that would further promote the health of crime victims with respect to HIV.

First, this bill provides the court with authority to order a person to furnish a blood sample to be tested for the presence of HIV *at the time that the person is charged* with certain limited offenses. Under current law, a court can only order a person *convicted* of an offense to furnish a blood sample to be tested for the presence of HIV. It can often take months or years for a case to move from the initial charging to conviction. During that time, a victim is unable to know whether the person who sexually assaulted them is HIV-positive or not. It is therefore common for sexual assault victims to take post-exposure prophylaxis ("PEP") medication following a sexual assault or other possible exposure to HIV. PEP medication must be started within 72 hours of possible exposure to HIV, and needs to be taken daily for 28 days.[12] The CDC advises: "The sooner you start PEP, the better. Every hour counts."[13] The CDC states that PEP is safe but may cause side effects like nausea in some people. Because a victim needs to know as soon as possible whether the person who assaulted them is HIV-positive, it is essential that a court have authority to order an HIV test at the earliest possible opportunity—that is, at the time

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[11] Tali Farhadian Weinstein and Jane Manning, *Weinstein's Prosecutors Brought His Past Into the Courtroom. Good."* N.Y. Times, Dec. 19, 2022, *available at* https://www.nytimes.com/2022/12/19/opinion/harvey-weinstein-verdict-la.html.

[12] *See* Centers for Disease Control and Prevention, *About Pep*, https://www.cdc.gov/hiv/basics/pep/about-pep.html.

[13] *Id.*

of charging. This proposed change is consistent with federal law, which allows a victim to file a motion in federal court—regardless of whether the offense is prosecuted in federal court or state court—to require a defendant *charged* in a criminal case to be tested for the presence of HIV. *See* 34 U.S.C. § 12391.[14] Although a victim may file a motion in federal court based on an offense charged in D.C. Superior Court, it is an additional burden on a victim to be required to file such a motion in a different venue from the charged offense, and many victims may be unfamiliar with federal court practice. In addition to federal law, 36 states allow a defendant to be tested for HIV at the time they are charged with certain offenses in a criminal case.[15] Finally, to be clear, the results of the HIV test obtained from this blood sample are *not* evidence that can be used at trial. D.C. Code § 22-3902(e) provides: "The result of any HIV test conducted under this section shall not be admissible as evidence of guilt or innocence in any criminal proceeding," and this bill does not make any changes to that provision.

Second, this bill permits HIV testing for offenses other than sex offenses where, due to the manner of the commission of the offense, there is a reasonable possibility of transmission of HIV. For example, during the course of an assault, the assailant may bite the victim and cause an open wound, telling the victim that the assailant has HIV and will give it to them. As a further example, a victim may be stabbed during an assault and have an open wound, which could come into contact with an open wound on the assailant. Although these cases happen relatively rarely, victims of these non-sex offenses that involve a reasonable possibility of transmission of HIV should be entitled to the same protection as victims of sex offenses.

Third, this bill clarifies that, if the government has independent information regarding the defendant's HIV status, the government is not precluded from disclosing that information to the victim. Under current law, there is no clear authority allowing the government to inform a victim of this status. The government may be aware that a defendant is HIV-positive from a variety of sources, such as a statement made by the defendant or a statement by a witness. This clarification to the law is essential to ensure that USAO-DC can inform a victim of this important information, so that the victim can take immediate steps to protect their health.

Fourth, this bill permits either the prosecutor or the victim to ask the court to order a person to furnish a blood sample to be tested for the presence of HIV. Although a victim may have an attorney to represent their interests in court, frequently, they do not. Prosecutors are in a position to make this request in court on their behalf. Moreover, a prosecutor can make this request at the time that a defendant is initially charged, whereas a victim may be unable to attend that initial hearing and make this prompt request. The prosecutor is a frequent conduit between the court and the victim, and can both appear in court and provide information to the victim.

Finally, this bill makes a clarifying amendment to the recently enacted *HIV/AIDS Data*

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[14] The federal statute allows a defendant to be tested for "the presence of the etiologic agent for acquired immune deficiency syndrome." The definition of "HIV test" in D.C. Code § 22-3901 includes similar language.

[15] *See generally* Rape, Abuse & Incest National Network, *HIV/AIDS Testing of Offenders* (Mar. 2020), *available at* https://apps.rainn.org/policy/compare/hiv.cfm. The following states allow for HIV testing at the time they are charged with certain offenses (some of these jurisdictions require HIV testing, and some allow for HIV testing upon request): Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Louisiana; Maryland; Michigan; Mississippi; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; South Carolina; South Dakota; Texas; Utah; West Virginia; Wisconsin; and Wyoming.

Privacy Protection and Health Occupation Revision Clarification Amendment Act of 2022 (B24-0207). USAO-DC's understanding is that the legislation precludes the DC Department of Health from disclosing HIV surveillance data that is obtained through new technology called molecular HIV surveillance, which is collected for statistical or public health purposes. At the same time, our understanding is that the proposed language is not intended to impact the disclosure and use of other Department of Health records, including medical records that are received, generated, and/or maintained by individual medical personnel in connection with the treatment of a person by Department of Health personnel for HIV or any other potentially communicable disease (at, for example, the Department's Health and Wellness Center). (And, of course, all medical records are protected by HIPAA and other relevant privileges and could only be obtained pursuant to a court order, search warrant, or a valid waiver by the patient/patient guardian.) We recommend a clarifying amendment to D.C. Code § 7-1605 that we believe is consistent with the intent of the legislation.

Clarification to Significant Relationship Definition

Consistent with the provisions in the Prioritizing Public Safety Emergency Amendment Act of 2023, this bill clarifies the definition of "significant relationship" in sexual abuse cases. This would fill a gap in liability by clarifying that a "contractor" of a school, church, synagogue, or similar institution has the same liability for sexual abuse as an "employee" or "volunteer" of the same.

Under current law, there is liability for certain sexual offenses and enhancements where the defendant and victim are in a "significant relationship," as defined in D.C. Code § 22-3001(10). This includes circumstances where the defendant is an "employee" or "volunteer" of a school, church, synagogue, or similar institution. Adding the term "contractor" provides a more comprehensive definition of those responsible for the care and supervision of children at schools and other institutions. Many organizations do not hire all of their employees directly; rather, they enlist contractors as part of that staffing. The contractors have the same interactions with children and responsibilities as many of the direct employees do, and it makes no sense to distinguish them for purposes of liability. This bill would ensure that a "contractor" of such an organization would have the same liability as an "employee" or "volunteer," filling a gap in liability.

Clarification to Admissibility of Pretrial GPS Records

Consistent with the provisions in the Prioritizing Public Safety Emergency Amendment Act of 2023, this bill clarifies that GPS records from the Pretrial Services Agency ("PSA") may be used in court as evidence of guilt in a criminal case or other judicial proceeding. This is a common-sense clarification that GPS records from PSA that, for example, indicate that a defendant was on the scene of a domestic violence incident or a murder can be admissible in that defendant's trial for domestic violence or murder. This clarification would not affect law regarding the admissibility of any statements that the defendant may make to PSA.

Global Positioning Systems (GPS) and other tracking devices are used by the court and the PSA as a condition of pretrial release designed to "reasonably assure the appearance of the

person as required and the safety of any other person and the community."[16] As the Committee on Public Safety and the Judiciary noted in enacting D.C. Code § 22-1211 (Tampering with a detection device), GPS devices and "other electronic monitoring equipment serve as a deterrent for monitored persons to commit new crimes, thereby protecting public safety without the necessity of incarceration. Further, GPS devices can be utilized to identify probable suspects by matching their whereabouts to the scene of the crime."[17]

Before the passage of the Prioritizing Public Safety Emergency Amendment Act of 2023, D.C. Code § 23-1303(d) read:

> (d) Any information contained in the agency's files, presented in its report, or divulged during the course of any hearing shall not be admissible on the issue of guilt in any judicial proceeding, but such information may be used in proceedings under sections 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purposes of impeachment in any subsequent proceeding.

In interpreting this statute, however, some defendants attempted to construe D.C. Code § 23-1303(d), standing alone, to prohibit the use of GPS data collected by PSA not only in prosecuting a violation of D.C. Code § 22-1211, but also in prosecuting much more serious crimes, up to and including murder. It is important that the Council, therefore, clarify that the limitations in D.C. Code § 23-1303 do not apply to GPS records that are in the possession of PSA. This clarification is consistent with the legislative intent of the statute.

In litigation, we consistently maintain that this statute allows for GPS records from PSA to be admissible as guilt in a court proceeding. Several trial court judges have addressed this issue and have agreed with our reading of the statute. The Council's clarification of the plain language of the statute, however, would foreclose any additional litigation on this point.

To remove any possible ambiguity about its scope, this amendment to D.C. Code § 23-1303(d) ensures that its language is consistent with its original intent—that is, protecting communications between a defendant and a pretrial services officer, and not protecting a defendant on pretrial release from the use of probative evidence of the defendant's commission of another crime or from information from other sources. GPS monitoring would not serve as a deterrent to committing new crimes if GPS monitoring evidence could not be used in the prosecution of those crimes. It would be tragic if we could prove that a person on pretrial release was on the site of a murder, rape, armed robbery, or aggravated assault, but were precluded from doing so because a court interpreted the language more broadly than intended by the statute. This bill resolves that question by amending the statute.

Judicial Discretion for Extradition of Misdemeanor Arrest Warrants

Consistent with the provisions in the Prioritizing Public Safety Emergency Amendment Act of 2023, this bill amends D.C. Code § 23-563, which contains the territorial limits for execution of an arrest warrant or summons. This permits—but does not mandate—a judge to make a misdemeanor arrest warrant or summons extraditable, which means that it could be

[16] D.C. Code § 23-1321(c)(1)(B).

[17] Committee on Public Safety and the Judiciary, *Report on Bill 18-0151, the "Public Safety and Justice Amendments Act of 2009"* at 5 (Council of the District of Columbia June 26, 2009).

executed outside the District of Columbia, including in neighboring Maryland and Virginia. Under this bill, a misdemeanor arrest warrant would only be extraditable if the judge finds "good cause" for it to be extraditable. "Good cause" would be presumed where the offense is an intrafamily offense or a misdemeanor sexual offense, though "good cause" could exist in other situations as well.

Before the passage of the Prioritizing Public Safety Emergency Amendment Act of 2023, a misdemeanor arrest warrant could *never* be extraditable, even where a judge believed that the circumstances would so warrant. This meant that a person could commit a misdemeanor offense in the District—including a domestic violence misdemeanor offense or a misdemeanor sexual offense—and would never be arrested for that District offense so long as they remain in, for example, Prince George's County, MD or Arlington, VA. This would lead to situations where a defendant could thwart law enforcement's ability to arrest that defendant, and allow an abuser to continue to perpetrate abuse in various jurisdictions.

Moreover, this change would bring extradition authority for arrest warrants more closely in line with extradition authority for bench warrants following a defendant's failure to appear, and warrants for violation of release conditions. Those types of warrants may be fully extraditable, regardless of whether the underlying offense involves a felony or misdemeanor. D.C. Code § 23-1329(d) provides: "Any warrant issued by a judge of the Superior Court for violation of release conditions or for contempt of court, for failure to appear as required, or pursuant to § 23-1322(d)(7), may be executed at any place within the jurisdiction of the United States." Further, in misdemeanor cases, subpoenas may be served at any place outside the District of Columbia that is within 25 miles of the place of the hearing or trial specified in the subpoena, *see* D.C. Code § 11-942(a), and the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings permits states to assist each other in compelling the attendance of out-of-state witnesses, including in misdemeanor cases, *see* D.C. Code § 23-1501 *et seq.*

Progressive Sentencing for Misdemeanor Sexual Abuse

This bill creates progressive sentencing for repeat misdemeanor sexual abuse, such that a person who has been previously convicted of misdemeanor sexual abuse, and who is charged with misdemeanor sexual abuse a second time may be charged with a felony offense. This felony offense would be a "crime of violence" such that, among other things, a person charged with this offense can be, but would not be required to be, preventatively detained pending trial to protect the community.

Under current law, a person who commits a sexual act or sexual contact without the use of physical force, incapacitation, or other acts outlined in the statute, may be convicted only of misdemeanor sexual abuse, which is punishable by a maximum of 180 days' imprisonment. Misdemeanor sexual abuse commonly involves conduct such as grabbing the buttocks or genitalia of a stranger. Unfortunately, within the District, there are some people who have committed the offense of misdemeanor sexual abuse on numerous occasions, and who are well-known to law enforcement and the court system. Because these individuals can typically only be charged with a misdemeanor—even when they have *multiple* prior convictions for misdemeanor sexual abuse—they are returned to the community after serving a relatively short sentence and, invariably, commit another act of misdemeanor sexual abuse. Even where they are convicted of

an aggravating circumstance under D.C. Code § 22-3020(a)(5) for having committed a previous sex offense, the maximum penalty is only 270 days' imprisonment. In addition, under current law, they are not required to register as a sex offender. Creating progressive sentencing with felony liability—including a maximum punishment of 3 years' imprisonment—for this repeated course of conduct would allow a judge to impose a higher sentence, thereby protecting the community from additional sexual assaults by this person so long as they are incarcerated.

This bill also makes a parallel change to the offense of misdemeanor sexual abuse of a child or minor.

Conforming Amendments to the *Expanding Supports for Crime Victims Amendment Act*

This bill makes several conforming changes to the recently passed Expanding Supports for Crime Victims Amendment Act of 2023 (B24-0075) that would enhance this legislation.

First, this bill clarifies that § 14-307(d) only applies where confidential information "of a victim" is being sought. This is consistent with the purpose and intent of this provision, which relates to victims' rights and the privacy of a victim. If, for example, the confidential records of a defendant or witness are being sought, it would not be appropriate to ascertain the position of the victim. This suggested change is consistent with the text of both local and federal Rules 17(c)(3) which states: "*Subpoena for Personal or Confidential Information About a Victim*. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order." (emphasis added).

Second, this bill clarifies that the safe harbor provision under the proposed § 23-1912 means that a sexual assault victim who is *already* under arrest or in custody at the time of the sexual assault forensic exam would not have their arrest/custody status changed simply due to the fact of the forensic exam. We believe this is consistent with the intent of the statute, which would be to limit a *new* arrest while a person is undergoing a forensic exam. If, for example, a person has been arrested, and is sexually assaulted by another arrestee while they are detained, that victim should receive a prompt forensic exam, but should not be released from custody solely on the basis of the forensic exam, and should not require an arrest warrant to keep them detained if they were originally arrested on probable cause. (Indeed, if a sexual assault exam could lead to a person's release from custody, that would create a perverse incentive on arrestees to routinely request sexual assault exams.)

Third, this bill clarifies that the expansion of the Crime Victims' Compensation Program (CVCP) means that victims in pending IRAA and Compassionate Release cases will be eligible for compensation and services. These motions—filed years after the original sentencing—may cause victims to reopen and relive a painful chapter in their lives, such that these victims and their families deserve access to services such as therapy. First, the language should be changed from the "resolution" of an application or motion to the "filing or resolution" of an application or motion. If a victim is not able to access services until the "resolution" of the motion, that may mean that they are not able to access CVCP services until the time of the defendant's release from incarceration, as many defendants whose IRAA or CR motions are granted are promptly released from incarceration. Rather, a victim should have access to CVCP services at the time an application or motion is filed, and before the defendant is released from incarceration. This can

provide them access to services such as therapy that help them process their ongoing trauma that can be instilled from even the filing of a motion and the prospect of relief, or receive any additional assistance if warranted. We expect that it was the Council's intent to make as many people eligible as possible by making them eligible "within one year after the resolution" of a motion, which could imply that a person is eligible before the resolution of the motion/application, such that the resolution just triggers the end date for the 1-year clock for eligibility. But because there is no start date attached to this, we are concerned that there could be a reading of the statute that would only permit eligibility after the resolution of a motion. Tying eligibility to the "filing or resolution" of the motion would clarify that a person becomes eligible no later than when the motion is filed. Second, language should be added that allows victims to access CVCP within 1 year after the "filing or resolution of any other post-conviction motion in which the claimant was a victim or secondary victim." In addition to IRAA and CR motions, many other types of post-conviction hearings can cause the victim to become re-engaged in a discussion of the underlying offense, and/or require some type of evidentiary hearing. This can similarly cause a victim to reopen and relive a painful chapter. Further, depending on the circumstances of the case, a post-conviction proceeding may result in the defendant's release from incarceration or may allow the defendant to have a new trial.

Conforming Amendments to the Rights of Child Crime Victims

Consistent with the provisions in the Prioritizing Public Safety Emergency Amendment Act of 2023, this bill allows a court to designate a case of "special public importance" where the child is a victim *or* is called to give testimony in the case. Before the passage of the Prioritizing Public Safety Emergency Amendment Act of 2023, pursuant to D.C. Code § 23-1903(d), in a proceeding in which a child is "called to give testimony," the court may designate the case as being of "special public importance." This designation requires the court to "expedite the proceeding and ensure that it takes precedence over any other," and "shall ensure a speedy trial in order to minimize the length of time the child must be involved with the criminal justice system." This bill makes a conforming change to this provision that would allow the court to designate a case of "special public importance" in a proceeding in which a child "*is a victim or* is called to give testimony" (emphasis added). This change would also allow the court to so designate a case where the case is in a sentencing posture or is not otherwise set for trial. Because a victim impact statement at the time of sentencing is not "testimony," a court would have no mechanism to designate a case as being of "special public importance" when, for example, the defendant has pled guilty and the case is in a sentencing posture. However, the same interests in "minimiz[ing] the length of time the child must be involved with the criminal justice system" apply regardless of whether case is set for trial or not, as the child's involvement must often extend beyond trial testimony. Further, this change would allow the court to so designate a case when a child is a victim but is not testifying at trial—for example, when a child is too young to testify, but the community still has an interest in the case proceeding in an expedited fashion.

Additional Protections for 12-Year-Old Victims of Sexual Abuse

Under D.C. Code § 22-3020(a)(1), a person who is found guilty of a sex offense in Chapter 30 of Title 22 may be subject to an increased maximum penalty where, among other

scenarios, the victim was *under* the age of 12 years at the time of the offense. This bill makes a modest modification to this enhancement to include victims who *are* 12 years old. Including 12-year-olds in this enhancement recognizes the youthful nature of 12-year-olds, and is consistent with distinctions that have been drawn in other areas of the D.C. Code. For example, both the Sexual Assault Victims' Rights Amendment Act (SAVRAA), codified at D.C. Code § 23-1907 *et seq.*, and the provisions related to civil protection orders, codified at D.C. Code § 16-1001 *et seq.*, provide victims with different rights starting at age 13, not age 12. Further, importantly, this change would have no effect on the age of consent in the District, and would solely relate to the applicability of the penalty enhancement. This penalty enhancement would permit—though not mandate—a judge to increase a sentence for sexual abuse where the victim was under 13 years of age at the time of the offense.[18] This bill would also create a conforming amendment to the sex offender registration requirements, mandating stricter registration where the victim is under 13, rather than under 12.

Enhanced Penalties for Violence Witnessed by a Child

This bill creates an enhancement that would apply to an intrafamily offense or crime of violence where the defendant committed the offense in the presence of a child, or where the child otherwise witnessed the offense, including by sight, sound, or otherwise. This enhancement could be defeated upon a showing by the defendant that the defendant reasonably believed that the child was not present and would not otherwise be able to witness the offense. This enhancement would apply when the child is not the victim of the charged offense (as that would result in its own liability).

Family violence has an adverse impact, often deep and profound, on a child's physical, cognitive, emotional, and social development. "Research shows that even when children are not direct targets of violence in the home, they can be harmed by witnessing its occurrence. . . . Children who witness domestic violence can suffer severe emotional and developmental difficulties that are similar to those of children who are direct victims of abuse."[19]

Other states have taken similar actions. "In many States, a conviction for domestic violence that was committed in the presence of a child may result in harsher penalties than a conviction for domestic violence without a child present. Approximately 9 States consider an act of domestic violence committed in the presence of a child an 'aggravating circumstance' in their sentencing guidelines. This usually results in a longer jail term, an increased fine, or both. An additional seven States, while not using the term 'aggravating circumstances,' require more severe penalties. In five other States, committing domestic violence in the presence of a child is a separate crime that may be charged separately or in addition to the act of violence."[20] This bill, consistent with these other states, create stronger penalties and accountability structures for

[18] D.C. Code § 22-3611 creates a separate general penalty enhancement for committing any crime of violence against a person under 18 years old, but many of the offenses in Chapter 30 of Title 22 are not "crimes of violence" pursuant to D.C. Code § 23-1331(4), so would not qualify for this offense.

[19] U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *Child Witnesses to Domestic Violence*, Child Welfare Information Gateway (2021), *available at* https://www.childwelfare.gov/pubPDFs/witnessdv.pdf.

[20] *Id.*

committing intrafamily violence in the presence of a child, which would relate in proportionate liability for this harmful conduct.

This bill would also allow this enhancement to apply to a crime of violence where the defendant committed the offense in the presence of a child, or where the child otherwise witnessed the offense. "Crime of violence" is defined in D.C. Code § 23-1331(4). For similar reasons to intrafamily violence, a child being exposed to the commission of a serious, violent crime can cause trauma to that child and have an adverse impact on that child's development and wellbeing.

Felony Strangulation

Consistent with the provisions in the Prioritizing Public Safety Emergency Amendment Act of 2023, this bill creates a felony offense of strangulation. Strangulation is widely recognized as one of the most dangerous forms of domestic violence, and a significant predictor for future lethal violence. However, before the passage of the Prioritizing Public Safety Emergency Amendment Act of 2023, virtually all non-fatal strangulation cases could be prosecuted in the District only as misdemeanor simple assault. By contrast, based on the documented physical and emotion harm associated with strangulation, particularly in the domestic violence context, and the fact that strangulation is a strong predictor of future domestic violence fatality, 49 states have a law allowing strangulation to be prosecuted as a felony.[21] There is overwhelming support from experts for the creation of felony liability for strangulation. We presented detailed testimony in support of this proposal in May 2021,[22] alongside other witnesses who supported this proposal.[23]

Non-Consensual Pornography

This bill closes a loophole in the law criminalizing distribution and publication of non-consensual pornography by modifying the provision requiring an "agreement or understanding" between the parties that the sexual image would not be disclosed; instead, the law would require that, essentially, the defendant knew or was reckless to the fact that the person depicted did not consent to the disclosure.

Current law requires an "agreement or understanding" that the sexual image would not be disclosed.[24] However, it is not always possible to prove the existence of an "agreement or understanding," creating a loophole in liability.

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[21] Since the public hearing on this bill in May 2021, one additional state—Ohio—now allows strangulation to be prosecuted as a felony. *See* https://www.news5cleveland.com/news/local-news/investigations/ohio-finally-recognizes-strangulation-as-a-felony-was-the-last-state-in-the-country-to-do-so. There is advocacy for South Carolina to create a stand-alone felony of strangulation as well. *See* https://www.live5news.com/2021/07/22/strangulation-not-standalone-felony-sc-advocates-call-change/.

[22] *See* https://www.justice.gov/usao-dc/pr/statement-us-attorneys-office-district-columbia-dc-council-regarding-measures-strengthen.

[23] *See* https://lims.dccouncil.gov/downloads/LIMS/46637/Hearing_Record/B24-0116-Hearing_Record1.pdf.

[24] The legislative history is clear, however, that "an explicit warning not to share a sexual image is not necessary to create an understanding that the sexual image is not to be further disseminated when the original

For example, in a recent case charged in Superior Court, a defendant disseminated sexual images of the victim where the victim did not consent to the disclosure. However, neither the victim nor law enforcement was able to ascertain how the defendant acquired those images. Therefore, the judge could not find that there was an "agreement or understanding" that the sexual image would not be disclosed. Although the defendant likely knew or acted in conscious disregard of a substantial risk that the victim did not consent to the disclosure, the absence of proof of an "agreement or understanding" meant that the defendant could not be found guilty of this offense, and was acquitted. Modifying this language to instead focus on the defendant's mental state and the lack of consent in the distribution would close this loophole. This modification would also address a situation where, for example, a defendant steals sexual images and distributes them; under that situation, there would have been no "agreement or understanding" between the defendant and victim.

Finally, by focusing on the defendant's mental state and the victim's lack of consent, this law may be applied more broadly to conduct perpetrated by someone other than a current or former intimate partner, with whom such an "agreement or understanding" may exist, allowing liability for anyone who distributes these images without the victim's consent, regardless of the past history between the parties.

Enhanced Penalties for Assaults Against Senior Citizens

This bill closes a gap in the Senior Citizen Victim Enhancement under D.C. Code § 22-3601, which allows many offenses to be enhanced, but does not include "assault with significant bodily injury" as an offense that can be enhanced when it is committed against a senior citizen. This was likely inadvertent, and previous legislation was likely intended to include a conforming amendment to this Enhancement.

D.C. Code § 22-3601(b) provides that the Enhanced Penalty for Crimes Against Senior Citizen Victims applies to the offenses of "Abduction, arson, aggravated assault, assault with a dangerous weapon, assault with intent to kill, commit first degree sexual abuse, or commit second degree sexual abuse, assault with intent to commit any other offense, burglary, carjacking, armed carjacking, extortion or blackmail accompanied by threats of violence, kidnapping, malicious disfigurement, manslaughter, mayhem, murder, robbery, sexual abuse in the first, second, and third degrees, theft, fraud in the first degree, and fraud in the second degree, identity theft, financial exploitation of a vulnerable adult or elderly person, or an attempt or conspiracy to commit any of the foregoing offenses." This list largely tracks the offenses delineated as a "crime of violence" under D.C. Code § 23-1331(4), except the offense of "assault with significant bodily injury." (Other areas where the enhancement list does not track the "crime of violence" definition are for terrorism-related offenses, gang recruitment, offenses committed against children, and felony assault on a police officer. The enhancement list also contains a few additional offenses that are not "crimes of violence" related to fraud, theft, and exploitation of an elderly person.)

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sharing occurs within the context of a romantic or similarly close relationship where it is the norm to send these images between the parties." Report of the Committee on the Judiciary and Public Safety on B20-0903, the Criminalization of Non-Consensual Pornography Act of 2014, at 5 (Council of the District of Columbia November 12, 2014).

The offense of assault with significant bodily injury was created by the Omnibus Public Safety Amendment Act of 2006 (L16-306). Assault with significant bodily injury was later added to the list of "crimes of violence" by the Omnibus Criminal Code Amendments Act of 2012 (L19-320), but this law did not make any conforming amendments to the Senior Citizen Victim Enhancement in D.C. Code § 22-3601. Page 11 of the committee report on the Omnibus Public Safety Amendment Act of 2006 says that the Senior Citizen Victim Enhancement "would expand the list of crimes subject to enhancement—to include all 'crimes of violence' that could be committed against an elderly person," so the original intent behind the enhancement likely would have been to capture all offenses subsequently categorized as crimes of violence as well. Further, the Enhanced Penalty for Committing Crime of Violence Against Minors under D.C. Code § 22-3611 was also created by the Omnibus Public Safety Amendment of 2006, and it can enhance any "crime of violence." Later amendments to the Senior Citizen Victim Enhancement in the Financial Exploitation of Vulnerable Adults and the Elderly Amendment Act of 2015 (L21-166) focused on financial exploitation of elders.

Likewise, we recommend adding the newly created felony offense of "strangulation" to this list of offenses, to permit greater liability where a person strangles a senior citizen.

Bill 25-0348, "Ensuring Safe Forensic Evidence Handling for Sexual Assault Survivors"

As to Bill 25-0348, we appreciate the intent of the bill, which is to support survivors of sexual assault, even in situations where they do not wish to report the sexual assault to law enforcement when they undergo a sexual assault nurse examination. At the same time, we have technical concerns with several aspects of this bill that may have unintended consequences, and we have concerns about the implications of storing this type of evidence at the Department of Forensic Sciences. We would be pleased to work with the Committee to address those concerns.

We also have significant concerns about the bill's proposed limitation on mandatory reporting for certain counselors who work with victims. Our Office strongly supports the appropriate expansion of mandatory reporting laws as a means to protect children and to allow law enforcement to identify and stop child abuse. The importance of mandatory reporting laws cannot be overstated, as the Council has previously recognized. The Committee Report to the Child Sexual Abuse Reporting Amendment Act of 2012 (codified at D.C. Code § 22-3020.51 *et seq.* found the following:

> Child sexual abuse is a deplorable crime that deprives victims of their voices and can cause emotional, physical, and mental trauma for decades after the abuse has ended. In order to end such heinous crimes, authorities have to know about the abuse, and such knowledge can only come from individuals who report to the authorities. Given individuals' hesitancy to come forward, encouraging reporting is key.

This bill, however, proposes limiting the mandatory reporting obligations of sexual assault counselors, human trafficking counselors, and domestic violence counselors, who may be the first people to speak with a child victim about what happened. Under current law, these counselors are generally exempt from mandatory reporting of crimes committed against children,

except where the counselor has "actual knowledge"[25] that either: the victim is under the age of 13; the perpetrator or alleged perpetrator with whom a victim under 18 years of age has a "significant relationship"; or the perpetrator or alleged perpetrator is more than 4 years older than a victim who is under 18 years of age. This bill proposes expanding that exemption from mandatory reporting, such that a counselor is only required to report if the counselor has "actual knowledge" that the crime disclosed to the counselor places the child in "immediate danger" of designated circumstances, and that any disclosure made by the counselor be "narrowly tailored to only include information regarding the immediate danger to the victim." At the outset, it is unclear how the "immediate danger" would be ascertained. For example, a victim of child abuse who has been groomed by their abuser (including an abuser who is in a position of trust with the victim, such as a teacher, coach, clergy member, or family member), or a victim of human trafficking likely will not fully appreciate that they are in danger. Further, although an immediate victim may not be in danger, there may still be a significant danger to the community that would justify requiring a mandatory report. For example, if a perpetrator has temporarily or permanently stopped abusing one child, but has started abusing another, it is unclear if there would remain an "immediate danger" to the first child. Focusing on the immediate danger to one child does not account, therefore, for the dangers to particular community members, or how the perpetrator's behavior could escalate beyond the conduct perpetrated on that child. Although there are other mandatory reporters that a victim may interact with as part of an investigation—such as a physician or a law enforcement officer—a victim's initial interactions and conversations with a counselor may inform what, if anything, the child discloses to a subsequent mandatory reporter or other trusted adult.

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We appreciate the Council's consideration of these important measures, as we all work together to protect the most vulnerable members of our community, including children, victims of intimate partner violence, victims of sexual assault and abuse, and elderly victims, and hold accountable those who harm them.

[25] Notably, a person who is designated as a mandatory reporter under D.C. Code § 4-1321.02(a) must make a report when they "know or have reasonable cause to believe" that a child they know in their professional capacity has been harmed in a designated manner. *See* D.C. Code § 4-1321.02(b)(1).