BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HEALTH
COUNCILMEMBER CHRISTINA HENDERSON, CHAIRWOMAN

PUBLIC HEARING

on

Bill 25-0692, the "Enhancing Mental Health Crisis Support and Hospitalization Amendment Act of 2024"

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

Thursday, July 11, 2024, 9:30 a.m.

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

Chairwoman Henderson 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 joined by my colleague, Jennifer Mika, the Pretrial Mental Health Coordinator at USAO-DC, to assist me in answering questions. We 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 25-0692, the "Enhancing Mental Health Crisis Support and Hospitalization Amendment Act of 2024." This bill will enhance the procedures relating to how the civil and criminal systems address the treatment and commitment of people with mental illnesses, when they are dangerous because of that mental illness. This bill will streamline processes and provide more tools to treatment providers and the courts both to address a person's mental illness and to protect the community. This bill is a crucial tool that will help to address the overlap between mental health, civil commitment processes, and criminal justice.

USAO-DC is committed to addressing mental health issues that intersect with the criminal justice system, with the dual goals of connecting people with mental health treatment and protecting the community. Our Office participates in a robust Mental Health Community Court within the Superior Court of the District of Columbia (D.C. Superior Court), where we divert certain individuals charged with certain low-level crimes away from the traditional criminal justice process, with the goal of addressing their mental health issues and reducing recidivism. We support prearrest diversion and were pleased that the recently enacted Secure DC Omnibus Amendment Act created a Prearrest Diversion Task Force to spearhead prearrest diversion in the District. Our Office—led by Pretrial Mental Health Coordinator Jennifer Mika—is an active participant with the Criminal Justice Coordinating Council's (CJCC) Substance Abuse Treatment and Mental Health Services Integration Taskforce (SATMHSIT). Ms. Mika also served as part of the District's delegation to the federal Substance Abuse and Mental Health Services Administration (SAMHSA)'s Policy Academy on Competence, and continues to collaborate with the D.C. Superior Court and the Department of Behavioral Health (DBH) to improve the processes for addressing mental health in the criminal justice system.

In addition to the changes proposed by this bill, we support other changes to several key statutes related to people with mental illnesses who present a danger to themselves or others. We have worked closely with the Office of the Attorney General for the District of Columbia (OAG-DC) to develop jointly proposed additional changes to these statutes that are aligned with the goals of this bill and that will further enhance the processes in these situations. We have also consulted with the DBH in developing these proposed changes. We look forward to collaborating with the Committee on this bill and additional related changes.

As background, there are several key sets of statutes in the D.C. Code that relate to people with mental illnesses who present a danger, with differing government agencies responsible for addressing those issues.

First, D.C. Code § 21-521 *et seq.* relates to emergency hospitalization of people who are believed to have a mental illness and, because of that illness, are likely to injure self or others. This process is commonly referred to as FD-12. Several groups of people are permitted under this statute to take a person into custody, transport them to a hospital, and apply for their hospital admission for purposes of emergency observation and diagnosis—DBH officers, officers authorized to make arrest, physicians, qualified psychologists, or, under the bill as introduced,

nurse practitioners. OAG-DC is responsible for addressing—and, as appropriate, litigating—whether a person remains hospitalized under this emergency hospitalization authority.

Second, D.C. Code § 21-541 *et seq*. relates to civil commitment of people who are mentally ill and, because of that illness, are likely to injure self or others if not committed. This process is governed by what is commonly referred to as the Ervin Act. Civil commitment is a non-criminal process whereby the Commission on Mental Health (Commission) makes a recommendation as to whether a person should be civilly commitment—that is, court ordered to receive mental health treatment. If the Commission recommends that the person be civilly committed, the Commission also recommends whether that civil commitment should be on an inpatient or outpatient basis, in line with the least restrictive alternative consistent with the best interests of the person and the public. A civil commitment order lasts for one year but can be renewed on an annual basis. OAG-DC is responsible for addressing—and, as appropriate, litigating—whether a person should be civilly committed.

Third, D.C. Code § 24-531.01 *et seq.* relates to the evaluation and treatment of criminal defendants whose competency to stand trial is called into question. In its current form, this process was created by the "Incompetent Defendants Criminal Commitment Act of 2004" (IDCCA). A criminal defendant is competent to stand trial when they have a sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding and have a rational, as well as a factual, understanding of the proceedings against them. A court may hold hearings and order evaluations conducted by DBH to determine whether or not a defendant is competent to stand trial, and if they are not competent to stand trial, whether they are likely to attain competence in the foreseeable future. A court may also order a defendant to participate in competency restoration efforts on either an inpatient basis at Saint Elizabeths Hospital or an outpatient basis at either the D.C. Department of Corrections or in the community in programs developed and run by DBH. This process is based on the requirements of a number of Supreme Court cases stemming from the Supreme Court's decision in *Jackson v. Indiana*, 406 U.S. 715 (1972). When there is a question as to whether a person charged in a criminal case prosecuted by USAO-DC is mentally competent to stand trial, USAO-DC is responsible for addressing—and, as appropriate, litigating—whether or not a person is competent to stand trial. A person charged in a criminal case also may be civilly committed, and USAO-DC works closely with OAG-DC, who handles any related civil commitment process. Civil commitment may proceed before, concurrently with, or after the criminal case, and the IDCCA sets out how the criminal competency proceedings relate to civil commitment proceedings.

Given that USAO-DC's role in these processes primarily relates to the IDCCA, we will focus our testimony on the IDCCA provisions in this bill and in our additional set of proposed changes. We appreciate the bill's desire to improve the transition to civil commitment from criminal cases. In addition, there are several other issues with the IDCCA that we propose remedying.

First, there is a lack of clarity in several definitions in the IDCCA. We propose several definitions that are consistent with national case law and other D.C. laws and regulations.

Second, the final drafting of the IDCCA inadvertently created ambiguity about the burden of proof for competence and restoration. We propose clarifying that the burden of proof remains with the party asserting incompetence and/or unrestorability.

Third, there is a lack of clear guidance in the IDCCA as to the process when DBH is

unable to provide an opinion about competence and/or restoration. We propose new language permitting a judge to order an additional period of treatment for clinicians to form and provide such an opinion.

Fourth, there is a lack of clear guidance in the IDCCA on a judge's authority to keep a criminal defendant at Saint Elizabeths Hospital (SEH) after being found competent to proceed to trial. We propose new language permitting a judge to place a criminal defendant at SEH if recommended by DBH.

Fifth, the IDCCA's articulation of the transition from criminal proceedings to civil commitment proceedings and the standard for keeping a criminal defendant at SEH during this transition requires additional clarity after the D.C. Court of Appeals decision in *Peyton v. United States*, 299 A.3d 552 (D.C. 2023). We propose new language articulating the standard for determining whether a criminal defendant should remain at SEH (1) pending a determination about civil commitment, and (2) between when a petition is filed and a hearing is held before the Commission. In addition, we propose new language establishing a rebuttable presumption in favor of continued admission at SEH for criminal defendants charged with certain dangerous or violent crimes; new language giving a judge explicit authority to order a criminal defendant to attend civil commitment evaluations; and new language ensuring the parties in the criminal case receive updates under seal on the civil commitment case.

Sixth, there is no guidance in the IDCCA on access to records essential to litigating contested issues of competence and/or restoration in the criminal case. We propose new language providing both parties in the criminal case access to DBH records for criminal defendants undergoing competence evaluations or restoration treatment.

Seventh, the IDCCA's dismissal provision is inconsistent with the time permitted for outpatient competency restoration. We propose reconciling the two inconsistent provisions.

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We appreciate the Council's commitment to addressing the intersection of mental health and public safety, with the goals of treating people who are suffering from mental illnesses while protecting the community. We look forward to continuing to work with this Committee and the Council on our shared goals of ensuring that the statutes governing both the civil processes and criminal processes are enhanced to better accomplish these goals.