

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW 20004

TO: All Councilmembers
FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary
DATE: January 27, 2010
SUBJECT: Report on Bill 18-424, “District of Columbia Safe Release of Inmates Amendment Act of 2010”

The Committee on Public Safety and the Judiciary, to which Bill 18-424, the “District of Columbia Safe Release of Inmates Amendment Act of 2010” was referred, reports favorably thereon with amendments, and recommends approval by the Council.

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I. BACKGROUND AND NEED

Bill 18-424, the District of Columbia Safe Release of Inmates Amendment Act of 2010, amends the law to require that, in the event of exigent and unusual circumstances, all incarcerated individuals released from the Central Detention Facility between the hours of 10 p.m. and 7 a.m. are certified by the warden of that facility to have been provided transportation, housing, and other requirements as specified in the Act in order to ensure the individuals’ safe release. To a large extent these requirement – transportation, housing, release counseling, etc. – are already being provided and this bill codifies existing policy and practice.

The District of Columbia Jail Improvement Act of 2003 (the “Jail Improvement Act”) requires that inmates not be released from the D.C. Jail between the hours of 10:00 p.m. and 7:00 a.m. (the “10 p.m. deadline”).¹ Prior to the Jail Improvement Act, the Department of Corrections

¹ D.C. Law 15-62, D.C. Official Code § 24-211.02(b)(6).

engaged in a persistent practice of releasing inmates late at night and in the wee hours of the morning in jail jumpsuits, without identification, without transportation, without housing, and without resources to secure housing or transportation.

The 10 p.m. deadline was imposed under D.C. Law 15-62 to protect the inmate and promote safety for the community surrounding the jail. Advocates for inmates were concerned that people being released late at night would be vulnerable to crime or mistreatment, and would be unable to access necessary social services. These returning individuals should be given every opportunity to re-enter society successfully. The first 72 hours after an inmate is released can be the most important, setting the stage for success or failure. It is important that inmates are released at a time when they can have access to housing and social services, thereby lessening the chances of recidivism.

Since enactment of the Jail Improvement Act, the Committee repeatedly has sought information from the Department of Corrections on the number of people released after 10 p.m., the reasons for the late release, and the conditions of their release. However, the Department of Corrections has resisted accountability. We do know though, that currently about eight inmates per month are released after 10 p.m. but we have no further details.² Our Place DC, a local non-profit that supports women who are or have been in the criminal justice system, has surveyed women released from the DC jail regarding the time of their release. Year after year, the surveys show that the jail is releasing inmates after 10 p.m. without access to resources and in jumpsuits, jeopardizing the inmates' chance of successful re-entry.

Since the enactment of the 10 p.m. deadline, the Department of Corrections has chafed at the requirement. Questions about compliance have often been raised at Committee oversight hearings. In 2007, the Department drafted legislation to effect repeal. Bill 17-352, the "Release From Confinement Act of 2007," did not receive Committee approval. Consequently, on February 17, 2009 current D.C. Attorney General Peter Nickles wrote Council Chairman Vincent Gray declaring that "...I am prepared to issue an opinion to the Director of the Department of Corrections declaring that the cutoff provision is unconstitutional as applied and advising the Director to cease implementing it. In my view, a preferable means of addressing this situation is for the Council to ... repeal the cutoff provision." The Council did not act on this ultimatum. Despite an exchange of correspondence between Mr. Nickles and the Committee's chairman, Mr. Nickles proceeded to issue a March 11, 2009 memorandum to the Director of the Department of Corrections (DOC) stating in part: "...the DOC is hereby advised that the Act, as applied, is unconstitutional and it is further directed to cease compliance with the provisions of the Act...".

In essence, rather than treat the 10:00 p.m. restriction on inmate release as a deadline to be met for the benefit of inmates, the Executive sees it as an obstacle, a burden to its administration of justice. It is easier to strike down the statute under the guise of a legal opinion

² Letter from Peter J. Nickles, Attorney General for the District of Columbia, to Honorable Phil Mendelson, Chairperson, Committee on Public Safety and the Judiciary (Feb. 24, 2009).

than to pursue strategies that ensure timely release and therefore benefit inmates. These strategies include: (1) increase the number of DOC personnel processing inmate releases, including putting more instrument examiners at the courts to begin release processing before the inmates return to the jail from court; (2) direct the courts and/or U.S. Marshall that prisoners being processed for release must return to the jail no later than, say, 6:00 p.m., in order to allow adequate time for release-processing; (3) expand the current pilot program of courthouse release; and (4) expedite completion of the Inmate Processing Center, which was agreed to in 2005 as settlement of the *Bynum*³ case regarding over-detention of inmates.

Over-detention – the confinement of an individual after he or she has been ordered released – is not *per se* unconstitutional. For example, in *Lewis v. O’Grady*, the 7th Circuit Court of Appeals recognized that a “reasonable time must be allowed for such matters as transportation, identity verification, and processing.”⁴ The Supreme Court has acknowledged that “[t]he Fourteenth Amendment does not protect against all deprivations of liberty . . . [,] only against deprivations of liberty accomplished ‘without due process of law.’”⁵ Thus, while constitutional issues are potentially raised in any circumstance of over-detention, certain societal interests and administrative needs prevent an automatic determination of liability.

Section 2 of Bill 18-424 is intended to require the Department of Corrections to fully complete a number of steps especially important if an inmate is to be released late at night. These additional administrative functions imposed on the Department of Corrections are intended to ensure that an inmate is not released at a time period when his or her safety, as well as the prospects for successful re-entry, are most at jeopardy.

The impetus for the 10 p.m. deadline was to ensure the timely release of inmates by giving the Department of Corrections a deadline to meet when processing releases. In its report on Bill 15-31 (now D.C. Law 15-62), this Committee stated: “The chances for successful reentry are also increased if ... the inmate is not released late at night.” The deadline was adopted as part of a larger law to improve conditions for inmates. Releasing inmates at midnight out of the backdoor of the jail, into a neighborhood where there is no transportation and no other facilities to assist inmates is not in their best interest. Often, they have no place to go. At the time Bill 15-31 was adopted, they were being released without identification, and wearing jail-issued jumpsuits. The 10 p.m. deadline is intended to ensure an inmate’s timely access to liberty. It is not, as the Administration contends, meant to result in the deprivation of liberty. If the Administration does not meet the deadline it has failed the inmate. Removing the deadline makes the situation worse.

To a large extent the requirements imposed by Bill 18-424 are already the policy of the government. Enacting them into law makes them enforceable, however. The bill requires that inmates released after the 10:00 p.m. deadline have a housing destination and are provided transportation, appropriate clothing, a seven-day supply of prescription of any medications, and

³ See, *Bynum v. District of Columbia*, 412 F. Supp. 2d 73 (D.D.C. 2006).

⁴ 853 F.2d 1366, 1370 (7th Cir. 1988).

⁵ *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

release counseling. In Mr. Nickles' October 2, 2009 letter to the Committee (objecting to the bill, a copy is attached) he states the following is already being provided:

- 1) Release all inmates in their own personal street clothes or civilian clothing issued by the Department of Corrections. Inmates shall not be released in their jumpsuits or prison uniforms.
- 2) Release all inmates with a Discharge Plan that includes a designation of housing and a resource booklet that identifies housing and homeless shelters where inmates can go upon release.
- 3) Provide transportation to released inmates when necessary. Inmates who require transportation and are released before the Metro closes at midnight shall receive Metro tokens in order to travel home. Inmates released after midnight when the Metro is closed shall be provided a taxicab ride home at no expense to them (the DOC has a contract with Yellow Cab whereby DOC summons the cab for the inmate by telephone call). The midnight shift responsible for release of inmates shall be trained on the new procedures.

Contrast this with the bill and there is not much difference. Mr. Nickles did not mention the supply of prescription drugs but this is already the practice and policy of the Department of Corrections and is a provision of its contract with Unity Healthcare that provides healthcare to all inmates. Also, the bill excludes Metro as a transportation option.

Since Bill 18-424 grants the Administration's request to provide in the law the ability to release inmates after 10:00 p.m. – albeit only in exigent and unusual circumstances – it is difficult to understand why the Attorney General continues to insist that the law and the bill are unconstitutional. The courts have repeatedly permitted certain societal interests and administrative needs to override liability regarding over-detention. Those interests and needs include successful re-entry and accurate release processing.

There is *no* case law that supports the conclusion that the 10 p.m. deadline is unconstitutional. Cases that have resulted in liability have involved instances of willful neglect or detentions exceeding the date of release by *several days*. Neither of these is at issue here. Indeed, a cursory search of relevant case law reveals that courts have upheld detentions for up to two days following a release order.⁶ The courts have repeatedly avoided setting any time limit for release, asserting a case by case reasonableness standard, although on the pre-trial side of detention the courts have stated that a 48 hour timeframe is reasonable.⁷

⁶ See, *Lund v. Hennepin County*, 427 F. 3d 1123 (8th Cir. 2005) (12 hours over-detention); *Brass v. County of Los Angeles*, 328 F. 3d 1192 (9th Cir. 2003) (39 hours over-detention); and *Dye v. Hennepin*, 2005 U.S. Dist. LEXIS 812 (Dist. Minn. 2005) (slightly less than 48 hours).

⁷ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Finally, it must be acknowledged that the District has been sued on the issue of over-detention: *Bynum v. District of Columbia*.⁸ Notably, the case did *not* challenge the 10 p.m. deadline, even though the 10 p.m. deadline was adopted during the litigation. Bynum involved over-detentions ranging from an extra day to many days, to months on end. Holding inmates overnight was *not* the issue.

Importantly, in 2006 the District of Columbia agreed to pay \$12 million in settlement of claims stemming from practices at Department of Corrections' facilities.⁹ Of that amount, \$3 million was reserved for the construction of an inmate processing center (IPC). The state-of-the-art IPC is supposed to provide adequate processing facilities for intakes, releases, and associated records processing. It will speed up the timely and accurate release of inmates.

While progress has been made on this project, there have been repeated delays. In milestones provided by the Department of Corrections to the Committee on April 27, 2007, an anticipated opening ceremony and dedication for the IPC was slated for May 2009. However, as of March 24, 2009, a design/build contract had not been signed. According to the Office of Property Management the projected completion date for the project is now February 2012 – almost three years late.

Bill 18-424 is necessary to ensure the safe release of inmates at night and to protect the Council's intent in enacting a 10:00 p.m. deadline for the release of inmates. The Committee urges its adoption.

II. LEGISLATIVE CHRONOLOGY

July 31, 2009	Bill 18-424, the "District of Columbia Safe Release of Inmates Amendment Act of 2009", is introduced by Councilmember Mendelson.
August 7, 2009	Notice of Intent to act on Bill 18-424 is published in the <i>D.C. Register</i> .
September 4, 2009	Notice of a Public Hearing on Bill 18-424 is published in the <i>D.C. Register</i> .
October 7, 2009	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-424.
January 27, 2010	The Committee on Public Safety and the Judiciary meets to mark-up and vote on the report and committee print of Bill 18-424.

⁸ *Supra* note 3.

⁹ *Id.*

III. POSITION OF THE EXECUTIVE

The Executive Office of the Mayor provided no witness to testify or answer questions regarding Bill 18-424. Written comments were submitted by Peter J. Nickles, Attorney General for the District of Columbia. The comments are attached and express opposition to the bill.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-424 on Wednesday, October 7, 2009. The testimony summarized below is from that hearing. A copy of the testimony is attached to this report.

John Rosser, Vice Chairperson, Fraternal Order of Police DC Corrections Labor Committee, testified regarding Bill 18-424. His position was neutral as to passage of the bill. He provided comments regarding the lag time in communication between the courts and the Department of Corrections, and regarding the number of inmates processed through the Department of Corrections annually.

Ivy Finkenshtadt, Staff Attorney, D.C. Prisoners' Project, testified in support of Bill 18-424. "Advocates for inmates [are] concerned that people released late at night would be vulnerable [to] crime and mistreatment, and would be unable to access social services if required."

Charles Thornton, Re-entry Task Force, testified in support of Bill 18-424. As a former inmate he stated: "I am greatly opposed to releasing individuals between the hours of 10:00 p.m. until 7:00 a.m. with no release plan in place that will insure [*sic*] transportation and safe and secure arrival to a predetermined destination."

Miguel Rosario, Public Witness, testified in support of Bill 18-424.

VI. IMPACT ON EXISTING LAW

Bill 18-424 will affect existing law by amending D.C. Law 15-62, the District of Columbia Jail Improvement Act of 2003, D.C. Code § 24-211.02(b), which prevents the release of an inmate from the D.C. Jail between the hours of 10:00 p.m. and 7:00 a.m. It will add a new subsection to the law that will allow the release of these individuals in the event of exigent and

unusual circumstances. Bill 18-424 requires that in the event of exigent and unusual circumstances, the Department of Corrections, via the warden of the Central Detention Facility, has to certify that the individual being released has been provided transportation, housing, appropriate clothing, a seven-day supply of all prescription medications the individual is to continue taking upon release, has been provided release counseling within seven days prior to release, and has been provided the option of remaining at the facility until 7 a.m. Bill 18-424 will also amend the law by requiring that the Mayor provide to the Council on a quarterly basis a detailed report regarding late releases: the exigent and unusual circumstances for his or her delayed release; the custody status of each inmate immediately prior to the time of his or her release; and the actual time of each release.

VII. FISCAL IMPACT

The attached January 11, 2010 fiscal impact statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-428. The Committee believes that with this bill the number of delayed releases should be de minimus (less than the number currently released after 10:00 p.m., which is “eight per month”).¹⁰ Further, the bill will reduce liability to the District because currently late releases are prohibited by statute and therefore if harm occurs to or is caused by a late-release inmate (released contrary to law) the District could be sued. This bill reduces that risk.

VIII. SECTION-BY-SECTION ANALYSIS

- Section 1 States the short title of Bill 18-428.
- Section 2 Amends D.C. Code § 24-211.02(b) by adding new paragraphs (7) and (8) to allow release of an inmate between the hours of 10 p.m. and 7 a.m. if an exigent and unusual circumstance exists. “Exigent” means requiring immediate action or aid; the circumstance is not exigent if it is/was predictable or preventable. Additionally, the circumstance must be “unusual” in the sense of extraordinary and rare. A late return from court is neither. In the event of an exigent and unusual circumstance, the Department of Corrections shall:
- A) Verify that the inmate has a residence, home, or shelter to which he or she can go at this late hour.
 - B) Provide the inmate with his or her own clothing, or with weather-appropriate attire that is not ill-fitting, nor a jumpsuit, and that is typical of street clothing worn by the public.

¹⁰ Nickles, *supra* note 2.

- C) Certify that the inmate has a seven-day supply of all prescription medications the inmate is to continue taking upon release and that the inmate received release counseling from the jail's healthcare provider within the seven days preceding release.
- D) Within seven days prior to release, provided the inmate with release counseling on access to benefits and services available in the District to facilitate reentry.
- E) Ensure that transportation to housing is immediately available at this late hour, and at no cost to the inmate, either by the Department of Corrections' transportation unit, taxi voucher paid for by the Department of Corrections, or friend/family picking up the inmate.
- F) Provide the inmate with the option of remaining at the facility until 7 a.m.
- G) Require the warden (or the acting warden on duty) to certify that all requirements of this new paragraph have been met prior to releasing the inmate.

A new paragraph (8) is added to require a quarterly report to the Council listing all inmates who have been released between 10:00 p.m. and 7:00 a.m. A quarterly report is already required in the law for other information about the jail.

Section 3 Adopts the fiscal impact statement.

Section 4 Establishes the effective date of this act, following a 60-day Congressional review.

IX. COMMITTEE ACTION

On January 27, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-424, the "District of Columbia Safe Release of Inmates Amendment Act of 2010". The meeting was called to order at 11:10 a.m., and Bill 18-424 was the first item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Bowser, Cheh, and Evans present), Chairman Mendelson moved the print along with an amendment to the print striking the language prohibiting releasing an inmate in a sweatsuit. The Department of Corrections currently allows an inmate to be released in a sweatsuit and this amendment would permit this. Councilmember Evans objected to the bill, stating that he has trouble supporting a bill that the Executive opposes. Councilmember Evans moved to table the bill while the

Committee works with the Department of Corrections to come to a compromise. The motion to table failed on a voice vote.

During further discussion of the print, Councilmember Cheh stated that she supports the bill because there is an extraordinary danger to the inmate and the community when the inmate is released at a time when there is no access to housing or social services. She further stated that the Executive frequently opposes change and that is not a reason to oppose a bill. Councilmember Alexander stated that she supports the bill and that the steps prescribed in the bill for releasing an inmate between the hours of 10 p.m. and 7 a.m. should be taken no matter what time of day an inmate is released. She further stated that she spoke to Director Brown and his only opposition to the bill was that it may increase the jail's liability if the inmate was harmed in the jail between the hours of 10 p.m. and 7 a.m. However, Councilmember Alexander believes that this is not an appropriate reason for opposing the bill – the jail can take the necessary steps to ensure that an inmate is not harmed. Chairman Mendelson stated that the bill reduces liability – current law prohibits release of an inmate during the hours of 10 p.m. and 7 a.m. and if an inmate was injured after he/she was illegally released, there may be liability.

Following discussion, the vote on the print was 4-1 (Chairman Mendelson and Councilmembers Alexander, Bowser and Cheh voting aye; Councilmember Evans voting nay). Chairman Mendelson then moved the report with leave for staff to make technical and editorial changes. After an opportunity for discussion the vote on the report was four to one (Chairman Mendelson and Councilmembers Alexander, Bowser and Cheh voting aye; Councilmember Evans voting nay). The meeting adjourned at 11:52 a.m.

X. ATTACHMENTS

1. Bill 18-424 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement.
4. Committee Print for Bill 18-424.