Clarifying the Post-Arrest Process in the District of Columbia: Report, Recommendations, and Proposed Legislation

Prepared by the D.C. Misdemeanor Arrest & Pretrial Release Project Subcommittee of the Council for Court Excellence

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Council for Court Excellence
Improving Justice for the Community

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- Improving public access to justice, and
- Increasing public understanding and support of our justice system.

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INTRODUCTION

This Council for Court Excellence report addresses corollary issues that were raised, but not considered directly or resolved, by the October 2010 CCE report entitled *Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation*. The Project Subcommittee which has participated in the preparation of this 2013 CCE report consists of many of the same stakeholder groups and individuals that collaborated on the 2010 report.

The District of Columbia is considered to be a model for the rest of the nation with respect to a core concept of pretrial release standards, that is, given the arrested person's presumption of innocence, he is to be released pending trial on personal recognizance or with the least restrictive conditions possible unless a judicial officer determines that he is a danger to the community or a flight risk. Unlike most other jurisdictions, in D.C. the imposition of neither a monetary requirement nor a surety bond can be used to detain a person before his or her trial. D.C. Official Code § 23-1321.[1] However, that standard applies only to arrestees who have made their initial appearance before a judicial officer, and in the District, that initial appearance happens only after the arrest has been reviewed by the appropriate prosecuting authority, either the Office of the United States Attorney for the District of Columbia (USAO) or the Office of the Attorney General for the District of Columbia (OAG).

The evolution of the District's **post-arrest** release system (*i.e.*, the procedures applicable between the arresting officer's completion of the arrest process and the arrestee's initial appearance before a judicial officer[2]), has been largely rooted in custom and practice with the unintended result being confusion by the public and oftentimes criminal justice practitioners – attorneys and police officers alike – about how the system works, which crimes are eligible for certain types of release, and how current and prior criminal history and other factors may affect post-arrest release options.

This report and its recommendations are designed to bring increased clarity and transparency to an otherwise well-crafted national model for all stages of the post-arrest and pretrial release processes. As stated above, the current post-arrest release can benefit from putting in writing the established custom so that the various participants in the criminal justice system can better understand them and ensure they are applied consistently. (It is revealing that a number of the Subcommittee meetings were devoted exclusively to developing an understanding of the post-arrest and pretrial release system and its criteria and nuances, primarily based on the understandings and anecdotal experiences of the Subcommittee members.)

This report also addresses an issue identified in 2010 concerning the use in the District of Columbia's criminal justice system of a practice referred to as "post-and-forfeit" by which persons arrested for certain low level offenses could terminate further processing in the court system by paying a predetermined "collateral" amount and "forfeiting" it. Some of the concerns raised were potential inconsistencies in the application of this procedure, adequate notice to the arrested person of potential

[1] A person can be detained pending trial if he is a danger to the community or to any other person or is a risk of flight or under other limited circumstances. D.C. Official Code § 23-1322.

[2] Unlike many jurisdictions which have "night court" or hearing commissioners or magistrates who set bail at all hours, the Superior Court for the District of Columbia schedules matters every day except Sundays. Arrests which have not been sufficiently processed by the court's "cut-off" time are held over to the following court day.

options and consequences, the lack of prosecutorial review of the adequacy of the arrest (which was of particular concern in the context of arrests for disorderly conduct, prompting the need for the 2010 legislative revisions), and the propriety of a person being "punished" (by, in effect, paying a "fine") without an adjudication or acknowledgement of guilt. Another issue raised was the apparent inability of persons charged with more serious offenses to be released, especially on weekends, by posting a "stationhouse bond" or through some other mechanism pending their first court appearance.

To consider these issues, the Project Subcommittee devoted a substantial amount of time reviewing, discussing, and simply trying to better understand what can happen when a person is arrested and what their possible release options are in the District of Columbia.

This report's recommendations are for the most part based on a consensus of the Subcommittee members. The report: provides a description of the post-arrest release process as understood by the Subcommittee; recommends a legislative proposal and updated instructions to the public about post-arrest options; and identifies additional issues for possible consideration.

PROCESSING ARRESTS IN THE DISTRICT OF COLUMBIA

As the chart on page 7 shows, not every encounter between a law enforcement officer and a civilian (even if a crime, infraction, or violation of a law or regulation has allegedly been committed) will result in an "arrest." The officer may counsel or warn the person, or take some more formal action. If the infraction or violation is civil (*i.e.*, non-criminal), the officer may: (1) issue a "notice of infraction" (NOI) for non-criminal traffic offenses or (2) issue a "notice of violation" (NOV) for other non-criminal violations, such as littering. For certain low level criminal offenses, the officer may issue a "field arrest" form (commonly referred to by its Metropolitan Police Department (MPD) form number of "PD 61-D"). In each of these three circumstances, the violator is NOT taken into custody by the officer but rather is given direction on how to proceed: in the first two instances, the violator can opt to pay the fine indicated or can request a hearing before an administrative law judge. The third instance, issuance of the "field arrest" form, requires the violator to appear at a police station within 15 days in order to complete the booking process[3], since the offense does constitute a criminal matter.

If the offense is one for which a field arrest is not authorized, a person is arrested and immediately taken into custody. Usually, this will result in a full search of the person, the use of handcuffs or other means of restraint, and transport to the arresting officer's station for processing. Depending upon the arrest charge, as well as a number of other factors, the arrested person will be processed at the station by way of one of the following four processes.

[3] If the person fails to appear within the 15-day time period, the officer issuing the field arrest form is responsible for bringing the matter to the prosecutor's attention. The prosecutor has discretion to request that the court issue an arrest warrant in order for the person to be taken into custody to resolve the matter.

1. "Post-and-forfeit collateral." D.C. Official Code § 5-335.01 recognizes the practice in which a person charged with certain low level offenses may pay the established collateral amount[4] and agree to "forfeit" it. By doing so, a formal criminal case will not be filed in court against the person, but the charge does remain on his arrest record. The arrestee or the Office of the Attorney General for the District of Columbia (OAG) can later decide otherwise, and either party can file with the court a "Motion to Set Aside Forfeiture" within 90 days of the arrest. Such a motion is not automatically granted but if it is, the charge will be reinstated and a court date set. If otherwise eligible to do so, the person may file a motion to seal that arrest record two years from the date of its occurrence. A comprehensive description of the "post-and-forfeit" process can be found in *District of Columbia v. Baylor*, 125 Wash. Law Rptr. 1665 (Aug. 25-26, 1997) (see Appendix 3).

2. "Citation release." D.C. Official Code § 23-1110 provides that a person arrested for a misdemeanor (unless the arrest is on a warrant) may be released on his promise to appear at a future court date. Currently, there is a list of citation-eligible offenses and other eligibility criteria that are used to determine whether citation release should be made available to the person (see Appendix 5). If the person fails to appear on the court date, a judicial officer may issue a bench warrant, subjecting the person to an additional criminal penalty.

3. "Posting Collateral or Bond." Perhaps somewhat surprisingly (at least to some members of the Subcommittee), all offenses in the District (except for crimes of violence and armed felonies, including carrying a pistol without a license) have a scheduled bond or collateral amount (see footnote 5). Except for traffic offenses and misdemeanors prosecuted by the OAG, surety bonds are not used in D.C. since there are no commercial sureties available to write them. Currently, the bond is $5,000 for a misdemeanor and $10,000 for a felony, except for those mentioned above.[5] If a person does not want to "post-and-forfeit" his collateral, or is otherwise ineligible to do so and also is ineligible for release on citation, he may post the proscribed amount and receive notice for a future court appearance. If the person fails to appear when required, the posted bond or collateral will be forfeited and a bench warrant may be issued for his arrest.

4. "Lock up." A person who is not eligible for post-arrest release under one of the above three processes or who does not agree to the conditions that would permit his/her release, will remain in the custody of the processing police agency until the next court day.[6] Hence, a person arrested on Saturday afternoon may remain in custody until sometime the following

[4] The collateral and bond amounts that are referenced throughout this report have been promulgated by the Board of Judges of the DC Superior Court. Portions of the most current lists are attached as Appendix 1, but the entire set of collateral and bond lists can be found at the court's website at http://www.dccourts.gov/internet/legal/aud_criminal/criminalforms.jsf.

[5] While it is theoretically possible to post a money bond at the police station, police departments are reluctant to handle large amounts of cash.

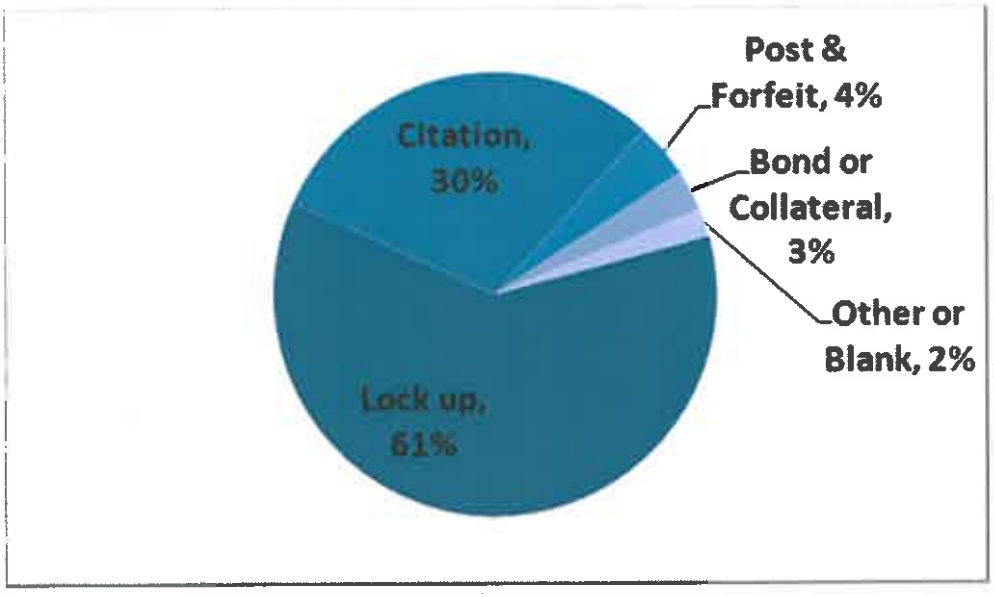
[6] At that time, the arrestee is transported to the DC Superior Court cell block pending an appearance before the arraignment judge. While in the cell block, the arrestee is provided with defense counsel and is interviewed by the Pretrial Services Agency for it to prepare a pretrial services report to assist the court in determining appropriate release conditions.

Monday afternoon, even if the prosecuting authority decides to not formally pursue a criminal case in court (see footnote 2).

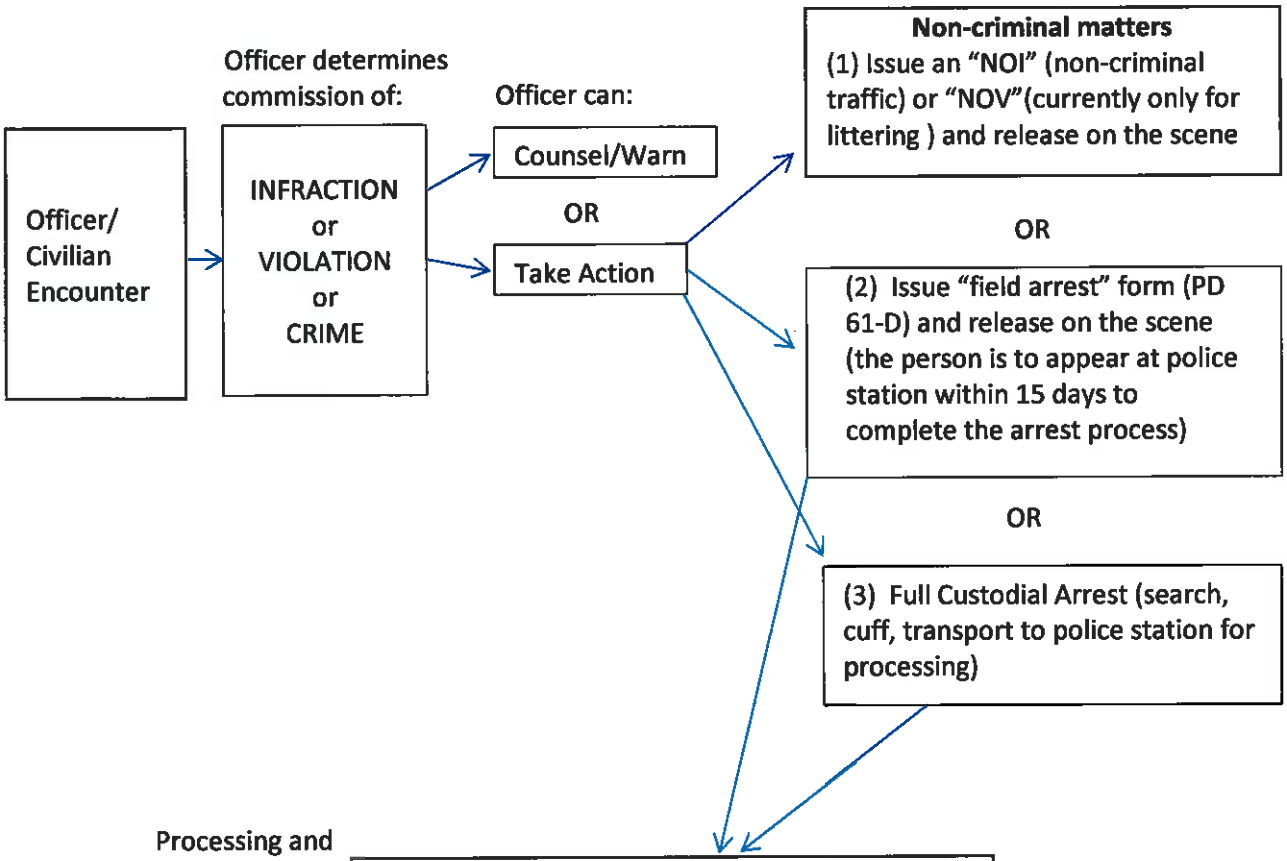
Except for arrests which have been resolved by way of a "post-and-forfeit," all arrests within the District are reviewed by either the USAO or the OAG which will determine which charges, if any, are to be brought in court. After this review and the completion of all of the necessary paperwork, the arrestee makes his initial appearance before a judicial officer where the pretrial release or detention decision is made.

To put this in perspective, in calendar year 2012, approximately 42,500 arrests were logged through MPD's central booking system which includes arrests by most other law enforcement agencies in the District. Of that number, the breakdown is as follows:

Lock-ups - 61%
Post-and-forfeit - 4%
Citation Release - 30%
Bond or collateral posted at police station- 3%
Other or blank - 2%



Police Encounters and Post-Arrest Processing Flow Chart



Processing and release options at the police station:

1. Post-and-forfeit collateral
-arrest record
-no court appearance/no conviction

2. Citation release
-promise to appear at future court appearance

3. Post collateral or bond
-secures future court appearance

4. Lock up
- presented in court next court day

NOTE: If probable cause for the arrest is negated during the arrest processing, an entry is made in the police agency's detention journal and the arrestee is released from the station.

RECOMMENDATIONS AND DISCUSSION

Recommendation 1. The Council for the District of Columbia should consider adoption of proposed legislation to update and clarify the post-arrest process and criteria.

A. The Need for the Legislation

The array of existing post-arrest options is incompletely described in the D.C. Code, which describes only the post-and-forfeit process. D.C. Official Code § 5-335.01. There was consensus among the Subcommittee members to recommend a complete revision to: (1) provide the opportunity for the D.C. Council to state policy reasons for post-arrest release; (2) minimize inconsistent application by law enforcement agencies and provide transparency to the public; and (3) refine the existing post-arrest options to increase their efficiency.

The Subcommittee identified the core values of the District's post-arrest process that the proposed legislation should ensure and enhance to include the following:

1. The release process should be consistent with assuring the safety of the community and any other person.
2. The form of release should assure the arrestee's appearance in court to answer a charge.
3. Every person should be given the opportunity to appear in court to answer a charge.
4. Money should not control who gets released and who does not pending first appearance.
5. If a judicial officer has issued a bench warrant that includes a bond, the arrestee may post the amount of the bond with the police and be given a notice to appear in court on a future date.
6. Arrests should be processed expeditiously.

The discussion below identifies the major sections of the proposed legislation and identifies major areas of discussion. The proposed legislation creates a new section, 23 D.C. Official Code § 583, "Processing Arrests," under Title 23 D.C. Official Code, Criminal Procedures, Subchapter V, "Arrest Without Warrant."[7] The section clarifies the post-arrest processing options to which an arrestee will be subject following his arrest within the District of Columbia.

The proposed legislation also modifies certain existing D.C. Official Code statutes that already address aspects of the post-arrest process: D.C. Official Code § 23-581, "Arrest without warrant by law enforcement officers;" D.C. Official Code § 23-1110, "Designation of official to issue citation or take collateral or bond;" and D.C. Official Code § 5-335.01, "Enforcement of the post-and-forfeit procedure."

[7] The Subcommittee discussed, but did not research, the rationale for the use of any of these post-arrest processes ONLY in instances of warrantless arrests, which is the current statutory framework. Since issuance of an arrest warrant is predicated upon a judicial officer's review and finding of probable cause, the Subcommittee believed that the intent of limiting these processes to warrantless arrests is to provide a judicial officer, under whose auspices the warrant was issued, the opportunity to initially determine the arrestee's release conditions.

B. Field Arrest ("PD 61-D") Process

The field arrest process is set forth in D.C. Official Code § 23-583(b) of the proposed legislation. Its current use is described in MPD Standard Operating Procedures - PD Form 61D (Violation Citation) (Appendix 2) which sets forth the circumstances and offenses for which a law enforcement officer may utilize the field arrest process.

When a person appears at a police station to complete the arrest process following the receipt of a field arrest form, he will be processed as if it were a full custodial arrest (*i.e.*, booked, fingerprinted, *etc.*). Just as with a custodial arrest, depending on the nature of the charge and other circumstances, this arrest processing can result in the use of the post-and-forfeit option, release on citation, or lock up for next day court presentment.

C. Citation Release

The revised citation release process is set forth in the proposed D.C. Official Code § 23-583(c) to augment the existing procedures in the current D.C. Official Code §§ 23-583(b) and 23-1110, which the Subcommittee determined to be insufficient.

The proposed legislation creates the position of the "Releasing Official," who is a law enforcement officer at the police station empowered to authorize citation release.

The proposed section provides that arrestees are eligible for citation release except under certain conditions. Some of the conditions are broad, such as if the person is subject to detention prior to trial pursuant to § 23-1322 or 23-1325, (c)(2)(i), or charged with a felony, (c)(2)(iii). There was considerable debate in the Subcommittee about whether all felonies should be presumed to be exempt from citation release or if certain, non-violent felonies, such as theft, should be eligible, pursuant to meeting other eligibility criteria. The Subcommittee debated this issue extensively, but no consensus was reached.

A major new issue addressed by this section is the provision of a statutory framework for violations of stay-away orders, since compliance with a stay-away order could be imposed as a condition for citation release. There was consensus among the Subcommittee that this issue be clarified in the proposed legislation.

The proposed legislation creates the authority for the law enforcement Releasing Official to release on citation people otherwise ineligible only in the very special circumstances that: (a) the Chief Judge declares that an event or set of conditions – such as a snowstorm or Inauguration - has occurred that will significantly impair the court's functioning; and (b) the relevant prosecutorial authority has approved.

The proposed legislation also addresses "hospital cases" and permits MPD to release on citation a person admitted to a hospital who is not otherwise eligible for citation release, with prosecutorial approval. The rationale for this provision is to provide an alternative so that MPD does not have to post a police officer at the hospital for persons who are significantly injured or ill and who do not pose a flight risk.

Finally, the proposed legislation provides a mechanism for citation release if the court is not in session (such as on Sundays), for people not otherwise eligible for release with the approval of the prosecuting authority.

D. Post-and-Forfeit

While the post-and-forfeit process described in D.C. Official Code § 5-335.01 was found by the Subcommittee to be largely descriptive of the post-and-forfeit process, the Code does not explain the interaction between eligibility for post-and-forfeit and eligibility for citation release. The proposed legislation clarifies that a person is only eligible for post-and-forfeit if that person is also eligible for citation release.

It is worth noting a 2012 decision by the U.S. District Court for the District of Columbia with respect to the District's ability to adopt and implement the post-and-forfeit process (*Fox, et al. v. District of Columbia* (Civil Action No. 10-2118)(see Appendix 4). This case challenged the constitutionality of the District's post-and-forfeit process on the grounds that it represented an unlawful seizure and violation of due process, among other claims. The Court, however, found that the post-and-forfeit process was voluntary in nature. If the arrestee opts for post-and-forfeit, there is a "safety valve" provision that allows the arrestee the option to re-open the case if he or she wishes to contest the arrest in court. Both of these elements of the post-and-forfeit process remain in the proposed legislation.

E. The Continued Use of Bond

Currently the D.C. Official Code allows for an arrestee to post bond to secure their release pending trial. *See* D.C. Official Code, 23 Chapter 11, "Professional bondsmen." After the Code was revised in 1992 to prohibit the imposition of a money bond that a defendant could not make, professional bondsman apparently found that it was no longer profitable to do business here so there are no commercial sureties currently licensed in D.C. On the rare occasion that a bond is used (primarily in traffic cases and other low level offenses), the money is posted at the police station and the arrestee is given a court date on which to appear.

The Subcommittee concluded that the practice of posting money bonds at a police station should not be permitted because it conflicts with the underlying principle that money should not control a person's release or detention pending presentment or trial. Rather, the Subcommittee agreed with extending the existing practice of not imposing pretrial money bonds in D.C. to the post-arrest context.[8]

Recommendation 2. The Metropolitan Police Department and other law enforcement agencies should adopt the proposed "plain English" description of post-arrest options and conditions on Form PD-67, with translations into other languages as necessary.

As a corollary to the statutory revisions proposed above, the Subcommittee also addressed the descriptions of the post-arrest release options on the back of MPD's Form PD-67, which is provided to an arrestee when he is eligible for post-and-forfeit, citation release, or bond/collateral release. The proposal (see Appendix 6) reflects existing and proposed law and is written in "plain English" style. It provides more clarity about eligibility and stay-away orders, consistent with the proposed legislation.

[8] There is an exception for warrants in which a judge has already authorized a money bond to be posted.

ADDITIONAL ISSUES FOR POSSIBLE CONSIDERATION

The Subcommittee identified and discussed a number of related issues, some of which are described below. The Subcommittee takes no formal position regarding follow up action on any of them, nor the priority in which any action might be considered.

1. The Council for Court Excellence or some other broad-based group should examine low-level misdemeanors in the D.C. Code and the D.C. Municipal Regulations that could be reclassified from a criminal offense to a civil infraction. (The American Bar Association is currently involved in such a project in a number of jurisdictions.) As an initial approach, the Subcommittee identified a number of D.C. Code criminal offenses with only a monetary fine attached (no term of imprisonment). It appears that as a practical matter the penalty for these offenses are really civil in nature, except for the consequence of having a criminal record. Practical implications for reclassifying these offenses are numerous: Who would enforce these new civil infractions – law enforcement officers or other city agencies? Would such a reclassification actually result in less enforcement of such violations? How would reclassified offenses be adjudicated - by the D.C. Superior Court or the Office of Administrative Hearings, a District government agency? Perhaps most importantly, how can violators be held accountable? The enormity of this challenge is illustrated by the fact that 87% of the violators in the city's current pilot project for decriminalizing littering offenses have defaulted on their tickets.

2. If moving towards increased use of the field arrest process (and potential reclassification of low level offenses as described above), how would law enforcement officers assure the positive identification of violators so as not to inadvertently fail to take into custody a person who may be wanted on more serious charges?

3. Given the wide range of amounts reflected on the current collateral and bond lists, the D.C. Superior Court Board of Judges, which has final approval for the bond and collateral lists as recommended by the OAG, should consider streamlining the amounts for greater clarity to the public and easier application by the law enforcement agencies.

4. Since the lack of prosecutorial or judicial review of post-and-forfeit matters was one of the initial concerns raised, the OAG should consider a method to ascertain if the post-and forfeit procedures are being applied correctly among all law enforcement agencies utilizing them.

5. During the final review stage, it was suggested that a provision be added to both § 23-1110 and § 5-335.01 to make clear that the legislation did not create any rights for either the arrestee or anyone else. Because the Subcommittee did not have an opportunity to fully discuss this issue and there is no consensus about it, the decision was made not to include such language in the proposed legislation. The issue is important because the change from the current informal system to a statutory system could be construed to create such rights even though the court, in a similar position, has absolute immunity with respect to its release/detention decisions. The Council may wish to address this issue when it considers the proposed legislation.

Proposed Legislation to Update and Clarify Post-Arrest Process and Criteria

Proposed D.C. Official Code § 23-583. Processing arrests.

(a) Consistent with the provisions set forth below, every person arrested within the District of Columbia for a violation of a District of Columbia criminal statute or regulation, or for a violation of a Court order or a directive issued pursuant to D.C. Official Code § 23-1110(b), shall have his or her arrest processed expeditiously, consistent with assuring the safety of the community and any other person, and consistent with assuring the arrestee's appearance in court to answer to the charge. Unless the person is not eligible for release under the following subsections, he or she shall be released if he or she promises to appear in court and abide by conditions of release, if any, and shall not be detained pending his or her first appearance before the judicial officer.

(b) Instead of taking the person into custody, a law enforcement officer operating in the District of Columbia may issue a field arrest form to a person whom he has arrested without a warrant when the person: (1) otherwise would be eligible for citation release; and (2) is charged with committing a misdemeanor prosecuted by the Office of the Attorney General for the District of Columbia and designated by the Chief of Police as being eligible for a field arrest. A field arrest form shall require the person to appear within fifteen (15) days before an official of the law enforcement agency, in order to process that arrest in conformity with the provisions below.

(c)(1) An official of the Metropolitan Police Department, or other law enforcement agency operating in the District of Columbia, appointed by the judges of the Superior Court of the District of Columbia pursuant to D.C. Official Code § 23-1110(a) (hereafter the "Releasing Official"), shall determine whether a person taken into custody, or appearing at a law enforcement agency following the issuance of a field arrest form, is eligible for release on citation pursuant to paragraph(c)(2) or is eligible to use the post-and-forfeit procedure pursuant to paragraph (c)(3).

(2) A person arrested without a warrant is eligible for release on citation unless:

> (A) there is reason to believe that the person may cause injury to him or herself or any other person, may cause damage to any property, or will not appear in court to answer to the charge; or
>
> (B) the person --
>
> (i) is charged with a crime of violence or dangerous offense, as defined in § 23-1331;
>
> (ii) is subject to detention prior to trial pursuant to § 23-1322 or § 23-1325;
>
> (iii) is charged with a felony offense;
>
> (iv) is charged with a misdemeanor offense that is not designated as eligible for citation release by the responsible prosecuting authority;

(v) is charged with an interpersonal violence offense as defined in § 16-1001(6)(A), intimate partner violence as defined in § 16-1001(7), or intrafamily violence as defined in § 16-1001(9);

(vi) is charged with an interpersonal violence offense as defined in § 16-1001(6)(B) where the criminal offense committed or threatened to be committed is violent;

(vii) cannot reliably be identified or inaccurately reports information concerning his or her name or other identifying information;

(viii) is in violation of a court order, including conditions of release, at the time of arrest;

(ix) is in violation of a directive issued pursuant to § 23-1110(b) at the time of arrest; or

(x) has not cooperated in the booking process.

(3) A person is eligible to use the post-and-forfeit procedure unless:

(A) the person is not eligible for citation release pursuant to paragraph (c)(2); or

(B) the person does not meets the criteria established pursuant to § 5-335.01(c).

(d) The Releasing Official is authorized to (i) issue a citation to appear on a future date in court, or at some other designated place, to an arrested person who is otherwise eligible for release pursuant to subsection (c)(2), and (ii) release that person from custody.

(e)(1) When the Chief Judge has declared that an event or condition significantly impairs the functioning of the Superior Court, a Releasing Official may issue a citation to a person who otherwise is not eligible for release under subsection (c)(2) to appear on a future date in court if the responsible prosecuting authority approves of the person's release.

(2) When a person has been admitted to a hospital during the course of the arrest processing, and otherwise is not eligible for release under subsection (c)(2), a Releasing Official may issue a citation to the person to appear on a future date in court if the responsible prosecuting authority approves of the person's release.

(3) When court is not in session and there is reason to believe that an arrestee who otherwise is not eligible for release under subsection (c)(2) should not be held in custody pending his or her first appearance before a judicial officer, a Releasing Official may issue a citation to the person to appear on a future date in court if the responsible prosecuting authority approves of the person's release.

(f) The Releasing Official may condition release on a person's agreement to stay away from a particular place and to stay away from and have no contact with a victim of or witness to the offense until his appearance before a judicial officer. The Releasing Official may not release a person if the person refuses to agree to abide by one or more conditions of release. Whoever knowingly fails to abide by a condition of release at any time prior to the first appearance before a judicial officer shall be taken into custody for presentment before a judicial officer.

(g) Whoever, having been released on citation pursuant to subsection (d) or (e) of this section or having posted bond pursuant to § 23-1110(a), willfully fails to appear as required shall be fined or imprisoned for not more than the maximum provided for the offense for which such citation was issued if the offense is a misdemeanor, or shall be fined not more than $5,000 and imprisoned for not more than 5 years, or both, if the offense is a felony.

Proposed D.C. Official Code § 23-581. Arrests without warrant by law enforcement officers.

This section is amended by adding the following new section:

"(a-8) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe that the person has been released on citation to appear in court pursuant to § 23-583(d) or (e), the person has been directed by the Releasing Official, as identified in § 23-1110(a), to stay away from a particular place or a particular person, and the person has violated that directive."

Proposed D.C. Official Code § 23-1110. Designation of official to issue citations or take money or bond.

(a) The judges of the Superior Court of the District of Columbia shall have the authority to appoint officials of the Metropolitan Police Department and other law enforcement agencies operating in the District of Columbia, to act as a clerk of the court with authority to issue citations pursuant to § 23-583(d), to take money pursuant to § 5-335.01, and to take bond imposed upon the issuance of a bench warrant issued by a judicial officer of the Superior Court for the District of Columbia, from persons charged with offenses triable in the Superior Court. An official so appointed, to be known as the Releasing Official, shall receive no compensation for these services other than his regular salary; shall be subject to the orders and rules of the Superior Court in discharge of his or her duties; and may be removed as the clerk at any time by the judges of the court.

(b) The Releasing Official shall have the authority to direct any person who is to be released with a future court appearance date under § 23-583(d) or (e), as a condition of that release, to stay away from a particular place and to stay away from and have no contact with a victim of or witness to the offense until his appearance before a judicial officer. The Releasing Official shall deny release to a person who refuses to agree to abide by this directive.

Proposed D.C. Official Code § 5-335.01. Enforcement of the post-and-forfeit procedure.

(a) For the purposes of this section, the term "post-and-forfeit procedure" is the mechanism in the criminal justice system in the District of Columbia whereby a person charged with certain misdemeanors may post and simultaneously forfeit an amount of money and thereby obtain a full and final resolution of the criminal charge.

(b) The resolution of a criminal charge using the post-and-forfeit procedure is not a conviction of a crime and shall not be equated to a criminal conviction. The fact that a person resolved a charge using the post-and-forfeit procedure may not be relied upon by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action to impose any sanction, penalty, enhanced sentence, or civil disability.

(c) The post-and-forfeit procedure shall be offered only to persons (1) who meet the eligibility criteria established by the Office of the Attorney General for the District of Columbia and (2) who are charged with a misdemeanor that the Office of the Attorney General for the District of Columbia, in consultation with the Metropolitan Police Department, has determined is eligible to be resolved by the post-and-forfeit procedure.

(d) Whenever the Metropolitan Police Department ("MPD"), or other law enforcement agency operating in the District of Columbia tenders an offer to an arrestee to resolve a criminal charge using the post-and-forfeit procedure, the offer shall be accompanied by a written notice provided to the arrestee describing the post-and-forfeit procedure and the consequences of resolving the criminal charge using this procedure.

(e) The written notice required by subsection (d) of this section shall include, at a minimum, the following information:

(1) The amount of money that the person must post and forfeit in order to terminate the criminal case, if the person is eligible for this procedure;

(2) That the arrestee has the right to choose whether to (A) accept the post-and-forfeit offer and terminate the criminal case or (B) proceed with the criminal case and a potential adjudication on the merits of the criminal charge;

(3) That, if the arrestee elects to proceed with the criminal case, he or she will be eligible for prompt release on citation to appear on a future date in court;

(4) That the agreement to resolve the charge using the post-and-forfeit procedure will be final 90 days after the date the notice is signed unless, within the 90-day period, the arrestee or the Office of the Attorney General files a motion with the Superior Court of the District of Columbia to set aside the forfeiture and proceed with the criminal case;

(5) If the arrestee or the Attorney General does not file a motion to set aside the forfeiture, the resolution of the criminal charge using the post-and-forfeit procedure will preclude the arrestee from obtaining an adjudication on the merits of the criminal charge except if a motion to set aside the forfeiture is granted pursuant to paragraph (5);

(6) That the resolution of the criminal charge using the post-and-forfeit procedure is not a conviction of a crime and may not be equated to a criminal conviction, and may not result in the imposition of any sanction, penalty, enhanced sentence, or civil disability by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action; and

(7) That, following the resolution of the charge using the post-and-forfeit procedure, the arrestee will continue to have an arrest record for the charge at issue, unless the arrestee successfully moves in the Superior Court of the District of Columbia to seal his or her arrest record.

(f) The notice required by subsection (d) of this section (i) shall be offered in Spanish to those persons who require or desire notice in this manner and (ii) to the extent practicable, shall be offered in another language to a person who has limited English proficiency.

(g) An arrestee who is provided the written notice required by subsection (d) of this section and who wishes to resolve the criminal charge using the post-and-forfeit procedure shall, after reading the notice, sign the bottom of the notice, thereby acknowledging receiving the information provided in the notice and agreeing to accept the offer to resolve the charge using the post-and-forfeit procedure. After the arrestee signs the notice, the arrestee shall be provided with a copy of the signed notice.

(h) The Superior Court of the District of Columbia shall determine the amount of money that is associated with each qualified misdemeanor determined by the Office of the Attorney General pursuant to paragraph (c). Within 90 days of the Superior Court of the District of Columbia issuing an updated list of the amount of money associated with each charge, the Chief of Police shall issue the list of charges that law enforcement officers are authorized to resolve using the post-and-forfeit procedure. The Chief shall make the list available to the public, including placing the list on the MPD website and having it available for review in each police station.

(i) The Mayor shall submit an annual public report to the Council identifying the total amount of money collected the previous year pursuant to the post-and-forfeit procedure and the number of criminal charges, by specific charge, resolved the previous year pursuant to the Metropolitan Police Department's use of the post-and-forfeit procedure.

Section-by-Section Analysis

Proposed D.C. Official Code § 23-583. Processing arrests.

This is a completely new section.

(a) Currently, there is no clear provision regarding the post-arrest processing of individuals in the District of Columbia. As noted in the report, the post-arrest process has been "largely rooted in custom and practice" and has created substantial confusion. This section makes clear that expeditious law enforcement processing of the arrestee and the opportunity for a future court appearance (unless otherwise ineligible) are to be utilized for a designated offense unless release is inconsistent with public safety or ensuring the arrestees appearance in court.

(b) This section codifies the practice of the Metropolitan Police Department (MPD) of issuing a field arrest form (PD Form 61-D) to an arrestee of an Office of the Attorney General for the District of Columbia (OAG) charge instead of making an immediate custodial arrest. It also recognizes the Chief of Police's authority to promulgate the list of eligible offenses and eligibility requirements. See Appendix 2. Like the following section, it reflects the principle that a person should be released in the least restrictive manner that is consistent with public safety and the appearance of the person for judicial proceedings. The proposal continues the existing practice that excludes persons who have been arrested on a warrant from field release (because a judicial officer has already reviewed the facts and ordered the arrest).

(c) (1) This language replaces what is currently found in D.C. Official Code § 23-1110(b)(2). It identifies a law enforcement official as the "Releasing Official" who determines if an arrestee is eligible for citation release or is eligible to utilize the post-and-forfeit process.

(2) Currently, there are no statutory or court rules addressing limitations or exclusions regarding citation release eligibility. (See Appendix 5 for a document titled "Citation Release Eligibility Criteria" which has been in use for several years. This was created to provide guidance to law enforcement agencies in the administration of the citation release process but has never been formally adopted.) This section lists the reasons why a person would be ineligible for citation release consideration.

(3) One flaw of the current post-and forfeit process is that some persons who have the money to do so may be electing to post-and-forfeit that amount, even though the person should not be released prior to having the matter reviewed by the prosecutor and the matter called in court. This section clarifies that the post-and-forfeit option is available only to persons who are otherwise eligible for citation release and who meet the established criteria in § 5-335.01(c).

(d) This subsection replaces current D.C. Official Code § 23-1110(b)(2) and gives the Releasing Official the authority to issue a citation for a future court appearance.

(e) (1) Under this paragraph, when an emergency or other event results in the Chief Judge closing or significantly altering the functioning of the Superior Court, the Releasing Official may utilize citation release for arrestees not otherwise eligible, so long as the appropriate prosecutor

approves of such release. This will alleviate the need for a number of persons being detained at the MPD Central Cell Block or at individual police stations until court re-opens.

(2) Under this paragraph, citation release can be used for persons who have been admitted to a hospital during the arrest processing, so long as the appropriate prosecutor approves of such release. This will eliminate the need for a police guard to be stationed at the hospital when the prosecutor agrees that the person is not a danger to persons or property and does not pose a flight risk.

(3) This paragraph has been described as the "safety valve" provision, because it allows the Releasing Official or an attorney acting on behalf of an arrestee to seek approval for release on citation for a person not otherwise eligible. To do so, the responsible prosecuting authority must first approve of the request.

(f) This subsection provides that Releasing Official may condition release on a person's agreement to stay away from a particular place and person and that failing to abide by that condition of release subjects the person to arrest and immediate presentment to a judicial officer. See Proposed D.C. Official Code § 23-1110 (b) for the authority of the Releasing Official to issue these directives.

(g) This subsection states the penalty that may be imposed for failing to appear as required.

Proposed D.C. Official Code § 23-581. Arrests without warrant by law enforcement officers.

New section (a-8). One of the primary concerns raised about the expansion of citation release was the fact that there is usually a two-to-three week period between the date of the arrest and the court arraignment date. In many of these misdemeanor cases, the prosecutor often seeks a "stay-away order," in court, from either the location of the offense or a victim or witness to the offense. The proposal contained in Proposed D.C. Official Code § 23-1110 (b) is to give the Releasing Official limited authority to try to protect persons or property during the interval between arrest and arraignment. The Releasing Official would be authorized to issue a directive that the arrestee stay away from a particular place or person, and making it a requirement of citation release that the arrestee agree to abide by it pending his appearance in court. Section (a-8) permits the arrest without a warrant of a person when there is probable cause to believe that the person was released on citation and that person violated a stay-away directive. This proposal was essential in getting concurrence from the prosecutors to expand eligibility for citation release. In order to enforce this provision, the Subcommittee agreed that a violation of such a directive needed to be an offense for which an arrest could be made based upon probable cause.

Proposed D.C. Official Code § 23-1110. Designation of official to issue citations or take money or bond.

(a) This subsection makes the following changes: it takes away the condition that "court is not open" in order for these procedures to be effective. Given the court's "cut-off" time, afternoon arrests would not be able to be processed in time to be brought to court, resulting in persons being held unnecessarily until the next court day. It also removes reference to the official as having the same authority as "the clerk of the Municipal Court had on March 3, 1933." It further identifies this official as the "Releasing Official."

(b) This subsection gives the Releasing Official the authority to direct a person who is to be released on citation, as a condition of that release, to stay away from a particular place and to have no contact with a victim of or witness to the offense until his appearance before a judicial officer. If the person refuses to agree to abide by this directive, the Releasing Official shall deny citation release. See discussion concerning Proposed D.C. Official Code § 23-581(a-8), above.

Proposed D.C. Official Code § 5-335.01. Enforcement of the post-and-forfeit procedure.

Throughout this section, the Subcommittee has used the word "money" in lieu of the word "collateral" to clarify the point that the person is agreeing to pay the amount noted in order to resolve the matter without having to go to court. That amount of money is, therefore, not "collateral" intended to ensure the person's future appearance at court.

(a) This subsection has deleted the phrase ". . . (which otherwise would serve as security upon release to ensure the arrestee's appearance at trial)," since the use of money (either as bond or collateral) is no longer applicable (except in the case of a bench warrant return).

(b) This subsection remains the same.

(c) This new subsection spells out that the post-and-forfeit procedure shall be offered only to persons who meet the eligibility criteria established by the Office of the Attorney General for the District of Columbia (OAG) and have been charged with a misdemeanor that the OAG, in consultation with the Metropolitan Police Department (MPD), has determined is eligible to be resolved by the post-and-forfeit procedure.

(d) This section is former section (c) and has deleted the phrase ". . . or Office of the Attorney General for the District of Columbia." That deletion was made at the request of the OAG since the OAG is never actually involved in tendering an offer to an arrestee to utilize the post-and-forfeit procedure at the time of arrest.

(e) This subsection is former subsection (d) and is consistent with the former section except as noted in the paragraphs below.

(1) This paragraph simply clarifies the language;

(2) This paragraph remains the same;

(3) This paragraph is similar to the former paragraph (3) in that it provides that the arrestee will be eligible for prompt release on citation to appear on a future date in court if he elects to proceed with the criminal case. This is so because citation release eligibility is now explicitly a requirement for post-and-forfeit consideration;

(4) This paragraph re-states former paragraph (6) in that using the post-and-forfeit procedure will be final after 90 days unless the arrestee or the OAG files a motion to set aside the forfeiture within the 90-day period;

(5) This paragraph re-states former paragraph (4) to more clearly state that absent a motion to set aside the forfeiture, using the post-and-forfeit procedure precludes an adjudication of the criminal case on the merits;

(6) This paragraph re-states current paragraph (5); and

(7) This paragraph remains essentially the same.

(f) This paragraph is former section (e) and remains essentially the same.

(g) This paragraph is former section (f) and remains essentially the same.

(h) This is former subsection (g). It removes the reference to bonds but otherwise remains essentially the same.

(i) This is former subsection (h). At the request of the OAG, the following phrase has been deleted: "(without the approval, on a case-by-case basis, of either the Office of the Attorney General or the Superior Court of the District of Columbia), and for all other instances in which the post-and-forfeit procedure is used." The OAG requests this deletion because the purpose of the annual report is for law enforcement agencies to report on their record of granting or denying the post-and-forfeit process at the time of arrest, and not for other instances of its use (such as in the courtroom).

At the request of the MPD, the following sentences have been deleted: "The data shall be reported separately for instances in which the post-and-forfeit procedure is independently used by the MPD. The report also shall identify the fund or funds in which the post-and-forfeit moneys were placed." The MPD requests that the first sentence be deleted because the Department does not use this authority independently. The only charges eligible for post-and-forfeit procedures are those which have been provided in advance by the OAG. The Department requests the deletion of the second sentence because all of the money received for post-and-forfeit is directed to the Superior Court, and therefore the Mayor has neither knowledge of nor control over the use of the funds.

APPENDICES

Appendix 1: Bond and Collateral List Schedules

Appendix 2: MPD Standard Operating Procedures – PD Form 61D (Violation Citation) (November 2005)

Appendix 3: *District of Columbia v. Baylor*, 125 Wash. Law Rptr. 1665 (Aug. 25-26, 1997)

Appendix 4: *Fox, et al., v. District of Columbia*, Civ. Action 10-2118 (03/30/2012)

Appendix 5: Citation Release Eligibility Criteria

Appendix 6: Proposed PD-67 Instructions

Appendix 1: Bond and Collateral List Schedules

February 2009

SUPERIOR COURT BOND AND COLLATERAL LIST

NON-TRAFFIC OFFENSES – BOND

OFFENSE	BOND AMOUNT
Any Misdemeanor, Not listed Elsewhere on the Bond and Collateral List	$5,000
Any Felony, Other than a Crime of Violence or Armed Robbery	$10,000
Crimes of Violence and Armed Felonies (including CPWL)	No bond

SUPERIOR COURT BOND AND COLLATERAL LIST

February, 2009

NON-TRAFFIC OFFENSES - COLLATERAL

OFFENSE NAME	REG	CITATION	AMT
Advert. Mat. - Scattered	3--8	24 DCMR 1008, 100.6	25
Affrays		22 DC 1301	35
Animals - Other than Dogs at Large	7--3	24 DCMR 906.7	25
Auctioneers	25	16 DCMR 1106	25
Barbed Wire Fences- Public Space	4--1	12A DCMR 3110.4, 113.4	25
Bees within 500 ft. of Human Habitation	18-14	24 DCMR 904, 100.6	50
Begging without a Permit	30-2	24 DCMR 500.7	25
Builders - Building Material on Roadway	3-3(e)	24 DCMR 110, 100.6	25
Builders - Building Material Stored in Alleys	3-3(d)	24 DCMR 110.14, 100.6	25
Builders - Fail to Place Light on Obstruction of Roadway/Sidewalk		24 DCMR 110.20	25
Builders - Failure to Store Building Materials on Private Property	3-3(b)	24 DCMR 110.6,100.6	25
Builders - Use of Public Space without Permit	3-3(a)	24 DCMR 110, 100.6	50
Cigarettes--Any Other Jurisdiction Tax Stamp		47 DC 2402(b)	150
Cigarettes--No DC Stamp		47 DC 2402(b)	150
Cigarettes--No Sales Certificate/License		47 DC 2404	150
Cigarettes--Selling or Dispensing Single Cigarettes		47 DC 214(b) and (c); 9 DCMR 1016.2	150
Cigarettes--Selling to Minors		22 DC 1320	150
Construction Code Violations		5 DC 1306	50
Cross Police Line	6--5	24 DCMR 2100.3,100.6	100
Crossing a Police Line - Capitol Police	158(d)	Gen. Ord. 4220, Section 158(d)	50
Curfew Violation		2 DC 1543(a)(2), 1543(d)(1)	25 for parents; 300 for establishments
D/O Craps	25-7	19 DCMR 1309	50
Dangerous Object on Street/Sewer	3--4	24 DCMR 2000.2,100.6	25
Deface Public Footway/Roadway	2--8	24 DCMR 101.2,100.6	50
Discharge Firearm	9(q)	24 DCMR 2300.1,100.6	300
Disorderly Conduct		22 DC 1321	35
Disrupting Official Business		1 DCMR 102	50
Distribute Handbills-Public Space	3--8	24 DCMR 1008	25
Disturbing a Religious Congregation		22 DC 1314	100
Dogs - At Large	18-2	24 DCMR 900.2, 900.9	25
Dogs - Disturbing the Peace	18-2	24 DCMR 900.1, 900.9	25
Dogs - Maintain Collar	18-2	24 DCMR 900.2, 900.9	25
Dogs - Menacing People	18-3	24 DCMR 900.6, 900.9	100
Dogs - Private Property	18-2	24 DCMR 900.5, 900.9	25
Dogs - Unleashed		24 DCMR 900.3, 900.9	25
Dogs - Vaccination Required		24 DCMR 901.1	25
Dogs - Vaccination Tag Required		24 DCMR 901.15	25
Dogs- Excrement on Public/Private Property		24 DCMR 900.7, .8	25
Drinking in Public		25 DC 1001	25
Emergency-Failure to Obey Police	6--5	24 DCMR 2100.2,100.6	100
Expired Commission - Campus Sec. Officer		6A DCMR 1203.2	50
Expired Commission - Special Pol. Officer		6A DCMR 1104.2	50
Fail to Obey Police Officer	18-2000.2	18 DCMR 2000.2,2000.10	100
Failure to Obey Order to Remedy Dangerous Condition	7-3.1-15	12H-F110.2, 12HF112.3	50
False Alarm	19-4	24 DCMR2106	100
False Report to Police	19-5	24 DCMR 2106; 5 DC 117.05	100
Fire Code - Failure to Obey Order (generally)		12H DCMR F112.3	50
Fireworks - Deliver		12H DCMR F3309.2.1, 12H DCMR F112.3	300

All citations to the D.C. Code and D.C. Municipal RegUlations are as of July 2005.

SUPERIOR COURT BOND AND COLLATERAL LIST

February, 2009

NON-TRAFFIC OFFENSES - COLLATERAL

OFFENSE NAME	REG	CITATION	AMT
Fireworks - Discharge		12H DCMR F3309.2.1,12H DCMR F112.3	25
Fireworks - Possession		12H DCMR F3309.2.1,12H DCMR F112.3	25
Fireworks - Sell		12H DCMR F3309.2.1 or F3309.1.1.1, 12H DCMR	300
Fishing - By Other than Rod, Hook, and Line		19 DCMR 1502.2	50
Fishing - Commercial Fishing		19 DCMR 1502.1	300
Fishing - Digging for Bait in Rock Creek Park		19 DCMR 1503.3	50
Fishing - Dip Net Exceeding Size		19 DCMR 1502.3	50
Fishing - Exceeding Limit for Species		19 DCMR 1503.1(C)	100
Fishing - Failure to Attach License Number to Eel Trap		19 DCMR 1502.7	50
Fishing - Failure to Check Eel Trap		19 DCMR 1502.7	50
Fishing - Failure to Display a Fishing License		19 DCMR 1501.3	50
Fishing - Fishing with Seine or Cast Net		19 DCMR 1502.4	50
Fishing - Fishing Without a License		19 DCMR 1501.1	50
Fishing - More than 2 Hooks Per Line		19 DCMR 1502.2	50
Fishing - More than 3 Lines		19 DCMR 1502.2	50
Fishing - Net Fishing in Rock Creek Park		19 DCMR 1503.2	50
Fishing - Operating in Excess of 5 Eel Traps		19 DCMR 1502.6	50
Fishing - Poss.Species with Size Limit, HeadfTail Removed		19 DCMR 1503.1 (d)	100
Fishing - Possession of EndangeredfThreatened Species		19 DCMR 1503.1 (e)	300
Fishing - Possession of Undersized Fish		19 DCMR 1503.1 (b)	100
Fishing - Take/Catch/Possess Striped Bass/Hybrid Striped Bass (Out of Season)		19 DCMR 1503.1(i)	100
Fishing - Take/Kill/Injure, Explosives/Chem./Firearms/Elec. w/o Permit		19 DCMR 1503.1(f)	300
Fishing - Taking, Catching or Possessing Sturgeon		19 DCMR 1503.1 (g)	300
Fishing - With Snag Hook		19 DCMR 1502.5	50
Fowls Without Permit	18-7	24 DCMR 902,100.6	25
Harbor Regs - Accident, Fail to Assist	29-13(a)	19 DCMR 1031.1	50
Harbor Regs - Accident, Fail to Report Personal Injury	29-13c	19 DCMR 1031.4(b)	300
Harbor Regs - Accident, Fail to Report Property Damage	29-13c	19 DCMR 1031.4(c)	25
Harbor Regs - Accident, Identify Self & Vessel	29-13(A)	19 DCMR 1031.2	50
Harbor Regs - Canoe Safety, Fail to Instruct	29-6c	19 DCMR 1036.4	25
Harbor Regs - Entering Diving Area		19 DCMR 1029.7	100
Harbor Regs - Entering Restricted Area	29-8(b)	19 DCMR 1029	100
Harbor Regs - Fail to comply with Fed Anchor Light regs	29-7	19 DCMR 1028.7	25
Harbor Regs - Fail to Give Harbor Master Change Name/Address	29-4cC8	19 DCMR 1003.3(a)	25
Harbor Regs - Fail to Obtain Permit for Marine Event	29-14	19DCMR 1040.2	25
Harbor Regs - Fail to Permit Police Officer to Board	29-23(a)	19 DCMR 1022.4	50
Harbor Regs - Fail to Provide Equipment, Livery Boat	29-6(b)	19 DCMR 1036.3	25
Harbor Regs - Fail to Yield for Emergency Vessel	29-23(b)	19 DCMR 1022.4	25
Harbor Regs - Failure to Comply Navigation Rules		19 DCMR 1026	50
Harbor Regs - Failure to Comply, Equipment Standards		19 DCMR 1034.2	50
Harbor Regs - Failure to Register Vessel	29-4(a)A	19 DCMR 1001.1	50
Harbor Regs - Failure to Wear Flotation Device -Operator & Person under 18	29-11(d)	19 DCMR 1026.7	50
Harbor Regs - Flotation Device - Sufl. Number, Approved, Suitable, Accessible	29-11(f)	19 DCMR 1034	50
Harbor Regs - Flotation Device, Children under 13	29-12(e)(1A)	19 DCMR 1026	50
Harbor Regs - Hazardous Condition/Fail to Correct	29-23c	19 DCMR 1022.5,1022.6	100
Harbor Regs - ID Number- Give or Display	29-4cC7	19 DCMR 1004.7	25
Harbor Regs - Land Amphibian Craft Without Permission	29-17	19 DCMR 1042.1	100
Harbor Regs - Livery, Fail to Keep Records		19 DCMR 1036.1	50
Harbor - Minor Operate Without Certificate	29-1Hdl	19 DCMR 1026.5	25

All citations to the D.C. Code and D.C. Municipal RegUlations are as 01 July 2005.

SUPERIOR COURT BOND AND COLLATERAL LIST

February, 2009

NON-TRAFFIC OFFENSES - COLLATERAL

OFFENSE NAME	REG	CITATION	AMT
Harbor Regs - Minor-Rent boat to	29-11c	19 DCMR 1026.4	50
Harbor Regs - Mooring Buoy-Place or Fail to Remove	29-7c	19 DCMR 1028.8	50
Harbor Regs - Muffler- Improper	29-18(a)	19 DCMR 1035.1	50
Harbor Regs Navigation Lights -Improper Display	29-5(b)3G	19 DCMR 1022.5	25
Harbor Regs - Negligent Operation	29-11(b)	19DCMR 1026.1	100
Harbor Regs - Noise	29-18	19 DCMR 1035.4 and .5	25
Harbor Regs - Obstructing Channel		19 DCMR 1028.4	25
Harbor Regs - Obstructing Docks	29-20(a)	19 DCMR 1030	25
Harbor Regs - Operation without Boating Safety Certificate		19 DCMR 1026.6	50
Harbor Regs - Polluting Waters	29-10	19 DCMR 1033.1	100
Harbor Regs - Speed	29-5(a)	19 DCMR 1027	50
Harbor Regs - Sunken Vessel, Fail to Notify Harbor Master		19 DCMR 1030.9	200
Harbor Regs - Sunken Vessel, Fail to Raise After Notification		19 DCMR 1030.9	300
Harbor Regs - Tie to Bridge or Seawall	29-20	19DCMR 1030.15	25
Harbor Regs - Tie to Buoy	29-20C	19 DCMR 1030.16	25
Harbor Regs - Tie to Navigation Aid		19 DCMR 1030.16	25
Harbor Regs - Validation Sticker - Fail to Obtain	29-4c	19 DCMR 1002	25
Harbor Regs - Validation Sticker- Fail to Display	29-4cC	19 DCMR 1004.14 and .15	25
Harbor Regs - Violation of Water ContactlWater Sport Regs.	29-12c	19 DCMR 1039	50
Harbor Regs - Yield to or Stop for P.O.	29-23(b)	19 DCMR 1022.4	50
Harbor Regs -Fail to Notify, Transfer/Destr.rrhelVAbandon.lRecovery/Doc.		19 DCMR 1003.3	100
Housing Code Violations		14 DCMR 102	50
Illegal Presence		6 DC 903, 916	50
Incommoding		22 DC 1307	50
Interference with a lawful demonstration - Expressive Conduct	158c	Gen. Ord. 4220 Section 158(c)	50
Interference with a lawful demonstration - Less than 20	158(b)(3)(A)	Gen. Ord. 4220 Section 158(b)(3)(A)	50
Intoxication		25 DC 1001 (c), 1001(d)	50
Kindling Bonfire		22 DC 1313	100
Massage--Cross-Sex		47 DC 2811 (a),	500
Metro - Fare Evasion		35 DC 216,253	50
Metro Misconduct		35 DC 251 (b), 253	35
Misrepresent Age to Enter ABC Establishment		25 DC 1002(b)(2), and (c)(1)	100
Misrepresent Age to Procure/Possess Alcohol		25 DC 1002(b)(1), and (c)(1)	100
No Occupancy Permit		11 DCMR 3204.4	500
Noise Violation		20 DCMR 2800.2, 2713.3	200
Obstruct Street	3-7(a)	24 DCMR 2001, 100.6	25
Obstruct Travel on Public Space	4--13	24 DCMR 2001.2 and .4, 100.6	50
Panhandling		22 DC 2302	50
Photographer Violations	31	24 DCMR 521-23, 501.9	25
Photographer-More than 5 minutes at location		24 DCMR 523.3, 501.9	25
Possession of an Open Container of Alcohol		25 DC 1001	25
Poster-Lewd	25-12	24 DCMR 108.3, 100.6	25
Providing Alcohol to a Minor		25 DCMR 785(b), and (c)	300
Public Address on Public Space without Permit		24 DCMR 700,100.6	25
Public Sewer, Misuse of	3--12	21 DCMR 201	25
Public Sewers, Inflammable Liquids	7-41.1	21 DCMR 201.4 and 201.10	100
Public Space, Obligations of Owners of Abutting Space	3--20	24 DCMR 102	25
Public Space, Selling Vehicles		24 DCMR 101.5,100.6	50
Public Space, Solicit Alms	4--17	24 DCMR 500, 501.9	25
Public Space, Solicitina Employment	4--14	19 DCMR 1203.7,1205.9	25

SUPERIOR COURT BOND AND COLLATERAL LIST

February, 2009

NON-TRAFFIC OFFENSES - COLLATERAL

OFFENSE NAME	REG	CITATION	AMT
Public Space, Soliciting Passengers	4--t3	24 DCMR 500.2, 50t.9	25
Public Space, Storing Merchandise	3--13	24 DCMR 111, 100.6	25
Public Space, Wet PainVOther Substance without Warning Device	3-7(b)	24 DCMR 2000.5,100.6	25
Public Toilets - Misconduct		24 DCMR 122	35
Purchasing Alcohol for a Minor		25 DC 785(a) and (c)	300
Rodent Control	32-2	22 DCMR 107	25
Sale of Cigarettes to a Minor		22 DC 1320	75
Second Hand Dealer - Failure to Keep Article Time Required	1--1	16 DCMR 1102, 1013.4	25
Second Hand Dealer - Failure to Keep Records Time Required	1--2	16 DCMR 1001,1003.8,1013.5	25
Sell/Deliver Alcohol to a Minor		25 DC 781(a)(1) and 831 (a)	300
Snow Removal, Railroad Track	3--6	24 DCMR 120.2,100.6	25
Sol. Pros.- 1st Off.	22-2701	22 DC 2701	500
Sol. Pros.- 2nd Off.	22-2701	22 DC 2701	750
Sol. Pros.- 3rd Off.	22-2701	22 DC 2701	1000
Street Lamps - Climbing	20-5	24 DCMR 107.4, 100.6	25
Street Lamps - Damage or Break	20-1	24 DCMR 107.1, 100.6	25
Street Lamps - Hitching Animals to	20-1	24 DCMR 107.1, 100.6	25
Street Lamps - Signs or Ads		13 DCMR 735,103.3	25
Tampering with Bicycle		18 DCMR 1200.8, 1110.1(a)	50
Taxi Violations - Loitering	345.7	50 DC 371	25
Taxi Violations - Permit Unlicensed Operator	350.2	31 DCMR 1000	50
Taxi Violations - Refuse to pay fare	305.14	50 DC 351	25
TenVTemporary Abode Regulation Violation		24 DCMR 121,100.6	25
Throwing Stones or Missiles		22 DC 1309	25
Transp. Manure	3--10	24 DCMR 1007, 100.6	25
Transp. Trash	3--11	24 DCMR 1007, 100.6	25
Transportation of Materials, Improper		24 DCMR 1007, 100.6	25
U.S. Capitol - Agricultural Vehicle, Operating within Capitol Square		2 US 1969, Art. 14, Sect. 103	75
U.S. Capitol - Airborne Objects, Flying on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(a)	25
U.S. Capitol- Animal Drawn Vehicle, Operating within Capitol Square		2 US 1969, Art. 14, Sect. 103	25
U.S. Capitol - Animal, Permitting in Capitol Square		2 US 1969, Art. 2, Sect. 7(a)	25
U.S. Capitol - Ball or Game Playing on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(a)	25
U.S. Capitol - Camping on Capitol Grounds		2 US 1969, Art. 10, Sect. 47(b)(1)	50
U.S. Capitol - Closed Area, Entering		2 US 1969, Art. 14, Sect. 105	200
U.S. Capitol - Construction Vehicle, Operating within Capitol Square		2 US 1969, Art. 14, Sect. 103	25
U.S. Capitol - Cordoned area, Entering		2 US 1969, Art. 14, Sect. 105	200
U.S. Capitol - Demonstrating without permit - East Front Capitol Steps	158(b)(1)	Gen. Ord. 4220, Section 158(b)(1)	50
U.S. Capitol - Demonstrating without permit - Extension of other group	158(b)(3)(B)	Gen. Ord. 4220, Section 158(b)(3)(B)	50
U.S. Capitol - Demonstrating without permit - More than 20 on Capitol Grounds	158(b)(2)	Gen. Ord. 4220, Section t58(b)(2)	50
U.S. Capitol - Demonstrating without permit - Using Structure	158(b)(3)C	Gen. Ord. 4220, Section 158(b)(3)(C)	50
U.S. Capitol - Driving Instructor, Violation of Responsibility		2 US 1969, Art. 18, Sect. 150(a)	25
U.S. Capitol - Funeral Procession, Passing through Cap. Sq. w/o Permit		2 US 1969, Art. 14, Sect. 90	25
U.S. Capitol - Ice Skating on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(b)	25
U.S. Capitol - Leash, None or Over 4 Feet		2 US 1969, Art. 2, Sect. 7(c)	25
U.S. Capitol - Op. Veh. of Excessive SizelWeighVLoad w/o Permit on Cap. Sq.		2 US 1969, Art. 17, Sect. 149(e)	25
U.S. Capitol - Play/Toy Vehicle, Riding on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(b)	50
U.S. Capitol - Playground, Using Capitol Grounds as		2 US 1969, Art. 14, Sect. 104(a)	25
U.S. Capitol- Recreational Vehicle, Operating within Capitol Square		2 US 1969, Art. 14, Sect. 103	25
U.S. Capitol - Roller Skating on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(b)	25
U.S. Capitol - Scooter, Operating on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(b)	25

All dtations to the D.C. Gode and D.G. Municipal Regulations are as of July 2005.

SUPERIOR COURT BOND AND COLLATERAL LIST

NON-TRAFFIC OFFENSES - COLLATERAL

OFFENSE NAME	REG	CITATION	AMT
U.S. Capitol - Setting up Camping Equipment on Capitol Grounds		2 US 1969, Art. 10, Sect. 47(b)(1)	50
U.S. Capitol - Skateboard, Riding on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(b)	25
U.S. Capitol- Skiing on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(d)	25
U.S. Capitol - Sledding on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(c)	25
U.S. Capitol - Sleep/Lie Down, Paved/Improved Areas (anytime)		2 US 1969, Art. 10, Sect. 47(b)(2)	50
U.S. Capitol - Sleep/Lie Down, Unpaved/Unimproved Areas (post-sunset - pre-sunrise)		2 US 1969, Art. 10, Sect. 47(b)(3)	50
U.S. Capitol - Snowmobile, Operating on Capitol Grounds		2 US 1969, Art. 14, Sect. 104(c)	25
U.S. Capitol- Storage of Camping EqUipment on Capitol Grounds		2 US 1969, Art. 10, Sect. 47(b)(1)	50
U.S. Capitol - Veh., Cling/Attach to (Bicycle/Roll.Skates/SledfToy Veh., etc.)		2 US 1969, Art. 11, Sect. 58	25
U.S. Capitol - Vehicle, Adorning in Derogatory Manner		2 US 1969, Art. 13, Sect. 78(b)	25
Capitol - Vehicle, Using for Advertising Prohibited		2 US 1969, Art. 13, Sect. 78(a)(b)	25
Unlawful Assembly		22 DC 1307	50
Unlawful demonstration of activities	158(e)	Gen. Ord. 4220, Section 158(e)	50
Unlicensed Driving Instructor	32-2.501	18 DCMR 1110.1(d), 900.1	100
Unlicensed Parking Lot	28-1	24 DCMR 600.1, 601; 47 DC 2846	50
Vending--After Hours Storage of Vending Equipment Less than		24 DCMR 511.1	300
Vending--Altered, Mutilated, or Forged License/Certificate		24 DCMR 507.5	100
Vending--Amplified Music/Hawking Items		24 DCMR 510.19	100
Vending - Cry out	6	24 DCMR 510.19, 501.9	50
Vending--Discharged Fire Extinquisher		24 DCMR 501.4	50
Vending--Expired Vending License		24 DCMR 501.7	50
Vending--Failure to Display Certificate		24 DCMR 507.2, and 501.9	50
Vending--Failure to Display Health Inspection		24 DCMR 507.3 and 501.9	50
to Exhibit License/Certificate Upon Demand		24 DCMR 507.4 and 501.9	50
Vending--Free Standing Rack		24 DCMR 512.8	50
Vending--Health Violation (No Running Water, Unclean Cart, ect.)		23 DC 513.2	200
Vending--Improper Food Storage		24 DCMR 513.2	200
Vending--Improper Good Product (Fruit & Nuts Not in Natural State)		24 DCMR 515.19(a) and (b)	200
Vending--Improper License (Wrong Zone or Class)		24 DCMR 502.9	50
Vending - Improper Vending Vehicle	6.407(b)	24 DCMR 512, 501.9	25
Vending--In Bus Zone (Must Have Sign Posted)		24 DCMR 510.7	50
Vending--In Marked Entrance or Loading Zone		24 DCMR 510.21	50
Vending--In Marked Entrance Way (Less Than 5 Feet from Doorway		24 DCMR 510.2	50
Vending--In an Unauthorized Geographical Area		24 DCMR 501.5, and 501.9	50
Vending--In Violation of Traffic Regulations		24 DCMR 516.2	50
Vending--In Violation of Vehicle Design Standards (Vehicle Size, Covered Bumpsers)		24 DCMR 512.6	50
Vending--Less Than 10 Feet of Another Vendor (5 Feet in Georgetown)		24 DCMR 510.18	50
Vending--Less Than 2 Feet of Tree Box		24 DCMR 515.13	50
Vending--Less Than 20 Feet of Metrorail		24 DCMR 510.2	50
Vending--Less Than 20 Feet of Police or Fire Station Driveway		24 DCMR 510.9	50
Vending--Less Than 300 Feet of a School (Prior to Start or Less Than 30 Minutes After School)		24 DCMR 515.2	50
Vending--Less Than 5 Feet of a Crosswalk		24 DCMR 510.8	50
Vending--Less Than 5 Feet of a Fire Hydrant, 2 Feet of Fixed Object		24 DCMR 510.13	50
Vending--Littering/Sidewalks, Roadway, Public Space		24 DCMR 514.1	100
Vending--Lottery Violation (Not Assigned Space and/or Vendor)		24 DCMR 516.7	50
Vending - Longer than Necessary		24 DCMR 516.1, 501.9	50
Vending--More Than 2 Feet From Curb		24 DCMR 5tO.16	50
Vending--No Health Permit/Certified Food Handlers/Inspection Stamp		24 DCMR 504.1	300
Vending--No Propane License Certificates		24 DCMR 507.5	200

All to D.C. Code and D.C. Municipal Regulations are as of July 2005.

NON-TRAFFIC OFFENSES - COLLATERAL

OFFENSE NAME	REG	CITATION	AMT
Vending--No Refrigeration/Improper Refrigeration		24 DCMR 513.2	200
Vending--No Stand, No Blue Skirt, etc.		24 DCMR 512.8	50
Vending--No Trash Receptacle		24 DCMR 514.2	50
Vending--No Valid DC Inspection & Registration (Certificates of Authority		24 DCMR507	50
Vending--No Water		24 DCMR 513.10,501.9	200
Vending--Non-Commercially Pre-packaged Foods (muffins, ect.)		24 DCMR 515.19(l)	200
Vending--Over Manhole, Ventilation Grate, or Service Duet		24 DCMR 510.22	50
Vending--Oversized Stand		24 DCMR 512.3	50
Vending--Reducing Sidewall (Restricting Pedestrian Passage)		24 DCMR 510.3	
Vending - Restricted Area		24 DCMR 515, 501.9	50
Vending - Restricted Hrs.		24 DCMR 511,501.9	50
Vending--Sidewalk Less Than 18 Feet (Central Zone)		24 DCMR 510.3	50
Vending--Square Block of Medical Facility		24 DCMR 515.1	50
Vending--Stored Items on Public Space		24 DCMR 510.15, and 501.9	50
Vending--Vending FraudulenVCounterfeit Merchandise		24 DCMR 509.1 (b)	50
Vending - Vending without a License		47 DC 2834, 2846; **24 DCMR** 502.2, **and 501.9**	300
Violations under Title 17, DCMR, Chapter 21 et seq (Security Officers and Security Agencies)		17 DCMR Chapter 21 et seq, 17 DCMR 2100.6	150
Water ReQulations, Violation of	23	21 DCMR 100	50

SUPERIOR COURT BOND AND COLLATERAL LIST

May 2007

TRAFFIC· COLLATERAL

OFFENSE	CITATION	COLLATERAL AMT
Allow Operation WI Improper Tags	50 DC 1501.04 (a)(2)	50
Altered Tags	18 DCMR 1104.2	100
Apportioned Tags Violations	50 DC 1507.03	500
Colliding With Pedestrian	50 DC 2201.28(c)	100
Display Expired Tags	18 DCMR 1101.3	50
Fail To Exhibit Permit	50 DC 1401 .01	25
Fail To Exhibit Registration	50 DC 1501.04(a)(1)(C)	25
Fail To Give Right Of Way To Pedestrian	50 DC 2201.28	50
Fail To Identify Self-Pedestrian	50 DC 2303.07	50
Failure to Obey Police Officer	18 DCMR 2000.2	100
Improper Use Of Dealer Tags	18 DCMR 1101.4,.5,.7	100
Missing Tags--Owner	50 DC 1501.04(a)(2), and (b)(1)	50
Misuse of Motor Vehicle Permit--Altered	18 DCMR 1100.2	100
Misuse of Motor Vehicle Permit--Let Another Use	18 DCMR 1100.3	100
Misuse of Motor Vehicle Permit--Use Another's License	18 DCMR 1100.4	100
Misuse of Temp Tags	18 DCMR 1101.1, 1110.1	100
No Tags	50 DC 1501.04(a)(1)(B), and (b)	50
Radar Detection Device	18 DCMR 736	50
Registration Certificate--Permit Another to Operate	50 DC 1501.04(a)(2) and (b)(1)	50
Towing - Failure to Clear Accident Debris	16 DCMR 411.9	100
Towing - Failure to Display License Properly	16 DCMR 403.4	100
Towing - Failure to Inform DPW of Public Tow	16 DCMR 406.4	100
Towing - Failure to Mark Tow Truck Properly	16 DCMR 404.2, 404.3, 404.4	100
Towing - Failure to Permit Proper Inspection	16 DCMR 401.2	300
Towing - Failure to Provide "Owner Bill of Rights"	16 DCMR 405.7	100
Towing - Initiating Private Tow Without Written Consent	16 DCMR 407.2	100
Towing - No Towing Control Number	16 DCMR 406.3	300
Towing· Operating a Storage Lot Without a License	16 DCMR 402.2	300
Towing - Operating Without a Valid Towing License	16 DCMR 411.8	300
Towing - Other Offense Not Specifically Identified	16 DCMR 400, et seq.	100
Towing - Unauthorized Removal of Accident Vehicle	16 DCMR 410.3	100
Towing - Unauthorized Towing Service At Accident	16 DCMR 410.9	300
Towing - Unlawful Deposit of Inoperable Vehicle	16 DCMR 410.10	200
Towing - Unlawful Scanner	16 DCMR 410.8	100
Towing - Unlawful Towing from Private Property	16 DCMR 406.7	300

All citations to the D.C. Code and D.C. Municipal Regulations are as of JUly 2005.

SUPERIOR COURT BOND AND COLLATERAL LIST May 2007

TRAFFIC - COLLATERAL

Towing - Unsafe Towing	16 DCMR 410.17	100
Towing - Unsecured Storage Lot	16 DCMR 405.1	100
Unlicensed Hacker	47 DC 2829(e), 2846	300
Unregistered Vehicle	50 DC 1501.04	50

All citations to the D.C. Code and D.C. Municipal Regulations are as of July 2005.

SUPERIOR COURT BOND AND COLLATERAL LIST
TRAFFIC OFFENSES-BOND **February 2009**

OFFENSE	CITATION	BOND AMT
Abandon Reclaimed Vehicle	50 DC 2421.09	100
Aid Permit By Misrepresentation	18 DCMR 1100.10	100
Allow Commercial Motor Vehicle Use	50 DC 404	300
Alter, Forge, Counterfeit Inspection Sticker	50 DC 2708	500
Alter, Forge, Counterfeit Title/Assignment	50 DC 2708	500
Altered Permit	18 DCMR 1100.2	100
Altered Registration	18 DCMR 1104.2	100
Altered Tags	18 DCMR 1104.2	100
Altered Title	18 DCMR 1104.3	100
Boating - Operating While Impaired	25 DC 1004(c)	300
Boating Under The Influence	25 DC 1004(a)	500
Boating While Intoxicated	25 DC 1004(a)	500
Defaced Vehicle ID	18 DCMR 1102	50
Driving Under Influence (DUI)	50 DC 2201.05 (b)(1)(A)	500
Driving While Intoxicated (DWI) Per Se	50 DC 2201.05	500
Emergency Parking Permit	18 DCMR 2403.4	50
Fail to Apply for Salvage/Non-Repairable Title	50 DC 2708	500
Fail to Notify of Salvage/Flood/Non-Repairable	50 DC 2708	500
Fail To Obtain DC Permit	50 DC 1401.02(i)	50
Fail To Surrender Permit	18 DCMR 1100.5	300
Fail to Surrender Salvage/Non-Repairable Title	50 DC 2708	500
False Information in Rebuilt Salvage Inspection	50 DC 2708	500
False Statement Lien Application	50 DC 1215	300
False Statement On Permit	18 DCMR 1104.1	300
False Statement On Registration Application	50 DC 1501.04(a)(3)	300
False Statement On Title	18 DCMR 1104.1	300
False Statement To DMV	18 DCMR 1104.1	300
False Statement-Dealers Certificate	50 DC 1501.04(a)(3)	300
Fictitious Inspection Sticker	18 DCMR 1103.1	100
Fleeing Law Enforcement (misdemeanor)	50 DC 2201.05b	500
Fraudulent Temp Tag	50 DC 1501.04	300
Leaving After Colliding-Pers. Injury	50 DC 2201.05(a)(2)	500
Leaving After Colliding-Prop. Damage	50 DC 2201.05(a)(3)	300
Loaning Registration	18 DCMR 1101.1	50
Loaning Tags	18 DCMR 1101.1	50
Misrepresent Salvage/Non-Repairable Vehicle	50 DC 2708	500
No Commercial Drivers License	50 DC 403	100
No Permit	50 DC 1401.01	75
No Permit (Motorcycle)	50 DC 1401.01	75
No Registration/Temp Tag Certificate	50 DC 1501.04	300
No Tags	50 DC 1501.04	50
Obtain Permit By Misrepresentation	18 DCMR 1100.6	200
Operate ATV/Dirt Bike	50 DC 2201.04b	500
Operating After Revocation	50 DC 1403.01	500
Operating After Suspension	50 DC 1403.01	500
Operating Public Vehicle W/O License	47 DC 2829, 2846	50
Operating While Impaired	50 DC 2201.05	300

All citations to the D.C. Code and D.C. Municipal regulations are as of February, 2009

Reckless Driving	50 DC 2201.04	250
Remove or Attempt to Remove Abandoned Notice	50 DC 2421.04	100
Removing Inspection Sticker	18 DCMR 1103.03	25
Speed-30 Miles Over Limit	18 DCMR 2200.12	100
Tamper With Auto	50 DC 2421.04	50
Tampering W/ Secured Bike	18 DCMR 1200.8	25
Unlicensed Driving Instructor	18 DCMR 900.1	50
Unlicensed Hacker	47 DC 2846, 2869	300
Unregistered Dealer	18 DCMR 500.2	50
Using Another's Permit	18 DCMR 1100.4	50
Violation No Fault Insurance Act	31 DC 2413	100

Appendix 2: MPD Standard Operating Procedures – PD Form 61D (Violation Citation) (November 2005)

STANDARD OPERATING PROCEDURES

PD FORM 61D
(Violation Citation)

November 2005

TABLE OF CONTENTS

PD FORM 61D SOP (Violation Citation)

STANDARD OPERATING PROCEDURES

METROPOLITAN POLICE

Title
PD Form 61D (Violation Citation)

Effective Date
December 26, 2005

Supplements:
SO-05-04 (Criminal Enforcement of Towing Regulations)

DISTRICT OF COLUMBIA

I. BACKGROUND

The PD Form 61D (Violation Citation) may be issued for the misdemeanor offenses under the jurisdiction of the Superior Court of the District of Columbia, and prosecuted by the Office of the Attorney General (OAG) for which collateral may be accepted by the Department. Attachment A contains the list of charges for which a PD 61D citation may be issued in accordance with the directions in this SOP. Members SHALL NOT issue a PD 61D for any offense that is not listed in this attachment.

In lieu of taking the violator into custody, the member can issue a PD 61D violation citation. The violator must either elect to forfeit the collateral amount set for that specific charge, or request an arraignment date to contest the charge. (CALEA 1.2.6)

A member will not issue a PD 61D citation unless he/she has reason to believe that the violator will not cause injury to persons or damage to property, and will make an appearance in answer to the citation (D.C. Official Code § 23-1110).

When processing this citation, Department members shall note:

- Violators are no longer required to post collateral to secure an arraignment date for PD 61D citations;
- All arraignment dates for PD 61D citations are now scheduled by the Pretrial Services Agency.

II. DEFINITIONS

When used in this directive, the following terms shall have the meaning designated:

1. Bond – A bond is security for the appearance of a person for trial or further hearing who is charged with an offense triable in the District of Columbia Superior Court. ***A bond is forfeited only on a punitive failure to appear. In cases for which only a bond is allowed, no collateral may be posted and***

forfeited by the offender with respect to the case. Bond cannot be posted for a PD 61D violation citation.

2. CD 2063 (Citation to Appear in Court) – This is a form developed by the D.C. Superior Court, and used to schedule both citation release and PD 61D arraignment dates. This form replaced the PD 799 (Citation to Appear) and the PD 778 (Citation Release Determination Report), both of which are no longer authorized for Department use.

3. Collateral process – The D.C. Superior Court Board of Judges sets all collateral and bond amounts for misdemeanor offenses under the jurisdiction of the D.C. Superior Court. If eligible, an offender can elect to forfeit the collateral amount assigned to the charge, but by doing so, the offender waives his/her right to a hearing in court, and the case against the offender will be concluded without an admission of guilt. The offender will not have a conviction record, but will have an arrest record on the charges for which collateral was forfeited.

4. Documentary evidence of identity – includes official government photographic identification such as driver's license, passport, green card, military ID, Department of Motor Vehicles ID, or a work ID with a photograph.

5. Fine – A monetary penalty imposed by the D.C. Superior Court after conviction of a criminal offense. The D.C. Superior Court may enforce any of its judgments rendered in criminal cases with fines or imprisonment, or both.

   NOTE: The PD 61D citation contains a line for the "fine" amount. The collateral amount for the violation is entered on this line.

6. Post and Forfeit – In lieu of appearing for a trial, the violator may elect to forfeit the collateral amount assigned to the charge without either admitting guilt, or adjudicating any criminal offense.

   Post and Forfeiture procedure in minor criminal (or traffic) offenses is a privilege, not a right, and is subject to government objection when requested, or revocation at a later date (prosecutorial discretion). The offender can also change his/her mind at a later date and file a "Motion to Set Aside Forfeiture" with the D.C. Superior Court.

III. ISSUING THE PD 61D

A. The PD 61D shall not be issued to juveniles or to persons with diplomatic immunity.

B. When multiple offenses occur during one incident, a separate PD 61D shall be issued for each offense, even if written warnings are being issued.

NOTE: Issuing Officers shall obtain CCNs from the Office of Unified Communications for each incident in which a PD 61D is issued. The same CCN can be used for multiple PD 61Ds issued at the same location, during the same event.

If a PD 61D is issued in conjunction with the preparation of a PD 251 (Incident-Based Event Report), the PD 61D should carry the same CCN as the PD 251. However, PD 251s are not required for the issuance of a PD 61D.

C. There are four copies in the PD 61D violation citation book: (#1) White, (#2) Yellow, (#3) Pink, and (#4) Goldenrod. The issuing officer shall distribute as follows:

1. (#1) White is provided at the end of the tour of duty to the check off official for distribution to District station personnel.

2. (#2) Yellow is issued to the violator;

   NOTE: If the issuing officer observes a violation for which a PD 61D can be issued, but the violator is not present, the citation cannot be left on the property, premises, in the door, on the windshield, etc. The issuing officer must personally hand the (#2) Yellow copy to the violator.

3. (#3) Pink copy is provided at the end of the tour of duty to the check off official for distribution to District station personnel.

4. (#4) Goldenrod is retained by the issuing officer for his/her records.

D. When issuing a PD 61D, members shall:

1. Request the violator produce or display documentary evidence of his/her identity.

2. If reasonably satisfied with the identification provided by the violator, request a WALES/NCIC check to ensure the violator is not wanted, and has no outstanding warrants.

   NOTE: When the violator does not have documentary evidence of identity, the member shall effect a summary arrest.

3. Complete the front of the form first, ensuring that the handwriting is legible, and the information can be read on all four copies of the citation.

4. Check the appropriate violation in box #20 (Charges), and write the collateral amount on the line titled "Fine."

If the violator is being charged with a violation not listed in box #20, check the "Other" box, and write the charge and the collateral amount.

5. Do not complete boxes #22 (MPD Disposition), and #23 (Collateral/Bond Receipt No.). Station personnel shall complete these boxes when the violator reports to the District.

6. Tear out the citations and the carbons, flip the citations over so that the (#1) White copy is on the top, the (#2) Yellow copy is second, etc., and reinsert the carbons.

7. Complete the officer contact information on the bottom of the back of the citation (boxes #25-30), ensuring that this information can be clearly read on all four copies.

8. Issue the (#2) Yellow copy to the violator. There should not be any narrative, or officer notes on the violator's copy.

9. Instruct the violator he/she has 15 calendar days from the date the violation citation was issued to appear at the police district station that is circled on the citation in order to forfeit the collateral (as noted in box #20), or request an arraignment date.

   NOTE: From the list of addresses on the front of the citation, the issuing officer will circle the police district station in which the citation was issued, and make sure the violator understands where he/she is to report in order to make a disposition on the charge.

10. After issuing the citation to the violator, complete the narrative.

    The narrative should include the facts and/or circumstances of the case, witness name(s), evidence, and any other relevant information should the case be papered for criminal prosecution. If the charge is a traffic charge for which collateral can be forfeited, the issuing officer will ensure he/she collects this information before issuing the citation to the violator in order to document it in the narrative. Information on the motor vehicle includes:

    a. Vehicle license number/state/tag year.

    b. Vehicle make/model/year/color.

    c. Operator's permit/license number/class/state.

    d. Description of location of vehicle.

e. All other relevant information pertaining to the violation.

11. At the end of the tour of duty, provide the (#1) White copy and (#3) Pink copy to the check-off official, who shall submit it to station personnel.

12. Retain the (#4) Goldenrod copy to present to the OAG if an arrest warrant is needed, or for papering the charge, if the violator requests an arraignment date.

E. Verbal or written warnings may be given in lieu of issuing a PD 61D when, in the sound judgment of the member, a situation exists that can best be resolved through the issuance of a verbal or written warning. CCNs are not required when issuing a warning citation.

When issuing written warning citations, the member shall:

1. Complete boxes #1-20 of the PD 61D.

2. Across boxes #21-23, write "Warning" in large capital letters, ensuring that this information can be clearly read on all four copies.

3. Complete the officer contact information in boxes #25-30 on the back of the citation.

4. Issue the (#2) Yellow copy to the violator, and instruct him/her that the citation is a paper warning citation, that there is no collateral associated with the offense, and that the violator need take no further action in this instance.

   In the narrative section on the remaining three copies, the member may wish to make notes regarding the facts and/or circumstances under which the warning was issued. The member may wish to reference these notes at a future date, should he/she issue a citation to the same violator for the same or a different offense.

5. Turn in the (#1) White copy and the (#3) Pink copy of the warning citation to the check off official, who shall submit it to station personnel.

F. The issuing officer shall:

1. Maintain the (#4) Goldenrod copy:

   a. For papering when violators request arraignment dates, and

   b. To track citations older than 15 days in the event an arrest warrant is needed.

Issuing officers may also refer to CJIS and/or the District station Disposition and Citation Release files to determine whether a disposition has been made in the 15-day suspense date.

2. Apply for arrest warrants with the OAG, when violators fail to make a disposition within the 15-day suspense date.

G. Attachment B to this directive contains locations for processing the PD 61D as this applies to specific elements/members.

IV. PROCESSING THE PD 61D

A. Station personnel shall:

1. Upon receipt of the (#1) White copies from the check off official, complete a transmittal and attach the (#1) White copies for interdepartmental mail delivery to the Records Branch. The (#1) White copy of all warning citations need not be forwarded (refer to Section V, 7, for instructions regarding filing).

2. Process citations for all violators who were issued a PD 61D in their District. If a violator reports to a District other than the District in which the citation was issued, station personnel shall instruct the violator to report to the correct location, as circled on the citation.

3. Request that the violator produce or display documentary evidence of his/her identity.

4. Match the name provided on the identification with the name on the violator's copy of the PD 61D.

NOTE: The violator must have in his/her possession proper identification before station personnel can process the citation. If the violator does not have documentary evidence of identity, instruct the violator to obtain the missing documentation and return to have the citation processed.

Station personnel shall use (#3) Pink copy of the citation to process, if the violator does not have the (#2) Yellow copy in his/her possession. However, the violator **must** have proper identification.

5. Conduct a WALES/NCIC check to make sure the violator has no outstanding warrants.

6. Completely book the violator in CJIS. At the Charge screen, enter the PD 61D ticket number in the "Warrant-NOI" field.

NOTE: Members who wish to check CJIS to determine when a disposition has been made on the PD 61D, will need to reference the "Warrant-NOI" field. To distinguish whether the disposition is based on a warrant or a PD 61D, members will note that a warrant number begins with an alphabetic designator, and the PD 61D ticket number contains six digits.

7. Because PDID numbers are not issued for PD 61D violation citations, the violator will not be live scanned, or linked in CJIS. Therefore, station personnel will not interact with the Pretrial Services Agency through the Citation Release Processing Screen.

8. Record the arrest number on the District Station copy of the PD 61D in the space above boxes #21-22.

NOTE: Station personnel are not required to complete a PD 163 (Arrest/Prosecution Report) when booking PD 61D cases. The CJIS arrest record provides documentation of the arrest.

B. If the 15-day suspense date has expired, the violator **is not** permitted to forfeit collateral. In these instances, station personnel are required to schedule an arraignment date for the violator to appear in court.

V. "ELECT TO FORFEIT" DISPOSITIONS

When a violator elects to forfeit collateral, station personnel shall:

1. Pull the (#3) Pink copy of the PD 61D from the 15-day Suspense file that matches the ticket number on the violator's (#2) Yellow copy.

2. Make a Post and Forfeit disposition in CJIS.

3. Write the arrest number on the (#3) Pink copy.

4. On the violator's copy and the (#3) Pink copy, write "E/F" (Elect to Forfeit) in box #22 (MPD Disposition), and write the collateral amount and the PD 67 Collateral Receipt number in box #23 (Collateral/Bond Receipt No.).

5. Return to the violator the (#2) Yellow copy of the PD 61D and the (#1) White copy of the collateral receipt.

6. Make one front and back copy of the (#3) Pink copy of the PD 61D.

7. File the (#3) Pink copy in the PD 61D Disposition file by month and year of the offense. File the (#1) White copy of warning citations by

attaching to the (#3) Pink copy, and filing by month and year of the offense.

8. Within 24 hours, provide the reproduced copy to an official in the administrative office.

   a. Within 24 hours, the administrative official will notify the member who issued the citation that the violator elected to forfeit the collateral.

   b. The official will provide the collateral amount and the PD 67 Collateral Receipt number to the member.

9. The member who issued the violation citation shall write the following on his/her (#4) Goldenrod copy of the PD 61D:

   a. "E/F" in box #22. This denotes the disposition Elect to Forfeit.

   b. The collateral amount and the PD 67 (Collateral Receipt) number in box #23.

   c. The date he/she was notified above boxes #21-22.

      NOTE: This will help ensure that the member does not inadvertently swear to a warrant against a violator who has complied with the 15-day suspense date.

VI. ARRAIGNMENT DATE DISPOSITIONS

When a violator requests an arraignment date, station personnel shall:

1. Pull the (#3) Pink copy of the PD 61D from the 15-day Suspense file and match the ticket number to the violator's (#2) Yellow copy.

2. Completely book the violator in CJIS and write the arrest number on the (#3) Pink copy.

3. Make a disposition for an arraignment date in CJIS as follows:

   a. At the "Charge" screen, choose the "61D Release" disposition (option "S" in CJIS).

   b. CJIS will automatically generate an arraignment date in the court date field. **DO NOT** use this date as an arraignment date.

4. Call the Pretrial Services Agency and inform the staff person that an arraignment date is needed for a PD 61D offense. Provide:

a. Your name and district, and the violator's name, arrest number, and the charge(s) associated with the incident.

   If the violator was issued multiple PD 61Ds over several days, Pretrial will try to set one arraignment date for the multiple charges, if possible.

b. Any additional information as requested by the Pretrial Services staff.

5. Upon receipt of an arraignment date, correct the arraignment date automatically generated in CJIS to match the arraignment date provided by the Pretrial Services Agency.

6. Write "PD 61D Release" in box #22 on the violator's (#2) Yellow copy and the District Station's (#3) Pink copy. Write "N/A" in box #23 because collateral is no longer required to secure an arraignment date.

7. Complete a CD 2063 (Citation to Appear in Court) and enter the arraignment date provided by the Pretrial Services Agency.

   a. On the line for the arrest charge(s) and applicable CCN or NOI number(s), list the charge as it appears on the PD 61D, and write the PD 61D ticket number. List all the charges that will be adjudicated by D.C. Superior Court on that arraignment date.

   b. Write "PD 61D case" at the top of the CD 2063.

8. Attach the violator's (#2) Yellow copy of the PD 61D to the CD 2063 Pink copy (Defendant copy) and return to the violator.

9. Instruct the violator to report on the date and time, and to the room indicated on the CD 2063 form.

10. Make one front and back copy of the (#3) Pink copy of the PD 61D. Attach the (#3) Pink copy to the Gold copy of the CD 2063.

11. File in the Citation Release file by date of the arraignment as scheduled by the Pretrial Services Agency.

12. Within 24 hours, provide the reproduced copy to an official from the administrative office.

    a. Within 24 hours from receipt of the copy from District Station personnel, the official from the administrative office shall notify the member who issued the citation to paper the case with the OAG.

b. If the member is assigned to an element other than a police district, the administrative official shall notify an official from that element by phone, and fax the form to that official, who shall be responsible for notifying the issuing officer within 24 hours.

VII. PROCESSING CITATIONS FROM OTHER LAW ENFORCEMENT AGENCIES

A. Violators shall be processed in accordance with the applicable procedures in this SOP. It is not necessary to provide reproduced copies of citations from other law enforcement agencies to the Records Branch, or to other elements within the Department.

B. When making an "elect to forfeit" disposition, station personnel shall:

1. Make a copy of the front of the violator's citation (the #2 Yellow copy).

2. Attach the (#1) White copy of the collateral receipt to the reproduced copy of the citation and provide this to the violator.

3. Make a copy of the collateral receipt.

4. Forward to the originating agency the original citation (the #2 Yellow copy) with the reproduced copy of the collateral receipt attached.

C. When scheduling an arraignment date, station personnel shall:

1. Schedule an arraignment date for the violator through the Pretrial Services Agency, and complete a CD 2063.

   NOTE: Violators who are processed at MPD police district stations are **NOT required to post collateral when requesting an arraignment date**, regardless of the instructions on the originating agency's citation.

2. Make a copy of the front of the violator's citation (the #2 Yellow copy), and a copy of the CD 2063.

3. Attach the reproduced copy of the violator's citation to the CD 2063 Pink copy (Defendant copy) and return to the violator.

4. Forward the original citation (#2 Yellow copy) to the originating agency with the reproduced copy of the CD 2063 attached.

VIII. PROCEDURES FOR PAPERING/ARREST WARRANTS

A. When papering PD 61D cases, the issuing officer shall:

1. Ensure that the case is papered within five (5) business days from the date he/she was notified by the administrative official, but no later than two (2) business days from the arraignment date.

2. Complete a PD 140 (Court Appearance Worksheet) and check in at the Court Liaison Division prior to reporting to OAG.

3. Bring the (#4) Goldenrod copy of the PD 61D, and any other material relevant to the case.

B. When processing an affidavit for the issuance of an arrest warrant, the issuing officer shall:

1. Be responsible for obtaining a warrant for each PD 61D that he/she has issued. The issuing officer shall respond to OAG within two business days from the date he/she was notified by the administrative official that the 15-day suspense has expired.

   NOTE: In the narrative of the warrant, the issuing officer shall notate that the defendant did not make a disposition of the PD 61D at any district station within the 15-day time frame.

2. Ensure a Lieutenant or above reviews and approves the warrant prior to presenting to the OAG.

3. Complete a PD 140, and check in at the Court Liaison Division prior to reporting to OAG.

4. Bring the (#4) Goldenrod copy of the PD 61D and any other material relevant to the case.

   The (#4) Goldenrod copy shall be attached to the original affidavit for the arrest warrant, regardless of whether OAG issues or declines the warrant.

5. If the OAG disapproves the warrant, the PD Form 61D shall be re-filed in the element's Violation Citation File. The 15-Day Suspense Book shall be annotated to reflect "No Papered" along with the name of the prosecutor who "No Papered" the case.

C. Upon receipt of the (#1) White Copy in the Office of Public Documents, Records Branch personnel shall file by CCN number.

IX. MAINTAINING THE 15-DAY SUSPENSE FILE

A. PD 61Ds for which the 15-day suspense period has expired shall be logged in the element's 15-Day Suspense book. The 15-Day Suspense book shall

contain the date of issuance, the name of the violator, the name of the issuing officer, and a space for recording the final disposition.

B. Each District shall maintain three station files in relation to the PD 61D:

1. The **15-Day Suspense file** shall contain the (#3) Pink copies of the PD 61D filed by month and year of the offense (box #18 on PD 61D), and arranged sequentially by date. Station personnel shall monitor this file on a daily basis to identify citations older than 15 days.

2. The **Disposition file** shall contain the warning citations, the citations for which the violator has elected to forfeit collateral, and the citations for which arrest warrants are requested. These citations shall be filed by month and year of the offense, and arranged sequentially by date. It is not necessary to maintain the Violation Citation File or the Warning Citation File. The Disposition file replaces these two files.

3. The **Citation Release File** shall contain paperwork for all violators who have received arraignment dates for both citation release cases and PD 61D violation citation cases. These are filed by date of the arraignment, as scheduled by the Pretrial Services Agency.

C. Station personnel shall:

1. On a daily basis, check the 15-day suspense file to identify PD 61Ds that are more than 15 days past the date recorded in box #18, the offense box.

2. Pull the expired (#3) Pink copies and complete a CJIS name check, verifying that the violator's ticket number for that offense has not been previously entered.

3. Complete the following:

a. Write "Arrest Warrant needed" and the date in large capital letters across boxes #22-23.

b. Make a front and back copy of the #3 Pink copy.

c. File the original (#3) Pink copy in the Disposition file by month and year of the offense.

d. Within 24 hours, provide the reproduced copy to an official in the administrative office.

D. Within 24 hours, the official from the administrative office shall notify the issuing officer to apply for an arrest warrant against the violator.

E. Commanding Officers shall ensure that a station employee, or other administrative person, is assigned the responsibility of regularly checking the 15-day Suspense file.

F. In all cases where the provisions of this order are in conflict with orders previously issued, the provisions of this order shall prevail.

X. ATTACHMENTS

A. Attachment A, "Charges for Which a PD 61D May Be Issued"

B. Attachment B, (Locations for processing the PD 61D)

//SIGNED//
Charles H. Ramsey
Chief of Police

CHR:SOA:DAH:JAH:jah:lm

CHARGES FOR WHICH A PD 61D MAY BE ISSUED

TRAFFIC

OFFENSE NAME	CITATION	AMT
Allow Operation W/ Improper Tags	50 DC 1501.04 (a)(2)	50
Apportioned Tags Violations	50 DC 1507.03	500
Colliding With Pedestrian	50 DC 2201.28(c)	100
Display Expired Tags	18 DCMR 1101.3	50
Fail To Exhibit Permit *	50 DC 1401.01	25
Fail To Exhibit Registration	50 DC 1501.04(a)(1)(C)	25
Fail To Give Right Of Way To Pedestrian	50 DC 2201.28	50
Fail To Identify Self-Pedestrian	50 DC 2303.07	50
Improper Use Of Dealer Tags	18 DCMR 1101.4,.5,.7	100
Radar Detection Device	18 DCMR 736	50

TRAFFIC – TOWING CHARGES

OFFENSE NAME	CITATION	AMT
Towing - Failure to Clear Accident Debris	16 DCMR 411.9	100
Towing - Failure to Display License Properly	16 DCMR 403.4	100
Towing - Failure to Inform DPW of Public Tow	16 DCMR 406.4	100
Towing - Failure to Mark Tow Truck Properly	16 DCMR 404.2, 404.3, 404.4	100
Towing - Failure to Permit Proper Inspection	16 DCMR 401.2	300
Towing - Failure to Provide "Owner Bill of Rights"	16 DCMR 405.7	100
Towing - Initiating Private Tow Without Written Consent	16 DCMR 407.2	100
Towing - No Towing Control Number	16 DCMR 406.3	300
Towing - Operating a Storage Lot Without a License	16 DCMR 402.2	300
Towing - Operating Without a Valid Towing License	16 DCMR 411.8	300
Towing - Other Offense Not Specifically Identified	16 DCMR 400, et seq.	100
Towing - Unauthorized Removal of Accident Vehicle	16 DCMR 410.3	100
Towing - Unauthorized Towing Service At Accident	16 DCMR 410.9	300
Towing - Unlawful Deposit of Inoperable Vehicle	16 DCMR 410.10	200
Towing - Unlawful Scanner	16 DCMR 410.8	100
Towing - Unlawful Towing from Private Property	16 DCMR 406.7	300
Towing - Unsafe Towing	16 DCMR 410.17	100
Towing - Unsecured Storage Lot	16 DCMR 405.1	100

**** Members shall act in accordance with the directions provided on Teletype # 05-024-04 "Operating without a Permit" (Attachment B) when processing this charge.***

NON-TRAFFIC

OFFENSE NAME	CITATION	AMT
Advert. Mat. - Scattered	24 DCMR 1008, 100.6	25
Animals - Other than Dogs at Large	24 DCMR 906.7	25
Auctioneers	16 DCMR 1106	25
Barbed Wire Fences- Public Space	12A DCMR 3110.4, 113.4	25
Bees within 500 ft. of Human Habitation	24 DCMR 904, 100.6	50
Builders - Building Material on Roadway	24 DCMR 110, 100.6	25

CHARGES FOR WHICH A PD 61D MAY BE ISSUED

Builders - Building Material Stored in Alleys	24 DCMR 110.14, 100.6	25
Builders - Fail to Place Light on Obstruction of Roadway/Sidewalk	24 DCMR 110.20	25
Builders - Failure to Store Building Materials on Private Property	24 DCMR 110.6, 100.6	25
Builders - Use of Public Space without Permit	24 DCMR 110, 100.6	50
Construction Code Violations	5 DC 1306	50
Dangerous Object on Street/Sewer	24 DCMR 2000.2, 100.6	25
Deface Public Footway/Roadway	24 DCMR 101.2, 100.6	50
Distribute Handbills-Public Space	24 DCMR 1008	25
Dogs - At Large	24 DCMR 900.2, 900.9	25
Dogs - Disturbing the Peace	24 DCMR 900.1, 900.9	25
Dogs - Maintain Collar	24 DCMR 900.2, 900.9	25
Dogs - Menacing People	24 DCMR 900.6, 900.9	100
Dogs - Unleashed	24 DCMR 900.3, 900.9	25
Dogs - Private Property	24 DCMR 900.5, 900.9	25
Dogs - Vaccination Required	24 DCMR 901.1	25
Dogs - Vaccination Tag Required	24 DCMR 901.15	25
Dogs- Excrement on Public/Private Property	24 DCMR 900.7, .8	25
Expired Commission - Campus Sec. Officer	6A DCMR 1203.2	50
Expired Commission - Special Pol. Officer	6A DCMR 1104.2	50
Failure to Obey Order to Remedy Dangerous Condition	12H-F110.2, 12HF112.3	50
False Alarm	24 DCMR 2106	100
Fire Code - Failure to Obey Order (generally)	12H DCMR F112.3	50
Fireworks - Deliver	12H DCMR F3309.2.1, 12H	50
Fireworks - Discharge	DCMR F112.3	25
Fireworks - Possession	24 DCMR 2106	25
Fireworks - Sell	24 DCMR 2106; 5 DC 117.05	50
Fishing - By Other than Rod, Hook, and Line	12H DCMR F112.3	50
Fishing - Commercial Fishing	12H DCMR F3309.2.1, 12H DCMR F112.3	300
Fishing - Digging for Bait in Rock Creek Park	12H DCMR F3309.2.1 or F3309.1.1.1, 12H DCMR F112.3	50
Fishing - Dip Net Exceeding Size	1502.2	50
Fishing - Exceeding Limit for Species	19 DCMR 1502.1	100
Fishing - Failure to Attach License Number to Eel Trap	19 DCMR 1503.3	50
Fishing - Failure to Check Eel Trap	19 DCMR 1502.3	50
Fishing - Failure to Display a Fishing License	19 DCMR 1501.3	50
Fishing - Fishing with Seine or Cast Net	19 DCMR 1502.4	50
Fishing - Fishing Without a License	19 DCMR 1501.1	50
Fishing - More than 2 Hooks Per Line	19 DCMR 1502.2	50
Fishing - More than 3 Lines	19 DCMR 1502.2	50
Fishing - Net Fishing in Rock Creek Park	19 DCMR 1503.2	50
Fishing - Operating in Excess of 5 Eel Traps	19 DCMR 1502.6	50
Fishing - Poss. Species with Size Limit, Head/Tail Removed	19 DCMR 1503.1(d)	100
Fishing - Possession of Endangered/Threatened Species	19 DCMR 1503.1(e)	300
Fishing - Possession of Undersized Fish	19 DCMR 1503.1(b)	100
Fishing - Take/Catch/Possess Striped Bass/Hybrid Striped Bass (Out of Season)	19 DCMR 1503.1(i)	100
Fishing - Taking, Catching or Possessing Sturgeon	19 DCMR 1503.1(g)	300
Fishing - With Snag Hook	19 DCMR 1502.5	50

CHARGES FOR WHICH A PD 61D MAY BE ISSUED

Fowls Without Permit	24 DCMR 902, 100.6	25
Harbor Regs - Accident, Fail to Assist	19 DCMR 1031.1	50
Harbor Regs - Accident, Fail to Report Personal Injury	19 DCMR 1031.4(b)	300
Harbor Regs - Accident, Fail to Report Property Damage	19 DCMR 1031.4(c)	25
Harbor Regs - Accident, Identify Self & Vessel	19 DCMR 1031.2	50
Harbor Regs - Canoe Safety, Fail to Instruct	19 DCMR 1036.4	25
Harbor Regs - Entering Diving Area	19 DCMR 1029.7	100
Harbor Regs - Entering Restricted Area	19 DCMR 1029	100
Harbor Regs - Fail to comply with Fed Anchor Light regs	19 DCMR 1028.7	25
Harbor Regs - Fail to Give Harbor Master Change Name/Address	19 DCMR 1003.3(a)	25
Harbor Regs - Fail to Obtain Permit for Marine Event	19 DCMR 1040.2	25
Harbor Regs - Fail to Provide Equipment, Livery Boat	19 DCMR 1036.3	25
Harbor Regs - Fail to Yield for Emergency Vessel	19 DCMR 1022.4	25
Harbor Regs - Failure to Comply with Navigation Rules	19 DCMR 1026	50
Harbor Regs - Failure to Comply, Equipment Standards	19 DCMR 1034.2	50
Harbor Regs - Failure to Register Vessel	19 DCMR 1001.1	50
Harbor Regs - Failure to Wear Flotation Device -Operator & Person under 18	19 DCMR 1026.7	50
Harbor Regs - Flotation Device - Suff. Number, Approved, Suitable, Accessible	19 DCMR 1034	50
Harbor Regs - Flotation Device, Children under 13	19 DCMR 1026	50
Harbor Regs - Hazardous Condition/Fail to Correct	19 DCMR 1022.5, 1022.6	100
Harbor Regs - ID Number- Give or Display	19 DCMR 1004.7	25
Harbor Regs - Land Amphibian Craft Without Permission	19 DCMR 1042.1	100
Harbor Regs - Livery, Fail to Keep Records	19 DCMR 1036.1	50
Harbor Regs - Minor Operate Without Certificate	19 DCMR 1026.5	25
Harbor Regs - Minor-Rent boat to	19 DCMR 1026.4	50
Harbor Regs - Mooring Buoy-Place or Fail to Remove	19 DCMR 1028.8	50
Harbor Regs - Muffler- Improper	19 DCMR 1035.1	50
Harbor Regs - Navigation Lights -Improper Display	19 DCMR 1022.5	25
Harbor Regs - Negligent Operation	19 DCMR 1026.1	100
Harbor Regs - Noise	19 DCMR 1035.4 & 1035.5	25
Harbor Regs - Obstructing Channel	19 DCMR 1028.4	25
Harbor Regs - Obstructing Docks	19 DCMR 1030	25
Harbor Regs - Operation without Boating Safety Certificate	19 DCMR 1026.6	50
Harbor Regs - Polluting Waters	19 DCMR 1033.1	100
Harbor Regs - Speed	19 DCMR 1027	50
Harbor Regs - Sunken Vessel, Fail to Notify Harbor Master	19 DCMR 1030.9	200
Harbor Regs - Sunken Vessel, Fail to Raise After Notification	19 DCMR 1030.9	300
Harbor Regs - Tie to Bridge or Seawall	19 DCMR 1030.15	25
Harbor Regs - Tie to Buoy	19 DCMR 1030.16	25
Harbor Regs - Tie to Navigation Aid	19 DCMR 1030 16	25
Harbor Regs - Validation Sticker - Fail to Obtain	19 DCMR 1002	25
Harbor Regs - Validation Sticker- Fail to Display	19 DCMR 1004.14 & 1004.15	25
Harbor Regs - Violation of Water Contact/Water Sport Regs.	19 DCMR 1039	50
Harbor Regs -Fail to Notify, Transfer/Destr./Theft/Abandon./Recovery/Doc.	19 DCMR 1003.3	100
Housing Code Violations	14 DCMR 102	50
Photographer Violations	19 DCMR 1002	25
Photographer – More than 5 minutes at location	24 DCMR 523.3, 501.9	25

CHARGES FOR WHICH A PD 61D MAY BE ISSUED

Poster-Lewd	24 DCMR 108.3, 100.6	25
Public Sewer, Misuse of	21 DCMR 201	25
Public Sewers, Inflammable Liquids	21 DCMR 201.4, 201.10	100
Public Space, Obligations of Owners and Abutting Space	24 DCMR 102	25
Public Space, Selling Vehicles	24 DCMR 101.5, 100.6	50
Public Space, Soliciting Employment	19 DCMR 1203.7, 1205.9	25
Public Space, Soliciting Passengers	24 DCMR 500.2, 501.9	25
Public Space, Storing Merchandise	24 DCMR 111, 100.6	25
Public Space, Wet Paint/Other Substance without Warning Device	24 DCMR 2000.5, 100.6	25
Public Toilets - Misconduct	24 DCMR 122	35
Rodent Control	22 DCMR 107	25
Sale of Cigarettes to a Minor	22 DC 1320	75
Second Hand Dealer - Failure to Keep Article Time Required	16 DCMR 1102, 1013.4	25
Second Hand Dealer - Failure to Keep Records Time Required	16 DCMR 1001, 1003.8, 1013.5	25
Snow Removal, Railroad Track	24 DCMR 120.2, 100.6	25
Street Lamps - Climbing	24 DCMR 107.4, 100.6	25
Street Lamps - Damage or Break	24 DCMR 107.1, 100.6	25
Street Lamps - Hitching Animals to	24 DCMR 107.1, 100.6	25
Street Lamps - Signs or Ads	13 DCMR 735, 103.3	25
Taxi Violations - Loitering	50 DC 371	25
Tent / Temporary Abode Regulation Violation	24 DCMR 121, 100.6	25
Transp. Manure	24 DCMR 1007, 100.6	25
Transp. Trash	24 DCMR 1007, 100.6	25
Transportation of Materials, Improper	24 DCMR 1007, 100.6	25
Unlicensed Driving Instructor	24 DCMR 600.1, 601; 47 1110.1(d), 900.1	100
Unlicensed Parking Lot	DC 2846	50
Vending - Cry out	24 DCMR 510.19, 501.9	50
Vending - Improper Vending Vehicle	24 DCMR 512, 501.9	25
Vending - Longer than Necessary	24 DCMR 516.1, 501.9	50
Vending - Restricted Area	24 DCMR 515, 501.9	50
Vending - Restricted Hrs.	24 DCMR 511, 501.9	50
Vending - Vending without a License	47 DC 2834, 2846	50
Water Regulations, Violation of	21 DCMR 100	50

ELEMENTS/MEMBERS LISTED BELOW WILL PROCESS PD 61Ds AT THE FOLLOWING LOCATIONS:

ELEMENT	DISTRICT
Harbor Patrol Section	First District
Environmental Crimes Unit	Sixth District
All elements/sworn members operating from/assigned to HQ (300 Indiana Avenue)	First District
All sworn members from SOD who process vending violations	First District

Appendix 3: *District of Columbia v. Baylor*, 125 Wash. Law Rptr. 1665 (Aug. 25-26, 1997)

D.C. Superior Court

CRIMINAL LAW AND PROCEDURE

POST AND FORFEITURE

Post and forfeiture procedure in minor criminal or traffic offenses is duly authorized, is a privilege not a right and is subject to government objection when requested or revocation at later date.

DISTRICT OF COLUMBIA v. BAYLOR, ETC., D.C.Super.Ct. Cr.Nos. D-1114-96, D-3504-96, D-3956-96, D-3125-96, T-6033-96 and T-6817-96, January 31, 1997. *Opinion* per Ronald A. Goodbread, Commissioner. *Anthony J. Gagliardi* for the District of Columbia. *Philip C. Baten, Ethel Schindler, David Ezrow* and *Veta Carney* for defendants.

MEMORANDUM OPINION AND ORDER

Part 2 of 2 Parts

C. "Right" vs. "Privilege"

A review of both the case law history and the principles set forth in the Bond Collateral Book makes it clear to the Court that the "post and forfeiture" procedure is not a right, but a privilege extended as a matter of pragmatic resolution of the vast corpus of cases coming before this Branch of the Court. In so concluding, the Court further finds, in response to the main arguments raised by these cases, that (1) the privilege is revocable, (2) the Government has standing to object to extending the privilege, and (3) the termination of a case in this fashion is legal and permissible.

1. A Revocable Privilege

A comparatively early case (indeed, cited in the Bond and Collateral Book at xiii) indicating that this is not a procedure "of right" is *Coleman v. District of Columbia*, 203 A.2d 918 (D.C. 1964). There the Court of Appeals observed that "[i]n certain cases . . . , an [alleged] offender is *given the privilege*, at the time he posts collateral as security, of forfeiting it instead of going to trial." Indeed, in plainer terms the Court went on to find that "[t]his is *not an absolute right*, as the government is authorized to petition the court to abrogate the forfeiture privilege of the violator at the time of [any later] application for a warrant [for arrest]."[26] *See also Shiel v. United States*, 515 A.2d 405, 411 (D.C. 1986) (discussing presentation of right to post and forfeit); *Smith v. District of Columbia*, 219 A.2d 842, 845 (D.C. 1966) (discussing trial after waiver of privilege to post and forfeit); and *Henderson v. District of Columbia*, 169 A.2d 759 (D.C.Mun.App. 1961) (discussing validity of waiver to post and forfeit).

That this process was never meant to be an irrevocable right, however, is further indicated by the fact that the Board of Judges itself stated that "[i]n any case, the Corporation Counsel may, at the time of *application for warrant*, petition a judge presiding in the Superior Court . . . ex parte, to set bond and abrogate the *privileges* of the violator to forfeit collateral." Bond and Collateral Book at viii (emphasis added). Noting that some attempt had been made to make the prospectively-forfeitable collateral commensurate with each offense, the Board of Judges added, with utmost significance to the issue currently before the Court in these cases, *"but forfeiture is not a right."* *Id.* at xiii (emphasis added) (citing *Coleman*, supra).[27]

Considered in this light, the statutory authorization for the Court to both promul-

(Cont'd. on p. 1676 - Post and Forfeiture)

26. Although it must be pointed out that different and stronger language has been used by our Court of Appeals in *subsequent* cases with respect to this procedure. Two years after *Coleman, supra*, in *Smith v. District of Columbia*, 219 A.2d 842, 845 (D.C. 1966), the Court of Appeals noted that the defendants "had *the right* to post and forfeit collateral" but that "[h]aving chosen instead to stand trial, they are hardly in a position to complain when, after conviction, the trial judge, as he had a right to do, imposed fines larger than the amount posted for collateral but well within the statutory limitations." (Emphasis added). This, however, the Government argues, *see* Govt. Resp. at 5, is phraseology prompted by the fact that the defendant's "right" had *already* "vested" after the Government itself had previously extended the "privilege" to post and forfeit, which was then spurned. Most recently, thirteen years after *Coleman*, in *District of Columbia v. Franklin Inv. Co., Inc.*, 404 A.2d at 539, the Court spoke of a defendant's "*option* of requesting a trial or *electing* to forfeit the collateral in lieu of trial." (Emphasis added). But any inconsistency in these holdings on this issue is ostensibly conceded in the only submission before the Court from any of the Defendants, when, in attempting to reconcile the *Coleman* and *Smith* cases, the conclusion is reached that "[i]n spite of these two cases, the better analysis would require a finding that the process is a privilege and not a right." Def. Mem. at 9. In any event, the Court has found no decision or other authority in this jurisdiction which expressly supports the proposition that the post- and forfeit procedure is a right, not a privilege.

27. Even conceding that the post and forfeit process is a privilege, *see n.26, supra*, Counsel for Ms. Baylor argues that, nevertheless, it can be interdicted only if and when the Government, in fact, applies for a "warrant" (as indicated by the empha-

U.S. District Court
for the District of Columbia

NOTICE

A memorial service for Charles A. Horsky, Esquire, will be held at 4:00 p.m., Wednesday, August 27, 1997, in the Ceremonial Courtroom of the E. Barrett Prettyman United States Courthouse.

D.C. Court of Appeals

CRIMINAL LAW & PROCEDURE

NEW TRIAL

Trial court did not err in denying new trial on grounds that defense had located a gun that may have been the murder weapon where the government case did not turn on who had possession of the weapon.

PAYNE v. UNITED STATES, ETC., D.C. App. Nos. 93-CF-1643 and 94-CF-1445, July 24, 1997. *Affirmed* per Reid, J. (Terry and King, JJ. concur). *Joseph R. Conte*, appointed by this court, for appellant Payne. *Shawn Moore*, appointed by this court, for appellant Garris. *Geoffrey Bestor* with *Eric H. Holder, Jr., John R. Fisher* and *Thomas J. Tourish, Jr.* for appellee. Trial Court—George W. Mitchell, J.

REID, J.: Appellants Ronald E. Garris and Ronnie Payne were convicted on two counts of premeditated first degree murder while armed, in violation of D.C. Code §§22-2401, -3202 (1989), two counts of assault with intent to kill while armed, in violation of D.C. Code §§22-501, -3202; one count each of carrying a pistol without a license, in violation of D.C. Code §22-3204(a), and possession of a firearm during a crime of violence, in violation of D.C. Code §22-3204(b). They filed timely appeals challenging their convictions. We affirm.

* * *

ANALYSIS

Garris's Ineffective Assistance Of Counsel Argument

Garris maintains that he was denied the effective assistance of counsel. To prevail on this issue, Garris "must show (1) deficient performance by his trial counsel, and (2) prejudice traceable to his trial counsel's deficiencies. The burden is a heavy one because of a strong presumption that defense counsel has rendered reasonable professional assistance." *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 669 (1984)). Garris contends that his "trial counsel's illegal drug usage during a serious double homicide trial was outside the boundaries of reasonable professional norms" and his performance not only was deficient but also prejudicial to him. "[T]o prove prejudice he 'must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

(Cont'd. on p. 1679 - New Trial)

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corroborative evidence. *See Williams v. United States*, 237 A.2d 539, 541 (D.C. 1968) (government has no "affirmative duty" to test for fingerprints); *United States v. Weisz*, 231 U.S.App.D.C. 1, 23-24, 718 F.2d 413, 436-437 (1983) (FBI agents not required to record allegedly exculpatory conversations with defendant), *cert. denied*, 465 U.S. 1027 (1984). We need not and do not decide whether the court's curtailment of cross-examination was an abuse of discretion. Rather, we consider it only as a factor—the principal factor, obviously—in deciding whether the court's instructional error was harmless.

We hold that the trial court erred in telling the jury that it could not base its verdict "on evidence that has not been presented," and, viewing the record as a whole, we conclude that the error was not harmless. Appellant's conviction is therefore reversed, and the case is remanded for a new trial.

Reversed and remanded.

POST AND FORFEITURE

(Cont'd. from p. 1665)

When Ms. Baylor first appeared in court on May 4, 1996, in the instant case, her tenth charge in almost exactly one year's time (an average "arrest rate," by *that* date, of once every 37 days), she agreed to post and forfeit $50 by July 5, 1996 (or, put another way, at her own request she was granted 62 days to post the $50—, or a rate of about 80 cents a day). On July 5, 1996, she reappeared before the undersigned and, again at her express request, was granted until September 6, 1996, to post and forfeit (or another 63 days, a total of 125 days' time—an average of about 40 cents a day over that time period). The Court ordered that there would be no further enlargements of time. Nevertheless, on September 6, 1996, the Court indulged the Defendant yet a third time, by granting her until November 7, 1996, to post and forfeit, or another 62 days—a grand total of 187 days to pay $50, which reduced the average daily total to 27 cents a day.

On November 12, 1996, nearly a week past her final deadline, the Defendant was back before the Court, not having paid a farthing toward the sum which she had agreed to forfeit some 192 days earlier.[3] On this occasion, however, the Government, noting her long history of public misconduct, together with her lassitude and arguably contumacious conduct in the instant case alone, objected to her having the benefit of the post and forfeit procedure any further. It was on this particular occasion that this Court was undecided about whether the Government had standing to make such an objection and it ordered Counsel for Ms. Baylor to brief the issue and the Government to respond, the result of which is the instant Memorandum Opinion.[4]

Ezzat H. Abdelhany. Charged with multiple counts of vending and health violations, Mr. Abdelhany appeared in court on September 19, 1996, was advised of his option to post and forfeit a total of $200, but instead demanded a non-jury trial, which was scheduled for November 12, 1996. On the trial date the Defendant was not present when the case was called and a bench warrant issued. The Defendant then arrived late and the bench warrant was quashed, but the Government, having been excused from being ready to proceed to trial, requested a status hearing, which was held on December 20, 1996. On that occasion, the Defendant requested the opportunity to post and forfeit, after all. Thus, rather than post and forfeit, and because of his subsequent tardiness, the Defendant occasioned a delay of 92 days—including forcing the Government to be ready for trial, only to have to excuse its witness(es). The Government objected to his being allowed to do so, and this case was taken under advisement, along with the *Baylor* case, *supra*, on which a similar issue had already been broached.[5]

Robin R. Heilig. In a case of unusual facts, Mr. Heilig, a 25-year-old resident of Springfield, Virginia, was charged with running onto the playing field at R.F.K. Stadium on Sunday, September 29, 1996, during some sort of athletic contest wherein, apparently, one team of gargantuan ruffians attempts to collide with another group of similar stature and mentality, all with the purpose of advancing a pointed spheroid toward the opposite end of the (restricted) playing field.[6] On his initial court date of October 18, 1996, at his request, Mr. Heilig was given until November 1, 1996, to ascertain counsel. On that date, however, he returned to court without having arranged for counsel. Nevertheless, the Court appointed counsel for him under the Criminal Justice Act, and the case was scheduled for trial on December 19, 1996. Without any prior notice to the Government from either the Defendant or Counsel, however, the Defendant appeared on the continued trial date, having required the Government to prepare for trial, and sought to post and forfeit—62 days after he could already have done so at his first court appearance.[7] The Government objected, and this case was added to the list of those then currently under advisement on the same issue.[8]

Herman S. Campbell. Mr. Campbell appeared before the Court on August 27, 1996, on citations for possession of an open container of alcohol ("POCA"), in one case, and reckless driving and driving under the influence of alcohol, in a separate case jacket,[9] both arising out of a common nucleus of operative fact. When, as often happens, there was "no paperwork" available during the course of the day, Mr. Campbell was excused. However, as also frequently happens, the paperwork on the cases arrived in the courtroom after he had already been excused, and a judicial summons issued for him to reappear in court to answer the charges on October 2, 1996. Mr. Campbell did return to court as summoned and entered a plea of not guilty on the moving violations

enth is the one *sub judice* (on which, it might be pointed out, she was arrested only two days after the immediately previous case, for the same offense, had been dismissed for want of prosecution). Notable also, is the fact that Ms. Baylor "picked up" 2 cases, the drinking in public charges, since the current case, although it is likewise noteworthy that on the only one which went forward, after this Court had already made it clear to her that the prior pattern of her court proceedings might, in all likelihood, be coming to an end, she made the first and only "payment" in all her cases, posting and forfeiting the inhibitory sum of $10 on her most recent drinking in public case. (She has now "avoided arrest" for 127 days since her last case—longer than any time period between any two of her prior cases.)

This is, the only indication—slender reed in the wind that it is—that her public conduct might change, and with it her attitude toward the criminal justice process. There is even less reason for the Court to acquiesce in according her the privilege of posting and forfeiting in the instant case; rather, the point has long since come and gone whereby she should face the consequences of her continuing conduct at trial.

3. As seen by the table in n.2, *supra*, she had, however, managed to pick up two additional cases by this point in time.

4. Thus, over an issue which could otherwise have been "retired" at the rate of about 25 cents a day over a 6 month period, to the administrative costs associated with this case alone (to say nothing of her other ten cases), was added the expense of appointed counsel under the CJA Program. It should also be noted that CJA counsel was appointed for each Defendant whose case is subject to this Memorandum Opinion, but only Counsel for Ms. Baylor, Phillip Baten, Esq. (who also represents Mr. Abdelhany), made any written submission or appeared in court to argue this issue at the scheduled hearing thereon. This presentation, it must be noted, was thorough, well-researched, well-reasoned, and persuasive even if not triumphant. The same may be said for the Government's submission by Anthony J. Gagliardi, Esq., which prevailed.

5. Mr. Abdelhany has no other record or any kin before this or any other Branch of the Court.

6. Both the logic and art of this particular exer cise escapes the Court, but its understanding of th rules and object of this athletic contest are irre evant to the charge that the Defendant was not a invited or permitted participant in the arranged fra

7. Mr. Heilig was charged with violation of D.C Code §2-342 ("no person shall at any time enter on any portion of the playing field within the Robert Kennedy Memorial Stadium"), the penalty for whic is set forth in §2-344 as a fine of "not more tha $300." To the extent that the Court could find a analogous provision in the Bond and Collater Book, it was for unlawful entry onto public feder facilities, the collateral for which is $50. Bond a Collateral Book at 287; *see* D.C. Code §§2-322 & 326, regarding R.F.K. Stadium as federal proper

8. Mr. Heilig has no other record of any ki before this or any other Branch of the Court.

9. That case is T-4330-96, which contains a de detailed set of jacket entries on which the Court h relied in tracking the activities in both cases. M Campbell is represented by the same CJA law in both cases.

The POCA case was also called on that occasion and the two matters were consolidated. A trial date of December 17, 1996 was set. Mr. Campbell, through Counsel, sought to post and forfeit on the POCA charge, while reserving trial rights on the other charges, but the Government objected on the grounds that all charges arose out of the same incident, arguing that if it was going to try one, it would try both cases. The Court then took the separate matter of the post and forfeit charge under advisement, together with the foregoing cases, and scheduled the moving violations cases for trial on February 26, 1997.[10]

Andrea M. Johnson. On October 4, 1996, Ms. Johnson was cited for driving without a permit and summoned to court for November 14, 1996. When she failed to appear, a bench warrant issued in the amount of the recently-increased collateral for this infraction, $75. Over a month later, on December 17, 1996, Ms. Johnson was a "walk-in-bench warrant." When she sought to post and forfeit on that occasion, the Government objected. The Court then appointed counsel for her and the case was continued under advisement.[11]

Andre Johnson. Mr. Johnson[12] was initially before the Court on December 17, 1996, on a charge of driving without a permit. Noting that he had another pending case (T-6033-96), and apparently wishing to preserve the tactical advantage of utilizing both for purposes of "plea bargaining," the Government objected to his being allowed to post and forfeit on this charge and the matter was continued to be determined by the ruling herein.[13]

Thus, of six Defendants in this case, at least three (and possibly four) are "first offenders" and one other has a remote record and no current charges. The question becomes whether these defendants, or any of them, has an inchoate right to post and forfeit, whether *ab initio* or on reconsideration after having earlier rejected that procedure, or whether this is merely a privilege to which the Government can object and require any or all of them to otherwise dispose of the case, either by plea or by trial.

The Court has found significant guidance in answering this question in both the statutory law and the case law, but has started with obtaining the famous "Judges' Bond and Collateral Book" itself, which turns out to be most interesting and informative.

B. The "Post and Forfeit Process: A Retrospective

For "police citation cases," D.C. Code §§23-1110(b)(1) & (2) provides that after a person is arrested, "instead of taking him into custody, [the police may] issue a citation requiring the person to appear . . . in court or at some other designated place, and [to] release him from custody" on that assurance.[14] It is at this juncture that the "post and forfeit" concept arises.

The theory behind the "post, and forfeit" process is that in cases of most "petty offenses" brought before the Traffic Branch, *e.g.*, no permit ($75), possession of an open container of alcohol ($10), drinking in public ($10), urinating in public ($25), littering ($10), vending without a license ($50), disorderly conduct ($50), and panhandling ($50); together with literally hundreds of other offenses, the defendant is permitted to "post" a security upon release to ensure his return to court for a prospective trial, but then in lieu of appearing for trial (thus saving both himself and the Government time and expense) he may then "forfeit" the collateral as a kind of "vicarious fine" paid, without either admitting or adjudicating any criminal or other liability. If s/he does so, the Government routinely and automatically declines to prosecute the case further. *See* Def. Mem. at 3 ("[I]t has become accepted practice that it means the termination of the case without judgment on the merits.").

The effect of the forfeiture is a closure of the case and typically no "criminal record" ensues. While this is not necessarily the case, inasmuch as either the Government or the Defendant can later move to set the forfeiture aside, it is the tact chosen by—the Court estimates—over 98% of persons accused of these offenses. *See, e.g., District of Columbia v. Jones*, 183 A.2d 391, 392 (D.C.Mun.App. 1962) (under Rule 35(b) a forfeiture is final unless an application is made within 90 days to vacate or set it aside).[15]

This is, apparently, a common method of "flushing" crowded traffic court calendars and is not unique to the District. " 'In large cities, the bail in a small and usually standard amount is waived and forfeited without further proceedings.' " *District of Columbia v. Franklin Inv. Co.*, 404 A.2d 536, 539 n.7 (D.C. 1979) (*quoting* 7 McQuillan, Municipal Corporations §24.651 at 758 (3d ed. 1968)); *cf.* Economos and Steelman, Traffic Court Procedure and Administration (ABA 2d ed. 1983) (Fine Paid Out of Bail) at 182; *see also* Govt. Opp. at 4 (citing an early study which found that 72 American cities allowed posting and forfeiting collateral in traffic cases).

1. Provenance of the "Bond and Collateral Book"

Reminiscent of the "Doomsday Book," compiled in 1086 by William the Conqueror of England, the Board of Judges of the Superior Court[16] promulgated a "Bond and Collateral Book" in November 1974, in order to implement the post and forfeit procedure, *inter alia*, in the District of Columbia.[17]

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10. While Mr. Campbell had had one felony and one misdemeanor case, both in 1980—both of which are much too remote in time to be considered for any relevant purpose here, even if they resulted in convictions—he has no other pending cases before any other Branch of the Court.

11. Ms. Johnson (not to be confused with four other persons who appear on the Court's criminal records docket under the name "Andrea M. Johnson," but each of whom has a different date of birth) has no other record of any kind before this or any other Branch of the Court.

12. This is a different person than Andrea Johnson in the previously-discussed case, and there is no evidence that they are related, despite the coincidence that each is represented by the same court-appointed lawyer under the Criminal Justice Act.

13. At least two other "Andre Johnsons" appear on the Court's computerized docket, both of whom have dates of birth different from this Defendant's. Two additional "Andre Johnsons," whose date(s) of birth do not appear on either the docket or the jackets for those particular cases (T-0323-96, a reckless driving charge, and D-2368-96, a disorderly conduct charge), had their cases "no papered." It is therefore impossible to determine from the Court's records whether this Mr. Johnson has any prior contacts with the local criminal justice system. Clearly, however, he has never exercised, much less abused, the "post and forfeit" procedures heretofore.

14. In this conjunction, and in light of the fact that police officers themselves are chronic "no-shows" in a substantial number of these cases when called on the Court's docket, it may be worth noting that the Board of Judges expressly envisioned that "[i]n the event the officer fails to appear, the citation may be cancelled." Bond and Collateral Book at x. By the same token, of course, it was also expressly comprehended that "[f]ailure of the person released on citation to appear, will be cause for the issuance of an arrest warrant . . ." *Id.*

15. Although it must be pointed out that the Municipal Regulations *do* provide, by definition, that any forfeiture in a *traffic* case is deemed a "conviction." *See* 18 D.C.M.R. 9901, at 903 ("[F]or purposes of this title, an unvacated forfeiture of bail or collateral deposited to secure the appearance of a defendant in court . . . shall be the equivalent of a conviction, regardless of whether the penalty is rebated, suspended, or probated."). Moreover, in certain circumstances, other sanctions may ensue following a forfeiture. *See, e.g.*, D.C. Code §40-439(a) ("If a person by final order or judgment is convicted of or *forfeits any bail or collateral* deposited to secure an appearance for trial for driving a motor vehicle within the District of Columbia at a time when his license is suspended or revoked, the operating privilege of such person shall be suspended and no license shall thereafter be issued to such person. . . .") (emphasis added). The same, incidentally applies to other permits, such as real estate licenses. *See, e.g.*, D.C. Code §45-1941 ("When during the term of any license issued by the Mayor, the licensee shall be convicted in a court of competent jurisdiction . . . , of forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, criminal conspiracy to defraud, or similar offense or offenses, or *forfeits collateral* or pleads guilty or nole contendere to any offense, . . . the Mayor shall suspend forthwith the license issued . . . and convene a revocation hearing within 30 days.") (emphasis added), *id.* §45-3220 (to the same effect for real estate appraisers).

16. The "Board of Judges" is statutorily established and defined as "the chief judge and the associate judges of the Superior Court of the District of Columbia." D.C. Code §11-1902(1).

17. Issued during the administration of Chief Judge Harold Greene, the committee which presided over this project consisted of Judge Byron W. Sorrell, Chairman, together with Judge Norma Holloway Johnson (now an Associate Judge of the U.S. District Court here) and Judge Robert H. Campbell. Other luminaries contributing to the effort included the Honorable Arthur L. Burnett, then U.S. Magistrate for the District of Columbia (now an Associate Judge of the Superior Court), the other two U.S. Magistrates for the District at that time, the Honorable Lawrence S. Margolis (now an Associate Judge of the United States Court of Appeals for the Federal Circuit), and the Honorable Jean F. Dwyer. (The same fees were operative, incidentally for both Superior and U.S. District Courts.) Also participating were Warren R. King, Esq., then Deputy Chief of the Superior Court Division, Office of the U.S. Attorney (since an Associate Judge of this Court, and now an Associate Judge of the D.C. Court of Appeals), and Howard Horowitz, Assistant Corporation Counsel (since Chief of the Law Enforcement Section of the Criminal Division of that Office, and now retired), together with twenty other contributors from various walks of official and private life. Bond and Collateral Book at ii-iii.

a. Statutory Authority

The Defense argues vigorously that there is a "Lack of Statutory Authority for Posting and Forfeiting" at all, Def. Mem. at 3, making brief obeisance to an argument that the empowerment of judicial officers to promulgate rates of collateral, which are tantamount to fines, appears to be a violation of the constitutional concept of "separation of powers." That argument need not detain us any longer than to acknowledge that the power of the Judges of this, an "Article I court"—itself *created* by legislative fiat—is, in fact, rooted in statutory authority.[18] Exercising that statutory authority, the Legislative Branch has (1) empowered the Board of Judges to set bond and collateral schedules and (2) permitted forfeiture thereof, with the implicit discretion of the prosecutor to then to terminate the case.

Power to Set Bond and Collateral. The implicit statutory authority permitting the Board of Judges to promulgate this schedule of fees is found in D.C. Code §40-605, covering "Motor Vehicles and Traffic. . . Fines and Penalties," which provides that "[t]he maximum monetary *sanctions* that may be imposed under this chapter shall be . . . an amount *equal to the collateral or bond established for the offense, by the Board of Judges of the Superior Court* of the District of Columbia. . . ." D.C. Code §40-605(a)(1) (emphasis added).[19] This statutory provision, thus implicitly empowers the Board of Judges to set the schedules for security, whether bond or collateral.

Power to Forfeit Collateral. While, as the Defense argues, Def. Mem. at 4, the aforementioned Section 40-605(a)(1) only expressly empowers the Board of Judges to *set* bond and collateral schedules, but does not expressly provide for *forfeiture* thereof, the emphasized phrase above ("monetary *sanctions*") clearly implies such a punitive power.[20] The more direct statutory authority for the general proposition that the collateral may be *forfeited* is found in D.C. Code §16-704(a), which states in pertinent part as follows (emphasis added):

> A person charged with an offense triable in the criminal division of the Superior Court . . . may give security for his appearance for trial or for further hearing, either by giving bond to the satisfaction of the court *or by depositing money as a collateral security* with the appropriate officer at the court or the station keeper of the police precinct in which he is apprehended. When a sum of money is *deposited as collateral security* as provided in this section it shall remain, in contemplation of the law, the property of the person depositing it *until duly forfeited by the court.*

See also id. §§23-1301 & 23-1321(c)(1)(B)(xii) (permitting an accused to "[e]xecute an agreement to forfeit upon failing to appear as required, the designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court indicia of ownership of the property, or a percentage of the money as the judicial officer may specify") and 18 U.S.C. §3146(g) ("Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.").

Thus, the Legislative Branch has, in fact, established the bedrock principle of "posting *and* forfeiting" collateral, but has left it to the Judicial Branch—which sets bonds as part of its intrinsic powers and duties—to promulgate a "schedule" of bond and collateral amounts for various petty offenses and infractions. This power is essentially uncontested in this matter. *See* Def. Mem. at 3 ("No attempt in this brief is made to challenge the authority of the courts to set bonds and collateral."); *see also id.* at 7.[21]

b. Promulgation of the Bond and Collateral Book

The resulting judicial compendium, colloquially known as "The Board of Judges' Bond and Collateral Book" (hereinafter "Bond and Collateral Book"), has a stated purpose to serve "as a workable reference for citizens, police and public officials, attorneys and judges alike in order that the determination of the amount of bond or collateral may be readily ascertained in connection with [minor] violations committed in the District of Columbia." Bond and Collateral Book at 1.[22]

2. Difference Between "Bond" and "Collateral"

Almost always used conjunctively, the terms "bond" and "collateral," in fact, have different, if indistinct, legal meanings. The Judges' Bond and Collateral Book expressly defines each.

Bond. "Bond" is defined as "[a] written obligation under seal signed by a surety approved by the court in such amount as directed by the court. A bond is security for the appearance of a person for trial or further hearing who is charged with an offense tri-

18. The Constitution provides that "[t]he judicial power of the United States shall be vested in one supreme court, and in such inferior Courts *as the Congress may from time to time ordain and establish*," Art. III, §1, which is, significantly, an "Article I" power assigned exclusively to Congress, *see* Art. I, §1, cl. 9, especially when compounded by the exclusive and plenary Congressional authority over the District of Columbia via Art. I, §8, cl. 17. Even on an "Article III", level, however, the progression of cases tends to ease the strictures on the concept of "separation of powers." *Cf. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528-29 (1935) (striking down the NRA as an unconstitutional delegation of legislative power to the Executive Branch, on a "strict construction" interpretation of the "separation of powers" principle); *Buckley v. Valeo*, 424 U.S. 121, 122-23 (1976) ("The Constitution by no means contemplates total separation of each of the three essential Branches of Government."); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 951, 985 (1983) ("restrictions on the scope of the power that could be delegated [have] diminished and all but disappeared").

But the traditional notions of "separation of powers" do not necessarily apply to this and similarly-created Article I courts. As the Supreme Court has long since held, "in vesting the judicial power, Congress may parcel it out in any mode and form in which it is capable of being exercised." *Prigg v. Comm. of Pennsylvania*, 41 U.S. 539, 568 (1842). Therefore, as has been well said, " '[t]he political truth is that the [actual] *disposal* of the judicial power (except in a few specified instances) belongs to Congress, and Congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the Constitution might warrant.' " *Myers v. United States*, 272 U.S. 52, 232-33 (1926) (emphasis added). As to the District of Columbia in particular, this principle has been acknowledged by our own Court of Appeals, which has held that "this court and the Superior Court . . . were created pursuant to the plenary power of Congress to legislate for the District of Columbia as provided in Art.I, §8, cl. 17, of the Constitution. Accordingly, in this unique jurisdiction, unlike the states, Congress has the constitutional authority to 'vest and distribute the judicial authority in and among courts and magistrates, and [to] regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.' " *Matter of Kerr*, 424 A.2d 94, 98 (D.C. 1980) *quoting Palmore v. United States*, 411 U.S. 389, 397 (1973).

19. While this statute appears, on its face, to apply to "civil fines before the Bureau of Traffic Adjudication, nevertheless, its significance for these purposes is that—for whatever reason and to whatever proceedings they may apply—the "collateral and bond" schedules are to be set, pursuant to legislative mandate, by the Board of Judges of this Court. Interestingly, this power is shared by the Mayor and the City Council, the statute empowering the Mayor to "modify this schedule of fines" by executive order which would take effect 45 days after it is presented to the Council, unless the latter exercises what amounts to a "legislative veto" via objecting resolution within another 45 days. D.C. Code §45-605(a)(1). A similar instance by which our Board of Judges is vested with ostensible "legislative authority" may be found in 42 U.S.C. §667(a) (empowering the Board of Judges to establish child support guidelines for the enforcement of AFDC payments under the Social Security Act in the District of Columbia), *see Fitzgerald v. Fitzgerald*, 566 A.2d 719, 723, 726-28 (D.C. 1989) (recognizing the delegated power to the Board of Judges to promulgate what amounts to a "schedule of fees" for those purposes, albeit striking down that particular set). Indeed, in this regard, not only does the Board of Judges in this capacity exercise seeming "legislative powers," it is also worth noting that the Board of Judges likewise exercises ostensible "executive power" by the very appointment of Hearing Commissioners themselves, as "judicial officers." *See* D.C. Code §§11-1732 (c), (b) & (c) (definition, appointment and removal respectively).

20. Again, that this statute does not expressly empower the Court to then *terminate the case*, or provide for the termination of the case on any basis, once collateral *is* forfeited, *see id.*, the inescapable logical conclusion is that *something* must happen to the collateral and to the case once it is forfeited; that "something," as pointed out below, is that the Government typically *chooses not to prosecute* the case further—but it is neither obligated to refrain from doing so *nor* prohibited from objecting to forfeiture in the first place. If collateral has already been forfeited, for example, the Government could timely move to set the forfeiture aside and rebring the case.

21. The overall statutory scheme, taken together, thus empowers the Court both to set and then to forfeit collateral. These are separate issues, however, from whether the Government retains its prerogative to *object* to a court-permitted forfeiture and, by so doing, to obviate the need to forfeit by refusing to cease prosecution of the case, even if collateral is forfeited. The argument that, even if there is statutory authority for the Court to set bonds and collateral and/or to forfeit same, nevertheless "[t]he statute speaks nothing about terminating the case upon the occurrence of a forfeiture," Def. Mem. at 4, is addressed *infra* in terms of the Government's prerogative to exercise its prosecutorial discretion not to pursue a case in the face of a forfeiture.

22. By Order of Chief Judge Greene dated December 16, 1975, the bond and collateral scheme became effective on January 1, 1976.

able to the Superior Court." Bond and Collateral Book at xiii. A surety, *per se*, however, is not necessarily required to secure the accused's future appearance in court, inasmuch as express provision was made that "[c]ash in the amount of the bond directed by the court shall be accepted in lieu of a surety bond." *Id.* at xiv; *see also id.* at viii (The Police Department "is authorized to accept, in lieu of bond as security for appearance in court, cash in the same amount as the bond is required."). Bond and Collateral Book at viii.[23]

Collateral. In close comparison, "collateral" is defined as "[a] sum of money in such amount as the court may direct and deposited with the appropriate officer at court or the station keeper of the police precinct . . . as collateral security for his appearance for trial or further hearing." *Id.* In contrast to a surety "bond," however, which is money put up by a surety, "[c]ollateral security remains the property of the person depositing it until duly forfeited by the court." *Id.*[24] Put another way, it is simply a "cash bond," recoverable without any intervening surety agency. Unlike a formal bond, however, the Bond and Collateral Book expressly states that *"[f]orfeiture of collateral is generally considered sufficient punishment for the offense. . . ."Id.* (emphasis added).

While, as the Government points out, "[b]ail bond and collateral are both intended to secure the appearance at trial of the defendant," Govt. Opp. at 4, the basic difference between the two is that collateral *may* be voluntarily forfeited without future liability, whereas bond is forfeited only on a punitive failure to appear. Thus, the Board of Judges held that for those cases for which only a "bond" is allowed, "no collateral may be posted and forfeited with respect thereto." Bond and Collateral Book at viii.

These "fees" accompany the accused to his or her first court appearance after citation, at which time the defendant is typically informed in pertinent cases that s/he may post and forfeit in the scheduled collateral amount, thus terminating the case at that point (as far as the *Court*—though not necessarily, for example in traffic cases, as far as the Bureau of Traffic Adjudication or any other administrative agency—is concerned), and that if s/he needs a "reasonable time" to pay the forfeiture amount in its entirety, it would be granted.[25]

Against the backdrop of this overall "bond and collateral" scheme, the Court, in the instant cases, is called upon to determine what happens when (1) the Government objects to the defendant's posting and forfeiting at the initial court appearance, or when (2) the Government objects after a typically "outraged" defendant has spurned the post and forfeit option at arraignment, has demanded a trial, has required the Government to prepare for trial or to take other steps, only to have the defendant relent and reconsider after he has been required to come back to court two or more times, and wishes *then* to post and forfeit, in order to "buy peace," or when (3) the defendant has not changed his mind, but, having asked for and received a "reasonable time" to pay the forfeiture, has, for whatever reason, failed to pay (typically has not paid at all, but often has simply failed to pay in full) and the Government objects to any further enlargement of time within which to do so. If the post and forfeit procedure is a "right," the Government would not be heard to object in any of these instances; if not, the Court would have to make a determination as to whether the Defendant would be allowed the opportunity to exercise the privilege in any given case.

Opinion concludes on Tuesday, August 26, 1997

23. Provision for "jail house bond" was made by allowing that "[b]ond to the satisfaction of the court may be posted at the court or with the station keeper of the precinct in which [t]he [accused] is apprehended." Bond and Collateral Book at xiv; *see also* D.C. Code §16-704(a), *supra*.

24. Thus, there was also provision for posting and forfeiting "station house collateral." *See also* D.C. Code §16-704 (a), *supra*. In such cases, as the Defendant's Memorandum points out, if the accused "chooses to post and forfeit the collateral [at the station house], the case is terminated" without ever even being brought to court. Def. Mem. at 1. The authority for the Police Department to act in this capacity stems from Super. Ct. R. Cr. P. 116(d)(2) creating "substitute clerks" among "officials of the Metropolitan Police Department . . . to act as clerks of this court with authority to take bonds or collateral security *in accordance with the schedule prepared and adopted by the court* from persons charged with any offense cognizable in the court at all times when the clerk's office is not open and its clerk accessible." (Emphasis added).

25. It is also noteworthy that while Super. Ct. R. Crim. P. 116(3)(1) allows that "[t]he bonds and collateral security provided . . . shall be subject to change in individual cases by any judge before whom a case may be pending," Rule 35(c) also expressly provides that "[t]he amount of collateral security required in a *traffic* case may be reduced by a judge *only if* (1) *such reduction has been specifically recommended in writing by the Corporation Counsel or his assistant* on a form separate from the Notice of Violation, or (2) the judge states his reason for the reduction in writing on a form separate from the Notice of Violation." (Emphasis added). The latter provision clearly implies a power inherent in the prosecutor's office to do something other than stand by passively while the post and forfeit process becomes a matter solely between the defendants and the Court.

LEGAL NOTICES

ANNUAL REPORT

NOTICE OF AVAILABILITY OF ANNUAL RETURN

The annual return of the International Cocoa Research and Educational Foundation for its fiscal year which ended on March 31, 1997 is available for inspection by any citizen upon request within 180 days after the date of publication of this notice, during regular business hours, at the principal office of the Foundation, 7900 Westpark Dr., Suite A320, McLean, VA 22102; (703) 790-5011. The principal manager of the Foundation is Lawrence Graham. Aug. 25.

FIRST INSERTION

JACKSON, Priscilla A.

Dorothy Simpson Dickerson, *Attorney*
1411 K St., N.W., Suite 503
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Superior Court of the District of Columbia. FAMILY DIVISION. DOMESTIC RELATIONS BRANCH. Priscilla A. Jackson, Plaintiff vs. William Henry Greene, Defendant. Jacket No. DR 1394-97d. ORDER OF PUBLICATION—ABSENT DEFENDANT. The object of this suit is Absolute Divorce. On motion of the plaintiff, it is this 6th day of August, 1997, ordered that the defendant William Henry Greene, cause his appearance to be entered herein on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the cause will be proceeded with as in case of default. Provided, a copy of this order is published once a week for three successive weeks in the *Washington Law Reporter* and the *Afro-American* before said day. /s/ GREGORY E. MIZE, Judge. [Seal.] Attest: *Clerk of the Superior Court of the District of Columbia.* By Rufus Horton, Deputy Clerk. Aug. 25, Sep. 2, 8.

WILLIAMS, Donna Hwail Yun

Donna Williams, *Pro Se*
1452-C Chanute Place, S.W.
Washington, D.C. 20336

Superior Court of the District of Columbia. CIVIL DIVISION. IN RE: Application of Donna Hwail Yun Williams. Civil Action Number: CA6288-97. ORDER OF PUBLICATION—CHANGE OF NAME. Donna Hwail Yun Williams, having filed a complaint for judgment changing Donna Hwail Yun Williams' name to Donna Hwail Yoon, and having applied to the Court for an order of publication of the notice required by law in such cases, it is by the Court, this 13th day of August, 1997, ORDERED that all persons concerned show cause, if any there be, on or before the 15th day of September, 1997, why the prayers of said complaint should not be granted: PROVIDED, That a copy of this order be published once a week for three consecutive weeks before said day in the *Washington Law Reporter.* DONALD S. SMITH, Judge. [Seal.] A TRUE COPY. TEST: Aug. 14, 1997. Clerk, Superior Court of the District of Columbia. By B. Fletcher, Deputy Clerk. Aug. 25, Sep. 2, 8.

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(Cont'd. from p. 1673)

gate the fee schedules and the provision for forfeiture of collateral, still do not directly address or answer the other questions of (1) who has the power to authorize, or object to, the forfeiture of collateral, and (2) how that forfeiture translates into the actual termination of a case.

2. Government Standing to Object

A subtler and more difficult question is that of who has the power to extend the privilege to the defendant; is it the Court's power, based on its authority to set the collateral in the first place, or is it only the Government which may offer the option to post and forfeit, stemming from its discretion to prosecute a case or to dismiss it? Put another way, the issue becomes not who *sets* the collateral to post and forfeit but who decides who *gets* to post and forfeit the collateral. Is it the same authority (the Court) or does one authority (the Court) *set* the collateral and another (the Prosecutor) determine who has *access* to the privilege? If the Government objects to posting and forfeiting, does that *ipso facto* end the matter and require the case to go to trial or to other disposition, or may the Court overrule the objection and, based on its power to set collateral in the first place, permit the defendant to post and forfeit it, anyway, thus depriving the prosecutor of his discretion to prosecute an accused offender? To pose this question, is to answer it: the judiciary has no plenary authority to interdict prosecutorial authority *ab initio*.

The very logistical purpose of such a "post and forfeit" procedure, as the Government points out, is that "the large volume of traffic cases handled in many jurisdictions requires a procedure to quickly dispose of the cases," but one which also provides a basis and means for the prosecutorial authority "to screen out repeat offenders or more serious incidents," Govt. Opp. at 4-5, so that egregious or multiple offenders are not merely "processed" through a macro system designed to expedite cases, rather than to discriminate serious offenses. Without such an inherent prerogative on the part of the Government to make these distinctions, and thus to withhold the privilege of posting and forfeiting, such a procedure would simply contribute to, if not outrightly encourage, such recidivism. Indeed, the essence of the long-standing practice and procedure in this area is that, as a matter of calendar economy, the Government *agrees* in the vast bulk of cases, to dismiss the charges *if* the defendant agrees to post and forfeit the collateral (and actually *does* so). Ergo, no agreement, no privilege.

This conclusion stems from the very need for the process in the first place and the nature of the "arrangement" in effectuating it. The ostensible "agreement" in these situations is this: the defendant agrees to post collateral as a guarantee that s/he will appear for trial and that if s/he does not do so the collateral will be forfeited. But, as in so many other aspects of life, there is a dramatic difference between theory and practice. Thus, while in theory collateral, like bond, is intended to insure the accused's future appearance at trial or other proceeding, the actual pragmatic practice is quite different. Typically, at arraignment the defendant is given the option to post and forfeit and a reasonable time within which to do so. That "post and forfeit" date becomes the control date, *not* a *trial* date. If the collateral is posted and forfeited, the case simply is not re-called and inconspicuously "disappears" from the docket; the Government does not even formally enter a *nolle prosequi*. If, as is more usual, the defendant has *not* paid by the control date, the Criminal Clerk's office simply causes a bench warrant to issue. Even then, however, upon execution and return of the bench warrant, what typically occurs is that the defendant is given *additional* time to post and forfeit. This spiral goes on indefinitely. Sooner, or later, however, if the defendant does not post and forfeit, he must get off the carousel and go to trial. Implicit in this ultimate outcome, therefore, is the Government's prerogative to object to any further post and forfeit opportunities and insist upon trial—ergo, posting and forfeiting, or withholding or withdrawing it, *must* be a *prosecutorial* power and prerogative, not a judicial one.

The "procedural accommodation," by the Government to demur on further prosecution following a forfeiture of collateral has the dual salubrious effects of conserving both prosecutorial and judicial resources, while at the same time, in an indirect way, penalizing a defendant for an alleged offense, thus sending an admonition to those charged with infractions without an undue burden on two branches of the government. In these and similarly situated cases, however, the Government permissibly *declines* to dismiss or *nolle* the cases on this basis, irrespective of whether the defendants are willing to forfeit a nominal collateral. This is *its* right.[28] To the extent that the post and forfeiture process is a set of mutual agreements, it is a "bargained-for exchange" in which the refusal to grant, or the withdraw of, assent by *either* party results in "no deal." It is, in short, an implicit plea bargain—an "offer" which, in our criminal justice system, can only emanate from the prosecutorial arm

sized phrase above), not as a matter of course in routine cases presented in court. Def. Mem. at 8 ("It would seem that under court rule, the prosecution cannot sua sponte, when a case comes to court or when a defendant had failed to post and forfeit in the past, request that the court would deny the defendant the privilege without first applying for a warrant at the initiation of the case."). But the Court does not see any appreciable distinction in this matter on the threshold issue of whether this is a "privilege." Leaving aside the superfluity of seeking an arrest warrant for someone who is, in all likelihood, already before the Court seeking to post and forfeit, the fact that such a privilege may be vitiated on the request for a formal arrest warrant does not necessarily mean that it may not be otherwise withdrawn or interdicted.

28. Indeed, as noted above, not only is the initial act of posting and forfeiting not necessarily an irrevocable prerogative of a defendant, but as also noted above, even if accomplished at the initial hearing, it may be rescinded by later motion of either party. *See supra* at 11, n.20, and 22-23. It is common for a defendant to come into court later on and move to set aside the forfeiture; certainly, the Government *also* has that right or a right to interdict it *ab initio*. If so, this means that the action was never an irrevocable right. This much was made clear by the Board of Judges when it noted that the Government could later move to "abrogate the *privileges* of the violator to forfeit collateral." Bond and Collateral Book, *supra*, at viii (emphasis added).

of the Executive Branch. This rationale leads the Court to agree with the Government's characterization that "[f]orfeiture is a privilege, the same as a plea offer or an individual's eligibility to a diversion program." Govt. Opp. at 4. The post and forfeit process is, for this Branch of the Court, analogous to the concept of "first offender treatment" ("FOT") wherein, in return for certain consideration, the Government dismisses a case without any lingering criminal record for the defendant. In that situation, of course, it is well-settled that, absent strong and seriously perfidious circumstances, the Court has no authority to "second guess" the Government's refusal to allow any given defendant such a privilege. See *Williams v. United States*, 427 A.2d 901, 904 ("We will not interfere with the prosecutor's decision whether or not FOT is appropriate for a particular defendant; 'no court has any jurisdiction to inquire into or review his decision.' "). The same basic premise applies to plea agreements. See *United States v. Ammidown*, 162 U.S.App.D.C. 28, 34, 35, 497 F.2d 615, 621, 622 (1973) ("[T]he determination of the . . . [Prosecuting] Attorney that the determination of the . . . [Government] is to be followed [as to plea offers] in the overwhelming number of cases. He alone is in a position to evaluate the government's prosecution resources and the number of cases it is able to prosecute. * * * [A] judge is free to condemn the prosecutor's agreement as a trespass on judicial authority only in a blatant and extreme case.").

Moreover, in cases where the defendant is repeatedly charged, often for the same offense (*e.g.*, panhandling or driving without a permit), the Government not only has "standing" to object and to decline to subscribe to the post and forfeit procedure, but, arguably, a point comes with a given chronic offender whereby the Government has a *duty* to do so. Otherwise, for example, in the case of a defendant who receives citation after citation for driving without a permit or for aggressive panhandling, the "forfeiture" becomes merely a "user's fee" for the illegal (and dangerous) utilization of the public streets of this community.[29] Particularly troubling is the fact that this procedure all too frequently ends up with the opposite effect from that for which it was intended. Instead of encouraging defendants to heed the admonition of the forfeiture and thus to *obey* the law in the future, the fact is that most defendants fail to pay the forfeiture anyway, despite always having been given a reasonable time within which to do so. Regrettably, therefore, when chronic offenders are not required to fulfill their *own requests* to be allowed to post and forfeit, but are also given unlimited additional opportunities on subsequent charges to make the same hollow representations that they will do so again, the post and forfeit procedure ends up having the direct effect of not only *encouraging* recidivist *violation* of the law but also—and this is particularly intolerable—patent and impudent defiance of the orders of the Court which required the defendant to do what, after all, s/he was given the voluntary option of agreeing to do in the first place.[30]

Therefore, the prosecutorial arm of the Executive Branch, which has the responsibility to enforce the law and to uphold the sanctity of the orders of the Judicial Branch, must remain in a position to discriminately select those cases which must be prosecuted in order to vindicate these principles. See *Jackson v. United States*, 357 A.2d 409, 411 (D.C. 1976) ("The decision on what charges shall be prosecuted rests with the government, and the exercise of that discretion is not subject to supervision by the court."); see also *United States v. Foster*, 226 A. 2d 164, 166 (D.C. 1967) (The prosecuting attorney "is an officer of the executive department . . . [and] exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows . . . , that the courts are not to interfere with the free exercise of discretionary powers of the [prosecuting] attorneys . . . in their control over criminal prosecutions."); *Menard v. Mitchell*, 139 U.S.App.D.C. 113, 122, 430 F.2d 486, 495 (1970) ("Obviously, those responsible for intervention and prosecuting criminal activity should have the primary responsibility for determining what information will be most helpful in carrying out their task; and so long as they do not infringe the rights of individuals, the courts may not interfere.").[31]

29. As the Government cogently argues with respect to Ms. Baylor, for example, "[i]t has been over six months and the defendant still ha[s] not paid and forfeited the money [as she repeatedly agreed to do]. She has failed to take advantage of the Government's offer and now must plead guilty or go to trial. The Government takes this charge seriously, because it is this conduct that erodes the quality of life in the District of Columbia." Govt. Opp. at 6.

30. The Court does not address the issue of whether any Defendant, specifically including Ms. Baylor, who "promised" to post and forfeit but failed to do so, is subject to a finding of contempt of court, or whether such a "promise" resulted in a "court order," violation of which could result in a contempt referral or finding, *see* Def. mem. at 9-11, because no such request has been made, and no motion to show cause has been filed in any of these cases.

31. But see *Pauling v. Eastland*, 109 U.S.App.D.C. 342, 345, 288 F.2d 126, 129 (1960) (As a "general rule . . . courts will not interfere with criminal prosecutions . . . . [a]though [e]xceptional circumstances of compelling force create the exception."); *Baxter v. United States*, 483 A.2d 1170, 1172 (D.C. 1984) ("This does not mean, of course, that the courts are without power to intervene if a prosecutor's decision to go forward with a trial is

Appendix 4: *Fox, et al., v. District of Columbia*, Civ. Action 10-2118, (03/30/2012)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA FOX, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 10-2118 (ABJ)

MEMORANDUM OPINION

Plaintiffs Barbara Fox and Hamilton P. Fox, III brought this action against two Metropolitan Police Department officers in their individual capacities and the District of Columbia [Dkt. # 15]. They allege eight causes of action arising from a dispute between Mr. Fox and the officers that ultimately led to Mr. Fox's arrest for disorderly conduct and his release pursuant to a "post-and-forfeit" procedure whereby an arrestee simultaneously posts and forfeits collateral in return for his release from jail without prosecution. Five of the claims (Counts 4–8) are brought solely by Mr. Fox against the District of Columbia, challenging the constitutionality of the post-and-forfeit procedure under Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States.[1] Mr. Fox has also moved for class certification on those counts [Dkt. # 14]. The District of Columbia has moved to dismiss all claims against it for lack

1 Although the amended complaint names both Mr. and Mrs. Fox as plaintiffs, and seeks certification for a class of others, the Court will refer to Mr. Fox as the only plaintiff in Counts 4 through 8 because the amended complaint identifies him as the sole representative plaintiff for those counts. Am. Compl. ¶¶ 231, 237, 242, 253, 259.

of standing and failure to state a claim [Dkt. # 19].[2] Because the Court finds that the complaint fails to state a claim that the post-and-forfeit policy violates plaintiff's due process rights either facially or as applied, and that the other claims against the District of Columbia have been conceded, the Court will grant the District of Columbia's motion to dismiss Counts 4 through 8.

Plaintiffs have also moved for leave to file a second amended complaint in this case, which retains Counts 1 through 3, but includes additional factual background and expands on the legal theories behind the claims against the District of Columbia. Because some of proposed amended counts merely restate legally deficient claims from the first amended complaint, the Court will deny leave to amend those claims on futility grounds. (Counts 5, 5A, 6, 6A, 7, and 8). The Court will grant leave to amend, though, with respect to the two new claims that were not raised in previous versions of the complaint, without prejudice to any responsive motions the defense may choose to file. (Counts 4A and 9).

The District has not moved to dismiss the individual counts, so Mr. and Mrs. Fox will have a full opportunity to pursue their claims against the arresting officers for alleged violations of their constitutional rights during the encounter on the street. But the challenge to the post-and-forfeit procedure fails, although not for lack of trying. Plaintiff has now provided the Court with three different versions of a prolix complaint – each longer and more detailed than the one that came before. The matter has been briefed extensively, and the Court held a lengthy hearing. Yet plaintiff has yet to articulate just what it is that is wrong with offering someone charged with a minor offense *the choice* to contest the charge in court or to pay a small sum and go home.

The fundamental flaw at the heart of plaintiff's case is that while his papers are generously seasoned with strong language connoting wrongdoing – "force," "coerce," "exact,"

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2 The officers have not moved to dismiss, and so the three claims brought against them (Counts 1–3) are not in dispute here.

"deprive," and "take," and the allegations all turn upon the city's alleged policy of "making" arrestees pay money, there simply was no coercion, taking, or deprivation inherent in the voluntary exchange that was offered and accepted in this case. Moreover, plaintiff was fully apprised of, but elected to forego, his right to seek to set aside the forfeiture and contest the arrest. Plaintiff makes extensive references to evidence adduced in another case which might be marshaled in support of allegations that the District remains deliberately indifferent to a pattern of disorderly conduct arrests made without probable cause, but there is no count in either the first or the second amended complaint that actually seeks to impose municipal liability for that sort of unconstitutional deprivation of liberty, and none of that has anything to do with all of the other offenses for which post-and-forfeit is an available option. The gravamen of every one of the class claims – as stated and as proposed to be restated – is that there is something abhorrent, unlawful, and unconstitutional about the post-and-forfeit procedure itself. But with respect to that particular practice, plaintiff has simply failed to state a claim upon which relief can be granted.

BACKGROUND

A. Factual Background

The events leading to this case began when Mr. Fox was approached by a police officer from the Metropolitan Police Department ("MPD") while sitting in his idling car in a "no parking" zone waiting for his wife to come out of a nearby drug store. Am. Compl. ¶ 19. An Officer B.L. Squires pulled up behind the car and told Mr. Fox that he needed to move. *Id.* ¶¶ 23–26. Since he was "standing," and not "parking," Mr. Fox reasoned that he was in compliance with the signs governing the location, and he took issue with the officer's instructions. The officer was unmoved, Mr. Fox asked to speak to a supervisor, and ultimately,

the officer would not permit the Foxes to leave the scene even after Mrs. Fox had returned to the car. Numerous other officers arrived, and according to the complaint, "Mr. Fox then made a remark to an arriving officer, within earshot of Officer Squires and other officers, that was derogatory of Officer Squires' intelligence and competence." *See id.* ¶¶ 24–33. It is not necessary to recite all of the details of the stand-off that ensued here. What matters for purposes of the instant motions is that Mr. Fox was ultimately issued a parking citation, placed under arrest, and transported to the police station, where he was placed in a holding cell. *Id.* ¶¶ 163–164. He was charged with the D.C. Code offense of "disorderly conduct – loud and boisterous." D.C. Code § 22-1321(1); Am. Compl. ¶ 15.

Mr. Fox alleges that while he was in the holding cell, he witnessed a police officer ask another arrestee whether he was willing to post thirty five dollars to be released. Am. Compl. ¶ 167. When the man declined to pay, the officer allegedly told him, "OK, you're going to Central Cellblock" and he was hauled away. *Id.* ¶ 169.

A few hours after Mr. Fox was put in the holding cell, an officer brought in Mrs. Fox and asked her "whether she would pay Mr. Fox's $35.00 'post & forfeit' amount." Am. Compl. ¶ 173. Although Mrs. Fox responded "yes," she apparently left the jail without paying the money and, instead, Mr. Fox was given a "post-and-forfeit" form to sign and allowed to pay the thirty five dollars himself. *Id.* ¶¶ 179, 186, 196.

The form, which Mr. Fox read, stated the offense he was charge with and indicated that he was being offered the option to post-and-forfeit a collateral. *Id.* ¶ 180. The form read:

> You are eligible to elect to forfeit collateral for this charge. If you elect to forfeit the collateral amount assigned to the charge, you are agreeing to waive your right to a hearing in court, and the case against you will be concluded without an admission of guilt. However, you will have an arrest record of all charges for which you forfeited collateral.

> Forfeiture is final unless you (or your attorney) file a "Motion To Set Aside Forfeiture" within 90 days from the date of the forfeiture. You may wish to file this motion if you decide to contest the charge at a later date.
>
> * * *
>
> By signing this form, you are acknowledging that it is your choice to elect to forfeit the collateral amount set for this charge, and that by doing so, you are agreeing to waive your right to a hearing in court.

Ex. 3 to Pl.'s Mot. to Certify Class [Dkt. # 14-3].[3] The back of the form stated: "IF YOU ARE ELIGIBLE FOR ONE OR MORE OF THESE EARLY RELEASE OPTIONS, AND YOU DO NOT ELECT ONE, YOU WILL NOT BE RELEASED BEFORE YOU ARE PRESENTED TO COURT ON YOUR CHARGES." Ex. 4 to Pl.'s Mot. to Certify Class [Dkt. # 14-4]. Although the form also described "release on bond" and "citation release," Mr. Fox was not offered either of these options. *Id.*; Am. Compl. ¶ 189.

Mr. Fox signed the form and paid the thirty five dollars. Am. Compl. ¶ 185. He alleges that he finished the administrative procedures incident to arrest no more than fifteen minutes later, and was released from jail about four hours after that. *Id.* ¶¶ 186–87, 199. He alleges that in total, he spent approximately nine hours in jail. *Id.* ¶¶ 164, 199. After his release from jail, Mr. Fox did not exercise his statutory right to seek to have the forfeiture set aside and contest the charges by filing a motion in Superior Court.

Mr. and Mrs. Fox filed the first amended complaint ("complaint") in this action on April 18, 2011. Counts 1, 2, and 3 are filed against the officers in their individual capacities and are

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3 The Court will consider this document in evaluating the Motion to Dismiss because it finds that it is incorporated into the complaint by reference. *See Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002).

not at issue here.[4] Am. Compl. ¶¶ 49–60. Counts 4 through 8 are filed as class action claims against the District of Columbia under 42 U.S.C. section 1983 and seek compensatory and consequential damages as well as injunctive relief.[5] *Id.* ¶¶ 231–63. At the March 20, 2012 motion hearing in this case, plaintiff orally conceded Count 4, which alleges that the post-and-forfeit process adds delay to plaintiffs' release once the right to release attaches, in violation of their Fourth Amendment rights. *Id.* ¶¶ 231–36; Rough Tr. (Mar. 20, 2012) ("Tr.") at 26. Counts 5 and 6 allege that the post-and-forfeit policy constitutes deliberate indifference to plaintiff's Fifth Amendment due process rights on its face and as applied, respectively. *Id.* ¶¶ 237–52. Counts 7 and 8 allege that the post-and-forfeit policy constitutes deliberate indifference to plaintiffs' Sixth Amendment right to counsel and Eight Amendment bail rights, respectively. *Id.* ¶¶ 253–63. Defendant District of Columbia has moved to dismiss the counts against it [Dkt. # 19].

Plaintiffs have also moved for leave to file a second amended complaint [Dkt. # 27, 30], which defendant District of Columbia opposes [Dkt. # 29]. Plaintiffs do not seek to change Counts 1, 2, or 3. Rather, the proposed second amended complaint contains additional factual background, adds two new claims (Counts 4 and 9), and restates some of the claims from the

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4 Plaintiffs previously moved to sever counts 1 through 3 from Counts 4 through 8, arguing in part that the two groups of claims do not arise from the same transaction and do not present common questions of law or fact. *See* Pl.'s Consent Mot. to Sever Claims [Dkt. # 21]. The motion stated: "The challenge to the alleged 'post and forfeit' policy and practice does not depend on the legitimacy/illegitimacy of the arrest." *Id.* at 3. At the motions hearing, counsel on the class counts distanced himself from that language. Tr. at 27–28. The motion to sever was subsequently withdrawn. [Dkt. # 35].

5 While he does not specify what kind of injunctive relief he seeks, the Court will construe it as a request to enjoin the District from using the post-and-forfeit procedure. The Court might also construe it as a request to order the expungement of the arrest record, but Mr. Fox alleges that his arrest record has already been expunged, Pl.'s Opp. at 2 n.1, and at the March 20, 2012 motions hearing in this case, counsel for the government agreed that the expungement had been granted. Rough Tr. (Mar. 20, 2012) at 11.

previous version of the complaint (Counts 5, 5A, 6, 6A, 7, and 8). Proposed Amended Count 4 alleges that the post-and-forfeit policy constitutes an unreasonable seizure, in violation of the Fourth Amendment of the Constitution. Proposed Second Am. Compl. ¶¶ 243–48. Proposed Amended Count 9 alleges that the District's use of the post-and-forfeit policy constitutes common law conversion. *Id.* ¶¶ 301–304. Proposed Amended Counts 5, 5A, 6, and 6A re-allege the facial and as applied substantive and procedural due process claims. *Id.* ¶¶ 249–87. And Proposed Amended Counts 7 and 8 re-allege the Sixth and Eighth Amendment claims. *Id.* ¶¶ 288–300.

B. Legal Background

The D.C. Code expressly grants the MPD the authority to tender an offer to any arrestee charged with certain misdemeanors to "obtain a full and final resolution of the criminal charge" by agreeing to simultaneously post and forfeit an amount as collateral. D.C. Official Code § 5-335.01(a). This is referred to as "the post-and-forfeit procedure." In essence, the option to post and forfeit is analogous to the option to pay a fine in order to resolve the charge and be released from jail quickly. Posting and forfeiting is not an admission of guilt, and it does not result in a criminal conviction. While the process does not eradicate the record of the original arrest, the statute provides that "[t]he fact that a person resolved a charge using the post-and-forfeit procedure may not be relied upon by any court . . . or agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action to impose any sanction, penalty, enhanced sentence, or civil disability." § 5-335.01(b).[6]

6 As previously noted, Mr. Fox succeeded in having his arrest record expunged in a separate action in Superior Court. *See supra* note 5.

The collateral amount for each charge is set by the Superior Court of the District of Columbia and, if not forfeited, serves as a security upon release to ensure the arrestee's appearance at trial. *Id.* The statute requires that the MPD provide written notice to the arrestee at the time the offer is tendered. *Id.* § 5-335.01(d). The notice must include, in relevant part, the identity of the crime to be resolved, and the amount of collateral to be posted and forfeited. *Id.* § 5-335.01(d)(1). The notice must also state that the arrestee has the right to choose whether to accept the post-and-forfeit offer or to proceed with the criminal case and a potential adjudication on the merits, and that forfeiture becomes final ninety days after the arrestee signs the notice.[7] *Id.* §§ 5-335.01(d)(2), (6). During that ninety days, the arrestee or the Office of the Attorney General may file a motion with the Superior Court of the District of Columbia to set aside the forfeiture and proceed with the criminal case. *Id.* § 5-335.01(d)(6).[8]

STANDARD OF REVIEW

In evaluating a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979) (citations omitted). Nevertheless, the Court need not accept inferences drawn by the

7 Mr. Fox does not dispute that he received a notice that satisfies the statutory requirements; indeed he quotes the notice in his complaint. Am. Compl. ¶ 182.

8 Plaintiffs allege that "there is no provision in any General Order, rule or statute for return of the 'collateral' money." Am. Compl. ¶ 141. However, the Court reads the provision of D.C. Official Code § 5-335.01 that allows the arrestee to file, and the Superior Court to grant, a motion to "set aside the forfeiture and proceed with the criminal case" as providing for the return of the collateral money if the Superior Court grants the motion. This interpretation was confirmed by counsel for the District at the motions hearing in this case. Tr. at 76–77.

plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

A. Subject Matter Jurisdiction

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibly Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction."). Because "subject-matter jurisdiction is 'an Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

When considering a motion to dismiss for lack of jurisdiction, unlike when deciding a motion to dismiss under Rule 12(b)(6), the court "is not limited to the allegations of the complaint." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, a court "may consider such materials outside the pleadings as it deems appropriate to resolve the question of whether it has jurisdiction in the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

B. Failure to State a Claim

"To survive a [Rule 12(b)(6)] motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' 'that the pleader is entitled to relief.'" *Id.* at 1950, quoting Fed. R. Civ. P. 8(a)(2). A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *id.* at 1949, quoting *Twombly*, 550 U.S. at 555, and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* In ruling upon a motion to dismiss, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (internal citations omitted).

ANALYSIS

A. Subject Matter Jurisdiction

Article III, section 2 of the Constitution permits federal courts to adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "This limitation gives rise to the doctrines of standing and mootness." *Foretich v. United* States, 351 F.3d 1198, 1210 (D.C.

Cir. 2003). "Lack of standing is a defect in subject matter jurisdiction." *George v. Napolitano*, 693 F. Supp. 2d 125, 128–29 (D.D.C. 2010), citing *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). To establish Article III standing, a plaintiff must demonstrate that "(1) he has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *George*, 693 F. Supp. 2d at 129–30, quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 180–81 (2000).

The District moves to dismiss for lack of subject matter jurisdiction on multiple grounds, and it certainly has a point. It is difficult to discern what Mr. Fox's alleged injury is. He claims that his injury is the deprivation of his thirty five dollars in cash. Pl.'s Opp. at 2. However, the facts as alleged show that he chose to post and forfeit the thirty five dollars – rather than proceed with his criminal case – in order to get out of jail more quickly and terminate his case, and that he was fully aware of his options. Furthermore, although he had ninety days to do so, Mr. Fox did not exercise his right to move to have the forfeiture set aside by the Superior Court of the District of Columbia.

"Federal relief may be withheld from persons who have 'deliberately bypassed the orderly procedure of the state courts.'" *Sullivan v. Murphy*, 478 F.2d 938, 963 (D.C. Cir. 1973), quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963). When the plaintiff has failed to "utilize state remedial channels that are both accessible and capable of affording a full measure of relief," he may properly be denied federal relief. *Id.* Here, the D.C. Code provides a remedy whereby an arrestee who has a change of heart in the light of day can seek the return of the forfeited collateral. Mr. Fox failed to exhaust his remedies in the Superior Court because he did not file

such a motion within ninety days of signing the post-and-forfeit notice. Therefore, the District fairly asserts that he may not now seek compensation for his thirty five dollars from this Court.[9]

But Mr. Fox also seeks injunctive relief on the grounds that the MPD violated his Fourth, Fifth, Sixth, and Eighth Amendment rights, and those of the class, by utilizing post-and-forfeit and accepting payment from arrestees who have not yet had access to counsel and by failing to provide a citation release option.[10] The Court presumes, then, that the injury he is alleging on behalf of the class is the deprivation of constitutional rights.[11]

But the District argues that even that claim would fail to meet the case or controversy requirement. For a plaintiff to have standing to request injunctive relief, he must show that he "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct, and the injury or threat of injury must be both real and immediate not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). In *Lyons*, the Supreme Court held that a plaintiff claiming to have

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9 In *Sullivan*, the D.C. Circuit found that plaintiffs' failure to file within the ninety day period did not preclude them from federal relief because the District had circulated misinformation about their rights pursuant to the post-and-forfeit policy and thus, the state remedial channels were not sufficiently "accessible." *See Sullivan*, 478 U.S. at 963. Here, there is no allegation that plaintiff was misinformed, so this case does not fall within that limited exception to the exhaustion requirement.

10 The complaint does not actually specify what type of injunctive relief Mr. Fox is seeking. However, since the proposed amended complaint contains an express request for an injunction banning the District from implementing any provision of D.C. Code § 5-335.01, the Court will construe the first amended complaint as seeking the same form of equitable relief. Proposed Second Am. Compl. ¶ 65. Mr. Fox's opposition to the motion to dismiss explains that the request for equitable relief also includes a request for the expungement of his arrest record if that has not already occurred. Pl.'s Opp. at 2–3. Since counsel for the District told the Court that Mr. Fox's arrest record had already been expunged, the Court will not consider that request.

11 In Count 6, he also alleges that post-and-forfeit is used to keep arrestees incarcerated as a form of punishment, in violation of the arrestee's Fifth Amendment rights. Am. Compl. ¶¶ 243–46.

suffered a past injury, who is seeking to enjoin the government from engaging in the allegedly unconstitutional conduct that caused his harm, lacks standing unless he alleges that he is *likely* to suffer injury in the future from the same conduct. *Id.* at 105–06. In that case, the plaintiff challenged a police officer's use of a "choke hold" as a violation of his substantive due process rights under the Fourteenth Amendment. *Id.* at 99. The Court held that he did not establish the existence of a live case or controversy against the city for injunctive relief because he failed to "establish a real and immediate threat" that he would again be stopped by the police and put in a chokehold. This requirement would only be satisfied by allegations that the plaintiff (1) would have another encounter with the police, and (2) "that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter," or that the city "ordered or authorized police officers to act in such a manner." *Id.* at 105–06. The Court concluded that "[absent] a sufficient likelihood that [Lyons] will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *Id.* at 111.

Similarly here, Mr. Fox is alleging a past harm. By the time Mr. Fox filed his complaint, he had already paid the thirty five dollars, the MPD had accepted the money, he had been released from jail, and the ninety day period during which he could have moved to have the forfeiture set aside had already expired. Moreover, he has not alleged that he is likely to have another encounter with the MPD and to be arrested for a collateral offense. However, unlike in *Lyons*, Mr. Fox has alleged that the city authorizes police officers to act in the contested manner on a regular basis. He cites section 5-335.01 of the D.C. Official Code, which authorizes MPD to offer the post-and-forfeit option to people arrested on charges of collateral offenses. Also, the

complaint included a request to have the arrest record expunged, a sort of relief that could give rise to a case or controversy. Thus, plaintiff's claim to standing is not as tenuous as the claim rejected in *Lyons*.

Furthermore, Mr. Fox has filed his complaint on behalf of a class of people who have been subject to the post-and-forfeit procedure in the past as well as those who will be subject to it in the future. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court applied the relation back doctrine to allow a plaintiff, who was representing a class in a suit alleging that the county violated the Fourth Amendment rights of people arrested without a warrant by combining probable cause determinations with arraignment procedures, to continue asserting the claims even though they had become moot as to him after the filing of the complaint. *Id.* at 52–58.

Therefore, since Mr. Fox premises his claim for an injunction on a statute authorizing the police to engage in the challenged conduct in the future, he seeks a form of relief other than the mere return of his forfeited $35, and at least his request for expungement though now moot survives under *Riverside*, the Court will move on to consider the merits of the District's motion to dismiss for failure to state a claim.

B. Failure to State a Claim

a. <u>The complaint fails to state a claim that the post-and-forfeit procedure violates the Fifth Amendment on its face.</u>

Count 5 of the complaint alleges that the post-and-forfeit process violates the Fifth Amendment of the Constitution on its face. Although the first amended complaint does not specify whether Mr. Fox is making a substantive or procedural due process claim, he elaborated on the allegations at some length in his opposition and explained that he had both theories in

mind. The Court will give him the benefit of all inferences in his favor and construe the complaint as alleging both.[12]

i) Substantive Due Process

Mr. Fox alleges that the post-and-forfeit policy constitutes deliberate indifference to his Fifth Amendment substantive due process rights and those of the class because it authorizes the MPD to deprive arrestees of their money without any legitimate reason. Pl.'s Opp. at 35.

"[T]he Due Process Clause provides that certain substantive rights – life, liberty and property – cannot be deprived except pursuant to constitutionally adequate procedures."[13] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The substantive component of the Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992) (internal citations omitted). In other words, there are some interests that are so fundamental that the government cannot invade them even if it follows a seemingly fair process. Thus, in substantive due process cases, the Supreme Court requires a "careful description" of the asserted fundamental interest to be protected. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). And it has certainly never found payment of a small sum to suffice, and particularly not in any circumstance where the payor was offered a choice of whether to pay it or not, and he received a benefit in return. *See Idris v. City of Chicago*, 552 F.3d 564, 566 (7th Cir. 2009) (refusing to find that "a property interest so modest [as a ninety dollar fine] is a

12 Counts 5 and 5A of the proposed second amended complaint revise and expand upon the original Count 5 to make the two-pronged theory explicit.

13 Because the District of Columbia is a political entity created by the federal government, it is subject to the Fifth Amendment. *See Propert v. Dist. of Columbia*, 948 F.2d 1327, 1330 n.5 (D.C. Cir. 1991), citing *Bolling v. Sharpe*, 347 U.S. 479, 499 (1954).

fundamental right" in a case challenging the constitutionality of a ninety dollar traffic fine imposed on the owner of a car that is photographed running a red light).[14]

Even if the Court construes the complaint as alleging the invasion of a liberty interest, and not just a minimal property interest, there is certainly no fundamental liberty interest in being released from jail before presentment the following morning. And another court in this District has already held that there is no constitutional right to citation release. *See Huthnance v. District of Columbia*, 793 F. Supp. 2d 183, 202 (D.D.C. 2011); *see also Hunter v. District of Columbia*, -- F. Supp. 2d --, 2011 WL 5529857, at *8 (D.D.C. Nov. 15, 2011). So, the Court finds that Mr. Fox has not alleged the deprivation of any fundamental interest.

Where there is no fundamental interest at stake, the Court assesses whether the legislation is arbitrary. *See Idris*, 552 F.3d at 566; *see also TXO*, 509 U.S. at 453–54 (Substantive due process protection is afforded where there is "an arbitrary deprivation of property without due process of law."); *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 84–85 (1980) ("Under traditional substantive due process analysis, government regulation of property rights will be upheld so long as it is not 'unreasonable, arbitrary, capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.'"); *Hilton Wash. Corp. v. Dist. of Columbia*, 593 F. Supp. 1288, 1290–91 (D.D.C. 1984), citing *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

In arguing that the post-and-forfeit payment is arbitrary, Mr. Fox first attempts to describe what it is. But in doing that, he devotes more than ten pages of his opposition brief explaining what it is *not*. Pl.'s Opp. at 16–28. ("The District's exaction of the 'post and forfeit'

14 The Supreme Court has found that a fine may be so grossly excessive that it violates the substantive component of due process. *Cf. TXO*, 509 U.S. at 459. But here, Mr. Fox is not challenging the collateral *amount*, he is instead challenging the District's ability to offer arrestees charged with a collateral offense the option to post at all. *See* Pl.'s Opp. at 17–18.

payment is neither a civil forfeiture, a legitimate fine, bail, nor any other legitimate exercise of government power."). At bottom, his substantive due process argument is based on the misguided notion that the District may not accept any kind of payment other than a civil forfeiture, fine, bail, or other payment expressly authorized in the Constitution. *See* Pl.'s Opp. at 17; Tr. at 37–38. Mr. Fox fails to acknowledge that the District has a general police power, which gives it the authority to enact measures to protect the health, safety, welfare, and morals of the community. *See In Rè Rail Freight Fuel Surcharge Antitrust Litigation*, 593 F. Supp. 2d 29, 37 (D.D.C. 2008) (States and the District of Columbia "retain traditional police powers to protect health and safety, which [are] reserved to them by the constitution . . . ."); *Bergman v. District of Columbia*, 986 A.2d 1208 (D.C. 2010) (same). So, it suffices to say that the post-and-forfeit payment is in essence a small fine that the District agrees to accept in return for an arrestee's prompt release from jail and the resolution of the charges against him. *See District of Columbia v. Baylor*, 125 Wash. Law Rptr. 1665, 1670 (Aug. 25–26, 1997) (defining the post-and-forfeit payment as "a kind of vicarious fine paid, without either admitting or adjudicating any criminal or other liability") (internal quotation marks omitted).[15]

Mr. Fox asserts that the payment is not a fine because the government may only impose a fine as part of a criminal offense when the fine is "based on a finding in a pre-deprivation hearing of criminal conduct" and "specifically authorized by statute." Pl.'s Opp. at 19. But he does not cite any precedent for his assertion and it does not survive close inspection. First, of course, this sort of payment is expressly authorized by statute. D.C. Official Code section 5-335.01 authorizes the MPD to tender an offer to an arrestee to resolve a petty criminal charge using the post-and-forfeit procedure. Second, the fact that the payment is not based on a finding

15 Indeed, the District acknowledges that the payment is somewhere between a type of surety and a fine. Pl's Reply at 11, 11 n.13; Tr. at 74–75.

of criminal conduct in a pre-deprivation hearing does not bear on whether or not the payment is a fine. The absence of a hearing is only relevant to the question of whether the payee receives sufficient process, as Mr. Fox himself pointed out repeatedly throughout his papers and in the motions hearing on this matter. *See* Pl.'s Opp. at 14–15, 29, 35–36; Tr. at 30. And since the payment does not result in a criminal conviction and it cannot trigger any of the collateral consequences of a criminal conviction, it is not appropriately likened to a criminal sentence.

So construing the forfeited collateral that constitutes the post-and-forfeit payment to be some type of fine, the Court must next resolve whether it is arbitrary. The Court finds that it is not. The city has asserted legitimate interests in preventing overcrowding in its jails, conserving its limited prosecutive resources, and clearing crowded court dockets, Def.'s Reply at 19, and it also has an interest in deterring criminal activity. By allowing an arrestee charged with a minor crime to pay a small sum in order to resolve the charge, the government fulfills those goals. Furthermore, the payment is a bargained for exchange whereby both parties obtain a benefit: the arrestee gains both his release and complete finality. He may very well conclude that he would prefer paying the fee to enduring whatever financial or personal burdens might be involved in a time-consuming and possibly embarrassing return to court, or he may simple seek to eliminate the risk of having a misdemeanor conviction on his record. So the District's acceptance of an arrestee's voluntarily tendered collateral is not an arbitrary deprivation of property, but a reasonable one.

And contrary to Mr. Fox's assertion, the procedure itself is not rendered constitutionally infirm for substantive due process purposes simply because some of the people who choose to pay the money may have been arrested without probable cause. The risk of an erroneous

deprivation is one of the factors that the Court weighs in the procedural due process inquiry, not the substantive due process inquiry.[16]

The long history of the post-and-forfeit process further weakens Mr. Fox's substantive due process claim. The Supreme Court has indicated that it approaches requests to strike down longstanding practices under the theory of substantive due process with skepticism. *See Glucksberg*, 521 U.S. at 723 ("To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State); *Reno v. Flores*, 507 U.S. 292, 303 (1993) ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it"). Before the post-and-forfeit policy was codified in 2005, the D.C. Superior Court noted that the post-and-forfeit procedure is reminiscent of the "Doomsday Book" compiled in 1086 by William the conqueror of England, and the Board of Judges of the Superior Court promulgated a "Bond and Collateral Book" in November of 1974 in order to implement it in the District of Columbia. *Baylor*, 125 Wash. Law Rptr. at 1670. The court also cited a study which found that seventy-two American cities allowed posting and forfeiting of collateral in traffic cases. *Id.* Given the policy's history and prevalence, this Court is particularly reluctant to strike the policy down on the grounds that it is a constitutionally repugnant violation of plaintiffs' substantive due process rights.[17]

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16 Furthermore, in a facial challenge, the plaintiff must demonstrate that there would be no instance under which the challenged policy would be lawful and constitutional. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). So, the Court should consider whether it would be unconstitutional in the least controversial cases – the ones where the police had ample probable cause to make the arrest.

17 Mr. Fox's claim also fails if the Court construes it as alleging an unconstitutional "taking" under the Fifth Amendment. First, there is no allegation in the complaint that the forfeited collateral is used for a private purpose, so the Court assumes that Mr. Fox is alleging that his property was taken for a public use, for which he is entitled to "just compensation." But, Mr. Fox fails to allege a "taking" at all. In *Bennis v. Michigan*, 516 U.S. 442 (1996), the Supreme Court held that if the proceeding by which property is transferred from a private citizen

Since Mr. Fox has not shown that it is arbitrary for the government to take a small sum of money from an arrestee who, given the choice to pay or go forward with his case, decides to pay, the Court finds that the post-and-forfeit policy does not on its face violate the substantive due process rights of Mr. Fox or those in his proposed class.

ii) Procedural Due Process

Mr. Fox next alleges that the post-and-forfeit policy on its face violates procedural due process. The parties dispute which standard the Court should apply to test the procedural due process claim.

Mr. Fox argues that the test the Supreme Court described in *Mathews v. Eldridge*, 424 U.S. 319 (1976) is applicable here. There, the Court considered the adequacy of administrative procedures for the termination of Social Security disability benefits. The Court found that the extent of the procedural protection that due process requires is "flexible" and dependent on the particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). And it based the determination of whether the particular procedures are constitutionally sufficient on three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The District, however, points the Court to the later decision of the Supreme Court in *Medina v. California*, 505 U.S. 437 (1992). In that case, the Court was presented with the

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to the government does not violate due process, then "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* at 456. Since this Court has already found that the post-and-forfeit policy does not violate due process, the District is not required to provide compensation under *Bennis*.

question whether the Due Process Clause permits a state to require that a defendant who alleges that he is incompetent to stand trial bears the burden of proving so by a preponderance of the evidence. *Id.* at 439. But rather than apply the *Matthews* test, the Court held that preventing and dealing with crime is so much the business of the states that courts should be reluctant to overturn a state criminal procedure "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445 (internal quotation marks omitted). In doing so, the courts exercise "substantial deference to legislative judgments." *Id.* at 446.

Mr. Fox tries to distinguish the instant case from *Medina*, arguing that the issue here "is not a traditional criminal procedure rule, but a novel system intended to 'supplement' the common law system . . . ." Pl.'s Opp. at 40. The Court finds this distinction unavailing – the post-and-forfeit policy sets out a procedure that the MPD follows in dealing with certain people arrested on criminal charges, so it is squarely a rule of criminal procedure. But regardless of which test the Court applies, it comes to the same conclusion: the post-and-forfeit procedure is adequate to satisfy procedural due process concerns.

The post-and-forfeit policy satisfies the *Medina* standard because Mr. Fox has not alleged that it violates any fundamental principle of justice. In light of the District's longstanding practice, Mr. Fox does not offer any historic basis for why the Court should find it to be unconstitutional. *See* 505 U.S. at 446–448 (the first inquiry is whether there is a historical basis for concluding that a policy violates due process). And Mr. Fox also fails to proffer any colorable basis for why a policy that allows the MPD to offer someone a means to resolve his charge *if he so chooses* offends any principle of "fundamental fairness." *See id.* at 448 (the second inquiry is whether the policy "transgresses any recognized principle of 'fundamental

fairness' in operation"). There is nothing unfair about being given the choice to pay a reasonable fine to resolve the charge of a petty offense, particularly where the payer has ninety days to think it over and change his mind, and the payment, once final, does not result in a record of conviction.

The post-and-forfeit policy also satisfies the *Mathews* test. Mr. Fox offers two potential private interests that are at issue here: 1) the arrestee's interest in the small collateral sum of money, and 2) his interest in regaining his liberty. As to the first, the interest is weak because it is a very small amount of money at stake. Next, the risk of an erroneous deprivation is very small. If the arrestee thinks that his arrest has been made without probable cause, he is not required to pay. And moreover, even if he does choose to pay, he has ninety days afterward to determine – either on his own or after consulting an attorney – that he should have challenged the charge and to move to set aside the forfeiture and proceed with the charge against him. The addition of a pre-deprivation hearing, therefore, would not lower the risk of an erroneous deprivation very much, if at all. Finally, the government has legitimate interests in preventing overcrowding of its jails, and not expending its limited resources on prosecuting petty offenses. So, the deprivation of property here does not warrant any additional procedure.[18]

Furthermore, the alternative to payment – remaining in jail until being presented for a preliminary hearing – does not warrant additional procedure. *County of Riverside v. McLaughlin*, 500 U.S. 44, 55–56 (1991) establishes that the Fourth Amendment permits the reasonable postponement of a probable cause determination, even up to forty eight hours. Mr.

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18 The Supreme Court has held that an individual must be given the opportunity for a hearing "before he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Laudermill*, 470 U.S. 532, 542 (1985). However, the Court has never found that such a small sum of money is a "significant property interest," particularly where the payee is given the option not to pay.

Fox's complaint does not allege that the post-and-forfeit policy increases the time it takes an arrestee who chooses not to post and forfeit to obtain a probable cause determination, let alone that such time is unreasonable.[19]

b. The complaint fails to state a claim that the post-and-forfeit procedure as applied violates the right to procedural or substantive due process guaranteed by the Fifth Amendment.

While Count 5 was an attack on the facial validity of the procedure, Count 6 of the amended complaint alleges that the post-and-forfeit violates the Fifth Amendment's due process protections as applied to Mr. Fox and the other members of the class. Am. Compl. ¶¶ 242–52. Again, here, the Court will give Mr. Fox the benefit of the doubt and treat the Count as alleging violations of both substantive and procedural due process.

In the paragraphs laying out the as-applied claim, Mr. Fox avers that the District maintains a policy of arresting people on disorderly conduct charges without probable cause. Am. Compl. ¶ 243.[20] He also suggests that the procedure has the effect of shielding those arrests from scrutiny. *Id.* ¶ 245. But ultimately, it is not the allegedly invalid arrests (or, as needed for municipal liability under section 1983, the city's deliberate indifference to a risk of such constitutional violations, *see Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2000)), that animate Count 6. The complaint does not contain a due process claim premised upon the conduct of the officers on the street.[21]

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19 Even if Count 4 of the complaint can be construed to allege that, Mr. Fox has expressly conceded Count 4. Tr. at 26.

20 The proposed second amended complaint expands on this allegation. *See, e.g.*, Proposed Second Am. Compl. ¶ 265 ("The District of Columbia, through the MPD, fails to train officers in how to apply the disorderly conduct statute.").

21 *See* plaintiffs' own Motion to Sever, which expressly states that "[t]he challenge to the alleged 'post-and-forfeit' policy and practice does not depend on the legitimacy/illegitimacy of the arrest." Pls.' Consent Mot. to Sever Claims at 3. As the Court noted above, Mr. Fox's

What Mr. Fox goes on to allege in Count 6 is that:

- The District of Columbia maintains a policy, custom or practice of offering post-and-forfeit to persons arrested on disorderly conduct, without offering citation release or collateral/bail release;
- That policy, custom, or practice is implemented when the officers have no expectations that criminal charges will be pressed against the arrestee;
- The District fails to adequately train MPD officers regarding the proper use of post-and-forfeit (*i.e.* that it should not be used as a tool to keep arrestees incarcerated) and to adequately supervise their use of the procedure;
- The lack of adequate training and supervision leads police to use the post-and-forfeit as a form of punishment, in violation of the arrestee's Fifth Amendment rights;
- The District had actual or constructive knowledge that officers were misusing post-and-forfeit at the time of Mr. Fox's arrest;[22]
- The post-and-forfeit policy and the failure to adequately train or supervise reflect a deliberate indifference to the constitutional rights of arrestees.

Am. Compl. ¶¶ 244–250. But this Count fails for the same reasons that the facial claim fails. Giving arrestees the choice between paying a small sum of money to resolve their charges or remaining in jail until they are presented in court – for a length of time which is not alleged to be unconstitutional – is not an unconstitutional "punishment." As the Court already stated, neither citation release nor release before a probable cause determination are constitutional rights. In other words, Mr. Fox does not allege that the way this policy is being implemented should lead the Court to analyze it differently from the way it analyzed it for purposes of the facial challenge.

This is so even though Mr. Fox alleges that some of the class members were or will be arrested without probable cause. All class members are free to contest the charges and put the

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attorney expressly disclaimed this statement at the motions hearing. *See supra* note 3. Nonetheless, the Court finds it notable.

22 The amended complaint actually states "[a]t the time of Ms. Smith's arrest," but the Court will assume this is a typo and that the complaint is supposed to refer to Mr. Fox's arrest.

government to its proof for ninety days even if they initially avail themselves of the post-and-forfeit option. Class members are also free to bring civil actions to challenge the constitutionality of their arrests in Court, and the Foxes' claims on those grounds survive this motion. Some individuals may claim that the District should be liable for unconstitutional arrests caused by its alleged indifference to an alleged ongoing practice of arresting people on charges of disorderly conduct without probable cause, just as Ms. Huthnance did. *See Huthnance v. District of Columbia*, 793 F. Supp. 2d 183 (D.D.C. 2011). But that is not this case.

Because the Court finds that Mr. Fox fails to allege a predicate constitutional deprivation, it need not reach the District's argument that plaintiff fails to establish *Monell* liability for his section 1983 claims.

c. The District's argument that the complaint fails to state a claim that the post-and-forfeit procedure violates the Sixth or Eight Amendments is conceded.

Mr. Fox does not respond to the District's argument that Counts 7 and 8 should be dismissed for failure to state a claim, so the Court will treat these two counts as conceded for purposes of the first amended complaint. *See Rosenblatt v. Fenty*, 734 F. Supp. 2d 21, 22 (D.D.C. 2010) ("[A]n argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded.") (internal citations omitted).

Therefore, the Court will grant the District of Columbia's motion to dismiss the counts against it for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

C. Motion for Leave to Amend

Plaintiffs have also moved for leave to file a second amended complaint.[23] According to Fed. R. Civ. P. 15(a)(2), the Court should "freely give leave [to amend] when justice so requires." But the decision to grant leave to file the amended complaint is not automatic. The Court may exercise its discretion to deny leave to amend where there is "undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies or futility." *Richardson v. United States*, 193 F.3d 545, 548–49 (D.C. Cir. 1999), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Defendant District of Columbia argues that the Court should deny plaintiffs' motion because the Court has already granted leave to amend once in this case and a second amendment would cause undue prejudice to the District, and because the proposed amendments are futile. The Court acknowledges that the District has already moved to dismiss two previous versions of plaintiffs' complaint, and it is sympathetic to defendant's position that allowing plaintiffs to amend again would require the District to start from scratch yet again. What's more, the proposed second amended complaint reasserts several claims that the District has already moved to dismiss in previous versions of the complaint on the basis that they fail to state a claim, and which plaintiffs conceded by failing to respond to the District's arguments (*e.g.* Counts 7 and 8 of the first amended complaint). But even so, the Court still might have been inclined to find it in the interest of justice to grant leave to amend for a second time if plaintiffs' proposed amendments actually cured the deficiencies in the previous versions of the complaint. That is not the case.

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23 Although the motion for leave to amend was originally filed only by Mr. Fox, [Dkt. # 27], plaintiffs filed a notice on November 3, 2011 clarifying that Mrs. Fox joins in the motion to amend [Dkt. # 30]. Like the first amended complaint, Mr. Fox is the only representative plaintiff alleging that the District violated his constitutional rights in Counts 4 through 9.

Therefore, the Court will deny in part plaintiffs' motion for leave to file a second amended complaint insofar as it proposes to assert proposed amended Counts 5, 5A, 6, 6A, 7, and 8. However, since neither party has provided any briefing on the merits of proposed added Counts 4A and 9, the Court will grant plaintiff leave to amend the complaint to add those two counts. The District will be permitted to file its answer or responsive pleading, including any appropriate motion to dismiss, in the time permitted by the rules.

a. Amended Counts 5, 5A, 6, and 6A

Counts 5, 5A, 6 and 6A in the proposed complaint are revised versions of what were Counts 5 and 6 in the first amended complaint – the facial and as applied due process claims. Plaintiffs have revised the Counts by separating the substantive and procedural claims into separate subparts of the Counts. They also added more detailed factual background related to the District's alleged policy of making disorderly conduct arrests without probable cause, and the implementation of the post-and-forfeit policy. Proposed Second Am. Compl. ¶¶ 67–173. However, the substance of Mr. Fox's claims remains the same, with the same deficiencies.

A court does not abuse its discretion if it denies leave to amend or supplement based on futility. *See, e.g.*, *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (agreeing with the district court that an amendment was futile when the facts alleged in the complaint "establish[ed] beyond doubt that the Government did not violate [plaintiff's] due process rights"); *Ross v. DynCorp*, 362 F. Supp. 2d 344, 364 n.11 (D.D.C. 2005) ("While a court is instructed by the Federal Rules of Civil Procedure to grant leave to amend a complaint 'freely,' it need not do so where the only result would be to waste time and judicial resources. Such is the case where the Court determines, in advance, that the claim that a plaintiff plans to add to his or her complaint must fail, as a matter of law . . . ."); *M.K. v. Tenet*, 216 F.R.D. 133, 137 (D.D.C.

2002) ("A court may deny a motion to amend the complaint as futile when the proposed complaint would not survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss."); *Ruffalo v. Oppenheimer & Co.*, 987 F.2d 129, 132 (2d Cir. 1993) (holding that leave to amend was properly denied on futility grounds since new pleading failed to allege any additional significant facts). *See also* 3 *Moore's Federal Practice*, § 15.15[3] (Matthew Bender 3d ed.) ("An amendment is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.").

Count 5 alleges that the post-and-forfeit policy violates class members' substantive due process rights on its face because the District has no constitutional power to "take the money" of arrestees, and that it violates their procedural due process rights because it provides inadequate process prior to the deprivation. Proposed Second Am. Compl. ¶¶ 249–262. These claims fail for the same reasons that they failed in the first amended complaint, and plaintiff's additional factual assertions do not save them. Therefore, amended Counts 5 and 5A are futile.

Count 6 alleges that the District's failure to adequately train or supervise the MPD regarding post-and-forfeit leads police officers "frequently to use post and forfeit as a form of punishment, in violation of arrestees' Fifth Amendment rights." *Id.* ¶ 270. Here too, plaintiff fails to cure the deficiencies in the first amended complaint. Rather than alleging that the *arrest* results in an unconstitutional deprivation of liberty, he alleges that the police's acceptance of payment pursuant to the post-and-forfeit policy is an unacceptable punishment. For all the reasons described above, the receipt of payment does not violate due process. So his amended Counts 6 and 6A are futile as well.

b. Amended Counts 7 and 8

Mr. Fox's proposed amended Counts 7 and 8 reassert Counts 7 and 8 from his first amended complaint. In its motion to dismiss the first amended complaint, the District argued that those counts failed to state a claim. Plaintiffs did not respond to those arguments, leading the Court to conclude that they had been conceded, *see supra* p. 25, so it would be prejudicial to the District for the Court to grant plaintiff another bite at the apple. But the Court finds proposed amended Counts 7 and 8 to be futile in any event, and it will deny plaintiffs leave to assert them on that basis.

i. Amended Count 7 fails to state a claim.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right does not attach, however, until prosecution is commenced, "that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation marks omitted). Plaintiff does not allege that adversary judicial criminal proceedings had commenced at the time he elected to post and forfeit. Instead he alleges that that the presentation of the post-and-forfeit option required Mr. Fox to "make decisions about the disposition of his case" including "how the post and forfeit would affect his right to release and the charges against him and whether it was a payment of bail under the Eight amendment and how it would affect his right to seal his arrest records." Proposed Second Am. Compl. ¶¶ 291–92.

However, "[t]he purpose of the Sixth Amendment counsel guarantee – and hence the purpose of invoking it – is to 'protec[t] the unaided layman at critical confrontations' with his

'expert adversary,' the government *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at 177–78, quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984). And the adverse positions solidify only when "the government has committed itself to prosecute." *Gouveia*, 467 U.S. at 189. Plaintiff presents nothing that would show that at the time the arrestee elects to post and forfeit, the government has committed itself to prosecute. The statute makes clear that election does not result in a criminal record, and payment is not an admission of guilt. The policy simply allows the arrestee to resolve the matter *before* the government decides whether to prosecute. Moreover, the procedure permits the arrestee to avail himself of counsel later and move to set aside the forfeiture he decided to undertake while still unrepresented. Therefore, plaintiff fails to state a claim that the policy violates the Sixth Amendment rights of Mr. Fox or any of the class plaintiffs.

ii. Amended Count 8 fails to state a claim.

Proposed amended Count 8 alleges that the post-and-forfeit payment is "not any species of bail," and so the District's policy of "taking post and forfeit payments from arrestees charged with collateral offenses constitutes deliberate indifference to the Eight Amendment bail rights of Mr. Fox and all other members of the class." Proposed Second Am. Compl. ¶¶ 296–300. The precise nature of plaintiff's Eight Amendment claim is somewhat elusive, but the District suggests in its motion to dismiss the first amended complaint that the only logical conclusion is that plaintiff is asserting that Mr. Fox had a right to bail and was refused it.

The Eight Amendment prevents the government from requiring excessive bail. U.S. Const. amend. VIII. However, Mr. Fox chose to post and forfeit before he was presented before a judicial officer – when bail is properly set. *See* 18 U.S.C. § 3142(f); *see also United States v.*

King, 818 F.2d 112, 114–15 (1st Cir. 1987) ("[T]he purpose of the requirement of an immediate detention hearing is to guarantee a speedy bail determination.") (internal quotation marks omitted). The Supreme Court has never found that by not offering bail *before* the preliminary hearing – where the duration of the pre-hearing detention does not violate the Constitution – the government violates the arrestee's Eight Amendment rights, and this Court declines to do so.[24]

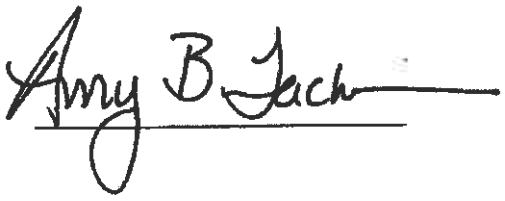
c. Amended Counts 4A and 9

Plaintiffs also seek to add two new claims: that the post-and-forfeit policy constitutes an unreasonable seizure, in violation of the Fourth Amendment (Count 4), and that it constitutes common law conversion because the District "takes money" from arrestees (Count 9). While the District argues generally that plaintiffs' new claims are futile, it does not substantively address these two counts. The Court declines to dismiss these counts prospectively on the basis of futility when it has not been presented with a clear legal basis for why they are futile. Therefore, the Court will allow plaintiffs to file a second amended complaint containing the revised factual allegations, proposed ¶¶ 1–52, 65–242, proposed Counts 1, 2, 3, 4A and 9, ¶¶ 53–64, 243–48, 301–04, and the relief demands. It will deny plaintiff leave to assert proposed amended Counts 5 through 8, ¶¶ 249–300.

24 Alternatively, if plaintiffs are asserting that the payment was in essence a payment of excessive bail, the Court still finds that it fails to state a claim. The post-and-forfeit payment is not bail at all, and it is hardly excessive. Another interpretation might be that plaintiff is asserting that the Constitution permits bail, but this is not bail, so it is unconstitutional. But the fact that something is not expressly authorized in the Bill of Rights does not make it unconstitutional.

CONCLUSION

Because plaintiffs have conceded Counts 4, 7, and 8 of their first amended complaint and fail to state a claim in Counts 5 and 6, the Court will grant defendant District of Columbia's motion to dismiss Counts 4 through 8 of the first amended complaint. The Court will also grant in part and deny in part plaintiffs' subsequent motion for leave to file a second amended complaint. A separate order will issue.



AMY BERMAN JACKSON
United States District Judge

DATE: March 30, 2012

Appendix 5: Citation Release Eligibility Criteria

CITATION RELEASE ELIGIBILITY CRITERIA
(Revised 05/14/2010 – Version 2)

23 D.C. Code Section 1110(b)(2) allows for a person arrested without a warrant and charged with a misdemeanor to be released from custody upon citation and a promise to appear in court. No citation may be issued if there is reason to believe the person will (1) cause injury to another, (2) damage property, or (3) fail to appear in court as required.

Any adult person eighteen (18) years of age or older arrested on one or more non-violent misdemeanor charges (or a person 16 or 17 years old charged with a traffic offense) shall be considered **ELIGIBLE**[1] for release on citation **UNLESS** he/she:

1. Is being charged with an intra-family offense as defined in D.C. Code §16-1001 (Domestic Violence);

2. Is being charged with Unlawful Entry (D.C. Code § 22-3302) at the White House complex or an Embassy;

3. Is being charged with Unregistered Firearm (D.C. Code §7-2502.01) or Unauthorized Ammunition (D.C. Code §7-2506.01);

4. Is being charged with Indecent Exposure/Proposal to a Minor;

5. Cannot reasonably be identified by MPD by name, to include PDID number (required by Pretrial Services Agency for criminal history determination), and/or place of residence (NOTE: Arrestees who are homeless and/or who reside in homeless shelters and/or group homes are eligible for citation release and are not to be automatically denied. Arrestees who do not reside in the District of Columbia are not to be automatically denied.);

6. Cannot conduct a coherent interview (*e.g.*, due to intoxication from alcohol or drugs)(NOTE: these arrestees shall be transported for medical evaluation and reconsidered for citation release after being medically released by a hospital or after he/she is considered sober);

7. Inaccurately reports information concerning his/her name;

8. Indicates an intention to flee, or to cause harm to any person or property, or otherwise poses a serious risk of flight (NOTE: This includes arrestees for offenses related to gang/crew involvement who may seek retaliation.);

9. May be held pursuant to D.C. Code §23-1322 for one of the following reasons:
   - is currently on probation, parole, or supervised release;

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[1] A Watch Commander may authorize the citation release of a misdemeanor arrestee notwithstanding the person being deemed "ineligible" because of one of these criteria. In such instances, the arrestee should be directed to appear in court at 1:00 p.m. the very next court date.

- is currently on release in a pending felony case;
- is currently on release in two or more pending misdemeanor cases;
- is currently on release in a simple assault, domestic violence, or misdemeanor weapons offense;
- is currently on release in a misdemeanor case AND the defendant's behavior suggests that he may be a danger to others due to possible mental illness issues;
- is arrested for a traffic offense and is on probation for or has a pending DWI, DUI, OWI, fleeing, reckless driving, or leaving after colliding (with property damage or personal injury) charge;

10. Has a criminal history which includes a BRA or escape conviction within the past two (2) years;

11. Has an outstanding extraditable warrant from another jurisdiction;

12. Is in violation of a court order (*i.e.*, curfew, stay away, Drug Free Zone, or Prostitution Free Zone); or

13. Is a current GunStat candidate.

Appendix 6: Proposed PD-67 Instructions

NOTICE TO ARRESTED PERSONS (Revised 04/11/2013 – V.4)

You have been arrested for a criminal offense that is on the list of offenses for which immediate release may be available/offered. You also appear to meet the criteria for immediate release established by statute and the prosecutor. After we have completed the paperwork, you may eligible to choose one of the three options described in greater detail below:

OPTION 1 -- POST AND FORFEIT MONEY

If you want to end the case now, and you are otherwise eligible, you may pay the amount of money the court has set for this offense and forfeit it. This means that a criminal case will not be filed against you in court, but you will have an arrest record and you will not get your money back. But this disposition will not result in the imposition of any sanction, penalty, enhanced sentence, or civil disability by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action. You may file a motion with the court to seal your arrest record two years from now unless you have a disqualifying conviction. If you change your mind and want to go to court to contest the charges, you can file a "Motion to Set Aside Forfeiture" within 90 days of today (and the Office of the Attorney General for the District of Columbia, the prosecutor for this case, may do the same). Such a motion is not automatically granted. If it is granted, the charges against you will be reinstated and you will have to go to court to answer them.

OPTION 2 -- CITATION RELEASE

If you want your day in court and you are otherwise eligible, you may be released immediately on citation. This means that you promise to go to court on the future date written on the citation. At that time, a prosecutor will decide whether to file a criminal case against you. If you do not go to court as directed, a bench warrant may be issued, and you can be arrested and charged with failing to appear even if the prosecutor decides to drop this case.

As a condition of your release on citation, you may be directed to stay away from and have no contact with a particular person or persons and/or to stay away from a particular place until you appear in court to answer the charge. If you violate that directive, a police officer can immediately arrest you, your release will be revoked, and you will be brought to court on the next day it is open.

If the prosecutor charges you with any crime, you will have a right to be represented by an attorney. If you cannot afford an attorney, one will be provided for you.

OPTION 3 -- BOND RELEASE

If you have been arrested on a warrant for which you may post a bond, you may pay the amount the court has set. You must still go to court on the date written on the form. If you do not go to court as directed, another bench warrant may be issued, you can be arrested and charged with failing to appear even if the prosecutor decides to drop this case, and you could forfeit the money you posted today.

If the prosecutor charges you with any crime, you will have a right to be represented by an attorney. If you cannot afford an attorney, one will be provided for you.