

**Testimony of Alan Pemberton on Bill 17-913:
“Juvenile Justice Improvement Amendment Act of 2008”
October 20, 2008**

Introduction

I am Alan Pemberton, lead counsel to the plaintiff class in the Jerry M litigation. My co-counsel are the ACLU National Prison Project and the Public Defender Service.

As I testified at the July 14 DC Council Roundtable regarding the problems with housing youth in adult jails, we are interested in working with the Council and other interest holders in creating solutions to this problem.

Brief Overview of Legislation

The Juvenile Justice Improvement Amendment Act of 2008 (“Juvenile Justice Act”) includes a number of measures intended to address the issues surrounding youth in adult jails. Although other witnesses today are better able than I am to testify as to the technical aspects of these proposed measures, I do want to offer my support of the “reverse waiver” provision in this Act and to testify concerning my views on the Home Rule Act issues that are presented.

By way of background, the current system contains no provision for judicial consideration of whether a youth who is prosecuted as an adult should be returned to the juvenile system. This leads to an unnecessary number of youth detained in adult facilities awaiting trial and results in youth being sentenced as adult felons who might have had a better chance of being returned to society as responsible citizens if they had been sent to the juvenile justice system. To address this problem, the Juvenile Justice Act contains a “reverse judicial waiver” provision under which Criminal Division judges would have the discretion to transfer a “direct file” youth back to the Family Division to be tried as a child.

Home Rule Issues

Before passing the Act, the Council must conclude that it can enact such a measure without violating the Home Rule Act. We believe that the proposed law would not violate the Home Rule Act.

Title 11 grants the Family Division with jurisdiction over a “child” as defined in title 16. The proposed legislation amends the definition of “child” in D.C. Code 16-2301 to provide that a “child” includes one who charged as an adult by the U.S. Attorney but who is subsequently reverse waived by the criminal court judge back to the Family Court.

This modification raises two potential Home Rule Act issues. (1) The Home Rule Act states that the DC Council has “no authority” to “enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts)[.]” Second, The Council has “no authority” to “enact any act or regulation . . . relating to the duties or powers of the United States Attorney.”

(1) Reverse Judicial Waiver Legislation Would Not Amend Title 11.

The first question is whether amending Title 16's definition of child as referenced in Title 11 will offend the Home Rule Act's prohibition against amending Title 11. Council likely has authority to do so without implicating the Home Rule Act because:

(a) The Home Rule Act limitation explicitly refers to Title 11, not Title 16. At this simplest level, the Home Rule Act restriction against amending Title 11 is inapplicable. No text of Title 11 will change under reverse judicial waiver. The natural reading of the Home Rule Act is that the parenthetical phrase "relating to organization and jurisdiction of the District of Columbia courts" merely describes Title 11, entitled "Organization and Jurisdiction of the Courts."

(b) D.C. Court of Appeals has upheld a Council amendment to Title 16 affecting the organization and jurisdiction of the courts. In *Flemming v. U.S.*, the court stated "although the Council is prohibited by [the Home Rule Act] from amending any provision of title 11 of the Code . . . it is not barred from amending [the statutory issue at issue in *Flemming*] which is in title 16." This is what would occur here.

(c) Finally, the Code has a provision that allows transfer of a juvenile from the Criminal to Family Division. The D.C. Court of Appeals in *Choco v. U.S.* found that the Criminal Division "must . . . transfer this case to the Family Division" when the government failed to prove that the juvenile met the age requirements in § 16-2301(3). Reverse waiver is analogous: it grants a Criminal Division judge the ability to pronounce a youth to be a "child" under § 16-2301, and order the "child" remanded to the Family Division.

(2) Reverse judicial waiver Legislation Likely Does Not Relate to the Powers or Duties of the U.S. Attorney

Despite the Home Rule Act's prohibition against legislation that relates to the duties or powers of the U.S. Attorney, the Council has passed many measures that create, amend, or repeal laws relating to criminal offenses prosecuted by the U.S. Attorney and affect how those cases will be handled in court. The proposed act is another such measure.

Such enactments likely do not trigger the Home Rule Act because, when Council enacts legislation creating, amending or repealing laws relating to specific criminal offenses, the duties and powers of the U.S. Attorney to prosecute criminal offenses remain unaltered – the U.S. Attorney still prosecutes all offenses not reserved for D.C.'s Attorney General. Similarly, under the reverse waiver bill, the U.S. Attorney still determines whether a juvenile should be prosecuted as an adult. Reverse waiver would merely give Criminal Division judges their own power to terminate such prosecutions and remand them to the Juvenile Division, just as they may already do when they conclude that other requisites of such a prosecution are not met.

Thank you.