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STATEMENT OF
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Bill 15-1073, The "Electronic Recording Procedures Act of 2004".

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Good morning Chairperson Patterson, members of the committee, and other Councilmembers. We are pleased to have the opportunity to testify on Bill 15-1073, The "Electronic Recording Procedures Act of 2004."

We must oppose this legislation. The result of this bill – perhaps unintended – will be to let criminals go free even when their own words establish their guilt.

We fully agree that it is a good idea to record (preferably on videotape) confessions made by criminal suspects. Indeed, we think having an electronic recording of the interrogation will be helpful to the government much more often than it will be helpful to the defendant. Defendants often claim at trial that the detective is lying about what they said, or that the detective misunderstood, or even that the detective forced the defendant to confess. A videotape of the interrogation will discourage or rebut such distortions of the truth.

However, it is unwise to legislate a requirement of recording that is enforced by exclusionary sanctions. The Metropolitan Police Department already has a General Order (GO-SPT-304.16) establishing its policy regarding electronic recording of interrogations. Failure to comply with a general order is grounds for disciplinary action, and we think it should be left to the police department to ensure that its order is complied with. Statements should not be excluded from evidence merely because they have not been recorded.

It is totally inappropriate to legislate a presumption of involuntariness if the statement is not recorded. Such a presumption would have no basis in fact, it reflects a fundamental misunderstanding of the law, and it would facilitate the commission of perjury by criminal defendants.

We recognize that this bill makes the presumption rebuttable, but it still erects a significant barrier to the admission of unrecorded statements. Normally the government need only prove by a preponderance of the evidence that a defendant's statement was voluntary. *United States v. Turner*, 761 A.2d 845, 854 (D.C. 2000). Normally this burden may be carried by demonstrating that the defendant made the statement after knowingly, intelligently, and voluntarily waiving his *Miranda* rights. This bill increases the government's burden of proof to "clear and convincing evidence" and it seems to say that an unrecorded statement is still presumed to be involuntary even if the defendant has made a valid waiver of his *Miranda* rights.

Both the Supreme Court of the United States and the District of Columbia Court of Appeals have made it clear that a statement is not involuntary unless "the will of [the defendant] was 'overborne in such a way as to render his confession the product of coercion.'" *United States v. Thomas*, 595 A.2d 980, 981 (D.C. 1991)(quoting *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991)).

When ruling on a claim of involuntariness, a court must consider the totality of the circumstances, not just one or two factors in isolation. *Thomas*, 595 A.2d at 981. It is never appropriate to find a statement involuntary absent a substantial element of coercive police misconduct. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986).

Indeed, Congress has legislated in this area in a statute that expressly applies to the District of Columbia. 18 U.S.C. § 3501(b) provides that "[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including [five enumerated factors]." The approach taken in Bill 15-1073 is totally inconsistent with this Congressional mandate to consider "all the circumstances surrounding the giving of the confession."

The approach of this bill is also completely inconsistent with case law, which does not give presumptive weight to any one factor. "Generally, the factors for consideration in determining voluntariness include the circumstances surrounding the questioning, the accused's age, education, and prior experience with the law, his physical and mental condition at the time the statement was made, other factors showing coercion or trickery, and the delay between the suspect's arrest and confession." *Davis v. United States*, 724 A.2d 1163, 1168 (D.C. 1998). In our experience, it is very rare for a court to find a statement involuntary. This is as it should be, because a statement is not involuntary unless the will of the suspect was "overborne in such a way as to render his confession the product of coercion." *Thomas*, 595 A.2d at 981.[1]

[1] Indeed, the District of Columbia Court of Appeals has often reversed rulings excluding a statement as involuntary because the trial court had not properly applied the "totality of the circumstances" test for deciding issues of voluntariness. *See, e.g., United States v. Turner*, 761 A.2d 845 (D.C. 2000); *United States v. Bell*, 740 A.2d 958 (D.C. 1999); *United States v. Thomas*, 595 A.2d 980 (D.C. 1991).

Moreover, there is no factual justification for erecting a presumption that a statement has been coerced simply because it has not been recorded electronically. Each year the Superior Court of the District of Columbia admits evidence about statements made during police interrogation by scores of defendants. No one has ever thought that these statements were involuntary simply because they had not been recorded electronically.

A finding of involuntariness will have especially harsh consequences. An involuntary statement is inadmissible at trial for any purpose. *United States v. Turner*, 761 A.2d 845, 853 (D.C. 2000). By contrast, "voluntary statements are admissible to impeach a defendant's trial testimony even if taken in violation of *Miranda*'s prescriptions." *Id.* The Supreme Court wisely has held that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris v. New York*, 401 U.S. 222, 226 (1971). If this bill is enacted, however, a defendant will be able to take the stand and lie, but the government may well be precluded from impeaching him with his confession to the crime simply because that confession was not electronically recorded and is presumed to be involuntary.

Much of our discussion has centered on the bill's misuse of the term "involuntary," but we would still object to the legislation even if it erected a rebuttable presumption that the statement is "inadmissible." "Confessions remain a proper element in law enforcement." *Arizona v. Mauro*, 481 U.S. 520, 529 (1987) (citations omitted). "Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)(citations omitted). This vital interest of our society does not become any less compelling

merely because a defendant's statement has not been recorded electronically.

As we understand this bill, a statement that is not in fact the product of coercion and was taken in complete compliance with the requirements of *Miranda* may be excluded from trial simply because it was not recorded electronically. Such a result is totally unjustified, and we respectfully ask the Council to reject this legislation.

Thank you for the opportunity to express our views. We request that this testimony be made a part of the record and we would be pleased to answer any questions you might have.