

GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT



*Addressing Crime Trends (ACT) Now
Amendment Act of 2023 (B25-555)*

Testimony of
Pamela A. Smith
Chief of Police

Before the
Committee on the Judiciary & Public Safety
Council of the District of Columbia
The Honorable Brooke Pinto, Chair

November 29, 2023
1350 Pennsylvania Avenue, NW, Room 500
Washington, DC 20004

It is the mission of the Metropolitan Police Department to safeguard the District of Columbia and protect its residents and visitors with the highest regard for the sanctity of human life. We will strive at all times to accomplish our mission with a focus on service, integrity, and fairness by upholding our city's motto, Justitia Omnibus -- Justice for All.

Good afternoon, Chairperson Pinto, members and staff of the Committee, other Councilmembers, and everyone in our great city watching us today. I am Pamela Smith, Chief of Police for the Metropolitan Police Department (MPD), and I am here with Lindsey Appiah, the Deputy Mayor for Public Safety and Justice to discuss Mayor Bowser's proposed legislation, the *Addressing Crime Trends Now Amendment Act of 2023*, or ACT Now. I would like to thank Chairperson Pinto for so quickly scheduling this hearing. It is critical that we continue the work that has been done so far this year to try to ensure that DC has the laws and tools to best address the two most significant public safety issues we are facing: illegal guns and the increasing use of them in the District, and the historically low sworn staffing levels at MPD.

Violent crime, largely driven by the possession and use of illegal guns, has been growing since March 2023, when the number of robberies and carjackings suddenly and sharply spiked. The increase peaked in June, with more than twice as many robberies and three times as many carjackings reported than in June of 2022. Mayor Bowser and the Administration reacted quickly, with the introduction of the *Safer Stronger Amendment Act of 2023* in May. Chair Pinto picked up the baton, holding a hearing on the legislation in June, and in July, proposing and shepherding through Council the *Prioritizing Public Safety Emergency Amendment Act of 2023* to immediately address some targeted legislative needs. This momentum has continued with Chair Pinto's *Addressing Crime through Targeted Interventions and Violence Enforcement Amendment Act of 2023*, and now Mayor Bowser's ACT Now proposal.

The forward momentum on policy and legislation is critical. Crime is still higher when compared to the same period in 2022. It is going to take some time to reverse the sharp rise in crime beginning this past March. Carjackings are down 7 percent, assault with a dangerous weapon is down 6 percent, and vehicle theft is down 11 percent. Overall index violent crime is down three crimes, and robbery is up 14 crimes over the prior period in 2023.¹

The second major public safety challenge we are facing is the lowest sworn staffing level in five decades. As of November 22, 2023, we have 3,339 sworn members. This is 460 fewer members than just three years ago.² To put that in perspective, at that time there was an average of 342 sworn members in each police district. In just three years, we have lost staffing for one and one-third police districts. However, there is reason for optimism. Our recruit classes are slowly growing. The classes for August, September, and October were the largest in more than a year.

¹ Data comparing the 133 days between July 17 through November 26, 2023, to the prior 133 days (March 6 through July 16, 2023). Chief Smith was appointed Acting Chief of Police on July 17, 2023. The *Prioritizing Public Safety Emergency Amendment Act of 2023* became effective on July 20, 2023. Motor Vehicle Theft is classified as a property crime, not a violent crime.

² As of the end of FY2020, September 30, 2020. This is about 700 sworn members lower than the end of FY2013 (4,010).



Attrition was lower in Fiscal Year (FY) 2023 than originally projected, with decreases in both resignations and retirements. Nevertheless, there was a net loss of 123 sworn members in FY23.

The many steps that the Administration is taking to address the two overarching challenges – violent crime and staffing – have been discussed at multiple hearings throughout the year so I will focus on the new tools in the proposed legislation. To begin with, ACT Now proposes changes in three criminal charges to help the criminal justice system address emerging crime trends.

Drug Free Zones

First, residents have valid concerns about public space with persistent drug activity – particularly distribution – and the disorder and other crimes that accompany them. Addressing these open-air drug markets through enforcement is increasingly challenging. Investigations take significant time and resources. There is less reliance on cash changing hands, making transactions harder to identify and track. And when arrests are made, the arrestees are often quickly back on the street, or they are quickly replaced by others involved in the drug trade. We need a new strategy – or perhaps an old one – to help us disrupt this criminal activity. For nearly 20 years, from 1996 through 2015, District law authorized the Chief of Police to establish drug free zones, DFZs, to interrupt illegal drug activity. We believe this can be an effective tool again by authorizing police to disperse groups of people engaging in illegal drug activity in designated areas for a limited time. Our goal is not to make a lot of arrests. Indeed, under the prior iteration of the law, the Department apparently did not make many arrests for failure to disperse. But disrupting the illegal activity will allow time for communities to come together to reclaim their public space, and potentially to work with other government and community partners to enhance it.

As detailed in the proposed legislation, MPD could establish a DFZ for up to five days when evidence and analysis indicate that drugs are being bought, sold, or used illegally, and threaten the health and safety of residents of the area. The Department would post signs in the area notifying the public of the boundaries and effective dates of the zone, and the prohibited behavior – that it is unlawful for two or more persons to congregate to illegally to buy, sell, or use drugs, and to fail to disperse from the zone when warned by a police officer. Violating the dispersal order could result in arrest and, if convicted, a penalty of up to 180 days in jail.

To highlight a few key points in the proposal:

- **Size:** The size of a DFZ is limited to no more than 1,000 feet per side.
- **Public Notice:** DFZs will be clearly marked with signs posted within and along the borders of the DFZ. A sample of the signs that were used previously is attached to my testimony.
- **Stops:** The establishment of a DFZ does not eliminate the requirement for an officer to have reasonable articulable suspicion before conducting a stop and to document it accordingly. The legislation notes that officers must consider the totality of the circumstances to determine whether someone is congregating for the purpose of illegal drug activity, such as observing the exchange of money for small packages, information from a reliable source, or prior drug convictions. Officers also should consider whether someone has legitimate reasons



for congregating, such as waiting for a bus or being near home. Some Councilmembers mentioned concerns that this could be used to target people coming and going from drug treatment centers in the city; language could certainly be added to the legislation to include that as an example of a legitimate activity.

- **Constitutionality:** Finally, the Office of the Attorney General (OAG) had previously testified to Council of concerns about the constitutionality of the prostitution free zones, which mirrored the language of the DFZs. We addressed this concern by adding a specific element of intent to commit drug crimes to the legislation, which the OAG has certified as legally sufficient.

In short, drug free zones are a useful and constitutional tool to address drug-related crime on District streets and protect the public from the dangers often associated with the distribution of illegal drugs.

Organized Retail Theft

The Administration hears the concerns of businesses and residents from across the city, in all eight Wards, about the damage from retail theft. Just last week, The Washington Post highlighted how retail theft is negatively affecting business on the H Street Northeast corridor.³ The prior week, Forbes Advisor released a national survey, which estimated that the cost to business of retail theft in DC – which included lost products, higher insurance, and other factors – was estimated at \$880 per resident.⁴ The Mayor’s ACT Now proposes new legal tools to help police and prosecutors address key trends in retail theft. Currently, first degree theft, also called Theft I, requires that the value of the goods stolen exceed \$1,000. Under the proposed legislation, Theft I could include the theft of 10 or more items having a value of \$250 over a 30-day period. Committing an assault or intentionally destroying or damaging the property of a retail establishment would also qualify as Theft I.

Lastly, recruiting, directing, or coercing individuals to commit organized retail theft would be a new crime. This would address individuals who are not committing the theft but directing others to do it for them. This is critical to help break up these criminal enterprises by getting to the top people. The proposed penalty of a maximum of 15 years is higher than the penalties for Theft 1 (maximum of ten years) or for conspiracy to commit theft (maximum of five years) because it does not make sense that the people at the top of a criminal enterprise should be subject to a lower penalty than the people at the bottom.

It is important to note that a maximum sentence of ten years does not actually result in sentences of ten years. According to public data published by the DC Sentencing Commission, the average Theft I sentence is 13 months confinement.⁵ Even for offenders with two or more prior

³ Schwartzman, P. (2023, November 20). H Street was once a symbol of D.C.’s rebirth. Now it’s barely holding on. *The Washington Post*. <https://www.washingtonpost.com/dc-md-va/2023/11/20/h-street-corridor-dc-crime/>

⁴ Metz, J. and Megna, M. (2023, November 14). The Impact of Retail Theft on Small Businesses and States. *Forbes Advisor*. <https://www.forbes.com/advisor/business-insurance/impact-retail-theft-on-small-businesses>

⁵ The District of Columbia Sentencing Commission. (2015). Final Data Sets. <https://sdc.dc.gov/page/datasets>



convictions for Theft I, which carries a maximum penalty of 15 years, the voluntary sentencing guidelines create a sentencing range of 14 to 32 months,⁶ part of which may be suspended.⁷ With sentences like this, it is clear why there is even less deterrence from committing Theft 2, which carries a maximum penalty of just 180 days. Our businesses need some relief, and this proposal can help the criminal justice system to address this problem. It should also be clear from this discussion why the Council should take up the Mayor's proposal in Safer Stronger to change the composition of the Sentencing Commission to include greater representation by people accountable to District residents.

Anti-Mask Law

The final proposed change to the DC Criminal Code is to revive a section of the *Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982* that was repealed by the Council in the summer of 2020. The repeal was perhaps an understandable reaction to the need for the public to wear masks during the pandemic to protect personal and public health. However, the law did not criminalize that conduct. The law prohibited people over 16 years of age wearing a mask on public space for the purpose of committing crimes or violations, intimidating, threatening, or harassing other people, or recklessly causing a reasonable person to fear for their safety.

The Department has charged this provision, which carries a 180-day maximum penalty, sparingly. In the 30 months before its repeal, MPD charged someone under this law only 15 times. In 14 of the cases, the subject was also charged with other crimes. In one case, officers were canvassing for someone who had committed multiple misdemeanor sexual assaults. They were able to charge a masked subject who was harassing another likely victim before he actually assaulted her.

This last case highlights how this law can be an important investigative tool. Anecdotally, we are hearing from more residents and businesses about people committing crimes such as robbery and retail theft while wearing masks. I have personally seen four individuals in a car all wearing full ski masks. If this law is revived, an officer may have reasonable articulable suspicion to stop someone wearing a mask, depending on the totality of the circumstances. For instance, wearing a ski mask in January when it is 20 degrees outside or a costume with a mask on Halloween would not be unusual or unexpected. However, it could be reasonable for an officer to conduct an investigative stop of someone wearing a full ski mask in July while loitering around a convenience store after a series of masked robberies at other convenience stores. This is all the more important now, when retail theft and violent robberies and carjackings are plaguing businesses and residents in our city. We urge the Council to revive this common-sense law.

⁶ The District of Columbia Sentencing Commission. (2023). *Voluntary Sentencing Guidelines Manual*. https://scdc.dc.gov/sites/default/files/dc/sites/scdc/page_content/attachments/2023%20Full%20Manual%20Final%20Updated.pdf

⁷ Pursuant to the Youth Rehabilitation Act, the Court may, in its discretion, issue a sentence less than any mandatory-minimum term. (D.C. Official Code § 24-903).



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In addition to these changes to the criminal code, Mayor Bowser, Deputy Mayor Appiah, and I urge the Council to consider the sections of ACT Now that take a second look at some of the provisions of the *Comprehensive Policing and Justice Reform Amendment Act of 2022*. We recognize the importance of fair and constitutional policing, and MPD is continuously working to earn and strengthen community trust. The District of Columbia has been a leader in systemic reform for decades, such as with uses of force and First Amendment assemblies. MPD has also long had one of the most restrictive policies and practices related to vehicle pursuits and neck restraints. However, when it comes to matters of public safety, it is important that we all be willing to assess our efforts and continue to adjust when appropriate. And the 2022 legislation merits review and revision in order to support public and officer safety, allow otherwise strong criminal cases to move forward, and ensure that MPD can recruit and retain the best police officers. I will explain in depth a few of the provisions and highlight others.

- **Vehicle Pursuits:** We appreciate the Council’s passage this summer of emergency legislation to amend the prohibition on pursuits in the 2022 legislation. Since the passage of the *Law Enforcement Vehicular Pursuit Clarification Emergency Amendment Act*, the Department has engaged in 13 pursuits,⁸ slightly lower than MPD’s prior average of four per month. None of these would have been permissible under the original law. The emergency language is more restrictive than our prior policy, but preserves the ability to pursue in some circumstances when the fleeing subject poses an imminent threat of death or serious bodily injury to another person. We urge the Council to make permanent this provision. We also urge the Council to repeal language that allows for certain practices that MPD does not authorize, including caravanning and ramming.
- **Neck Restraints / Asphyxiating Restraints:** MPD supports the intent of the provisions addressing neck restraints and asphyxiating restraints. For decades, MPD has required officers to avoid tactics that may impede a subject’s ability to breathe, or may result in chest or throat compressions, airway blockage, or positional asphyxia. Officers have also been required to seek medical attention immediately if a person appears to be having difficulty breathing. However, the definitions in the 2022 legislation went much further and have caused what we believe are unintended consequences.

The new law is rigid in its definitions, leaving officers with sustained use of force violations for contact with the back and side of the neck that is either incidental – lasting only moments before an officer realizes where their hand or arm is – or was intended to protect a subject – such as one officer who held the back of the neck of a subject who was banging their head against a brick wall. Alternatively, I have seen officers hesitate when trying to control a combative subject. This hesitation, although understandable, could have disastrous consequences for the officer or a member of the public, particularly if the subject is armed. And the sustained uses of force have serious consequences as well, because cases with uses

⁸ From July 20 to November 28, 2023.



of force outside of law or policy may not be papered or prosecuted. In addition, in future cases officers with sustained use of force violations may be portrayed negatively by defense counsel and lose credibility with the judge or jury.

Therefore, we urge the Council to pass the proposed language clarifying that the prohibition on neck restraints applies to actions that restrict breathing or choke an individual, but not simply contact with the side or back of the neck during a physical struggle to bring an individual into custody. The much broader definition of asphyxiating restraints – which essentially applies to the whole torso – would be clarified to apply to actions where the purpose or intent is to severely restricting breathing. Otherwise, any time a subject’s breathing is severely restricted – which can happen, for instance, when someone runs from police – an officer who has made contact with the subject’s torso risks a sustained use of force violation.

The legislation would continue to prohibit what the public thinks of as a chokehold, or using an object or body part with the purpose of severely restricting breathing. In addition, we recommend that this change be retroactive to the date the provisions were enacted so that MPD’s Use of Force Review Board can review each case to determine whether the conduct is prohibited under the amended definition and expunge sustained violations that would be permitted under the amended law.

- **Body-Worn Camera (BWC) Videos:** The Administration once again urges the Council to reconsider the prohibition on officers watching their body-worn camera videos before writing reports for routine cases. By establishing what is essentially a random memory test for officers, this law needlessly jeopardizes the city’s ability to hold offenders accountable – at every step from arrest warrants to papering to prosecutions. The credibility of officers can be impeached for any difference between the initial report – which has to be based solely on an officer’s notes and memory – and the video.

This prohibition is a departure from national best practice. Allowing officer viewing in most cases has the support of the independent Police Executive Research Forum, which conducted extensive research supported by the US Department of Justice to develop best practice policies around BWCs. Their rationale for allowing officers to review BWC videos noted that, “Real-time recording of the event is considered best evidence. It often provides a more accurate record than an officer’s recollection, which can be affected by stress and other factors. Research into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly.”⁹ The current law provides a strong advantage to the defense, which was not the intent of the District’s investment in BWCs.

⁹ Community Oriented Policing Services (COPS), U.S. Department of Justice and the Police Executive Research Forum (PERF). (2014). Implementing a Body-Worn Camera Program Recommendations and Lessons Learned. [https://www.policeforum.org/assets/docs/Free Online Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](https://www.policeforum.org/assets/docs/Free%20Online%20Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf)



Mayor Bowser’s proposal would still prohibit officers from viewing BWC video before writing initial reports for incidents with an officer-involved death, a firearm discharge by the officer, a head strike, an MPD canine bite, and any use of force with an immediately apparent serious bodily injury. The US Attorney’s Office also supports amending this provision. The Council should pass this common-sense revision.

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Lastly, several provisions in the 2022 law would result in MPD officers having fewer privacy rights than convicted criminals. Under District law, except in limited circumstances, MPD cannot release information about an individual’s arrest or conviction record unless the individual consents to the release of the information.¹⁰ I support holding officers accountable for misconduct, up to and including termination. However, we must strive to balance enhanced accountability for officers while acknowledging that they have privacy and safety interests as well. In order to continue to attract and retain the best officers, we must ensure that there is equity in handling their routine performance of duty that is not determined to be a serious violation of policy or law.

To that end, ACT Now would:

- Allow the faces of DC and federal employees to be redacted from BWC releases. The officers using force are already identified by name by the Deputy Mayor. But without good reason, the District should be cautious before subjecting government employees and their families to the virtual and real-life harassment that has become so prevalent in today’s society. We already have concerns that the automatic release of the involved officer’s name before any evaluation of whether the use of force is justified within policy or law may unduly prejudice members of the public and subject the officer and family to harassment. However at least there is some tie to the officer’s actions, rather than simply being a government employee at the scene of a use of force.
- Clarify that no personally identifying information or medical information about officers shall be subject to disclosure. We should all be able to agree that the District government should not unduly expose private medical information about officers or information that would put them at higher risk of identity theft.
- Remove employee names from released discipline records and the announcements of adverse action hearings, and require disclosure only in sustained investigations/discipline cases that result in suspension, demotion, termination. To compare this to the handling of criminal cases, this provides for the release of identifying information only if there is a “conviction” (a sustained violation) for serious misconduct that merits a significant penalty.

¹⁰ Pursuant to DC Municipal Regulations Section 1-1004 Adult Records. Under DC Code 5-113.01(a)(4), arrests are required to be maintained in “arrest books,” but these are not available to the public in a format that can be searched by the arrestee name.



- Clarify that when an officer is the victim of a crime for which the trial is usually a bench trial, the defendant should be granted a jury trial only if the officer was in uniform or acting in official capacity at the time of the crime. Defendants should not be granted special advantages just because they commit crimes such as misdemeanor sexual abuse, attempted theft, or destruction of property against someone they did not know was a police officer. If we want officers to live in DC, they should have equal protection under the law.
- Repeal the language giving the Office of Police Complaints (OPC) “unfettered access” to information related to any case under OPC’s purview. This includes all complaints, all use of force incidents, and any in-custody death. Instead, the Administration’s proposed legislation would reinstate OPC’s “timely and complete access to information,” as well as the requirement that identifying information in these files remain confidential, which was inexplicably repealed in the 2022 legislation.

This provision creates substantial risks regarding the release of security-sensitive information, such as the identities of witnesses and confidential sources. This concern is highlighted by a recent incident where an OPC employee was discovered to be watching body-worn camera videos with no justification. Particularly since OPC lacks the many layers of accountability and oversight that have been put in place at MPD, providing OPC unfettered access to all MPD files without any obligation of confidentiality is highly problematic.

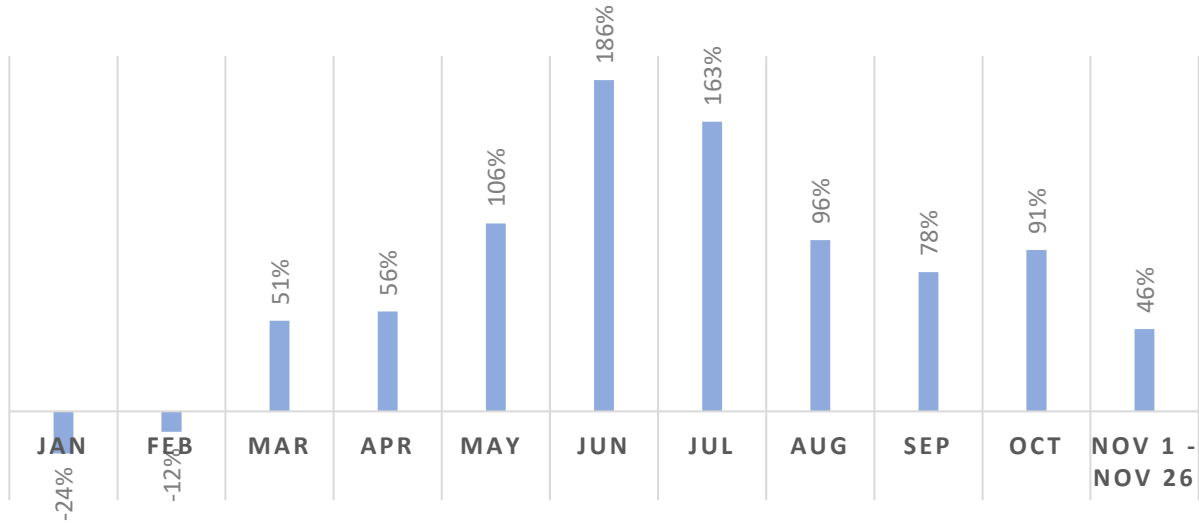
The Department has a strong record of providing requested information to OPC under the “timely and complete access” standard. However, unlike “unfettered access,” it allows for the possibility that we may not always agree that all the requested information is either relevant or should be released outside the Department. In these infrequent cases, OPC is able to seek redress with the Chief of Police or the Council. This standard is important not only to members, but should be important to anyone who may be identified in a police file. The Chief of Police and members of the Department are subject to questions and accountability for our actions daily – through the public, the media, the courts, OPC, auditors, the Council, and others. That is not true of OPC. Therefore, OPC should not have unfettered access to these highly sensitive files, and they should be required to keep the identity of people named in them confidential.

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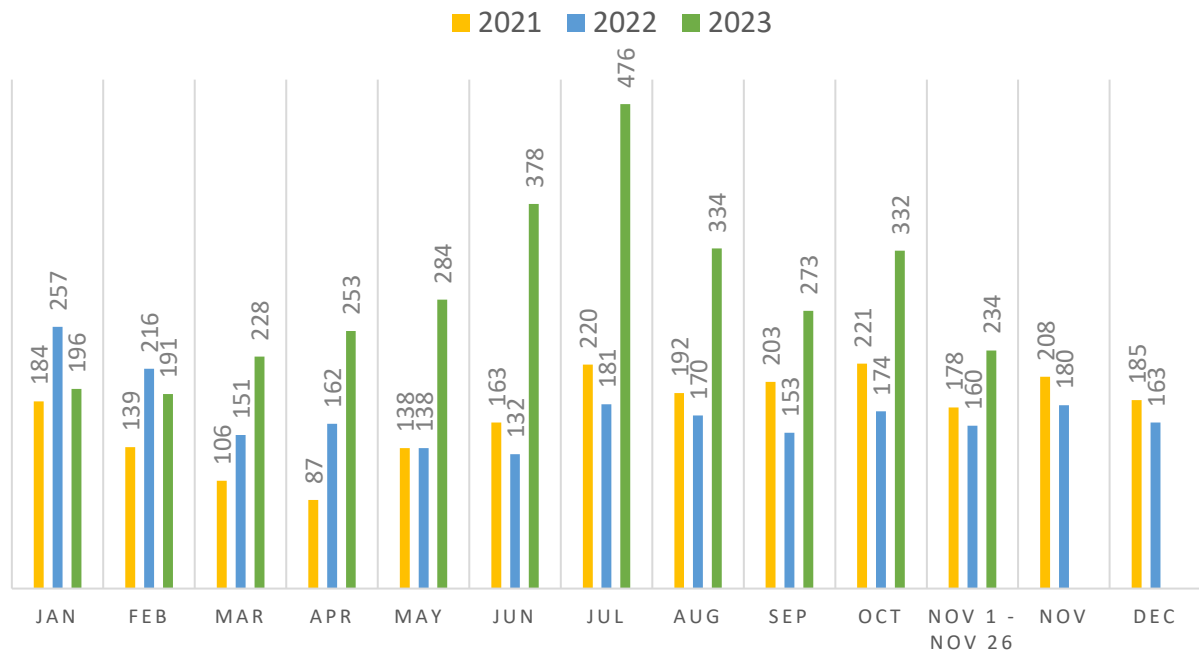
In conclusion, thank you for the opportunity to speak with you today about ACT Now. By closing some significant gaps in our criminal code, ACT Now will enhance the ability of MPD and our government partners to protect our communities and hold offenders accountable. In addition, by amending some recently enacted legislation, the Council will support the community and officers in key ways. The amendments will lower or remove recently enacted barriers to closing and prosecuting cases, hopefully allowing us to remove violent offenders from streets. The amendments will not only support good police officers who are doing good work in our communities daily, but will support officer retention and recruitment. In turn, this will help us gradually reverse the devastating reduction in police staffing, and therefore support a safe and vibrant city. I appreciate your consideration of this important legislation.



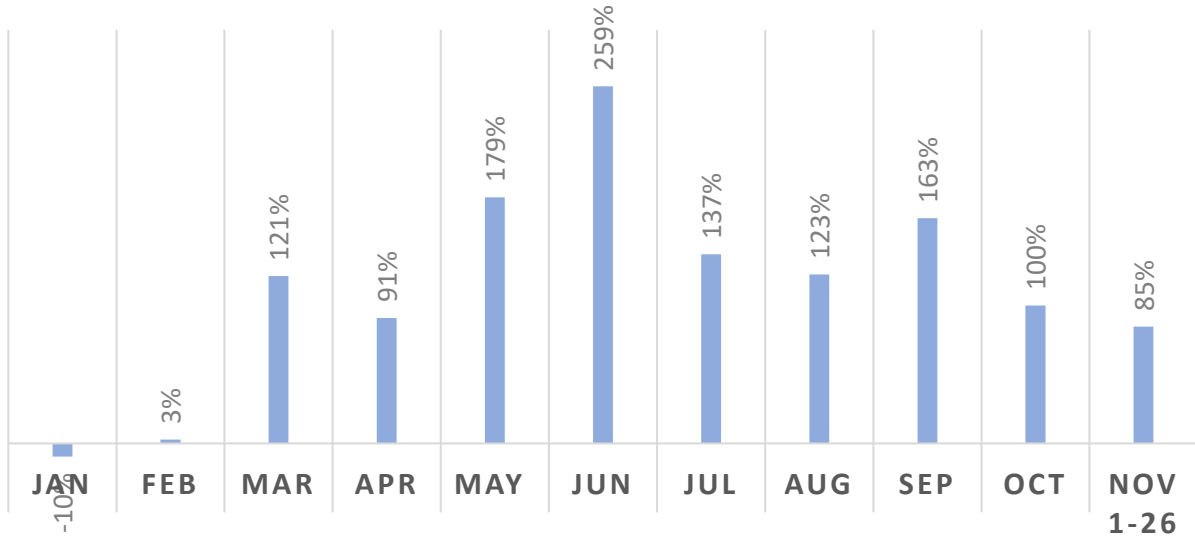
% CHANGE IN ROBBERIES BY MONTH, 2023 VS 2022



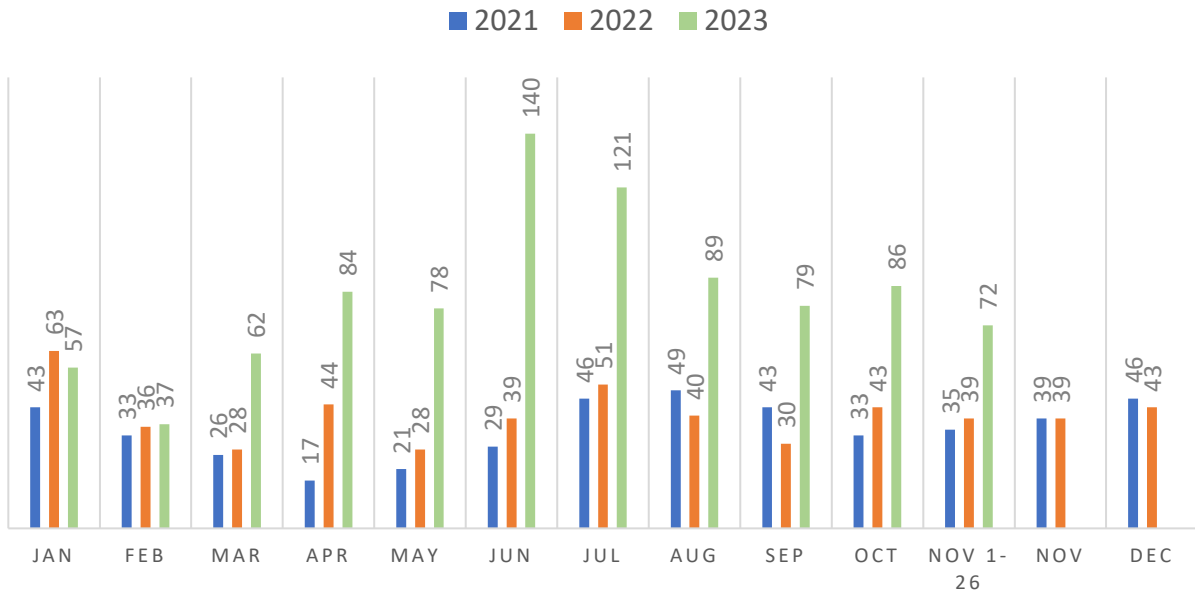
ROBBERY BY YEAR AND MONTH



% CHANGE IN CARJACKINGS BY MONTH, '23 VS '22



CARJACKINGS BY YEAR AND MONTH





WARNING

This area has been declared a
DRUG FREE ZONE

BY ORDER OF THE CHIEF OF POLICE

Any person congregating in a group of two (2) or more on public space within the boundaries of this Drug Free Zone for the purpose of participating in the use, purchase, or sale of illegal drugs, and who fails to disperse after being instructed to disperse by a uniformed member of the Metropolitan Police Department, is subject to arrest. An arrest can result in a fine of not more than \$300, imprisonment for not more than 180 days, or both.

[D.C. Law 11-270, Anti-Loitering/Drug Free Zone Act of 1996]

BOUNDARIES

Boundaries of Defined Drug Free Zone:

EFFECTIVE DATES

Start Date:

Time:

End Date:

Time:

Cathy L. Lanier
Cathy L. Lanier
Chief of Police

QUESTIONS? Contact the Patrol Services and School Security Bureau at (202) 576-6600 or visit www.mpdc.dc.gov/aboutdfz

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