OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

TO: Kathleen Boucher
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VIA Marc P. Hansen Marc Hansen
County Attorney

FROM: Edward B. Lattner EBL
Chief, Division of Human Resources & Appeals

DATE: November 14, 2011

RE: **Bill 35-11, Offenses—Loitering or Prowling—Established**

Bill 35-11 would prohibit certain loitering and prowling, defined as "remain[ing] in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity."

Bill 35-11 is based on § 250.6 of the Model Penal Code. Laws based on the § 250.6 of the Model Penal Code, have met with mixed results in the appellate courts. Courts in Oregon, Washington, Idaho, and the United States Court of Appeals for the Eighth Circuit (reviewing an Omaha, Nebraska law), have found those laws to be unconstitutional, while courts in Florida, Georgia, and Wisconsin have upheld those laws. Even the Florida court acknowledged that its loitering and prowling statute "reaches the outer limits of constitutionality and must be applied with special care."

Although open to reasonable debate, we believe that it is more likely than not that the Maryland Court of Appeals would find Bill 35-11 unconstitutional, because it vests a police officer with virtually unfettered discretion to determine whether a person is committing the crime of loitering and prowling. We believe that the Court of Appeals' analysis would be heavily influenced by the impingement Bill 35-11 places on the otherwise constitutionally protected right of a person to move about in a public place.

Background

Loitering laws have a long and checkered history in American jurisprudence.[1] These laws typically permit the arrest of individuals suspected of having committed or of being about to commit a criminal offense, but they require little or no proof of actual misconduct by the accused. The Model Penal Code's loitering and prowling statute was an attempt to fashion a constitutional loitering statute, narrowly designed to reach only alarming loitering. Model Penal Code Commentary 388. This approach has not gained universal approval in the courts.

Courts finding loitering and prowling laws unconstitutional.

In *State v. Bitt*, 798 P.2d 43 (Idaho 1990) the Idaho Supreme Court affirmed the dismissal of a criminal complaint charging a violation of Pocatello, Idaho's loitering and prowling statute finding that the statute was unconstitutionally vague on its face, violating the Due Process Clause of the Fourteenth Amendment. The statute, like Bill 35-11, provided that a person could not be arrested or convicted unless he fails to identify himself and offer an explanation of this presence and conduct which dispels the police officer's alarm. The court concluded that this vague language vested "virtual complete discretion in the hands of the police to determine whether the suspect has satisfied the identification and explanation provisions" of the statute. *Id.* at 48-49. The court likened this provision to the California stop and identify law the Supreme Court found unconstitutionally vague in *Kolender v. Lawson*, 461 U.S. 352 (1983). The California statute at issue in that case was unconstitutionally vague, because it failed to clarify what was contemplated by the requirement that a suspect provide a credible and reliable identification upon request and therefore vested complete discretion in the hands of the police to determine whether the suspect had satisfied the statute and was therefore free to go in the absence of probable cause to arrest. The Court further held that the statute implicated consideration of the constitutional right to freedom of movement. The Idaho court also found the statute violated the Fourth Amendment because it criminalized "behavior which amounts to nothing more than the type of suspicious conduct which justifies a *Terry* stop."[2] *Id.* at 49. This made the Idaho statute similar to the Texas stop and identify statute the Supreme Court invalidated on Fourth Amendment grounds in *Brown v. Texas*, 443 U.S. 47 (1979); the Texas statute permitted the police to stop an individual without any specific, objective facts establishing reasonable suspicion to believe that the individual was involved in criminal activity.

In *City of Bellevue v. Miller*, 536 P.2d 603 (Wash. 1975), the Washington Supreme Court

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[1] These laws usually outlawed vagrants, rogues, vagabonds, and "idle and disorderly persons."

[2] A *Terry* stop is a term that takes its name from *Terry v. Ohio*, 392 U.S. 1 (1968) in which the Supreme Court concluded that a police officer could constitutionally stop a person for a brief investigative detention where the officer has articulable suspicion that the person is involved with criminal activity (but not probable cause for an arrest). The police officer may also frisk that person for weapons where the officer reasonably suspects that the person is armed and presents a danger to the officer or others.

reversed the defendant's conviction under a city wandering or prowling statute because that statute was unconstitutionally vague on its face. That statute, again based upon § 250.6 of the Model Penal Code, prohibited wandering or prowling "in a place, at a time, or in a manner and under circumstances, which manifest an unlawful purpose or which warrant alarm for the safety of person or property in the vicinity." The court wrote that "legislation which purports to define illegality by resort to such inherently subjective terms as 'unlawful purpose' or 'alarm' permits, indeed requires, an *ad hoc* police determination of criminality." *Id.* at 607. And although it did not specifically identify the Fourth Amendment as a touch point, the court expressed concern that the statute permitted an officer to arrest an individual who engages in suspicious or questionable behavior. *Id.* at 607-08. Finally, the court noted that the Model Penal Code treated loitering and prowling as a "violation," a non-criminal act, while the city statute provided criminal penalties for its violation.

In *City of Portland v. White*, 495 P.2d 778 (Or. App. 1972), the court upheld the dismissal of a charge under Portland, Oregon's loitering and prowling statute, concluding that the statute was unconstitutionally vague.

Enforcement of an unconstitutional statute can not only lead to a reversal of a criminal conviction, but also an award of damages against the enforcing government and officer. In *Fields v. City of Omaha*, 810 F.2d 830 (8th Cir. 1987), the Eighth Circuit found Omaha, Nebraska's loitering and prowling statute unconstitutionally vague on its face and remanded the case to the trial court for a determination of compensatory and punitive damages. Specifically, the court found that the identification and explanation provisions vague, based upon the Supreme Court's decision in *Kolender*. The court also concluded that the arresting officer violated the Fourth Amendment when he stopped and detained Fields in the absence of articulable suspicion of criminal activity. Moreover, the arresting officer was not entitled to qualified immunity because, at the time of the arrest, it was clearly established that an officer could not stop and detain an individual absent reasonable suspicion of criminal activity. *Id.* at 835-36.

Finally, faced with Indianapolis' loitering and prowling law, the United States Court of Appeals for the Seventh Circuit abstained from deciding the issue, concluded that it was best resolved by the Indiana state courts. *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). In so doing, the court acknowledged that the law was vague, but not "so hopelessly vague that no feat of interpretation could save it from being invalidated as an undue burden of freedom of speech and assembly." *Id.* at 1352. Because only a state court can authoritatively interpret its own statutes, the court abstained from deciding the matter in order to permit the state court to put a gloss on the ordinance "and maybe save the ordinance from being struck down." *Id.* at 1353.

Courts upholding loitering and prowling laws.

While Florida has upheld the constitutionality of its state loitering and prowling statute, it

has done so by interpreting the statute to require an imminent breach of the peace or imminent threat to public safety before an arrest can be made. In *D.A. v. State*, 471 So.2d 147 (Fla. Dist. Ct. App. 1985), the court noted that there are two elements to a loitering and prowling charge: (1) that the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals and (2) such loitering took place under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. *Id.* at 150. "The gist of the first element is aberrant and suspicious criminal conduct which comes close to, but falls short of, actual commission or attempted commission of a substantive crime." *Id.* at 151. As to the second element, which the court described as the heart of the offense, the state must establish that the behavior described in the first element "must be alarming in nature; that is, it must threaten the physical safety of persons in the area or the safety of property in the area." The court concluded: "It must, in a word, amount to an imminent breach of the peace or an imminent threat to public safety."[3] *Id.* at 152. The court conceded that while this second element is akin to the type of conduct that justifies a temporary investigative detention (a *Terry* stop), "a much greater showing of alarm or concern" is required under the loitering and prowling statute." *Id.* at 153. "Stated differently, the statute must not be applied so as to criminalize conduct which amounts to nothing more than a basis to temporarily detain or arrest a person for committing some other crime." *Id.* at 153. Even with this judicial gloss, the Florida has acknowledged that "the statute, although constitutional, plainly reaches the outer limits of constitutionality and must be applied by the court with special care so as to avoid unconstitutional applications. *Id.* at 153.

The Georgia loitering and prowling law is patterned after the Florida law and the Georgia Supreme Court has upheld the law as constitutional based upon Florida case law. *Bell v. State*, 313 S.E.2d 678 (Ga. 1984).

Finally, the Wisconsin Supreme Court upheld Milwaukee's loitering and prowling law against vagueness, overbreadth, and Fourth Amendment challenges. *City of Milwaukee v. Nelson*, 439 N.W.2d 562 (1989). The court determined the law was not unconstitutionally vague because "it provides sufficient notice and guidelines to law enforcement officials, judges, and ordinary citizens by limiting the term 'loiter' in scope, place, or purpose." *Id.* at 448. The court concluded the law was not overbroad because it "is not aimed at constitutionally protected conduct but at conduct which causes alarm for the safety of person or property." *Id.* at 453.

Conclusion

Although prognostication of how the Maryland Court of Appeals might view a loitering and prowling statue based on the Model Penal Code is an inexact science, we believe that the

[3] By applying this judicial gloss to the statute, the conduct prohibited by the loitering and prowling law becomes substantially similar to disturbing the peace/disorderly conduct already prohibited by Maryland law. Md. Code An.. Crim. Law § 10-201 and Montgomery County Code § 32-14.

Court of Appeals would find the reasoning of the Idaho Supreme Court sounder than the opinion of the Florida Supreme Court. Bill 35-11 vests a police officer with "virtual complete discretion . . . to determine whether the suspect has satisfied the identification and explanation provisions" of the statute. *State v. Bitt*, 798 P.2d at 48-49.

In *Ashton v. Brown*, 339 Md. 70 (1995), the Court of Appeals struck down Frederick City's curfew law because it provided for an exception for events supervised by a "bona fide organization", a term the Court found to be unconstitutionally vague. The Court concluded,

> In addition, the curfew ordinance 'fails to provide legally fixed standards and adequate guidelines for [those] . . . whose obligation it is to enforce, apply and administer the penal laws.' [citation omitted]. In the present case, Chief Ashton purported to implement the curfew enforcement action at the Rainbow on the basis of his singular determination that a 'bona fide organization' was one without a profit-making motive. The Frederick ordinance provided no clear standards within which the Police Chief was obliged to act. *Id.* at 93.

Bill 35-11 presents the same problem for County police—there are no clear standards for a police officer to follow in determining whether a suspect has dispelled the officer's alarm. We believe that the Court of Appeal's concern over the broad discretion granted a police officer under Bill 35-11 will be heightened by the impingement this law places on the otherwise constitutionally protected right to move about in a public place. *See Kolender v. Lawson*, 461 U.S. 352.

Finally, Bill 35-11 contains two inherently contradictory provisions. On one hand subsection (c) permits an officer to arrest a person who flees without giving the person an opportunity to dispel the alarm of the officer. On the other hand, subsection (e) provides that a person must not be charged with a violation of the statute unless the officer has first warned the person and the person has refused to stop the violation. These provisions raise the possibility that an officer could arrest a person but no charges could be brought against the person.

If you have any concerns or questions concerning this memorandum please call us.

Cc: Thomas Manger, Chief of Police
Bob Drummer, Senior Legislative Attorney

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