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**35TH LEGISLATURE'S COMMITTEE ON
RULES AND JUDICIARY**

TESTIMONY

ON

BILL NOS. 35-0227, 35-0228, and 35-0269

Good Day, my name is Julie Smith Todman, and I am the Chief Territorial Public Defender for the Office of the Territorial Public Defender. I would like to begin by thanking Senator Capehart, Chairperson, Committee on Rules & Judiciary, and Senator Kenneth Gittens, Bill Sponsor, for this invitation to testify concerning these matters. I would further extend that gratitude to each of you, the members and staff of the 35th Legislature.

The Office of the Territorial Public Defender is established by title 5, section 3521 of the Virgin Islands Code to represent the indigent charged with crimes in court. Today, I am testifying on behalf of the Office of the Territorial Public Defender, which we call the OTPD. I was invited to provide my testimony concerning three (3) proposed bills.

Bill Number 35-0227: An Act amending title 3 Virgin Islands Code, chapter 37 to enact the Virgin Islands Commission on Ethics and Conflicts of Interest.

Bill Number 35-0228: An Act amending title 3 Virgin Islands Code, chapters 8 and 37 to enumerate the duties and functions of the Virgin Islands Commission on Ethics and Conflicts of Interest; appropriating \$500,000 from the General Fund of the Treasury of the Government of the Virgin Islands to the Virgin Islands Commission on Ethics and Conflicts of Interest and for other related purposes.

The first two bills create the *Virgin Islands Commission on Ethics and Conflicts of Interest*; provide authority for the Commission by amending authority now vested in the Attorney General; designate funds for the operation of the Commission; establish its rules; and provide for penalties for perjury and false statements to the Commission.

As for the third bill,

Bill Number 35-0269: An Act amending title 2 Virgin Islands Code, chapter 1 by adding a section 10 providing a penalty of not less than \$250 or a sentence of imprisonment for not more than 30 days for the commission of sworn falsehood/perjury related to proceedings before the Legislature of the Virgin Islands.

I am pleased to provide this input from the OTPD concerning these proposed pieces of legislation. My thoughts on these bills are mostly focused on the criminal penalties. The OTPD is the agency tasked with

representing indigent persons accused with crimes, and our interaction with the Courts regarding these bills would be in handling cases related to criminal charges arising from ethics related violations and the punishments the courts mete out related to those criminal charges.

Bill Number 35-0227

Taking each of the bills in numerical order, the OTPD has no significant comment as to Bill Number 35-0227, the enacting legislation. As attorneys, we are bound by an ethical code. The practice of regularly considering and applying those ethical mandates is benefit and makes lawyers better at their job. The OTPD wholeheartedly supports a new emphasis on ethics in governance and new tools to guide that practice.

Bill Number 35-0228

As for the second of the bills, OTPD believes Bill Number 35-0228 must be given careful consideration before passage because some portions may run afoul of the Constitution, as interpreted by the Third Circuit Court of Appeals.

The concerning sections is Section 1110(k).

Section 1110(k) states in part that, “No person may disclose or acknowledge, to any other person, information relating to a complaint,

preliminary inquiry, investigation, hearing, or petition for reconsideration that is before the Commission.”

This well-meaning provision probably runs afoul of free speech rights, at least as interpreted by the Third Circuit. The importance of the Third Circuit is that a constitutional challenge to this legislation may be brought in our local U.S. District Court. Any decision from that Court falls under the purview of the Third Circuit.

There are many similarities between Bill 35-0228 and the Pennsylvania Public Official and Employee Ethics Act (which I will refer to here as “the Pennsylvania Act.”)¹ The Pennsylvania Act was a 1978 law which sought to prevent financial conflicts of interest between a public official’s duties and his or her private financial affairs. Section 1110(k) of Bill 35-0228 closely tracks the language of Section 1108(k) of the Pennsylvania Act, making it illegal to disclose information about the operation of the commission. In a case known as Stilp vs. Contino,² the Third Circuit found that language in the Pennsylvania Act runs afoul of the First Amendment. Bill 35-0228 utilizes the same provision that the Third Circuit ruled against when applying the Pennsylvania provision.

¹ 65 Pa. Cons. Stat. § 1101, *et seq.*

² 613 F.3d 405 (3d Cir. 2010)

The Third Circuit specifically found that it was improper to silence complainants as to their ethics complaints. In the words of the Third Circuit, “... is not narrowly tailored ...[and] ... imposes a blanket prohibition on disclosure regardless of the timing of the disclosure.”³

In, Stilp, the Plaintiff challenged a state statute that barred disclosure of the filing of a complaint before the State Ethics Commission and mandated that complaint filers be bound to confidentiality in proceedings. Mr. Stilp publicized his filing of an ethics complaint, which violated a rule prohibiting disclosure of ethic complaint filings. Importantly, Mr. Stilp sought to challenge the confidentiality provision and intentionally violated the non-disclosure section, which is identical in effect to Section 1110(k) of Bill 35-0228. After publicizing his intended complaint, but before Mr. Stilp was criminally charged, Mr. Stilp sought injunctive relief to prevent his prosecution arguing that the statute was unconstitutional because it violated his First Amendment rights. The Federal District Court issued an injunction prohibiting enforcement of the provision. The Attorney General appealed to the Third Circuit. The Third Circuit agreed with Mr. Stilp and noted that:

“We hold that Section 1108(k), as construed by defendants **to prohibit public disclosure of the fact that an Ethics Act**

³ Stilp v. Contino, 743 F. Supp. 2d 460, 468 (M.D. Pa. 2010).

complaint was filed, does not survive strict scrutiny and cannot be enforced. A blanket prohibition on disclosure of a filed complaint stifles political speech near the core of the First Amendment and impairs the public's ability to evaluate whether the Ethics Commission is properly fulfilling its statutory mission to investigate alleged violations of the Ethics Act.”⁴

Because the language of Bill 35-0228 criminalizes constitutionally protected conduct, consistent with the Third Circuit’s ruling in Stilp v. Contino, the OTPD opposes Section 1112(k) of Bill 35-0228.

Bill Number 35-0269

Finally, Bill 35-0269 seeks to establish penalties for “commission of perjury in proceedings before the Legislature of the Virgin Islands.” The OTPD does not take a position on the necessity of Bill 35-0269 as this creates another criminal offense.

I appreciate the opportunity to provide you with the position of my office as to these bills. We also appreciate the difficulty of crafting these provisions and provide these comments to strengthen our collective effort to improve the operation of this Territory’s government for all of its people. With that being said, I would be happy to answer any questions.

⁴ Stilp v. Contino, 613 F.3d 405, 415 (3d Cir. 2010)(emphasis supplied)