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October 10, 2001

Honorable Cathy Patterson
Chairman, Judiciary Committee
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 109
Washington, D.C., 20004

RE: Testimony Concerning Bill 14-2, The "Misdemeanor Jury Trial Act of 2001"

Dear Chairman Patterson,

I am writing you in my capacity as the president of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), a local affiliate of the National Association of Criminal Defense Lawyers.¹ As our name implies, many of our members represent criminal defendants in the Superior Court of the District of Columbia; consequently, we are keenly interested in, and very supportive of, Bill 14-2, The "Misdemeanor Jury Trial Act of 2001." The attached written comments² are intended to supplement the oral comments which I expect to be made, on behalf of our organization, by our treasurer, Andrew J.J. Delehanty, at your public hearing on Friday, October 12, 2001.

¹ The District of Columbia Association of Criminal Defense Lawyers is an organization dedicated to advancing justice and due process for the District's citizens accused of crime or other misconduct. Our membership includes private criminal defense lawyers as well as attorneys from the Public Defender Service and the Office of the Federal Public Defender. We are a non-partisan organization.

² We have provided the Committee with 20 copies of the statement, plus for the convenience of Councilmember Ambrose, a special copy printed in 24 point Arial Black.

We hope you find these comments helpful. Thank you for your consideration.

Respectfully

Richard K. Gilbert

STATEMENT OF THE DISTRICT OF COLUMBIA
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF BILL 14-2, THE "MISDEMEANOR JURY TRIAL ACT OF 2001"

On behalf of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), I am pleased to appear before the Committee on the Judiciary to testify in support of Bill 14-2, The "Misdemeanor Jury Trial Act of 2001," a bill which would restore the right to a trial by jury for any defendant facing more than six months in jail, by virtue of being charged in a single proceeding with several misdemeanors. Our association supports the Misdemeanor Jury Trial Act for several reasons, based on our experience as criminal defense attorneys most directly affected by the current trial scheme in the Superior Court.

First, and most importantly, this issue is not theoretical. There are defendants who receive more than six in jail without ever having a jury hear their case. Recently in the District we have the public example of Attila Cosby, the George Washington University basketball player who was originally charged with rape, a manifestly serious crime, but one for which he would have had the right to have a jury decide who was telling the truth. Instead, the government charged him with seven misdemeanor counts, all allegedly arising out of the same incident. His trial ran for three weeks, but was heard only by a judge. After being convicted of five of the misdemeanor counts, he was sentenced in September to two and one half years in prison. His case unusual for its high profile, is unfortunately not the only such case.

The legal basis for denying a trial by jury to any person charged with an offense for which there is less than six months' incarceration springs from the 1989 Supreme Court case of *Blanton v. North Las Vegas*, 489 U.S. 538 (1989), holding that petty offenses which carry a maximum prison term of six months or less do not have the right of a trial by jury guaranteed in the Sixth Amendment. Currently, as the Cosby case demonstrated, prosecution of multiple misdemeanor offenses in one case can lead to sentences of more than one year. This question was not discussed in the *Blanton* case because Blanton only had one charge, and it was his first offense. Blanton could have received a longer sentence if he was a repeat DUI offender, but Justice Marshall specifically refused to discuss whether there would be a right to a jury trial in that case.

Mr. Blanton's offense was very minor, driving while under the influence of alcohol. His maximum possible punishment was two days to six months, with alternatives to incarceration available under that law. In the District of Columbia that same offense carries a penalty of \$300 fine and not more than ninety days' incarceration. 40 D.C. Code §716(a)(2), the District of Columbia has chosen to use that ruling as a basis to deny a trial by jury to a broad array of offenses including simple assault, possession of drugs, destruction of property, and petty theft. Further, the Jury Streamlining Act made attempts to commit a crime, which are considered misdemeanors, except in the case of robbery, all punishable by less than six month's imprisonment, which means that attempts to commit serious felonies such as drug dealing, auto theft, and burglary can be prosecuted without a jury trial.

Furthermore, the "petty" offenses, which the District allows to be tried without jury can be punished by up to 180 days in prison. In the District, this could mean being removed to a

remote place such as Red Onion, VA, a severe family separation. Fines of up to \$1,000 can be imposed for each offense. Five years' probation can be imposed. Offenses such as domestic assault, violating a protective order, theft, shoplifting, and possession of stolen property can be considered crimes of moral turpitude, and bar a non-citizen from readmission to the United States or renewing a visa.

The current Jury Streamlining Act has been used by the United States Attorney to perpetuate many practices, which are questionable and difficult to reconcile with the pursuit of justice. I do not have access to the full statistics of the Court or the United States Attorney's Office, but I have experiences, which my colleagues have shared. The United States has used the jury streamlining act to manipulate the outcome of felony cases, which are not to their satisfaction. I have represented defendants in at least two felony cases where the trial was set off several times for the many reasons trials can be postponed. Finally on the morning of trial, the Assistant United States Attorney asked the case to be reduced to a misdemeanor, by changing an offense such as unauthorized use of a motor vehicle to attempted unauthorized use of a motor vehicle. Neither the court nor the defense had any warning of this move, and the Assistant United States Attorney refused to give any reason, other than "prosecutorial discretion". The case had to be postponed yet one more time so it could be moved to a misdemeanor judge's calendar and re-scheduled for trial. By using this tactic, the United States Attorney wasted valuable court resources. The Grand Jury had heard witnesses, paid by the Court, had voted an indictment, paid by the Court, and a preliminary hearing had been held, paid by the Court. A felony judge, one of the more experienced and capable criminal judges in our court, had to tell other accused persons that they could not have trial on this day because my case was scheduled. And since most criminal defendants are represented by attorneys compensated under the Criminal Justice Act or from the Public Defender Service, the District fisc had to pay for the cost of preparing a jury trial, and lawyers preparing for a jury trial do spend more time on the case than for a bench trial.

After forcing the District of Columbia to make all of these expenditures the United States Attorney, who has no responsibility for the District budget, made all of them unnecessary. The United States Attorney did not have to give a reason for this decision. Let me emphasize that in both cases, these were not unfamiliar cases to the prosecuting attorney. Each had been scheduled for trial more than once, which means the case had been before a judge more than three times, as is usual in felony cases.

Fundamentally, we strongly believe that a trial by jury is at the heart of our judicial process, and should not be lightly thrown away. A trial by jury is a trial by the community, the ultimate source of the government's power. A fair-minded judge can evaluate evidence and decide whether witnesses are credible, but can never do a better job than a panel of citizens. The key to the jury is that not one person is convinced that an accused person is guilty, but several persons must be convinced. I refer particularly to domestic violence offenses, where there are often no witnesses other than the complainant and the defendant. Credibility is the key to guilt or innocence, and a jury does a better job than a judge, because each juror brings his or her own personal scheme for judging credibility, and the results can better reflect the opinion of the community.

Finally, a jury trial is what the public expects from the court for a serious offense. What is a serious offense? We believe it is wrong to deny the right to a jury trial for a compilation of offenses, each of which carries less than six months in jail, but which collectively can result in years of incarceration. Trial and sentencing by a judge for a petty offense such as a traffic violation are so common the public expects them. But if the whole case carries a severe penalty, the public expects a jury trial, regardless of the technical fact that all of the counts are misdemeanors. The "right to remain" silent, or the Miranda right is a good analogy. Some law enforcement officers do not agree with reading a suspect his rights, but the concept is now so rooted in both the legal and the popular culture that the United States Supreme Court recently unanimously affirmed its constitutional standing. The fact I could just say "Miranda" and everyone in this room knows what I am talking about shows how much this decision is part of the popular culture. So too a jury trial is the natural expectation of a defendant facing substantial jail time, and of the general public. And I can tell you that when I take the misdemeanor case of a new criminal client, I still very often get an expression of disbelief when I explain that a jury will not hear his case.

Should the Council consider these consequences when debating this bill? Again, Justice Marshall, writing in *Blanton*, said this is the job of the legislature. "The judiciary should not substitute its judgment as the seriousness for that of a legislature, which is far better equipped to perform the task, and is likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect." This Committee, and the Council should consider all of the results, which will fall on a convicted citizen and the public at large after a trial by court, rather than a jury. It should approve this legislation.

Thank you for your consideration.

Andrew J. J. Delehanty