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October 26, 2001

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

RE: Supplemental Comments 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 to continue our support of Bill 14-2, The "Misdemeanor Jury Trial Act of 2001." The attached written comments¹ are intended to supplement the written statement which we previously provided as well as the oral comments made on behalf of our organization by our treasurer, Andrew J.J. Delehanty, at your public hearing on Friday, October 12, 2001.

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

Respectfully

Richard K. Gilbert

¹ 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.

SUPPLEMENTAL 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 supplement our previous statement and oral testimony 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. In this statement we expand upon our answer to a question posed by Chairman Patterson during our testimony presented on October 12, 2001 about whether the proposed legislation would lead to "splitting," that is the practice of a prosecutor bringing otherwise naturally joined misdemeanors² as separate cases in order to avoid the requirement of a jury trial.

The short answer is that yes, this possibility exists, but only if the motive of the prosecuting agency is to get the maximum possible jail exposure for the defendant without risking a jury trial regardless of efficiency to the system. In practice, however, we think it is unlikely that prosecuting agencies, particularly the Office of the United States Attorney, will actually resort to this obvious manipulation for one simple reason. In most serious cases, it is the defendant who seeks a severance of charges and/or a severance from codefendants; the almost "canned" response of the government is to extol the virtues of efficiency of joined trials, citing years of favorable case law in support. We seriously doubt the Office of the United States Attorney will undercut this reasoning by engaging in the rank hypocrisy of doing exactly the opposite, artificially creating multiple cases out of one, and thereby increasing the administrative load on the court system, simply to avoid a jury trial.³

We urge the Committee to keep its focus on the fundamental issue - whether 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. We believe it is wrong⁴, and we believe that most of the community also instinctively believes it is wrong, especially when confronted with such obvious prosecutorial manipulation as occurred in the

² Superior Court Criminal Rule 8 permits joinder in an information of several different charges arising from the same incident or of several similar charges arising from different incidents.

³ If we are wrong about the intellectual consistency of the Office of the United States Attorney, we imagine the returns to them in engaging in "splitting" would be minimal. In the first place, the administrative burden to their office also increases with the number of case jackets it has to manage. Secondly, judges might grant a motion to consolidate charges, thereby granting defendants a jury trial anyway, or decline to impose consecutive sentences in many cases, thereby depriving the prosecutors of the greater sentence they seek. Thirdly, such blatant hypocrisy on the part of prosecuting agencies runs at least the risk that the Council itself will reexamine the right to a jury trial in all misdemeanor cases. Lastly, it is worth pointing out that in individual cases, it might well be in the interest of the defendant to have separate trials.

⁴ We hold this belief as a matter of principle. As a practical matter, many of our members who handle cases under the Criminal Justice Act in Superior Court may actually receive a windfall if the government were to take one integral case and break it down into several discrete cases.

Attila Cosby case.⁵ If this Committee, and the Council itself, agrees, it should enact the legislation and not be swayed by a prosecutorial bluff to clog the system with unnecessary cases, solely for the purpose of avoiding a trial by jury.

Thank you for your consideration.

Respectfully,

Richard K. Gilbert

⁵ Cosby was 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 a trial by jury. Instead, the government charged him with multiple 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 was unusual for its high profile, but is unfortunately not the only such case.