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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 the “Actual Claims Of Innocence 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, the “Actual Claims Of Innocence Act of 2001,” a proposal to amend Title 23-110 of the D.C. official code to allow individuals to file petitions of actual claims of innocence at any time. The attached written comments² are intended to supplement the oral comments which I expect to be made, on behalf of our organization, by myself 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 THE “ACTUAL CLAIMS OF INNOCENCE 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 the “Actual Claims Of Innocence Act of 2001,” the pending proposal to amend Title 23-110 of the D.C. official code to allow individuals to file petitions of actual claims of innocence at any time. This is legislation which will fill a glaring gap in ability of those persons who are actually innocent of the crimes for which they were convicted to gain some measure of justice.

Citizens who are not attorneys, and indeed even attorneys not familiar with the practice of criminal law, are often astounded to learn that proof, which is developed after a trial, that a prisoner is actually innocent of a crime will not automatically spare that prisoner the death sentence (*Herrera v. Collins*, 506 U.S. 390 (1993)) or lengthy incarceration (*Schlup v. Delo*, 513 U.S. 298 (1995) (proof of actual innocence may excuse procedural default of other constitutional claims, but is not necessarily itself a basis for constitutional relief). The “answer” to this anomaly is that under a rule of law, there must be rules, and our current rules in the District of Columbia, and elsewhere, do not provide a procedure for granting such relief in all cases of actual innocence.

There is no logical or legal reason why this must be so; legislatures are fully empowered to create such procedures. Indeed, this Committee has forwarded to the whole Council, a bill which would create precisely such a procedure in cases where DNA evidence may prove decisive. The proposal now before this Committee will create a procedure applicable to all claims of actual innocence, not just DNA cases. We unhesitatingly support such legislation.

While there are legitimate points appropriate for discussion, we assume that there are fundamental points of agreement shared by all of the members of the Committee, and by the Council itself. For example, we assume no member seriously believes it desirable or even just to incarcerate a person for a crime they did not commit, if for no other reason than that the actual perpetrator goes unpunished, sometimes to commit other offenses. Likewise, we assume that no member seriously doubts that instances of wrongful convictions do occur. This Committee has heard ample evidence of this when it conducted lengthy hearings on the Innocence Protection Act. Certainly each month, if not each week, produces new instances of innocent men and women who were wrongfully convicted. While DNA technology has produced many, but not all, of such exonerations, it is widely appreciated that many cases with similar types and quality of evidence exist which have no dispositive DNA evidence available. This bill will reach those cases.

We, therefore, understand that concerns about the proposal will center upon two questions. First, whether such legislation is necessary, that is does it provide relief to a truly innocent prisoner that is not available under existing law, and second, what will be the burden to the system, not from the meritorious claims, but from the many spurious claims which will likely be filed by desperate, but guilty, individuals. For the reasons set forth below, we believe careful consideration will lead the Committee to the conclusions that there are claims of innocence that

will not otherwise be heard without this legislation and that the burden from spurious claims will not be so great as to warrant foreclosing the meritorious ones.

We believe it would be helpful to the Committee to briefly review the forms of relief currently available to a convicted prisoner who becomes aware of evidence which would exonerate him or her. A convicted prisoner has, of course, the right to appeal the conviction. However, a direct appeal is usually limited to issues presented by the existing record of trial; evidence not presented at the trial is not considered by appellate courts.

The current version of District of Columbia Code §23-110 authorizes a defendant to challenge a conviction which is, among other grounds, obtained in violation of the Constitution or the law of the District of Columbia. Cases where the evidence of innocence was known to the government, but not disclosed to the defense, could be brought under this section. So also could cases where the evidence of innocence was known to the defense, or available to the defense through the exercise of due diligence, but was not presented because of the incompetence of the trial attorney. However cases where the evidence of innocence was not presented at the trial through no one's fault are not covered by the current version of §23-110.

Superior Court Criminal Rule 33 provides for the grant of a new trial based upon newly discovered evidence. Currently such a motion must be filed within three years of conviction. We anticipate that opponents of the proposal will seize upon Rule 33 to argue that a procedure exists whereby a criminal defendant can seek a new trial based upon evidence of the defendant's innocence, such that no new legislation is needed. We agree that the effect of the proposal would be to "overrule" the time limits of Rule 33, at least as to claims which go to actual innocence, however, we believe the Committee should do just that.

Certainly many claims of newly discovered evidence of actual innocence will be brought within the three year period; there is usually no advantage to a prisoner in delaying such claims. However, there are types of evidence which may not be discovered within that period through no fault of the prisoner. Generally speaking, there are five types of evidence which could exonerate a prisoner:

1. Credible admissions by the actual perpetrator. The defendant usually has no control over the actions of the actual perpetrator, and indeed may not even be aware of his existence, such as in cases when a perpetrator may confess to the crime when arrested years later for a crime in another jurisdiction.
2. Physical evidence at the crime scene and/or in contact with the victim which is linked to the actual perpetrator. While this could be the perpetrator's DNA evidence, it could also be such other evidence as fingerprints, trace evidence, such as hair and fibers from the perpetrator, or identifiable implements or objects left at the scene which are later traced to the perpetrator.
3. Physical evidence found on the perpetrator or in his possession, such as in his house or car, which links the perpetrator to the crime scene or victim. In addition to DNA from the victim, this could include trace evidence from the scene or victim, implements used in the crime, such as

a firearm identified as having been used to shoot the victim, or proceeds of the crime, such as a unique piece of jewelry from the victim.

4. Evidence which completely contradicts a key component of the government's case, such as a proof an "eyewitness" was not present at the scene, or the credible recantation by a key government witness.

5. Credible evidence of an affirmative defense, such as alibi or self-defense, when the witness was either unknown to the defendant, could not be found, or was, for reasons beyond a defendant's control, unwilling to come forward.

With the exception of the last category of exonerating evidence, it should be obvious that the timing of the discovery of exonerating evidence is often fortuitous and completely beyond the control of the defendant. We see no compelling reason why an innocent person should be denied legal relief simply because of the timing of events he cannot control. Even with respect to evidence of affirmative defenses, the category of evidence most likely to be within the defendant's control, it is not uncommon for a defendant to be arrested and held without bond for an offense occurring many months or even years earlier. As every experienced defense attorney will tell you, in many cases there are prospective witnesses who cannot be located, because the defendant, who is incarcerated, knows only a partial name or an old address. Since investigative efforts often stop upon conviction, the ultimate discovery of such witnesses is, as a practical matter, often a matter of chance as well.

One other comment about the time limits of Rule 33 is appropriate. The Rule requires, not that evidence be discovered within three years, but that a motion for relief be filed within that period. If the exonerating evidence is discovered by law enforcement, it may take time before it is communicated to an official, whether a police detective or prosecutor, who can appreciate its significance to the prisoner's case. It will take more time before it is communicated to the prisoner, or the prisoner's lawyer, if he still has one; (most prisoners are unrepresented after the appeals process is complete). Likewise, if a prisoner, or his family, discovers exonerating evidence, they must either contact the attorney if there still one representing the prisoner, engage a new attorney, or draft a *pro se* motion. In any case, time, perhaps crucial time, will elapse before the Court receives a properly drafted motion under Rule 33.

We also expect the Committee to address concerns about the burden on the Superior Court from spurious motions which may be filed under the proposal. We fully expect that there will be few, if any, spurious or frivolous motions brought under this new provision by attorneys for prisoners, but *pro se* motions may be another story. There is no question that prisoners who are not innocent, but who have exhausted their other avenues of relief, will seek to use the expanded grounds of §23-110. However, we think that the ultimate burden on the courts will be slight. In the first place, judges already receive many *pro se* motions from defendants which lack merit, and which are summarily disposed of. We expect the same to be true with many *pro se* motions under the new provisions.

The proposal specifically retains the language from §23-110 which permits the judge to deny, without notice to the parties and without a hearing, motions when "the motion and the files

and records of the case conclusively show that the prisoner is entitled to no relief.” We expect many, if not most spurious motions will fall under that definition. For example, we expect that judges will normally summarily deny the following types of *pro se* motions:

1. A motion merely asserting the prisoner is innocent.
2. A motion merely seeking to revisit the evidence at trial.
3. A motion asserting only evidence which impeaches a government witness, such as evidence of a conviction in another jurisdiction.
4. A motion asserting evidence which goes to a tangential point; for example, one asserting new evidence which discredits a cooperating accomplice when the prisoner himself confessed to the police.
5. A motion containing only a mere general assertion about what a witness would say, without a statement, affidavit, or sufficient details coupled with an assertion the witness is willing to so testify.
6. A motion in which the prisoner, having waived his right to testify, now asserts he wishes to testify about his innocence.
7. A motion containing a recantation by a government witness without explanation as to why the witness is now changing his or her story and why the witness waited to come forward.

To be sure, there are some cases in which a judge may hold a hearing on the above types of motions, and one would hope that, if the defect is simply in the lack of specifics, the judge would deny the motion without prejudice to the defendant refile the motion with the appropriate information. However, for the most part, these types of motions will likely take little of the judge’s time. In this regard, it is also worth noting that the passage of time, while legally irrelevant under the proposed revision, will still have an important function in resolving many motions. Because the failure to produce the evidence promptly, or the failure of a witness to come forward, will be a factor in judging the reliability of the evidence or the credibility of the witness, a prudent defense counsel will attempt to show the judge the reasons for the delay in producing the evidence. To use two obvious examples, a government witness who recants only upon being sent to the same prison as the prisoner, or the girlfriend who five years later “remembers” that the prisoner was at home with her on the night of the murder, are not likely to persuade a judge of their credibility, absent some extraordinary explanation for the delay in coming forward.

We anticipate that opponents of the legislation will complain about the necessity of “finality” of judgments. Frankly, we fail to see what is the value in the “finality” of an incorrect and unjust judgment, but the relative importance of “finality” as compared to getting it right, can be seen in the statutes of limitations. The government wants strict time limits to attack the convictions it obtains, but seeks much more freedom in bringing cases after the events have passed. The most serious offenses have no statute of limitations, and the statute of limitations for other felonies is six years, twice the time allowed by Rule 33.

There is, however, one area of finality that is worth discussing, that is the “finality” or closure to the victims or their families. I am not speaking about the right of the victim to closure at the expense of the continued incarceration of an innocent person. Surely no one thinks that is appropriate. However, there is concededly some diminution of closure when a guilty defendant

files such a motion. While we believe this concern is not a trivial one, we believe that, after careful consideration, that several factors tip the scales in favor of the proposed legislation.

First, as indicated above, a large proportion of the “frivolous” motions will be denied without a hearing. It seems to us, that unless and until the judge decided that notice to the parties and a hearing is required in the interests of justice, that the victims or their families need not be told about every pleading the prisoner makes.

In recent years the prosecutors in the District of Columbia have placed greater emphasis on working with, informing, and consulting with victims and their families. This is a laudable development. However, in our experience, one consequence of this is that prosecutors, and even more so detectives, have continued to “demonize” the defendant, often telling the family of other wrongdoing they suspect of the defendant; they assure the family that they have the right person and that no error has been made. This is true not just in cases where the evidence is airtight, but also in case which are not so clear, such as cases with potentially unreliable informants or possibly mistaken eyewitnesses. Presumably victims and their families, also follow the news; they know that people are exonerated every month, some with much publicity. When and if, a judge finds sufficient merit in a motion to warrant the steps of a hearing, we think it becomes the responsibility of the government to explain to the victim or the family that some evidence has come up which, if true, might call into question the correctness of the verdict and that the judge is only trying to insure that right thing is done.

We all recognize that no system run by human beings is perfect. Indeed, even if this legislation were to pass, there may still be innocent persons imprisoned who simply cannot meet the standards of this bill. However, we also believe that no person is "disposable;" the continued incarceration of an innocent person, if preventable, is, in our view, a scandal and a shame. We freely expect that very few motions under this proposal will ultimately be granted, but if even one innocent person can gain his or her freedom under this proposal, the cost can never be too great. Simply put, this bill is the right thing to do, and we ask the Committee to approve it.

Thank you for your consideration.

Richard K. Gilbert