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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 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, to continue our support of the "Actual Claims Of Innocence Act of 2001," which would 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 comments<sup>1</sup> are intended to supplement the written statement we previously submitted and oral comments which I made, on behalf of our organization, 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

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<sup>1</sup> 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 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 offer these supplemental comments to the Committee on the Judiciary 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. As we previously observed, this is legislation which will fill a glaring gap in the ability of those persons who are actually innocent of the crimes for which they were convicted to gain some measure of justice.

At the public hearing held on Friday, October 12, 2001, the Chair asked what position we took on some proposed substitute language proposed by the Office of the United States Attorney.<sup>2</sup> As we understand that proposal it would scrap the proposed legislation and in its place create a legislative exception, under very limited circumstances, to the time limits of Superior Court Rule of Criminal Procedure 33 under which a defendant could seek a new trial on the basis of newly discovered evidence of actual innocence. We believe the current legislation proposed by this Committee, which would amend section 23-110, is a superior vehicle for vindicating genuine claims of actual innocence. Consequently, we urge the Committee not to adopt the proposal of the Office of the United States Attorney.

In the first place, we would note that the legislation proposed by the Committee has the benefit of being much simpler to apply. As was pointed out by the Public Defender Service, there is already an existing body of case law interpreting section 23-110. Although the proposal of the Office of the United States Attorney follows the format of Rule 33, it includes many new requirements that have not been previously interpreted by any court in the District of Columbia.

However, our disagreement with the approach of the Office of the United States Attorney runs much deeper. The proposal of the Office of the United States Attorney, like the current Rule 33 and like current litigation of ineffectiveness of counsel claims under §23-110, places much of its focus on the conduct of the lawyer and not the truth of the evidence. Fully half of the findings which the United States Attorney would have a defendant establish by clear and convincing evidence in order to gain relief involve the “due diligence” of the defendant and his or her counsel. For example, the United States Attorney would deny relief to a defendant with conclusive evidence of his innocence if he cannot show that his attorney exercised due diligence in presenting the evidence to the court after discovering the evidence, even if that discovery was after the trial.<sup>3</sup>

Should the fault lie with the defendant himself, such as the failure to disclose exculpatory evidence to his counsel, we expect that judges will, under the Committee’s proposal, find that the defendant has “waived” the claim for purposes of §23-110. For example, a defendant is counseled by the trial judge that the decision whether to testify at trial is his alone and the trial judge determines on the record that the defendant is waiving that right in cases where the defendant declines to testify. We believe it would be the highly extraordinary case where a judge would later consider a claim of actual innocence based upon the defendant’s desire to testify in a post-trial setting.<sup>4</sup>

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<sup>2</sup> Of course, the Office of the United States Attorney opposed “the enactment of any legislation that would change the post-conviction jurisprudence in the District of Columbia - with the possible exception of claims of innocence based on DNA.” (October 12, 2001 Statement of United States Attorney Roscoe C. Howard, Jr., p.4, emphasis in original)

<sup>3</sup> We address the relationship between due diligence and the constitutional effectiveness of counsel below. Suffice it to say that there is no constitutional right to effective counsel after the trial and appeal are concluded, so a defendant whose attorney was grossly negligent when learning of exculpatory evidence years later would have no relief at all under the proposal of the Office of the United States Attorney.

<sup>4</sup> One such example might be in a codefendant case where the defendant could credibly show after the fact that he was intimidated from testifying by his codefendants. *See, United States v. Hamid*, 531 A.2d 628 (D.C. 1987)

However, the defendant does not have that same degree of control over counsel. For example, counsel may have known of the exculpatory evidence, but declined for a tactical reason not to introduce the evidence. Under the proposal of the Office of the United States Attorney, the defendant would get no relief even if the evidence of innocence were uncontroverted. As another, quite common example, the defendant may have told the attorney of possible existence of the exculpatory evidence but the attorney did not investigate thoroughly enough to discover the evidence before trial; trial court is then faced with the difficult task of deciding how much investigation is due diligence and how little investigation is constitutional ineffectiveness. To use yet another example, the defendant may know the actual perpetrator possesses the evidence of the crime, such as the vehicle used in the crime, but does not realize its evidentiary significance because the attorney did not share with him the police reports and did think not ask him about who else might have owned such a vehicle. Is that a lack of diligence on the part of the defendant or on the part of the attorney? If so, the defendant would get no relief, even if the victim's blood and hairs were found in the trunk of the vehicle.

To those unfamiliar with the actual practice of criminal law, the due diligence requirement may seem unimportant; after all, one could reason, if an attorney was not diligent, then the attorney must have been constitutionally ineffective, such that a motion under the current version of District of Columbia Code §23-110 could be brought. Unfortunately that is not so. There are different standards for establishing due diligence for Rule 33 purposes and constitutional ineffectiveness for §23-110 purposes, and the government frequently argues, successfully we might add, that a criminal defendant seeking a new trial, on one hand, has not shown that his attorney acted with due diligence for Rule 33 purposes, while on the other hand, has also not shown that the attorney's performance fell below acceptable norms.<sup>5</sup>

We continue to believe that such a focus on the conduct of the attorney now required by current law is simply wrong, at least where the issue is whether the evidence demonstrates that the defendant is actually innocent of the crime for which he or she is being incarcerated. We reiterate that we freely expect that very few motions under the Committee's current proposal will ultimately be granted. Indeed, even if this legislation were to pass in its current form, there may still be innocent persons imprisoned who simply cannot meet its standards. However, we fear there will be many more who cannot meet the requirements of the proposal by the Office of the United States Attorney. While no system run by human beings is perfect, surely it must be also true no person is "disposable," and the continued incarceration of an innocent person, if preventable, is a scandal and a shame. 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 in its current form.

Thank you for your consideration.

Respectfully,

Richard K. Gilbert

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<sup>5</sup> For example, courts are loath to find that an attorney was constitutionally ineffective for an isolated act or failure when the overall representation was adequate, *see, Brewer v. United States*, 609 A.2d 1140 (D.C. 1992). Yet this might be precisely the claim of many defendants seeking a new trial on the basis of newly discovered evidence, that the attorney failed to locate that one piece of convincingly exculpatory evidence.