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Statement of
Leslie McAdoo, Chair, Expungement Subcommittee
and Michael Hays
of the Council for Court Excellence
before the
Committee on the Judiciary,
Council of the District of Columbia

Bill 16-746
Criminal Record Expungement Act of 2006

July 13, 2006



Good morning, Chairman Mendelson and members of the committee. My name is Leslie McAdoo. I am a criminal defense attorney in solo private practice here in the District of Columbia. I am also a Board Member of the Council for Court Excellence ("CCE"), and I chaired the CCE's Subcommittee that examined the issue of expungement, and which produced the report entitled *Creating an Expungement Statute in the District of Columbia: A Report and Proposed Legislation*. This report has been widely distributed since its release in April 2006. The legislation the Subcommittee proposed has been adopted in Bill 16-746, the "Criminal Record Expungement Act of 2006." I am accompanied by Michael Hays, another member of the Expungement Subcommittee and CCE Board Member, and a partner at the law firm of Dow Lohnes.

We appear today on behalf of the Council for Court Excellence, which is a local nonpartisan civic organization founded in 1982 to improve the administration of justice in the courts and related justice agencies in the District of Columbia. For 24 years, CCE has been a unique resource that brings together members of the civic, legal, business, and judicial communities to work in common purpose to identify and promote court reforms, improve public access to justice, and increase public understanding and support of our justice system. To be clear, however, no judicial member of CCE participated in the formulation of this testimony.

CCE has worked closely with the DC Council and the Committee on the Judiciary on many issues, including the 1994 Probate Reform Act, the Office of Administrative Hearings Establishment Act of 2001 and subsequent amendments, as well as on a number of sentencing related matters. In June 2005, we testified before the Judiciary Committee in joint hearings with the Committee on Health regarding persons with mental health diagnoses in the DC Jail and Correctional Treatment Facility.



Our testimony today highlights the detailed discussion of expungement found in the Subcommittee's final report, and I turn to that topic now.

As I am sure you know, the collateral consequences of criminal records pose serious burdens on persons who bear the stigma of an arrest or conviction. The adverse effects of such records are often wide-ranging, affecting the ability of individuals to obtain employment, to secure public housing or public assistance, acquire credit or to vote, among others. The American Bar Association has recognized that, "a regime of collateral consequences may frustrate the reentry and rehabilitation of [offenders], and encourage recidivism."¹

On the other hand, society has an interest in maintaining records of arrests and convictions to aid future criminal investigations and in order to make legitimate and critical decisions about individuals.² For example, employers may have good reason not to hire an individual who has been convicted of a crime involving a breach of trust.

Bearing these competing interests in mind, most other jurisdictions in the nation have crafted legislation that establishes criteria for the expungement of criminal records. Thirty-six of the fifty states permit individuals to clear their criminal records if the charges against them are dropped or they are acquitted at trial. And, a substantial number of states (24), provide for expungement of convictions in some instances. However, the District of Columbia currently has only a handful of limited expungement provisions scattered among the DC Code and the DC Superior Court Rules. The Council for Court Excellence believes that the DC Council should enact comprehensive legislation to address expungement in all cases where the DC Council

¹ American Bar Association. ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons R-4 (3rd Ed. 2003).

² Deborah K. McKnight. Information Brief: Expungement of Criminal Records. Report of the Minnesota House of Representatives. See <http://www.house.leg.state.mn.us/hrd/pubs/expgreccs.pdf>.



concludes it is appropriate. The legislation proposed by our Subcommittee, and adopted in Bill 16-746, would provide such a comprehensive remedy.

This proposed legislation is the result of almost a year of regular meetings and intensive work by our Subcommittee. By design, the Subcommittee was quite diverse. It included members of the CCE Board of Directors, defense attorneys, prosecutors, and court administrators. The major DC criminal justice system agencies represented on the subcommittee were the DC Superior Court, the US Attorney's Office for DC, the DC Office of the Attorney General, the DC Public Defender Service and the DC Pretrial Services Agency.

Expungement is a public policy issue that is based on judgments about which reasonable persons may, and do, disagree. The positions on the issues taken in the proposed legislation reflect the collective judgment of the subcommittee and, as such, are based on a number of compromises among competing interests and divergent views about the circumstances under which expungement should be available. Although the subcommittee worked together very cooperatively and was able to achieve a remarkable degree of consensus on many issues, unanimity was not reached on every issue. Thus, certain provisions of Bill 16-746 may be criticized or opposed by particular members of the CCE Board of Directors or particular stakeholder agencies, while other members of the subcommittee will strongly support them or advocate going beyond them. We believe that the positions taken in the proposed legislation are reasonable and constitute a sound approach to expungement, but the Subcommittee fully recognizes that the DC Council may make different judgments on various issues. At base, the Council for Court Excellence strongly supports the enactment of comprehensive legislation addressing expungement. The draft legislation produced with the Subcommittee's report is one



proposal for doing so and provides a basis for the DC Council to make its own judgments as to the precise legislation that best serves the needs of the District's citizens.

In terms of specifics, the proposed legislation addresses expungement in three different types of situations: (1) cases of "actual innocence" where individuals can prove they did not commit the offense for which they were arrested; (2) cases that do not result in convictions because, for example, charges are dismissed, or the defendant successfully completes a diversion program, or the defendant is acquitted at trial, and (3) a limited set of convictions for minor offenses. Different rules are proposed for each situation. A one-page summary of the rules that apply to these situations is attached at the last page of our testimony.

Cases of actual innocence produced little, if any, controversy among the subcommittee. Actual innocence cases are currently addressed by Rule 118 of the DC Superior Court Rules of Criminal Procedure. Rule 118 is thoughtfully designed and appears to have worked reasonably well in practice. Nonetheless, there was consensus on the need to supercede Rule 118 with legislation because the terms and conditions for expungement should be determined by the legislative branch rather than the judiciary, and because a statutory scheme, rather than a court rule was deemed more accessible to the citizenry.

The proposed legislation's approach to "actual innocence" essentially adopts that of Rule 118 with certain adjustments. The burden remains on the individual to demonstrate that he/she is actually innocent of the offense. However, the time limits for seeking relief imposed by Rule 118 have been eliminated, and the burden of proof has been lowered from "clear and convincing evidence" to the "preponderance of the evidence" (although the higher standard would still be used if the person waits more than four years to seek relief). The new provision also applies to cases where the person demonstrates innocence after being acquitted at trial, a situation that Rule



118 does not address. The relief provided to innocent persons remains the same as under Rule 118 -- all law enforcement and court records relating to the arrest or prosecution are collected and placed under seal with the Superior Court. Finally, an additional, new component of relief restores the innocent person to the status he or she occupied before being arrested and/or charged so that he/she need not disclose the expunged arrest or conviction in response to questions on that subject.

In cases of actual innocence, once the criminal records are sealed with the Superior Court, they are not available to anyone including law enforcement personnel. This is appropriate because the individual should not have been arrested in the first place and there is no legitimate law enforcement interest in knowing about prior arrests of innocent people for purposes of investigating future crimes.

However, a different calculus applies to the other two categories of cases that are addressed by the proposed legislation: cases that do not result in convictions and certain cases that have resulted in convictions. In these categories of cases, the defendant either may have committed the offense or definitely did commit the offense. The Subcommittee decided that criminal records in these categories should remain accessible by law enforcement (and certain licensing or school agencies) for future investigative or background check purposes. Thus, the form of expungement that is proposed for these categories is limited to removing arrest or conviction records from access by the general public.

There was some debate within the Subcommittee about the merits of providing expungement relief to persons charged with crimes that do not result in conviction. This category of cases involves a very "mixed bag" of situations. It will include some innocent persons who cannot prove their innocence so as to qualify for the relief provided in cases of actual innocence.



On the other hand, many persons in this category will be culpable to a greater or lesser degree. However, there was general agreement that low-level misdemeanor arrests not resulting in conviction should be eligible for expungement relief. Providing such relief for felony arrests not resulting in conviction generated less agreement, although the majority of the Subcommittee favored expungement in such cases as well.

Charges that do not result in conviction are eligible for expungement under the proposed legislation after a waiting period of two years for less serious misdemeanors and five years for more serious misdemeanors and all felonies. It should be emphasized that expungement of the public records in such cases is not automatic; the court must first find that it is in the interests of justice to expunge public records after weighing the competing interests in expunging the records and the interests in retaining public access to them. Further, no expungement of charges not resulting in conviction is permitted if the person has had a conviction at any time for an offense that is not eligible for expungement or if the person has a subsequent conviction for any offense (other than minor traffic offenses or the like).

The provision of expungement relief for a limited set of convictions for minor offenses produced the most controversy among the subcommittee. In these cases, there is no question about culpability. However, the offense may be minor, or there may be extenuating circumstances, or it may become clear that the offense was an isolated mistake by an individual who has led an otherwise upright life or who has been rehabilitated since the offense was committed. The majority of the Subcommittee concluded that at least some of these individuals may be deserving of expungement.

The convictions eligible for expungement include many misdemeanors and four of the least serious felony charges. However, all other felony convictions are not eligible for



expungement nor are misdemeanors involving sex offenses, intra-family offenses, offenses against children, or those involving fraud or drunk driving. Further, a waiting period of seven years after the completion of the sentence (not the date of the conviction) is required. No expungement under this provision is permitted if the person has had a conviction at any time for an offense that is not eligible for expungement or if the person has a subsequent conviction for any offense (other than minor traffic offenses or the like).

In closing, I would like to emphasize again that because an expungement statute is an act of legislative grace that must take into account many competing interests, reasonable persons can disagree as to the scope and contours of the legislation. Our Subcommittee strove to achieve compromises that respected all the various interests, while recognizing that the compromises we reached were not necessarily the only reasonable ones. The Council for Court Excellence therefore fully supports the work of the DC Council in turning our draft into a final form that best serves all of the District's interests and citizens.

Thank you and I would be happy to answer any questions that you may have.

"Criminal Record Expungement Act of 2006" Summary

CATEGORIES	ELIGIBLE OFFENSES	BURDEN OF PROOF	WAITING PERIOD	PRIOR or SUBSEQUENT RECORD	ACCESS to RECORDS POST-EXPUNGEMENT
Actual Innocence	All offenses	If the individual applies for expungement within four years, he/she must prove innocence by a "preponderance of the evidence." If the individual applies for expungement after four years, he/she must prove innocence by "clear and convincing evidence."	None	N/A	Records are sealed with DC Superior Court; unavailable to anyone including law enforcement personnel
Non-convictions	All offenses	For felonies and major misdemeanors the individual must prove by a "preponderance of the evidence" that the interests in expungement outweigh the countervailing interest in retaining access to the record. For minor misdemeanors the prosecutor must prove by a "preponderance of the evidence" that interests in retaining access to the record outweigh the countervailing interests in favor of expungement.	After a non-conviction, the individual may not apply for expungement until: Two years for less serious misdemeanors. Five years for more serious misdemeanors and all felonies	Ineligible if the individual has a conviction at <u>any time</u> for an offense that is ineligible for expungement or if the individual has a <u>subsequent</u> conviction for any offense (with exception of minor traffic offenses)	Records are removed from access by the general public, but remain available to law enforcement (and certain licensing and school agencies)
Convictions	Most misdemeanors and four felonies	The individual must prove by "clear and convincing evidence" that interests in expungement outweigh the countervailing interest in retaining access to record of conviction	After a conviction, the individual may not apply for expungement until: Seven years after the completion of the sentence (not the date of conviction)	Ineligible if the individual has a conviction at <u>any time</u> for an offense that is ineligible for expungement or if the individual has a <u>subsequent</u> conviction for any offense (with exception of minor traffic offenses)	Records are removed from access by the general public, but remain available to law enforcement (and certain licensing and school agencies)