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DIVISION OF CRIMINAL JUSTICE

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Testimony of the Division of Criminal Justice

In Opposition to:

H.B. No. 7219 (RAISED) AN ACT CONCERNING THE TRIAL OF DRUG-DEPENDENT PERSONS

Joint Committee on Judiciary – February 26, 2007

The Division of Criminal Justice strongly opposes H.B. No. 7219 and would respectfully request that the Committee reject this bill. Section 21a-278 of the general statutes deals with sale of narcotics by non-drug dependent persons. When enacted, there were strong public policy and issues enumerated by the legislature. Case law has consistently recognized the public policy behind the statute – that a person who sells drugs for profit must be treated more harshly than those who sell to support a drug habit.

"The legislative history of Sec. 21-278 reveals this intent: 'The intent of the bill is to give the state's attorney and prosecuting authority the opportunity to charge an additional crime which does carry a harder sentence which goes toward imprisoning the person who is not drug dependant and who, in fact, is selling drugs for profit. *State v. Jenkins*, 41 Conn. App. 604, 609 (1996)

[O]ur drug laws reflect the strong public policy that neither the use nor the sale of illicit drugs will be tolerated in this state. The harshest sentences, of course, are reserved for professional drug dealers, who are deemed to pose the greatest threat to our society. [A]n obvious purpose of our drug statutes is to reduce the drug trade in Connecticut." *State v. Hill*, 237 Conn. 81 (1996)

The public policy issue behind the statute is clear and has been consistently recognized by our courts. When charging under the non-drug dependent statute, the state has the burden to prove the elements of the sale of narcotics statute beyond a reasonable doubt. The issue of drug dependency is not an element of the crime. It is an exemption from liability, and it is the defendant's burden to produce evidence of drug dependency. *State v. Hart*, 221 Conn. 595 (1992), *State v. Januszewski*, 182 Conn. 142 (1980), *State v. Jenkins*, supra, at 607.

A person charged under this statute is presumed to be non-drug dependent, but may avoid liability by proving by a preponderance of the evidence that he or she is drug dependent. H.B. No. 7219 seeks to remove the benefit of the presumption of non-drug dependency by requesting that a hearing occur prior to the state's presenting evidence. This proposal basically guts the issue of drug dependency, and the public policy behind its enactment. It also seeks to strip away the prosecutors' charging authority under this statute.

The second subsection proposed under this bill, requiring the prosecuting authority to in essence bifurcate the charge of sale in the first part, and an allegation of non-drug dependency in the second part, is an attempt to circumvent what the courts have long and consistently held is both proper and constitutional. The drug dependency issue is not an element of the crime. *Jenkins*, 608. This proposal is seeking to burden the state with proving a negative by making it an element of the crime. Case law is further clear that bifurcating the issue of drug dependency is not required, and withstands constitutional scrutiny because the claim of drug dependency as an exemption from liability which is akin to an affirmative defense. The courts have stated there is no requirement for a bifurcated hearing. *Jenkins*, supra, at 609, citing *McMillan v. Pennsylvania*, 477 U.S., 79, 81.

There have been claims historically by defendants that a requirement to present evidence of drug dependency prejudices them because it is essentially admitting possession of narcotic substances. The claim is that this diminishes the state's burden of proof in criminal cases. This issue has been dealt head on by the courts. The jury instructions in these matters emphasize that just because a person uses drugs, it does not mean that person is a dealer. It does not mean that the person sold drugs on the date in question. Juries are instructed that they must not draw any negative inferences as to the defendant's guilt on the elements of sale simply because they might believe he or she has a drug problem. *Jenkins*, 621. The issue is also more than adequately covered by the *voir dire* process. Typical questions include, "Do you believe a person is a drug dealer just because he uses drugs?" Such questions amply weed out persons with such predispositions. Persons answering yes to such questions are typically excused for cause.

In summary, this bill is asking the legislature to abandon the important public policy concerns of 21a-278, and to circumvent what defendant's have not been able to accomplish in the courts. .