State of Connecticut

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Testimony of
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Raised Bill No. 7235
An Act Concerning Crime Victims and the Authority of the Victim Advocate

Judiciary Committee Public Hearing
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The Office of Chief Public Defender is strongly opposed to the passage of Sections One, Two, Three, Four and Twelve in ***Raised House Bill No. 7235, An Act Concerning Crime Victims and the Authority of the Victim Advocate.***

Section One - This proposed legislation as contained in Sections One and Two is similar to legislation proposed in the past. The testimony of the Office of Chief Public Defender is the same as testimony and arguments as those written by former Chief of Legal Services Unit, G. Douglas Nash and myself which were submitted by the Office of Chief Public Defender in opposition to such similar proposals previously raised in 2003, 2004, 2005 and 2006.

The ramifications of subsection (6) of section 1 as proposed are broad upon the criminal justice system and adversely impact upon the rights of an accused. In addition, if passed, the legislation would negatively impact upon the financial resources of this agency. The passage of the language would necessitate the allocation of additional funding to the Division of Public Defender Services. Expenditures resulting from an increased number of appeals that the Victim Advocate may pursue by initiation or intervention as a result of the awarding of party status to the Victim Advocate in an

appeal in a criminal matter cannot be sustained within the current budget of the Division and would require additional staffing and resources.

The language of the bill grants the Victim Advocate the right to file an appeal on behalf of a crime victim in order to advocate for any right guaranteed to the crime victim by statute or the state constitution. Pursuant to the language, the Victim Advocate would be permitted to take an appeal at any time from a decision not supportive of his/her viewpoint.

The proposal permits the victim advocate to file an appeal, although the proposal contains no explanation of which court is appropriate, the Appellate or Supreme Court. In addition, providing a right to appeal does not translate into a situation wherein practical relief can be given to the victim. First, the constitution prohibits an appeal or appellate review of or concerning the criminal case. The last sentence of the Connecticut Constitution Amendment Article XXIX(b) provides that:

> Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.

The plain words of a constitutional amendment are given even more importance than plain words in a statute. After all, it is the citizenry that has passed this 'basic law'. Their understanding of the constitutional provision is paramount. And the language clearly states that "[n]othing ... shall be construed as creating a ... ground for appellate relief in a criminal case." The rights apply only to a criminal case. Any relief would be in or in connection with the criminal case. A distinctive feature of an appeal is that its jurisdiction is purely statutory. Unless the authority to appeal can be found in the statutes, there is no appeal.

But merely to be able to point to a statute does not constitute authority to appeal. In *State v. Salmon*, 250 Conn. 147 (1999), the Court reviewed and summarized the test for appeal jurisdiction where an appellant has claimed appellate jurisdiction under a statute. The appellant must "establish in the following sequence that: (1) it was a party to the underlying action; (2) it was aggrieved by the trial court decision; and (3) the

appeal is from a final judgment." *Id.* at 162-63. Even if an appellant can pass this test, the appeal may still be subject to dismissal. If, for example, appeal jurisdiction is specifically excluded by statute or constitutional provision, as in the case here, an appeal cannot lie. See *Cannavo Enterprises, Inc. v. Burns*, 194 Conn. 43, 48 (1984) (no appeal right from small claims actions). Nor can an appeal lie unless it is justiciable. *Rivera v. Commissioner of Correction*, 254 Conn. 214, 225 (2000) (re mootness).

Lastly, any practical, post-conviction relief on appeal would violate the defendant's constitutional right against double jeopardy. For example, a violation of a victim's right to be present in the courtroom could not be regained on appeal unless a new trial was ordered. The principle of finality would certainly suffer. For example, a victim who seeks relief from being excluded from the courtroom could only be made whole by recreating the event. The sentence and conviction would have to be reversed and the case returned to a pretrial stage where the erroneous hearing could be replicated but this time with the victim present. Once this corrected hearing has occurred, the case would return to a post-judgment stage only if the accused admitted guilt or was found guilty after a trial. Once the conviction is opened, it is void and cannot be returned to its former state automatically. The accused or the State may wish to proceed in the reopened case differently. This would "undo" a completed and final criminal prosecution in which the traditional parties of the State in the form of the prosecutor and the defendant participated fully and reached a binding conclusion. See *State v. Malcolm*, 257 Conn. 653, 664 (2001) (re finality in post conviction motions).

The clash between the victim's rights and the double jeopardy bar is easily imagined. The concept that the judgment may be reopened and the accused subject to another "prosecution" solely at the behest of the victim runs directly counter to the constitutional protection against double jeopardy. See *Illinois v. Vitale*, 447 U.S. 410 (1980). As explained in *State v. Alvarez*, 257 Conn. 782, 788 (2001):

> [The double jeopardy clause] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction . . . These protections stem from the underlying premise that a defendant should not be twice tried or punished for the same offense. *United States v. Wilson*, 420 U.S. 332, 339 . . . (1975). The Clause operates as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the

possibility that he may be found guilty even though innocent.

The federal constitutional double jeopardy bar, found in the Fifth Amendment, is applicable to the states through the due process clause. *State v. Alvarez*, 257 Conn. at 787. The same protections are guaranteed by our state constitution through its due process clause. *Id.*; citing *Kohlfuss v. Warden*, 149 Conn. 692, 695 (1962).

For the victim to gain the relief he seeks, he must request this Court to interpret Amendment Article XXIX (b) in a way that places it in direct conflict with these well-understood and long-standing constitutional rights. This Court abhors causing such a conflict where a reasonable interpretation avoids it. This Court "must presume that the new constitutional provision 'intended a reasonable, just and constitutional result.'" *Gialmo v. City of New Haven*, 257 Conn. 481, 497-98 (2001); see *State v. Johnson*, 250 Conn. 1, 65 (2000). It also presumes that the framers' intent was to draft an effective amendment and one not in conflict with other constitutional provisions. See *cf. Murray v. Lopes*, 205 Conn. 27, 36 (1987) (Presumption that legislators enact effective and constitutional laws). It is unfathomable that the framers' intention was to retract the well-known double jeopardy guarantee, especially since the right is primarily a federal constitutional one and therefore represents a minimum guarantee that the State cannot affect. *State v. Mikolinski*, 256 Conn. 543, 547(2001); *State v. Dukes*, 209 Conn. 98, 112-13 (1998). It is even more unreasonable to consider that the framers of Amendment Article XXIX (b) intended to create this major conflict without any mention of it.

Section Two - The Office of Chief Public Defender is also strongly opposed to the passage of the proposed language in subsection (a) of section 2 that, as drafted, could eradicate any privilege that currently exists pursuant to statute. By inserting the language "notwithstanding any provision" of the statutes concerning the confidentiality in lieu of "consistent with the provisions" of such, the legislation would mandate that the victim advocate have access to information that is otherwise privileged and confidential within an attorney client file.

In addition, the language would require that the Victim Advocate be given access to certain processes of state government, including law enforcement investigations, executive sessions of state agencies, personnel information and sensitive security information not currently accessible to the public through the *Freedom of Information Act.*

In addition, the Office of Chief Public Defender remains strongly opposed to the proposed language ***subsection (c) of section 2*** that would grant extremely broad investigative subpoena power to the Victim Advocate. The proposal permits the Victim Advocate to subpoena any person to appear and/or produce "books, papers and other documents". Although there is language that may appear to exempt out defendants or their attorneys in a "criminal prosecution", the language would permit a subpoena to issue to a person or his/her attorney *after* the disposition of a criminal matter. The language should prohibit a subpoena from issuing to any defendant as to a criminal prosecution, whether pending or disposed of clearly prohibit the issuance of a subpoena to the attorney in regard to a former or current client or any member of the defense including an investigator, social worker, paralegal or any expert witness retained by the defense for testimony or production of property. Otherwise, the issuance of a subpoena would violate the attorney client privilege and the rules of confidentiality. In addition, as drafted, the proposal would permit a person to be subpoenaed regardless of whether the person was convicted or acquitted or the case nolled or dismissed. Because the proposal is so broad as to time, the constitutional violations that could result could be egregious if a person, not charged but the subject of an investigation by law enforcement, was compelled to give testimony against himself. As drafted, the victim advocate would be authorized to use an investigative subpoena to compel testimony or production of information even after the disposition of a criminal matter including during any post conviction proceedings.

Pursuant to the proposed language, the Victim Advocate would also be permitted to subpoena any person, including a suspect, law enforcement official or witness, at anytime during an ongoing investigation by law enforcement and prior to the filing of formal charges. The Victim Advocate would be authorized to use an investigative subpoena to compel testimony from a law enforcement official or a witness during pretrial proceedings and throughout the trial.

Not only does the attorney file contain privileged and confidential information, but in many cases it contains sensitive information and documents relating to the defendant's medical or psychiatric history that are protected by privilege or privacy laws. And if the Victim Advocate was successful in obtaining any of this information, there is no provision in the bill to restrict the Victim Advocate from sharing any information obtained with law enforcement or the state attorney's office.

A subpoena against any member of the defense would have adverse effects upon the attorney-client relationship. As employees of a state agency, professionals employed by the Division of Public Defender Services are particularly vulnerable to these adverse effects because of the pre-existing view of many clients that public defenders are merely part of the "system." This view is reinforced when a member of a public defender office is compelled to present testimony or any information in regard to a former or present client. The ability of an individual public defender or an entire office to have the confidence of its clients and to expedite the court's business is irreparably threatened as a result.

As attorneys, public defenders are bound not only by the attorney-client privilege but also by the rules on confidentiality. *Rule 1.6 - Confidentiality* of the *Connecticut Rules of Professional Conduct* is broader than the protections afforded by the attorney-client privilege. "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Comment to Rules of Professional Conduct Rule 1.6 - Confidentiality.* Further, attorneys are required to supervise non lawyers such as investigators, social workers and clerical staff to assure that the non-lawyers adhere to the confidentiality requirements as well. See *Rule 5.3 – Non-Lawyer Assistants* of the *Connecticut Rules of Professional Conduct.*

Section Three - Although not entirely opposed to this section, the Office of Chief Public Defender suggests the following language in bold, caps and underlined, be inserted in line 146 as follows:

143 (b) If such violation] (c) If a violation of the conditions of the
144 defendant's probation or conditional discharge is established, the court
145 shall permit any victim of the crime for which the defendant was
146 convicted **<u>AND SUBSEQUENTLY FOUND IN VIOLATION OF A CONDITION WHICH AFFECTS THE VICTIM</u>** to appear before the court for the purpose of making a
147 statement for the record regarding disposition of the case under this
148 subsection. In lieu of such appearance, the crime victim may submit a
149 written statement to the court and the statement shall be made part of
150 the record at the hearing. After considering the crime victim's
151 statement, the court may: (1) Continue the sentence of probation or. . .

Section Four - The Office of Chief Public Defender is opposed to the language which would expand the offenses for which a protective order be issued as it is overbroad and unnecessary. Current law provides for a protective order to be issued in domestic violence, stalking and witness tampering cases. The court already has the authority to order conditions of release, on a case by case basis, which may include no contact with the victim.

Section Twelve - The Office of Chief Public Defender believes that this proposal could violate the confrontation rights of the defendant should the defendant be denied the information if not already available through existing court documents. Counsel for the defendant should not be denied access to such information if such information is not readily available through information that may be public and contained in other court documents.

For the reasons stated, the Office of Chief Public Defender would oppose passage of Sections One, Two, Three, Four and Twelve.