



# State of Connecticut

## DIVISION OF PUBLIC DEFENDER SERVICES

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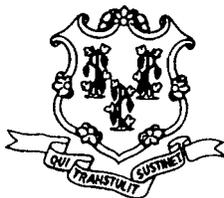
**Testimony of  
Deborah Del Prete Sullivan, Legal Counsel  
Office of Chief Public Defender**

***Raised Bill No. 1458  
An Act Concerning Jessica's Law***

**Judiciary Committee Public Hearing  
April 4, 2007**

Consistent with its position in the past, the Office of Chief Public Defender opposes *Raised Bill No. 1458, An Act Concerning Jessica's Law*. Sections 1 through 8 and section 10 would require the imposition of mandatory prison sentences on persons convicted of sexual offenses against a person under the age of 13 years. In recent years, there has been debate about mandatory minimum sentences and reasons for departure from the imposition of such. The bill, however, would remove all discretion from the court to consider any mitigating information pertaining to the defendant and requires that the court impose a mandatory sentence regardless.

The Office of Chief Public Defender is also opposed to Section 9 of the bill as it would provide a "tender years exception" which as drafted is unconstitutional. For the reasons stated in the attached testimony submitted by Deputy Chief Public Defender to the Judiciary Committee in regard to *Raised Bill 1245, An Act Concerning a Tender Years Exception to the Hearsay Rule*, this office urges this Committee to reject this section.



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**Testimony of  
Brian S. Carlow  
Deputy Chief Public Defender**

***Raised House Bill No. 1245  
An Act Concerning A Tender Years Exception to the Hearsay Rule***

***Judiciary Committee Public Hearing  
February 28, 2007***

The Office of Chief Public Defender opposes passage of ***Raised House Bill No. 1245, An Act Concerning A Tender Years Exception to the Hearsay Rule***. This legislation as drafted is unconstitutional and would undermine the effort to obtain truthful and accurate testimony in criminal trials. Currently, the State and Federal Constitutions, our statutes and our evidentiary rules provide safeguards that help ensure that truthful and accurate testimony is presented at criminal and juvenile trials. This proposed legislation does not comport with constitutional and evidentiary provisions that have served to minimize the risk of false or inaccurate testimony being presented to a jury or judge. The effectuation of this proposed legislation would also conflict with the workings of a related statute, ***Connecticut General Statutes Section 54-86g, Testimony of victim of child abuse. Court may order testimony taken outside courtroom. Procedure.***

***Raised House Bill No. 1245, as drafted***, provides that an out-of-court statement by a child under the age of sixteen or "a person who is chronologically sixteen years of age or older, but who has a mental or developmental age of less than sixteen years because of mental retardation or developmental disability" shall be admissible in a criminal, juvenile or civil proceeding if certain minimal requirements are met. To the extent that subsection (3)(B) would allow the testimonial statement of a complainant to be introduced without the child testifying or without the statement being subjected to cross-examination, that provision is unconstitutional as it violates the confrontation clause. The United States Supreme Court, in ***Crawford v. Washington, 541 U.S. 36 (2004)*** held that with respect to testimonial statements, if those statements have not been subject to cross-examination, the confrontation clause has not been satisfied and thus the statements are not admissible. This holding by the Supreme Court is clear and unequivocal. With respect to non-testimonial evidence, the statute is unconstitutional in that

it lessens the burden for the admissibility of hearsay statements set forth in *Ohio v. Roberts* 448 U. S. 56 (1980). The language in the proposed statute reads that such hearsay evidence may be admitted if there is “a probability that the statement is trustworthy.” Although that language is not defined in the proposed legislation, it would appear to be considerably less stringent than the constitutionally required “indicia of reliability” as articulated by *Ohio v. Roberts* and its progeny.

If a child does testify, the Connecticut Code of Evidence and our Supreme Court precedent have set clear and appropriate rules as to whether and under what circumstances that child’s prior or out of court statement is admissible at trial. The hearsay rules are set forth in Article VIII of the Code of Evidence. Indeed, there is an additional provision in the code for the admission of statements that do not satisfy the requirements of the other established hearsay rules. That provision, Section 8-9 (the Residual Exception), allows for statements to be admitted that do not fall within any other exception if there are “guarantees of trustworthiness.” In their entirety, the rules codified in Article VIII of the Code set forth the circumstances under which hearsay statements are sufficiently reliable to be introduced into a criminal or juvenile trial, even in some situations where the declarant is not available to be cross-examined. These standards are to foster truthful and accurate testimony. The proposed legislation relaxes the stringency of many of those evidentiary rules, again running afoul of the constitutional requirements set forth in *Ohio v. Roberts*.

A related concern is that our Supreme Court has addressed important issues with respect to the admissibility of prior statements in *State v. Whelan*, 200 Conn. 743 (1986) and *State v. Troupe*, 237 Conn. 284 (1996), the former laying out rules to govern when to admit prior inconsistent statements for substantive purposes and the latter holding that constancy of accusation evidence is admissible for very limited (non-substantive) purposes. The implementation of this proposed statute would effectively overrule both of those important cases, as the state would be allowed to offer prior inconsistent statements substantively without meeting the *Whelan* requirements, and it could offer a wider scope of constancy evidence, in violation of *Troupe*.

Additionally, this proposed legislation would generate conflict with Connecticut General Statutes Section 54-86g, *Testimony of victim of child abuse. Court may order testimony taken outside courtroom. Procedure*, a statute whose purpose is presumably similar to that of Bill No. 1245 (“[t]o facilitate the prosecution of child sexual assault cases by establishing a tender years exception...”). Connecticut General Statutes Section 54-86g provides that the testimony of children twelve years of age and younger can be videotaped and admitted into evidence in lieu of live courtroom testimony. In most cases, this videotape procedure prohibits a face-to-face encounter between the child and the accused. Importantly, the child is cross-examined by defense counsel during this videotaping procedure. The presence of cross-examination was the basis upon which our Supreme Court in *State v. Jarzbek*, 204 Conn. 683 (1987) held that this procedure was constitutional. The problem with the proposed legislation is that it could work to circumvent Section 54-86g in that a prosecutor could claim that a child is “unavailable” to testify if, for example, s/he was fearful of facing the defendant in the courtroom; in that scenario, ordinarily the state would need to file a motion pursuant to Connecticut General Statutes Section 54-86g, and if it could meet the necessary showing to allow for a videotape procedure, the defendant’s attorney would still be entitled to cross-examine the child-complainant. The proposed statute could therefore allow the prosecution to bypass Connecticut General Statutes Section 54-86g (by claiming “unavailability”) in a way that violates a defendant’s otherwise-held

right to cross-examine a witness. It is also important to note that Connecticut General Statutes Section 54-86g also provides other protections to the child complainant.

Other concerns include the group of complainants that would fall under the language of the statute. Connecticut General Statutes Section 54-86g included children twelve years and younger. The proposed legislation includes children up to the age of sixteen and in certain circumstances, persons over the age of sixteen. Anecdotal evidence would suggest that children as defined in this bill do not possess enhanced credibility as opposed to adults. Thus, the proposed legislation would limit or eliminate the ability to challenge the veracity of complainants in an age group where such challenge is critical to assessing the truthfulness and accuracy of the claims being made. A final concern is that the definition of "child", which includes a class of mentally or developmentally disabled individuals who are the functional equivalent of persons under sixteen years of age, is unworkably broad. For a trial court to interpret when a person older than sixteen falls within this group would likely require a battle between experts and the slowing of the trial process.

The position of the Office of Chief Public Defender is that in the context of any criminal or juvenile case, the rules involving the admissibility of evidence must be such that they ensure, to the greatest degree possible, that the evidence submitted is both truthful and accurate. Our Evidence Code has codified rules that properly balance the need of the State to be able to introduce relevant and material evidence in the prosecution of cases with the necessity that those accused of criminal activity to have an opportunity to contest the validity of the claims being made. The rules contained within that Code are time tested and have been proven to be both effective and appropriate. To the extent any change might need to be made in this area, the Evidence Code Oversight Committee is charged with addressing that issue. Indeed, that Committee met as recently as yesterday to address this issue and will be looking at whether or not any change is necessary and if so, what change. We believe that that Committee, which has members of all the relevant constituencies, should be allowed to continue its work in assessing the issues presented by the proposed legislation.