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**Testimony of Adele V. Patterson  
Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705  
An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing  
March 26, 2009**

The Office of Chief Public Defender opposes the many changes to Connecticut law contained in **Raised Bill No. 6705, *An Act Concerning Habeas Corpus Reform***, for the reasons described below in a section-by-section analysis. As drafted, this bill would unfairly reverse the presumption of access to the courts, especially for indigent inmates seeking relief through habeas corpus proceedings. Furthermore, this proposal if enacted would have significant costs associated with an increased number of cases and would result in increased trial and appellate litigation.

**Section 1**

Section 1 of the proposal states that the entire bill is prospective in that it applies only to cases filed on or after October 1, 2009 that challenge either the conviction or sentence in a criminal case or the commitment to the Psychiatric Security Review Board by a person found not guilty by reason of mental disease or defect. If given effect, it would be inconsistent, with Sections 3 and 5 of the bill that change the legal effect of actions taken in the past.

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender

Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

## Section 2

Section 2 provides for the repeal of unspecified statutory and common law causes of action and limits the jurisdiction of Supreme and Appellate Courts.

- This section would repeal many statutes which are not identified in the proposal.
- This section would drastically and unpredictably alter the legal landscape of Connecticut criminal law.
- The language is vague and unlimited. This section is likely to take up many more lawyer and court resources in litigation over its meaning than it would conserve.

For example, the second sentence of the bill would, by its terms, eliminate the power of the Connecticut appellate courts to review cases under Writs of Error and delegate such matters to review by the Writ of Habeas Corpus before they could be considered by the higher courts. Such a provision would generate litigation and, if given effect, would certainly delay and complicate resolution of many cases beyond the scope of the present habeas corpus docket.

Section 2 may represent an attempt to advance the conflicting goals of speeding disposition of post conviction proceedings while strictly enforcing the requirement that all other roads to relief be tried before resorting to habeas corpus. This Section is unnecessary because those goals could readily be advanced under current law without restricting the power of courts to hear appropriate cases.

## Section 3

Section 3 of the bill mandates a court decision on questions about procedure and substance of all prior litigation before reaching the merits of every case and every claim raised within a case. This Section takes two separate defenses that, under current law, can be raised by the State (respondent) and then decided in an adversarial context and treats them as a single issue that every court must decide in every case before reaching the merits of any claim. The two defenses are (1) that the claim already was presented and decided in connection with the case (*res judicata*) and (2) that the claim could have been raised in an earlier related proceeding but was not (*procedural default*).

The bill requires that a judge must decide these issues as to every claim presented but it does not describe what procedure would be followed in order for the

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

judge to make that decision. While Section 3 clearly would shift these issues from the category of defenses to be researched and presented by the State (respondent) into the category of jurisdictional question for the court to decide, it fails to describe how this new procedure could work. For example, it does not explain how the judge would get all of the information necessary to make these decisions.

It is significant that Section 3 requires the court to decide these issues in every case even when the parties agree that such a decision is not necessary. This would be an unfortunate loss of efficiencies that occur when the parties, who are familiar with the history of the case, are inclined toward agreement. Compliance with Section 3 would actually generate more litigation.

In addition, because Section 3 uses different language from controlling case law on "cause and prejudice" to describe what the inmate petitioner must prove in order to get his claims heard, it is certain that enactment of this Section would cause many costly and time consuming appeals to determine the extent to which the legislature intended to alter and codify the meaning of those common law legal rules.

The cause and prejudice standard currently does not apply to such claims. Section 3 (a) (1), (2) and (3) explicitly would re-introduce the additional litigation that the courts have dispensed with as wasteful and confusing. Under current Connecticut case law, such duplication has been deemed unnecessary when the case raises claims of ineffective assistance of counsel at trial, State v. Leecan, 198 Conn. 517, 541-42, cert. denied, 476 U.S. 1184 (1986); on appeal, Valeriano v. Bronson, 209 Conn. 75, 85, 546 A.2d 1380 (1988); and in a prosecution leading to entry of a guilty plea, Johnson v. Commissioner, 285 Conn. 556, 569-70 (2009).

The merger of the disparate legal doctrines of procedural default and res judicata in this bill makes little sense. It would not be possible to attribute logical meaning to a statute saying that, "no court may decide the claim if it was raised and decided . . . on procedural grounds, in any earlier proceeding . . ." This Section makes no sense because a claim can only be "decided" on its own terms, but a decision may be avoided on procedural grounds. For example, a decision on a claim may have been avoided on the procedural ground that it is a claim that only can be heard in habeas corpus. Yet this bill would require a showing of cause and prejudice for the failure to bring the claim where it could not have been brought.

March 26, 2009

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender

Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

The exception stated in Section 3(b)(2) significantly limits the ability of our courts to consider claims of actual innocence. This section would result in extensive litigation because it raises the bar on proof of actual innocence. First, it seems to limit the evidence presented on such a claim to newly discovered evidence. While the Appellate Court has stated that claims of actual innocence must include such newly discovered evidence, the Connecticut Supreme Court has not yet ruled on that requirement. Second, the proposal would place two additional limits on the types of evidence that may be considered on claims of actual innocence as defined in the case of Miller v. Warden, 242 Conn. 745 (1997). First, it would exclude from the court's consideration newly discovered evidence that either casts doubt upon or contradicts the testimony of the state's trial witnesses (impeachment). Second, it prohibits consideration of evidence that is "cumulative" to or supports the defense case presented at trial. This alters the standard set by the Connecticut Supreme Court in Miller v. Warden which is: the court is required to consider all of the evidence introduced at trial together with all of the evidence introduced at the habeas corpus trial to determine whether the convicted person has proved by clear and convincing evidence that he is actually innocent and whether in consideration of all the evidence, that no reasonable fact finder would find the person guilty.

To adopt such limits on the evidence available on claims of actual innocence would be to prevent Connecticut courts from correcting wrongful convictions such as have been reversed throughout the country due to such evidence as unreliable scientific testimony or theories, police/prosecution failure to disclose their involvement with "jailhouse informants" and other types of suppression of exculpatory evidence. This provision would undoubtedly be subject to constitutional challenge.

The exception described in Section 3 (b)(3) is largely illusory. To say that no habeas corpus claim may rest on a new constitutional rule until that rule already has been found to apply retroactively is to say that only federal interpretations of the United States Constitution can be applied in state habeas corpus proceedings. Because questions of retroactivity do not arise in trial courts or on direct appeal – new rules always apply in those contexts – they only can be decided in habeas corpus cases. Thus, although it may appear simple, the language of this exception is internally inconsistent, exceedingly confusing and ambiguous when considered in the context of the body of law that covers the retroactive application of constitutional interpretation. Excessive, costly, and unnecessary litigation would surely follow adoption of such a statute.

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

If Section 3 were to apply to previously filed cases that did not result in a court decision, it would constitute an unexpected and unjust change in the legal effect of actions taken by litigants in the past. At times, differing docket management approaches by judges have led to the not uncommon practice of withdrawal and re-filing of habeas corpus cases. Sometimes those actions were taken unilaterally under a court rule that absolutely allows a person to withdraw a case before trial; sometimes withdrawals or partial withdrawals are the result of agreement to stipulate to judgment on a particular claim. Reasonable minds might disagree about the efficiency of such an approach but no one, especially not the petitioners, lawyers and judges who proceeded that way anticipated that such a withdrawal would later act as a bar to re-filing. It would be reasonable to expect considerable litigation over the question of whether a statute could operate to treat the earlier filed case as creating a bar against a case filed after it is enacted.

This bill would decrease certainty in the operation of the law in Connecticut. It would involve years of litigation before the effect and scope of the provisions could be known.

#### Section 4

Section 4 of the bill also establishes a statute of limitations of three years from sentencing or one year after final disposition of an appeal in which to file for a Writ of Habeas Corpus. This section provides for a statute of limitations for filing habeas corpus cases. A person who appeals would have one year from the end of the appeal process in which to get a case filed in court, and a person who does not take an appeal would have three years from the time his/her sentence was imposed. Unlike most statutes of limitations which run from the time a claim accrues or from the time a person knows or reasonably should know that he has the claim, this Section would create a fixed time with only very limited exceptions.

Adopting a statute of limitations for habeas corpus cases will cause a surge in cases filed in court necessitating a commensurate increase in resources to the Agencies, lawyers and courts who handle these matters. It is certain that there are not currently adequate resources to provide representation to the expected influx of inmates filing cases within the time allotted under this proposal or any reasonable time thereafter.

March 26, 2009

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender

Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

It is worth noting that although the number of pending habeas corpus cases has increased over the years, the number has remained remarkably steady by comparison to the greatly increased numbers of incarcerated persons and of persons who are in "custody" through supervision.

Date	Pending habeas corpus cases	persons in custody or supervision	Incarcerated persons
11/1/2000	1309	17,401	10,814
9/19/2008	1362	23,471	15,017
Increase %	4%		38.77%

In current criminal procedure, convicted persons do not receive any official notice of the availability of habeas corpus procedures. Nor does the right to counsel attach until a case is **actually filed** in court. By making it so that a person must either file quickly or lose access to the courts through habeas corpus, it is reasonable to expect the filing of a greatly increased number and percentage of "place holder" petitions that will require investigation and research.

For example: a convicted person who receives a sentence and a term of probation now may file a petition at any time he is serving the sentence. However, petitioners rarely file habeas corpus petitions while released on probation or parole. They are much more likely to seek relief when re-incarcerated after violation proceedings. Because the proposed statute of limitations runs from the original sentence only and cannot be extended by subsequent proceedings, such persons rationally would be induced to file habeas cases under the proposal that they might never file without a statute of limitations.

The bill is drafted to allow one year in which to raise claims arising from proceedings in the Sentence Review Division, of trial court hearings of motions to correct illegal sentence, and of motions for modification of sentence in the trial court. Inexplicably, the proposal would require that any challenge by writ of habeas corpus be initiated during the time that an appeal would likely be pending. This would be directly contrary to the usual order of proceedings as well as to risk being disallowed under the procedural default portions of the bill. Yet, no provision is made to start a new period for filing after a plea, hearing or appeal in a violation of probation

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

proceeding, probably the most common post-judgment proceeding through which people are confined.

It is also apparent that court procedures will have to be altered and formalized in order to protect access to the courts. Current practice does not afford an inmate petitioner control over the time at which the petition he sends to the court is reviewed and/or docketed. Unlike other civil cases—or even habeas corpus cases where a fee is paid on filing-- which are stamped in and filed at the time they arrive in court, inmate filed habeas corpus cases may be collected for judicial review and also may repeatedly be returned to the petitioner before being accepted for filing. This practice would frustrate the filing of petitions and, because petitioners have no pre-filing assistance, they may be deprived of any access to the court if they are unable to satisfy a clerk or a judge within the time allowed that the case is properly filed in court.

Existing case law squarely places the burden on the inmate petitioner to get his/her habeas case timely docketed in court. Current statutes and rules of court permit some courtside delay before docketing. Therefore, under the provisions of this bill, changes in court procedure to ensure consistency and fairness in handling the filings would be necessary to avoid constitutional litigation challenging access to the courts. There are a very large number of reported federal cases from around the country representing vast amounts of time and effort litigating the meaning and effect of the federal statute of limitations where the question of filing is about a one or two day delay. Indeed, an enormous amount of litigation continues to be generated by the 1995 adoption of the federal statute of limitations. We note that the existing one year federal statute of limitations does run for persons whose convictions are otherwise final and who do not have a properly filed state post conviction proceeding pending.

It is not at all clear how this statute would operate. Unlike the usual limitations periods in our statutes, which can be asserted as a defense in a pending case, this proposal would require that a person establish compliance with its terms or the existence of an exception before the application for the writ of habeas corpus could be "allowed". In the technical language of habeas corpus cases, this seems to mean that the jurisdictional proof must be offered before the case is permitted to exist. Not only does this make no practical sense but it also would have the effect of disallowing the appointment of counsel on a factual and legal point of critical importance.

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

If a person seeks a writ of habeas corpus after the time has expired, in every case he must "establish due diligence in presenting the claim." The meaning of that term will only become known as cases proceed through the courts and are decided on appeal.

Certain issues are sure to be presented. Since the provisions clearly apply to persons who are committed after a finding of not guilty by reason of insanity, what may be held to constitute diligence for such persons? What level of "diligence" is expected from a person incarcerated at age 14 or 15 as a result of transfer to the adult docket, or an inmate who is aged, deaf, doesn't speak English or who is illiterate? Which, if any, of those conditions would be considered a disability or impairment under such a law? What evidence of disability or impairment would be adequate to "establish" why a person did not file earlier?

The bill does not make clear how an inmate in a correctional institution would be able to establish that a physical disability or mental disease *precluded* a timely assertion of the claim. There are an ever increasing number of inmates in our prisons who suffer from undiagnosed or untreated mental illness; it does not seem just or fair to require such persons to prove nor to require a habeas corpus judge to determine whether, at another time, the person before him was unable through his illness to access the courts.

A rational person who knows he has a legal or factual challenge to his conviction has every incentive to raise that challenge as early as he can. Yet, there often are injustices corrected through habeas corpus that fall short of meeting the standards for establishing actual innocence. Misfeasance and malfeasance in the criminal justice system may not be discovered for many years yet such a statute of limitations would prevent our courts from even assessing the effect of such known occurrences as dishonest police officers, mistaken or false scientific reports, and lawyers suffering undisclosed impairments or maladies.

No amount of diligence would have disclosed to petitioner inmate Dwayne Johnson that the legislature would enact a law raising parole eligibility from 50% to 85% of his sentence. Nor would any amount of diligence reveal to him that the Board of Pardons would apply that new statute to him while he was serving a sentence for a crime committed prior to its enactment. Should Mr. Johnson have been prevented from challenging that *ex post facto* law by the writ of habeas corpus because he did so beyond a statute of limitations? If he had been so barred then the Board and

Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing

Department of Corrections would have continued to misinterpret and mis-apply the statute in a way that would have kept him and others incarcerated beyond the time the legislature intended. Instead, the citizens of Connecticut have benefitted from the interpretation of that statute provided by the Connecticut Supreme Court. Johnson v. Commissioner, 258 Conn. 804 (2002).

Neither the general provision nor the exceptions of this proposal account for the barriers indigent inmates face in gaining access to the courts. No one in the criminal justice system is required to advise a person that the writ of habeas corpus even exists. Indigent inmates do not have access to legal advice on habeas corpus matters prior to initial filing, and prisons do not have to make legal reference materials available to inmates nor must they facilitate the production or filing of an inmate's legal papers in court. The conditions for access to formal and informal legal information in correctional institutions vary widely among the institutions and between incarcerated persons. Indeed, some inmates may be segregated for security reasons, for punitive reasons, or for health reasons. By accounting for none of these realities, the proposal is likely to be arbitrary in application unless accompanied by an appropriate allocation of resources to ensure that everyone – whether or not they can afford private counsel – has access to the constitutionally protected writ of habeas corpus.

### Section 5

Section 5 of the bill unfairly precludes appointment of counsel on second or subsequent habeas petitions and eliminates constitutional standards for representation by appointed counsel in habeas corpus cases.

The section would place the following burdens on a judge reviewing habeas corpus petitions:

- (1) to determine without the assistance of the parties whether the papers are initiating a second or subsequent application for writ of habeas corpus; and, if so:
- (2) determine whether the "grounds for relief" in the inmate's filing "are not frivolous";
- (3) determine whether the interests of justice will be furthered by appointing counsel;

(4) order the public defender to find out if the inmate is eligible for appointed counsel;

(5) decide whether to order the public defender to assign counsel, to appoint counsel as if General Statutes Section 51-296 applies or to appoint counsel through the judicial budget and under section 51-291.

These additional burdens to discover facts that may or may not be readily available increase the workload of court staff and judges. Further, the bill appears to allow a judge to deny appointment of counsel without an articulated and recorded reason for the denial. The procedures contemplated by this Section are vulnerable to constitutional attack and would create litigation that would extend rather than streamline proceedings.

The section as drafted is internally inconsistent in permitting the appointment of counsel through the regular procedures set out in General Statutes §51-296 but also stating that the provisions of that statute do not apply. This proposed section also does not indicate when a judge should decide whether to appoint counsel for an inmate petitioner. Such uncertainty will not promote efficient and decisive resolution of habeas corpus cases.

Currently indigent inmates do not have the assistance of counsel in drafting their initial pro-se pleadings that initiate habeas corpus cases. Section 5 unfairly precludes appointment of counsel for second or subsequent petitions where counsel should be appointed. A subsequent petition can follow the withdrawal of a first petition, the settlement by agreement of a first petition, the erroneous dismissal of a first petition, the proper dismissal as premature of a first petition or any number of other reasons that a valid constitutional claim was not heard or fully developed after the filing of a prior petition. Such denial of counsel in these situations seems arbitrary and unjust. We are concerned that under this Section judges, unaided by counsel or the parties, have to make individual determinations about whether to grant or deny counsel to one side of the case. The availability of counsel to inmates should not depend on their financial wherewithal or upon the legal sophistication with which each of them is able to plead his claims to the court.

Section 5(b) eliminates the right to effective assistance of habeas corpus counsel. This provision is illogical and of questionable constitutionality. Under precedent of the Supreme Court of the United States and the Connecticut Supreme Court, state statutes

that provide counsel for indigent persons are held to mean "counsel" in the constitutional sense of reasonably competent counsel. Because Connecticut provides for the appointment of counsel in habeas corpus cases under General Statutes Section 51-296, it is irrational to provide in a separate statute that the person for whom such counsel is appointed has no recourse for constitutional harm when the lawyer does not fulfill the role to which s/he was appointed.

We urge that the legislature reject any law that requires that counsel be appointed in habeas corpus cases but then allows substandard representation. Such a provision does nothing to promote proper litigation of cases nor does it promote finality and confidence in the fairness and correctness of the outcome.

Section 5(c) states that the court can deny counsel even when the first habeas corpus case was not addressed or decided. As drafted, an inmate who has used a writ of habeas corpus to raise a claim of deliberate indifference to a medical condition is affected the same as a person who has previously fully litigated a challenge to a conviction.

The obvious questions for litigation under this section will concern whether a newly filed second petition is subject to the rule.

#### Section 6

Section 6 of the bill provides for a return to decentralization of habeas corpus petitions by amending Connecticut General Statutes §52-466 to move the place where habeas corpus cases are filed and tried from the current unified habeas corpus court in Tolland to the civil courts in the jurisdiction where the criminal case originally was heard.

In 2006 this statute was amended to require that all habeas corpus petitions would be filed in Tolland/Rockville court instead of at various courts in the counties where inmates are incarcerated. Two primary reasons for centralization were to reduce the number of duplicate filings in various trial courts filed by individual inmates, and to facilitate timely adjudication of claims. A return to decentralized filing would require increased allocation of judges and clerks to handle habeas corpus filings in those other courts, most of which will never have received a habeas corpus petition before.

Discussions are currently underway among members of the Habeas Corpus Subcommittee of the Chief Justice's Criminal Practice Commission to make habeas corpus trials more easily accessible to counsel, witnesses and interested members of the

March 26, 2009

**Testimony of Adele V. Patterson, Acting Chief of Habeas Corpus Services  
Office of Chief Public Defender  
Raised Bill No. 6705 - An Act Concerning Habeas Corpus Reform  
Judiciary Committee Public Hearing**

public. This subcommittee includes judges, court personnel, habeas clerks, prosecutors, private counsel and the public defender's office. We hope that such efforts may be allowed to continue without losing the expertise and case management benefits that have been gained through filing at a single location.