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Testimony in Support of
Raised Bill No. 230, An Act Concerning the Videotaping of Custodial Interrogations
Raised Bill No. 5273, An Act Concerning Eyewitness Identification
Raised Bill No. 5445, An Act Concerning the Death Penalty

Committee on Judiciary
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One of the worst mistakes – indeed, perhaps the worst mistake - a criminal justice system can make is to wrongfully convict an individual for a crime committed by someone else. No matter how competent and professional the criminal justice system, wrongful convictions can and do occur. As the exonerations of James Tillman, Miguel Roman, and Kenneth Ireland have demonstrated, Connecticut is not immune from wrongful convictions. There is no reason to believe Tillman, Roman, and Ireland are the only individuals who have been wrongfully convicted in Connecticut. Nor is there any reason to believe wrongful convictions will not occur in the future. But the first two bills, requiring the videotaping of custodial interrogations and the double-blind administration of eyewitness identification procedures, will at least greatly reduce the likelihood of wrongful convictions occurring in the future.

Raised Bill No. 230, An Act Concerning the Videotaping of Custodial Interrogations

Wrongful convictions occur for many reasons. One of the more frequently-observed contributing causes involves false confessions. According to the New York-based Innocence Project, which has played an important role in the exoneration by DNA of 251 individuals, false confessions – defined broadly to include not only fabricated and falsified reports of interrogations but also incriminating statements, outright confessions, and guilty pleas of innocent defendants – occurred in 25 per cent of the wrongful convictions overturned by DNA. False confessions were the second most frequent cause of wrongful convictions after eyewitness misidentifications.

That estimate corresponds quite closely with the one reported last year by the New York State Bar Association's Task Force on Wrongful Convictions. Its examination of 53 wrongful convictions in the state revealed that false confessions figured in 12 of them, a ratio the Task Force labeled "shockingly high." (For the report, see <http://www.nysba.org/Content/NavigationMenu42/January302009HouseofDelegatesMeetingAgendaItems/TFWrongfulConvictionsreport.pdf>.) As the Innocence Project has noted, false confessions occur for many reasons – duress, coercion, intoxication,

diminished capacity, mental impairment, ignorance of the law, fear of violence, threat of harsh sentence, gullibility, etc. And while often regarded as the result of methods of interrogation that intimidate, threaten, or coerce the person being questioned, they can and do occur in instances in which law enforcement personnel act within the spirit and letter of the law.

The Task Force recommended that custodial interrogations of all felony-level suspects be electronically recorded in their entirety and that law enforcement personnel, prosecutors, judges, and defense attorneys be given specific training about false confessions. It noted that 12 states and the District of Columbia require – eight by statute and five by judicial decree -- that custodial interrogations be electronically recorded. Included are some of Connecticut's neighbors – for example, Massachusetts and New Jersey. 26 of New York's 62 counties have adopted some form of recording of such interrogations and there are currently pilot programs underway in four other counties. In all, the Innocence Project notes that 500 jurisdictions make use of some form of electronic recording of interrogations. It also reports that, despite their initial skepticism, law enforcement personnel often come to appreciate the value of recording interrogations – presumably, because it provides a means of supporting their testimony in court about what was said in an interrogation. I would not be surprised if the state's Pilot Project has found support for the recording of custodial interrogations among law enforcement personnel for the same reason.

Raised Bill No. 230 would require that any oral, written or sign language statement made by a person under investigation for or accused of a capital felony or class A or B felony made as a result of a custodial interrogation be presumed to be inadmissible as evidence in a criminal proceeding unless the interrogation is recorded electronically and is substantially accurate and not altered. If enacted into law, this bill will provide a safeguard against errors and inaccuracies in courtroom descriptions of interrogations while also providing support for the testimony of law enforcement personnel who describe and characterize interrogations accurately in court. I urge you to approve the bill.

Raised Bill No. 5273, An Act Concerning Eyewitness Identification

The studies conducted by the Innocence Project and the New York Task Force on Wrongful Convictions agree that the single most frequently-occurring cause of wrongful convictions is misidentification by a victim or eyewitness. The Innocence Project reports that eyewitness misidentification occurred in more than 75 percent of the convictions overturned by DNA. The Task Force reported that misidentification of the accused by a victim or a witness occurred in 36 of the 53 cases it studied.

Both organizations argue that the best way to reduce the wrongful convictions that result from eyewitness misidentification is by changing the procedure by which such identifications are obtained. Specifically, both organizations recommend:

- 1) double-blind administration of the identification procedure, meaning that neither the witness nor the person administering the procedure know who the suspect is;
- 2) that eyewitnesses be told that the administrator doesn't know the identity of the suspect and the suspect may not be present in the lineup or photo board;
- 3) that the fillers (those who are not the suspect) in the lineup or photo board match the description of the suspect.;
- 4) that the witness be asked immediately for a statement of confidence level;
- 5) that the entire identification procedure be videotaped or otherwise electronically recorded; and
- 6) that the members of the lineup or photographs be presented sequentially rather than simultaneously.

As you know from testimony in previous years, the last of these is controversial and contested. Last year, I discussed in some detail the rationale for sequential rather than simultaneous presentation, the flaws in the design of the Chicago-area study (also known as the Mecklenburg study) that found a higher rate of "false positives" – i.e., identification of fillers – in sequential presentation, and the merits of the study conducted in Hennepin County, Minnesota, that found that sequential presentation, accompanied by blind administration, substantially reduced the selection of "false positives" and dramatically increased the ratio of selection of suspects relative to selection of fillers. I will not repeat what I said last year except to say the most important recommendations are the first five, pertaining to double-blind administration, the instructions given eyewitnesses, the selection of fillers, the statement of confidence level, and the electronic recording of the entire procedure. If all five were mandated statewide, I believe the number of eyewitness misidentifications would be greatly reduced, regardless of whether the lineup or photos were presented sequentially or simultaneously.

While Raised Bill No. 230 requires the preparation of a written record of the identification procedure, it does not require that the entire procedure be videotaped or otherwise electronically recorded. The preparation of a written record alone would not prevent someone involved in the procedure from attempting to influence an eyewitness. Nor would it provide evidence that no such attempt had occurred. A videotape or other electronic recording of the actual procedure would not only document any effort to influence a witness but would cause anyone who might otherwise be tempted to influence a witness to refrain from doing so. For that reason, I urge that you require, in addition to the written record, that the entire procedure be electronically recorded.

Raised Bill No. 5445, An Act Concerning the Death Penalty

In view of the votes in the House and Senate last year in support of House Bill 6578, it is quite possible the state will at some point in the future eliminate the option of imposing the death penalty on those convicted of a capital felony. But until that happens, the death penalty will remain an option. That being the case, I believe the Committee and the General Assembly should address the shortcomings that exist in the current law.

At last year's public hearing on Bill 6578, Representative Lawlor and Chief State's Attorney Kane discussed the protracted, often decades long, post-conviction appeal process in death penalty cases and whether and how it might be shortened. That, I gather, is the purpose of Section 2 (lines 44-99), which amends subsection (c) of section 54-95 of the statutes. I'm not a lawyer so I will leave it to others to advise you whether the legislative branch can, as in lines 73-77, define the conditions under which the state Supreme Court can grant a writ of habeas corpus or, more generally, impose limits on the duration of the post-conviction appeals process.

Aside from that issue, there are five aspects of the Bill which I commend and urge that you approve, regardless of what is done with respect to Section 2. As you know, there are 10 men on death row at the Northern Correctional Institution in Somers. Seven of the 10 are members of minorities; five are African American and two are Hispanic. Minorities make up approximately 20 percent of the state's population. Although there are 13 judicial districts in the state, nine of the 10 men on death row were sentenced in two of the districts – five in Waterbury and four in Hartford.

Such statistics do not in and of themselves constitute evidence of bias, either by race or geography. But they do raise questions that need to be answered about the imposition of the death penalty: Why are 90 percent of those on death row individuals who were sentenced in two of the 13 judicial districts? Do prosecutors, judges, and juries in the 13 districts apply the same standards in deciding whether to ask for and impose the death penalty? And why, in a state in which 20 percent of the population consists of members of minorities, are 70 percent of those on death row individuals who are members of minorities?

This bill takes those questions seriously and is to be commended for that reason. Section 4 (lines 109-128) calls for the creation of a database on all possible capital felonies that includes information about the race, ethnicity, gender, religion, sexual orientation, age, socioeconomic status of the defendants and victims, as well as information on the geographic area in which the offense occurred and was prosecuted. Only with such data can the questions raised above be answered.

The bill addresses the disparity across the 13 judicial districts in the frequency with which the death penalty has been imposed over the past quarter-century by creating, in Section 6 (lines 170-219), a Death Penalty Authorization Committee. Consisting of the Chief State's Attorney and the state's attorneys of each judicial district, the Committee will review and authorize requests by prosecutors to seek the death penalty.

In so doing, it provides a means of ensuring that the likelihood that the death penalty is imposed in a capital felony will not depend on the location of the crime but, rather, on criteria that are applied uniformly across the state.

In addition to creating an extensive database on all possible capital felonies in the state and a Death Penalty Authorization Committee, the bill includes three provisions that, taken together, will greatly reduce the likelihood of wrongful convictions in capital felonies in which the death penalty may be imposed. As far as I know, none of the 10 men on death row claim to be innocent. Nevertheless, it is important to take every possible step to ensure that no one is wrongfully convicted of a capital felony and sentenced to death. The Innocence Project, it might be noted, reports that 17 of those exonerated by DNA since 1989 had been sentenced to death. And the Center on Wrongful Convictions at Northwestern University reports that 130 individuals sentenced to death were later exonerated and that there have been at least 40 executions of individuals for whom there was compelling evidence of innocence.

The three provisions are contained in Sections 12, 14, and 15. Section 12 (lines 270-310) requires that any custodial interrogation of a person suspected of murder be electronically recorded by means of a video and audio recording device or, if such a device is lacking, by an audio recording device. This is an important provision for the reasons noted above in regard to Raised Bill No. 230. Section 14 (lines 320-413) requires the use of the same double-blind sequential eyewitness identification procedure that is proposed in Raised Bill No. 5273 and is important for the same reasons noted in regard to that bill. And Section 15 (lines 414-447) requires, in the event the prosecution plans to use of statements allegedly made to an informant, a series of measures to assess the reliability of the informant. That, too, is an important provision.

I urge that, regardless of what is decided with respect to Section 2, you approve the provisions in Sections 4, 6, 12, 14, and 15. Taken together, they will ensure that the death penalty is applied in an impartial manner in the state and will greatly reduce the likelihood of a wrongful conviction for a capital felony.