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**Testimony of Brian Carlow, Deputy Chief Public Defender**

***Raised Bill No. 6439 - An Act Concerning Habeas Corpus Reform***

**Judiciary Committee Public Hearing - March 7, 2011**

I am speaking today in opposition to Raised Bill 6439, which among other things establishes a statute of limitations for habeas corpus petitions.

At the outset, it is important to understand the various types of Habeas Corpus claims that exist. There are essentially three types of habeas corpus petitions. The first is a challenge on the conditions of confinement.

The second is a claim based on a time calculation of the sentence being served. This type of habeas petition either claims that the sentencing law has been applied incorrectly, or that the sentencing law has been applied correctly but in violation of the intentions of the parties involved in the sentencing.

The third type of habeas corpus petition attacks the validity of the conviction itself either because the defendant is actually innocent, or because of the ineffective assistance of counsel.

Despite the language of its proposal, based upon testimony in previous years, it is our understanding that the Chief State's Attorney, and other proponents of this bill, do not want to interfere with the legitimate filing of petitions claiming actual innocence. We agree and believe this type of petition should be entirely removed from the bill's coverage.

Nor have proponents focused on habeas petitions based on conditions of confinement or errors in sentence time calculations. While I am happy to discuss these types of petitions if the committee would like me to, I believe the real focus of this bill is on petitions claiming ineffective assistance of counsel.

It is on this aspect of habeas corpus petitions that I want to focus most of my comments.

Proponents of the proposed legislation, principally the Division of Criminal Justice, have asserted for years that multiple petitions are overwhelming the Habeas Corpus system. Both anecdotal and statistical evidence establish that that is not accurate. For several years, we have been attempting to have Criminal Justice provide us with either the statistics or the individual cases that support their contention that multiple petitions are a major problem. We met with Criminal Justice and Judicial in the fall to try to see if there was evidence that such multiple petitions was a major problem. We followed up that meeting with a letter asking both other departments to identify any problematic petitions they saw. To date, they have informed us of no new problematic petitions.

After requesting the information for an extended period of time, Criminal Justice did recently provide us with the list. All the petitioners identified by Criminal Justice constitute less than 3% of over 5500 cases examined. There were only 22 (less than ½ of one percent) cases of petitioners seeking to litigate claims already decided by a previous Habeas Corpus petition. To suggest that multiple petitions are a major problem is simply unsupported by the facts.

Even if we assume that the issue that the proponents raise needs to be addressed, the fact is that there are rules designed to address that issue and also there are processes that have been put in place by the Judicial Department and the Division of Public Defender Services to ensure that multiple petitions remain a relatively insignificant issue.

First, both the Judicial Department and the Division of Public Defender Services have implemented a screening mechanism to identify and resolve petitions raising issues that have already been decided. Many petitions have been declined by Judicial before ever being referred to our office.

Second, there are numerous vehicles in our law to protect against the precise concerns raised by the state. Though a lengthy and involved list, I include them here to emphasize that not only do we dispute the degree of the problem as stated by Criminal Justice, but also to show that the law as it exists today is designed to address the issues being raised.

**In short, habeas courts and prosecutors can readily deal with the relatively few repeat filings using the tools already available to them. Those tools include:**

- **Abuse of the Writ**

Abuse of the writ is an equitable doctrine that empowers the judge to refuse to hear (or even docket) a petition on the ground that the inmate is abusing the system. This tool has been used to prevent an inmate from filing any further petitions or to dismiss an existing petition. Abuse of the writ can be based on an inmate filing many petitions, or can arise when an inmate could have raised a claim in the earlier habeas, but intentionally withheld the claim in order to get a second hearing.<sup>1</sup> The abuse of the writ doctrine has also been used prospectively. The Court has ruled that any future petitions from one particular inmate would be an abuse of the writ and could not be filed without the Court express permission.<sup>2</sup>

- **Laches**

Laches is an equitable doctrine barring delayed claims where the Commissioner of Corrections (or other person holding the petitioner) is prejudiced by the delay. This tool has been used to bar consideration of the inmate's claims. Laches applies where there is both unreasonable delay and prejudice to the Commissioner's ability to defend the habeas case. The State has successfully used this tool to bar consideration of an inmate's claims.<sup>3</sup>

### ***Res judicata* and Collateral Estoppel**

*Res judicata* and collateral estoppels are legal doctrines that bar a person from relitigating a claim that was already heard and decided by the Court. The doctrine of *res judicata* ordinarily bars not only any claim that was actually litigated and decided, but also any claim that could have been raised in the earlier case. Collateral estoppel applies to and bars litigation of a claim that has actually been litigated and decided, but also bars litigation of facts that have previously been decided. The Connecticut Supreme Court has ruled that *res judicata* applies in habeas cases, but only to claims that were actually raised and decided in the earlier litigation. This ruling was based on the common law history of the writ of habeas corpus and the special place that the writ of habeas corpus holds in history, and in the legal system. Despite this limitation *res judicata* is a tool that has been used successfully to bar consideration of repetitive claims.<sup>4</sup>

- **Dismissal of Successive Petitions**

Connecticut Practice Book §23-29 (3) authorizes the court to dismiss a case *at any time* on its own motion (or the motion of the Commissioner of Correction) if the petition presents the same ground as a prior petition that was previously denied, unless the later petition states new facts or offers new evidence not available at the time of the prior petition. This provision has been invoked by the Court and successfully raised by the Commissioner to bar consideration of the inmate's claims.<sup>5</sup>

- **Motion for Injunction**

The State has successfully moved the habeas court to grant a permanent injunction barring a petitioner from filing any further petitions. An injunction can be entered where a party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. <sup>6</sup>

All of these tools are available to deal with repeat petitions. As a result, they render the proposed bill unnecessary.

**In conclusion**, the proposed bill is based on a perceived problem that is grossly overstated by the Criminal Justice. Despite repeated efforts to have evidence presented to support its claim concerning the severity of the problem, the information presented supported the conclusion

that the problem claimed is exceedingly small. Additionally, as it exists today, the law has the mechanisms in place to address the concern of repeated attempts to litigate issues that have been decided and those mechanisms are being utilized successfully. The Office of Chief Public Defender urges this Committee to reject this bill.

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<sup>1</sup> Examples of the successful use of the abuse of the writ doctrine include Gaffney v. Warden, 2007 Conn. Super. LEXIS 2921 (Conn. Super. Ct. Nov. 5, 2007) (prospectively holding additional petitions shall be considered an abuse of the writ); Zollo v. Warden, 2009 Conn. Super. LEXIS 3024 (Conn. Super. Ct. November 4, 2009) and Frank v. Warden, 2009 Conn. Super. LEXIS 2722 (Conn. Super. Ct. Oct. 8, 2009).

<sup>2</sup> Simms v. Warden, 229 Conn. 178 (1994).

<sup>3</sup> Examples of the successful use of the laches doctrine include Dickinson v. Mullaney, 2004 Conn. Super. LEXIS 2474 (Conn. Super. Ct. July 15, 2004) and Ostroski v. Warden, 2009 Conn. Super. LEXIS 618 (Conn. Super. Ct. Mar. 9, 2009).

<sup>4</sup> Moody v. Warden, 2009 Conn. Super. LEXIS 1722 (Conn. Super. Ct. 2009) and Toccaline v. Warden, 2008 Conn. Super. LEXIS 1669 (Conn. Super. Ct. 2008) are examples of cases in which the res judicata doctrine was successfully used to bar consideration of the inmates' claims.

<sup>5</sup> Examples of the use of the successive petitions provision to bar consideration of an inmate's claims include Danzy v. Warden, 2008 Conn. Super. LEXIS 2743 (Conn. Super. Ct. 2008) and Zollo v. Warden, 2009 Conn. Super. LEXIS 3024 (Conn. Super. Ct. 2009).

<sup>6</sup> Example of the use of this tool to bar consideration of the inmate's claims include McCarthy v. Warden, 1997 Conn. Super. LEXIS 769 (Conn. Super. Ct. 1997) and Johnson v. Warden, No. 30857 (Tolland Judicial District Nov. 6, 1984) (Smith, J.)