



## 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. 5366* **An Act Concerning Civil Actions and Subpoenas Filed To Harass an Individual or After Numerous Actions Against the Individual Have Been Dismissed**

### Judiciary Committee Public Hearing - March 12, 2012

The Office of Chief Public Defender is opposed to that portion of this *Raised Bill No. 5366, An Act Concerning Civil Actions and Subpoenas Filed To Harass an Individual or After Numerous Actions Against the Individual Have Been Dismissed* which would be applicable to habeas corpus proceedings or civil suits by persons who have been exonerated on the grounds of actual innocence and seek damages or compensation. During previous sessions, legislation has been proposed intended to reform the current state process. As a result, over the past several months, numerous meetings have taken place at which habeas reform has been, and is being, discussed in detail. The attendees at the meetings include Judges who have and continue to preside over habeas corpus matters and representatives from the Judicial Department, the Chief State's Attorney and representatives from his office and the Chief Public Defender and representatives from her office.

This group has been meeting in good faith and has had extensive discussions pertaining to habeas reform. The proposed legislation, if passed, will directly impact upon the changes in procedure currently being discussed and upon a petitioner's right to seek a remedy. The new hearings in Section 2 and 3 will result in the expenditure of additional resources by this agency at a time when it lacks the resources to do so.

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For these reasons, this office requests that if the bill is voted out of committee that language be added that specifically excludes habeas corpus proceedings from Sections 1 and 3 so that the new provisions are not applicable to habeas corpus proceedings. In addition, this office requests that the language proposed in Section 2 not be changed. This office takes no position on whether a pro se litigant should first be authorized to issue a subpoena. But by expanding the language to a party, a financial and procedural burden is placed upon the attorneys employed by this agency or who have been appointed as Assigned Counsel and paid by this agency if required to comply with the hearing requirements.

In civil actions where a person has had three or more complaints or appeals against another dismissed by a state or federal court because such were frivolous or malicious or failed to state a claim, Section 1 (a) (1) would require a certificate to be filed that is signed and sworn to by the pro se party or the attorney "that a reasonable inquiry has been made and that, in the opinion of the attorney or party, there are grounds for a good-faith belief that such action has merit and that such action is not being filed for a malicious purpose or solely to harass the defendant." While this office has no position regarding this proposed provision as it applies to civil lawsuits, the problem here is that habeas corpus proceedings are civil proceedings which are brought against either the Warden or the Commissioner of Correction as the Respondent. The proposed language in section 1 would be applicable to habeas corpus proceedings. Inmates who file habeas corpus petitions are entitled to representation after the filing, if indigent. If indigent, counsel is then appointed from this agency. The language places the burden of filing a certificate which must provide a detailed discussion as to why there is a good-faith basis, all without the benefit of counsel. Habeas Corpus petitions are filed by pro se inmates. As drafted, subsection (a)(2) could bar certain petitioners from filing a habeas corpus petition. There already exist rules pursuant to the Connecticut Rules of Court which permit the exercise of discretion by a court to dismiss a habeas on various grounds.

Section 2 would now require an attorney who is representing an inmate or probationer in a habeas proceeding, not just a pro se litigant, to notify the clerk (1) if the petitioner is convicted of certain crimes and (2) if the subpoena is directed to the victim of such crimes. In addition, an attorney representing an inmate or probationer in a habeas corpus matter would now be required to obtain the permission of the court prior to issuing a subpoena to the person who was the victim in the underlying criminal matter for

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the habeas hearing or a deposition. The bill requires the attorney to provide notice to the clerk of the intention to subpoena the victim and requires that a hearing be scheduled at which the attorney representing the petitioner must "make an offer of proof as to the content of the testimony expected to be given by the victim." Only if the court determines that the testimony to be given is relevant and necessary to the proceeding will the court permit the subpoena to be issued. The section further limits the examination of the witness so that it does not exceed the scope of the offer of proof and finding of the court. An issue arises however in those instances where the victim refuses to speak with petitioner's counsel. How can an offer of proof be made? The addition of this requirement would create a need to depose a victim in order to make the required showing. Currently depositions are not available to obtain the testimony of any witness, including victims, absent exigent circumstances that will render the witness unavailable to testify. Thus the proposed legislation would achieve a result exactly contrary to that intended, while also requiring the expenditure of additional resources by this agency at a time when it lacks the resources to do so. Moreover, an attorney licensed to practice law in this state is required to comply with the Rules of Professional Conduct in his/her treatment and dealings with the court and persons regardless of whether such persons are represented by other counsel or not. Pursuant to Rule 4.4, counsel is required to have respect for the rights of third persons and "not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. . . ". As a result, the language of this section is not necessary as it applies to attorneys licensed to practice in this state due to the ethical obligations already imposed.

Section 3 would require court authorization prior to the issuance of a subpoena against the defendant. The defendant in a habeas proceeding, typically the Commissioner of Correction or the Warden, is referred to as the *Respondent*. This bill would place additional burdens on the petitioner's counsel in habeas cases and prohibit a subpoena to issue for the Department of Corrections where an inmate or probationer has had 3 or more complaints or appeals against the Department of Correction dismissed as "frivolous or malicious or failed to state a claim upon which relief may be granted." Because appeals are included, a single case could result in three dismissals: the original Superior Court ruling, a dismissal by the Appellate Court and a dismissal by the Supreme Court. Thus a single unsuccessful habeas petition would satisfy the '3 or more' requirement and forever subject a person to the requirement of a sworn certificate of merits and the risk of financial or disciplinary sanctions if a Court disagrees with the assessment of merit. As in Section 2, this proposed language would require that counsel "make an offer of proof as to the

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content of the testimony expected to be given" at a hearing. Habeas petitions are routinely filed pro se by persons who are not legally trained in the law. Not only would these additional hearings impact upon the petitioner's right to access to courts, but also the financial resources of the Division.

Lastly, because habeas reform is the subject of detailed discussions between those involved in the court procedures, this Office requests that the Committee oppose this bill as drafted.