

TESTIMONY OF THE HONORABLE THOMAS A. BISHOP

**IN SUPPORT OF
RAISED BILL 456. AN ACT CONCERNING ADOPTION OF THE CONNECTICUT
CODE OF EVIDENCE BY THE SUPREME COURT**

**JUDICIARY COMMITTEE PUBLIC HEARING
MARCH 17, 2014**

Good Morning, Senator Coleman, Representative Fox, Senator Kissel, Representative Rebimbas and members of the Committee. My name is Thomas Bishop. For ten years I was honored to be a judge of the Appellate Court and, for seven years earlier, a judge of the Superior Court. By statute and leave of the Chief Justice, I still have the opportunity to hear appeals and I work from the Norwich courthouse to help litigants with cases pending in either the trial or appellate court resolve their pending issues by agreement. I am here today to address Raised Bill 456, ***An Act Concerning Adoption of the Connecticut Code of Evidence by the Supreme Court***. I will briefly explain the genesis of this bill and to express my support of it, as well as that of the Chief Justice and members of the Supreme Court.

By way of background, in the early 1990s this Judiciary Committee and the leadership of the Judicial Branch discussed the feasibility of situating evidence law developed by the Court in one place. At first, it was the thinking of this Committee's leadership that such a project could be undertaken by legislation, but over time your leadership decided it would be better for a Code to be adopted by the Judicial Branch because it would be easier for the Court to develop and amend such a Code. Accordingly, the Chief Justice appointed a committee chaired by Justice David Borden and that committee ultimately recommended a Code which was adopted by the judges

of the Superior Court in 2000. In conjunction with the adoption of a Code, the Chief Justice appointed an Evidence Oversight Committee, chaired by Justice Joette Katz and comprised of judges and lawyers chosen by the Chief Justice. I served on that committee from its inception, and, since 2008, have chaired it. I speak today, however, as an individual and not in that official capacity.

In 2008, the Supreme Court issued its opinion in the criminal case of *State v. DeJesus*. There, the Supreme Court was confronted with a rule contained in the Code concerning the admissibility of past misconduct alleged to have been committed by the defendant, DeJesus. The rule then in existence was that evidence of such conduct could only be admitted to show intent, motive, identity, or common scheme but not to show a defendant had a propensity to commit criminal acts. In *DeJesus*, the Supreme Court carved out an exception to this rule and stated that in crimes involving abhorrent sexual behavior, evidence of similar past conduct by the defendant could be admitted to show the defendant's propensity to commit such misconduct. As a consequence of *DeJesus*, there was concern in some quarters regarding the continuing viability of the Code. If the Supreme Court could modify the Code through a decision, are trial judges really bound by it? At the time, I was teaching a seminar at UConn Law School on judicial independence and I became interested in looking more deeply into the question of the role of courts in rulemaking. Following my research, I was fortunate to have an article published in the Connecticut Law Review in November 2012 on this general topic. I learned, in the course of my study, that in the vast number of states, evidence codes are adopted by the state's highest courts. I also began conversations with the Chief Justice about the notion of our Supreme Court adopting the Code as a way to

make clear that the Code is, indeed, binding on lower courts, and that the Supreme Court and the legislature retain their authority over the law of evidence. We agreed that the Court has the inherent authority to adopt such a Code, but that it would be preferable, in light of the joint authority of the Court and the legislature with respect to evidentiary rules, for the Court to act in conjunction with legislation authorizing the Court to adopt a Code. The Chief Justice agrees fully with this approach. Thus, this legislation has been proposed. The Chief Justice, and indeed the Supreme Court, will adopt the Code only through the collaborative route of enabling legislation.

As you will see, the legislation requires the Chief Justice to appoint a committee of lawyers and judges and to confer with the Judiciary Committee on an annual basis. This idea stems from the notion that evidence lawmaking is a shared responsibility of the judiciary and the legislature. Because there are some areas of overlap, it is a good idea that the Evidence Code Oversight Committee and this Committee have a vehicle to periodically discuss developments and initiatives in evidence lawmaking.

Finally, while we support this bill, we would also suggest an additional sentence be added to the bill to make it clear that by acting in this way neither the Supreme Court nor this body yields its ongoing authority regarding evidence law. Specifically, that sentence would read as follows: "Nothing in this provision is intended to limit the common law authority of the Supreme Court or the legislative authority of the General Assembly with respect to the law of evidence." A proposed amendment to add this language is attached to my testimony.

Thank you for this opportunity to speak with you. I'd be happy to answer any questions you may have.

Proposed amendment to Raised Bill No. 456, *An Act Concerning Adoption of the Connecticut Code of Evidence by the Supreme Court*:

Insert the following after the word “committee.” in line 21:

“Nothing in this provision is intended to limit the common law authority of the Supreme Court or the legislative authority of the General Assembly with respect to the law of evidence.”