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Testimony of Natasha M. Pierre, Esq., State Victim Advocate
Submitted to the Judiciary Committee
Wednesday, March 4, 2015

Good afternoon Senator Coleman, Representative Tong and distinguished members of the Judiciary Committee. For the record, my name is Natasha Pierre and I am the Victim Advocate for the State of Connecticut. Thank you for the opportunity to provide testimony concerning:

House Bill No. 6923, *An Act Concerning Sexual Assault* and
House Bill No. 6939, *An Act Concerning Sexual Assault in the First Degree*

Sexual assault is a crime that not only violates an individual's total physical body but also severely devastates an individual's emotional and psychological mind. The sense of shame, humiliation and fear that overcomes a victim can last many years, and for some victims, a lifetime. For victims of sexual assault who report the crime to police, these effects are compounded by a lengthy investigation and prosecution that typically circles back to the actions of a victim rather than the offender. After all, the best defense, and most common, in a sexual assault case is that the sexual contact was consensual. This defense immediately shifts the focus from the defendant to the victim. It is no wonder that sexual assault is still one of the most under-reported crimes.

House Bill No. 6923 will improve the protections for victims of sexual assault by requiring that any evidence of the sexual conduct of the victim offered by the defendant in a criminal prosecution be filed under seal. If after an in camera hearing, the court finds the evidence admissible, and the case proceeds to trial, the evidence would be unsealed. These protections would extend to any transcript of the hearing and to any further disclosure of the evidence by the defense counsel, without prior approval of the prosecuting authority or the court.

Section 2 of House Bill No. 6923 will establish deadlines for the transfer of sexual assault evidence collection kits to the state lab so that such kits are not languishing on the shelves of a police department evidence room. Specifically, the bill would require the transfer of such kits to the state lab no later than ten days after the collection of such evidence. Additionally, the lab would be required to analyze the evidence within sixty days after the collection of evidence or maintain the evidence for five years in cases where the victim chooses to remain anonymous. These deadlines will ensure the timely transfer and analysis of evidence which will assist in the investigation and prosecution of cases involving sexual assault.

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Senate Bill No. 6939 will provide flexibility to the court in imposing sentence for conviction of certain sexual assault offenses by allowing the Courts to impose a "split" sentence of prison and probation to permit longer terms of conditional liberty and official supervision. To ensure that the full intent of the proposal is met, the OVA believes that some minor amendments need to be considered:

1. Currently, the court is prohibited from sentencing a person to a period of probation for conviction of certain sexual assault offenses that are classified as an A felony. This proposal would allow the court to consider a period of probation for certain sexual assault first degree offenses, and there is no prohibition against the court imposing a sentence of probation only. **The OVA believes that language should be added to clarify that any sentence of probation is permissible only in conjunction with a period of incarceration.** Otherwise, the OVA believes that the punitive aspect for conviction of a serious sexual assaults may be diminished.

2. This bill would require a 10 year sentence, which cannot be suspended or reduced by the Court, if a person commits sexual assault in the first degree against a minor. However, as written, it will not result in the true intent of establishing a mandatory minimum sentence for Conviction of certain violent, sexual assault offenses, unless the following language is applied: **"...ten years of the sentence may not be suspended or reduced in any manner."**

   As background for this recommendation, the OVA has attached an opinion it sought and received from the Attorney General's Office in January 2014. The AG opinion indicates that absent the above referenced language, the Department of Correction (DOC) has the authority to release inmates prior to serving the mandatory portion, as long as the inmate remains under the supervision of DOC.

I urge the Committee to support House Bill No. 6923 and House Bill No. 6939 with the recommended amendments. Thank you for consideration of my testimony.

Respectfully submitted,

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January 27, 2014

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Dear Attorney Ambrose:

You have requested an opinion regarding the authority of the Board of Pardons and Paroles (Board) to grant parole release and the Commissioner of Correction (Commissioner) to grant supervised release to persons, whose convictions include a mandatory minimum sentence of incarceration, prior to the completion of the minimum mandatory sentence in a penal institution. The question you pose is rather general. You do not inquire about a particular set of facts under a particular statute involving a mandatory minimum sentence. We therefore answer your question generally, providing advice on what we believe are the appropriate legislative guideposts. This is an important caveat to underscore because neither the sentencing statutes nor the relevant statutory release mechanisms are drafted identically. Some were passed at different times and in some cases exceptions have been enacted that might create some uncertainty. It is possible, therefore, that certain statutes or factual circumstances might yield a different result in light of relevant statutory canons of interpretation.

Further, our conclusions should not be construed as embracing or criticizing either the legislature's enactment of mandatory minimum sentences or the policy of early release of sentenced inmates through parole or transitional programs. These questions of public policy are for the legislature to pass upon and for the executive agencies to implement. We can only do our best to divine what policy the legislature has in fact enacted. *Okeke v. Commissioner of Public Health*, 304 Conn. 317, 329 (2012).

Using the available tools of statutory construction, we conclude that, as a general proposition, where the legislature has intended to limit the release of a person whose conviction includes a mandatory minimum sentence or to prohibit the reduction of such a sentence, it has used express language to that effect. For example, certain statutes, principally related to operating a vehicle under the

influence, expressly preclude reducing a mandatory minimum sentence *in any manner*, which would include by the Board or the Commissioner. *E.g.*, Conn. Gen. Stat. § 14-227a. Similarly, Conn. Gen. Stat. § 18-98e expressly limits the authority of the Commissioner in applying earned risk reduction credits so as not to permit a reduction in a mandatory minimum sentence. In the absence of such express language, we conclude that a limitation as to their authority should not be implied.

Mandatory Minimum Sentences

The legislature has provided mandatory minimum sentences for a wide variety of crimes.[1] The language the legislature has chosen to create mandatory minimum sentences, however, varies somewhat for different criminal offenses. Generally, most statutes establishing mandatory minimum sentences do not in fact use that phrase, but rather use language restricting the authority to reduce or suspend a sentence.[2] For example, most statutes providing for mandatory minimum sentences indicate that some period of the sentence imposed "may not be suspended or reduced ***by the court***" (emphasis added). *E.g.*, Conn. Gen. Stat. § 53a-55a (manslaughter in first degree with firearm); § 53a-59 (assault in first degree); § 53a-92a (kidnapping in first degree with firearm); § 53a-101 (burglary in first degree). A smaller number of statutes involving operating a vehicle under the influence and other motor vehicle offenses state that some portion of the sentence imposed "may not be suspended or reduced ***in any manner.***" (emphasis added). *E.g.*, Conn. Gen. Stat. § 14-227a(g) (operating while under influence); § 14-215(b), (c) (operating with revoked or suspended license). Another small number of statutes provide only that some period of the sentence shall not be suspended or reduced without the reference "by the court" or "in any manner." *E.g.*, Conn. Gen. Stat. § 21a-278a (sale of drugs to minors); § 53-202b (sale or transfer of assault weapon); § 53-202c (possession of assault weapon); § 53-202j (felony with an assault weapon); § 53a-136a (carjacking).

The use of the different language can be significant. In *Plourde v. Liburdi*, 207 Conn. 412 (1998), the Supreme Court addressed whether statutory good time and employment credits, administered by the Commissioner under

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[1] For a comprehensive listing of crimes for which the legislature has set mandatory minimum sentences, see OLR Research Report 2013-R-0103, *Crimes With Mandatory Minimum Prison Sentences – Updated and Revised* (Feb. 5, 2013), http://www.cga.ct.gov/2013/rpt/2013-R-0103.htm.

[2] The phrase "mandatory minimum sentence" is found in several statutes involving sentencing. *See, e.g.*, Conn. Gen. Stat. §§ 21a-278;21a-283a; 53a-24(b); 53a-30(a); 53a-39(c);

Conn. Gen. Stat. §§ 18-7a and 18-98a, applied to reduce a mandatory minimum sentence under Conn. Gen. Stat. § 14-227a. At the time, § 14-227a, which prohibits operating a motor vehicle while under the influence, provided that, upon a third violation, the court must impose a mandatory minimum sentence of 120 days, "which may not be suspended or reduced in any manner." 207 Conn. at 415. The Court contrasted the language used in § 14-227a – "in any manner" – with language used in other statutes with mandatory minimum sentences that provided that the mandatory minimum could not be suspended or reduced "by the court." The Court concluded that the legislature's choice of different language reflected a different intent. The choice to use the phrase "in any manner" indicated an intent to preclude any authority to reduce what the Supreme Court itself referred to as a "mandatory minimum sentence." *Id.* at 416-17.

Thus, where the legislature has intended to limit all authority – a court's, the Board's and the Commissioner's – it has expressed that intent through the use of the phrase "in any manner." The legislature is presumed to have intended to create a harmonious and consistent body of law, and statutes relating to the same subject matter must therefore be read together. *In re Jusstice W.*, 308 Conn. 652, 663 (2013). Moreover, where the legislature uses one set of words in one place, and another set of words in another place, the legislature has demonstrated that it knows how to express different intentions. *Tine v. Zoning Bd. of Appeals*, 308 Conn. 300, 308 (2013); *Southington '84 Assocs. v. Silver Dollar Stores, Inc.*, 237 Conn. 758, 767-68 (1996); *Plourde*, 207 Conn. at 416. Where the context demonstrates that the legislature knew how to convey its intent expressly, the failure to do so implies the legislature did not intend to include the absent language. *Marchesi v. Board of Selectmen*, 309 Conn. 608, 618 (2013). A court will not supply language that the legislature has omitted and will not impute an intent that is not apparent from the language the legislature has chosen to use where the legislature could have easily provided that language. *State v. Ward*, 306 Conn. 698, 710 (2012). In the absence of the phrase "in any manner" or some similar language to evidence an intent to limit the Board's and the Commissioner's authority – and not just a court's authority – we will not read into the statutory language such an intent.

As a general proposition, therefore, we conclude that only those statutes establishing mandatory minimum sentences using the phrase "in any manner" – or some similar language – impose a limit on the authority of the Board or the Commissioner.

Authority of the Board of Pardons and Paroles

The Board's authority to release on parole is set forth in Conn. Gen. Stat. § 54-125a.[3] Under subsection (a) of § 54-125a, the general rule is that a person incarcerated under a sentence of more than two years and who has served not less than one-half of the sentence (less any risk reduction credit) may be eligible for release on parole. Subsection (b) creates certain exceptions. First, a person convicted of certain specified crimes, such as murder, is ineligible for parole

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[3] Section 54-125a provides, in relevant part:

> (a) A person convicted of one or more crimes who is incarcerated on or after October 1, 1990, who received a definite sentence or aggregate sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the aggregate sentence less any risk reduction credit earned under the provisions of section 18-98e or one-half of the most recent sentence imposed by the court less any risk reduction credit earned under the provisions of section 18-98e, whichever is greater, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which the person is confined, if (1) it appears from all available information, including any reports from the Commissioner of Correction that the panel may require, that there is reasonable probability that such inmate will live and remain at liberty without violating the law, and (2) such release is not incompatible with the welfare of society.... The parolee shall, while on parole, remain under the jurisdiction of the board until the expiration of the maximum term or terms for which the parolee was sentenced less any risk reduction credit earned under the provisions of section 18-98e....
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> (b) (1) No person convicted of any of the following offenses, which was committed on or after July 1, 1981, shall be eligible for parole under subsection (a) of this section: (A) Capital felony, as provided under the provisions of section 53a-54b in effect prior to April 25, 2012, (B) murder with special circumstances, as provided under the provisions of section 53a-54b in effect on or after April 25, 2012, (C) felony murder, as provided in section 53a-54c, (D) arson murder, as provided in section 53a-54d, (E) murder, as provided in section 53a-54a, or (F) aggravated sexual assault in the first degree, as provided in section 53a-70a. (2) A person convicted of (A) a violation of section 53a-100aa or 53a-102, or (B) an offense, other than an offense specified in subdivision (1) of this subsection, where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed less any risk reduction credit earned under the provisions of section 18-98e.

Conn. Gen. Stat. § 54-125a.

altogether. Conn. Gen. Stat. § 54-125a(b)(1). Second, under subsection (b)(2), a person convicted of the crimes of home invasion (§ 53a-100aa) or burglary in second degree (§ 53a-102) or of crimes involving use or attempted or threated use of physical force is ineligible for parole until 85 percent of the sentence (less any risk reduction credit) has been served. Conn. Gen. Stat. § 54-125a(b)(2).

It is especially illuminating to our search for the legislature's intent that prior to 1999 § 54-125a(b) included an additional provision concerning mandatory minimum sentences. Specifically, former subsection (b)(3) of § 54-125a provided:

> (3) No person convicted of any other offense for which there is a mandatory minimum sentence which may not be suspended or reduced by the court shall be eligible for parole under subsection (a) of this section ***until such person has served such mandatory minimum sentence*** or fifty per cent of the definite sentence imposed, whichever is greater.

Conn. Gen. Stat. § 54-125a(b)(3) (Rev. to 1999) (emphasis added). That subsection, however, was eliminated by Public Act No. 99-196.

By amending § 54-125a to remove the specific provision relating to mandatory minimum sentences, the legislature manifested an intent that the Board exercise its authority to grant release on parole without regard to whether a mandatory minimum sentence had been completed. Since the passage of Public Act No. 99-196, the remaining provisions of subsections (a) and (b) have governed the Board's discretion to grant release. "When the legislature amends the language of a statute, it is presumed that it intended to change the meaning of the statute and to accomplish some purpose." *Chaterjee v. Comm'r of Revenue Services*, 277 Conn. 681, 693 (2006). If the legislature had wanted to ensure that a person convicted of a crime for which there was a mandatory minimum sentence would not be eligible for parole until the mandatory minimum was served, it could easily have done so. Instead, it effectively did just the opposite, by eliminating the prior provision that did impose special requirements for mandatory minimum sentences.

The legislative history of Public Act No. 99-196 reveals that the prior provision relating to mandatory minimum sentences was repealed because of unintended consequences in the application of former subsection (b)(3) and subsection (b)(2) that could have allowed for a person with a mandatory minimum sentence to be eligible for parole earlier than a person without a mandatory

minimum sentence.[4] Rather than amend § 54-125a in some way to avoid these unintended consequences, but yet retain a requirement that the mandatory minimum sentence be served before a person becomes eligible for parole, the legislature simply chose to eliminate subsection (b)(3) and to allow the remaining provisions of the statute to control. 42 Sen. Proc. 2722-24 (June 2, 1999).

Of course if the elimination of subsection (b)(3) has led, in the legislature's judgment, to other unintended consequences -- such as the eligibility for parole of a class of offenders the legislature wishes not to make eligible – it can change the law, as it chose to do in 1999. However, in light of the statutory language of § 54-125a and the legislative amendments that led to that present language, we conclude that the Board's authority to grant parole release is not limited beyond those statutes imposing mandatory minimum sentences using the phrase "in any manner." [5]

Authority of the Commissioner of Correction

Under Conn. Gen. Stat. § 18-100c, the Commissioner has authority to release to a halfway house, group home, mental health facility or other approved community correction program, a person serving a sentence of two years or less who has served in prison not less than one-half of the sentence, less applicable statutory credits earned.[6] First, it is important to recognize that release to a

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[4] In explaining the reason for eliminating subsection (b)(3), Senator Williams offered an example:

> [I]f someone was guilty of a Class D felony that included a one-year minimum mandatory sentence . . . and was given the maximum sentence under the Class D felony, five years in jail, then under this section they would be eligible for parole after serving just fifty percent of the entire five-year sentence, or two-and-a-half years. Whereas if you back up to the previous section [(b)(2)] where we have moved well beyond the fifty percent mark, and are now looking at more of an eight-five percent time served for crimes of this nature. And again, this – I don't believe was by design. I believe this language, when it was incorporated, was inadvertent.

42 Sen. Proc. at 2723-24 (June 2, 1999).

[5] Your letter suggests that our conclusion is consistent with how you understand the Board to have interpreted and administered its statutory mandate. As discussed, the legislature is free to change this statute.

[6] Section 18-100c provides in full:

> A person convicted of a crime who is incarcerated on or after July 1, 1993, who received a definite sentence of two years or less, and who has been confined under such sentence for not less than one-half of the sentence imposed by the

halfway house or the like under § 18-100c does not under Connecticut law constitute a reduction or suspension of a person's sentence. A person released under this statute remains under the jurisdiction and supervision of the Commissioner and continues to serve his or her sentence. Conn. Gen. Stat. §§ 18-100(e), 18-100c, 18-100d;[7] *see Asherman v. Meachum*, 213 Conn. 38, 48-49 (1989).

Significantly, where the legislature has wanted to limit the Commissioner's authority with regard to mandatory minimum sentences, it has used language that has made apparent that intent. As discussed above, the legislature has evidenced an intent to limit all authority, including the Commissioner's, when it uses the phrase "in any manner" when establishing a mandatory minimum sentence. *Plourde*, 207 Conn. at 416. Moreover, when the legislature enacted Public Act No. 11-51 providing for risk reduction credits for persons convicted after October 1, 1997, it expressly directed that "[i]n no event shall any credit earned under this section be applied by the [C]ommissioner so as to reduce a mandatory minimum term of imprisonment such inmate is required to serve by statute." Conn. Gen. Stat. § 18-98e(d)(emphasis added). Similar language is absent from other statutes relating to the Commissioner's authority to commute, diminish, reduce or deduct from a sentence, or to transfer an inmate to a different intuition or a halfway house, group home or residential program. *See* Conn. Gen. Stat. §§ 18-7, 18-7a, 18-7a, 18-98a, 18-98b, 18-100, 18-100c. The

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> court, less such time as may have been earned under the provisions of section 18-7, 18-7a, 18-98a, 18-98b or 18-98d or less any risk reduction credit earned under the provisions of section 18-98e, may be released pursuant to subsection (e) of section 18-100 or to any other community correction program approved by the Commissioner of Correction.

[7] Conn. Gen. Stat. § 18-100d provides: "Notwithstanding any other provision of the general statutes, any person convicted of a crime committed on or after October 1, 1994, **shall be subject to supervision by personnel of the Department of Correction until the expiration of the maximum term or terms for which such person was sentenced** less any risk reduction credit earned under the provisions of section 18-98e." (emphasis added)

Conn. Gen. Stat. § 18-100(e) provides "(e) If the Commissioner of Correction deems that the purposes of this section may thus be more effectively carried out, the commissioner may transfer **any person** from one correctional institution to another or to any public or private nonprofit halfway house, group home or mental health facility or, after satisfactory participation in a residential program, to any approved community or private residence. Any inmate so transferred shall remain under the jurisdiction of said commissioner." (emphasis added)

legislature's use of express language to limit the Commissioner's authority reinforces our conclusion that, in the absence of such express language, an unexpressed intention to limit the Commissioner's authority should not be implied. *Marchesi*, 309 Conn. at 618.

Therefore, we conclude that the Commissioner's authority to release or to reduce a sentence is limited only in those circumstances where the legislature has expressly provided for such a limitation. If the legislature disagrees with the way the Commissioner has interpreted or administered these programs, it is free to change the pertinent statutes.

We trust this is responsive to your request.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL

c. The Honorable James Dzurenda
The Honorable Erica Tindall