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March 21, 2016

Email: JUDtestimony@cga.ct.gov
TO: JUDICIARY COMMITTEE
RE: RAISED BILL SBOO460

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AN ACT CONCERNING COMPENSATION FOR WRONGFUL INCARCERATION **WRITTEN TESTIMONY OF ATTORNEY KENNETH ROSENTHAL**

Since graduating from the UConn School of law in 1978, I have been a practicing attorney in New Haven, where I continue to practice. In the course of that 38 year career I have been involved in all levels of the criminal justice system. For the past five years the criminal portion of my practice involves post-conviction proceedings on behalf of indigent prisoners, with a particular focus on claims of innocence. I currently co-teach a course on "Habeas Corpus and Innocence" at the Quinnipiac School of Law.

This past September a client of mine, Bobby Johnson, had his conviction set aside and the prosecution dismissed, after serving nine years in prison for a murder he did not commit. As widely reported in the media at the time, Bobby's case was one of the first non-DNA exonerations in the State. It was also noteworthy because the ultimate result came about through close cooperation with the Conviction Integrity Unit of the Chief State's Attorney's Office and New Haven State's Attorney Mike Dearington.

Bobby was 16 years old at the time of his arrest and incarceration in October 2006, when he was an entering junior at Hillhouse High School. He did not see the outside of a prison wall until the day of his release at the New Haven Courthouse on September 4, 2015. While in prison he earned his GED at Cheshire Correctional Center where he served the majority of his sentence. The six months since his release have been challenging, requiring him to become adjusted to a world on the outside that had changed considerably over the nine years since he last knew it. Starting out at age 26, he has no work history, a 9-year gap to explain, and no easy path to obtaining employment. One of his first challenges was obtaining a social security card to even be able to apply for employment (the City provided him an ID card, but Social Security does not recognize it as a valid form of requisite ID for applying for social security status). He has no driver's license, and for three and a half months was required to sleep on his cousin's sofa until he procured a place of his own. He wants to attend junior college (Gateway) but does not have the resources to do so. The day to day frustrations of starting out from prison are difficult for those of us who have not been through his travails to comprehend – the daily indignity of having to depend on others for sustenance, shelter, transportation, and numerous other details that the rest of us have the luxury of moving into gradually as we grow into adulthood and live in this world.

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As Bobby's case illustrates, it is fitting that the Connecticut legislature enacted what is now Conn. Gen. Stat. § 54-102uu, and has a procedure for assisting someone who has been placed in Bobby's position through a breakdown in the criminal justice system. In addition to monetary compensation, the statute provides for payment of expenses of employment training and counseling, free tuition and fees at any unit of the state's system of higher education, and "any other services . . . need[ed] to facilitate such person's reintegration into the community." Nothing can give someone such as Bobby back the nine years he lost – arguably the most important years in any young person's life – and he will bear the scars of the injustice suffered for many years to come. But Connecticut's commendable compensation system is a just -- and critical – step in the right direction.

I understand the concerns generated by former Commissioner Vance's recent compensation decision in the Sean Adams cases. In many respects I share those concerns, including the impact the adverse reactions to that decision will have on the ability of demonstrably innocent persons such as Bobby to obtain relief under the statute, notwithstanding the fact that Bobby's case presents precisely the harm the statute was intended to address.

Raised bill SB00460, as currently worded, includes three provisions in particular that I believe to be inconsistent with the original purpose of the compensation statute, and to a large extent the very purposes the amendment is seeking to achieve.

- **SECTION 1(a)(2)(a)** – insert in line 12, following the word "provided", the following language: "*the State's Attorney's Office certifies in writing to the Claims Commissioner that such dismissal was on grounds consistent with innocence, or*" . . .
 - The concerns that have been noted with placing unfettered discretion in the hands of a single person – the Claims Commissioner – are only aggravated by this subsection as currently worded. Moreover, the Office of the Claims Commissioner is not the optimum forum for determinations of whether a given dismissal is on grounds consistent with innocence. Where the State's Attorney's Office – the Connecticut State agency possessing the investigative tools, having familiarity with the detailed case records and procedural history, and holding expertise in criminal justice matters – will certify in a given case that the dismissal was on grounds consistent with innocence, that certification should serve as an acceptable alternative to an evidentiary hearing before the Claims Commissioner, and would streamline the process where available. My experience in the Johnson case indicates that this alternative should be included: the dismissal of his case occurred after the Chief State's Attorney's Office, under the leadership of CSA Kevin Kane and Deputy CSA Leonard Boyle, in conjunction with New Haven SA Dearington and the New Haven Police Department, utilized a newly adopted "conviction integrity protocol" to re-examine the evidence in Bobby's case and initiate the motion to vacate that led to his exoneration. In an era when non-DNA cases represent an increasing proportion of the exonerations nationwide, and when exonerations obtained with the cooperation of law enforcement personnel likewise comprise an increasing

proportion of the total, this alternative means of satisfying the "innocence" element under the statute would be especially appropriate.

- **SECTION 1(d)(2)** – replace/restore the word "consider" in lieu of the amended (underlined language in lines 65-71, and add the following language at line 74, following the word "section": "*Any claim in an amount exceeding a number which is the product of the numbers of years of incarceration times \$80,000 shall be submitted to the General Assembly, which shall review and dispose of any such claim in accordance with section 4-149.*"

- The current bill's proposed limitation of available damages to what in effect is a lost earnings calculation, with a limited adjustment factor that again is tied to earnings, misses the predominant damages in a wrongful incarceration case, and uses a one-size-fits-all rule that is inconsistent with the multi-factor and individualized features of just and fair compensation under our justice system. Even in a purely economic damages setting (e.g., employment law), there is no such limitation to dollars and cents earnings or earning capacity. In the setting of wrongful incarceration, it would be a sad commentary on our commitment to righting the injustice and daily indignity of wrongful incarceration, to ignore the predominance of non-economic damage: pain and suffering; loss of life's enjoyment; loss of familial contacts; deprivation of the joy of parenting and intimate relationships; lack of privacy; lack of any element of self-control and self-dignity that comprises such essential constituents of personal identity, fulfillment and happiness; harm to physical and mental health; to say nothing of sometimes unspeakable brutalities that goes with being housed (despite innocence) with a pre-selected population of society's most dangerous and violent individuals year after year. It is respectfully submitted that the proper fix for unlimited discretion in the award of damages is not the opposite extreme – removal of any meaningful individualized justice or consideration of the multitude of non-economic factors – the predominant factors – that render wrongful incarceration the intolerable injustice that our courts have rightfully described it to be. It is respectfully submitted that the language proposed above adequately addresses the concerns regarding "excessive" compensation, without throwing out the baby with the bathwater. The \$80,000 per year figure is borrowed from the State of Texas, which uses it as the gauge of proper compensation in such cases, and Connecticut should do no less.

- **SECTION 1(g)** – It is respectfully suggested that the bills proposed change to this section, turning on its head the existing language affirming the right of wrongfully incarcerated persons to pursue pre-existing legal remedies, including in particular remedies for violation of federal constitutional rights under 42 U.S.C. § 1983, is contrary to the original purpose of the statute, and completely unrelated to the Statement of Purpose attached to the bill, and raises significant issues of legality and constitutionality

under the supremacy clause of the United States Constitution. Moreover, it appears to be fixing a "problem" that does not exist. None of the Sean Adams petitioners have pursued any other damages remedy in State or Federal Court, and the statute of limitations would preclude them from ever doing so. In the only case in which a claimant who had pursued an action at law in addition to a claim under the statute has received an award through the Claims Commission – that of Larry Miller – that award reduced, dollar for dollar, the sum recovered in the court action. To the extent the sequence of awards were ever to the contrary, the well-established rules precluding double recovery would require the reduction of the court award by the amount of any award received under the statute. Most importantly, the proposed change in the language of subsection (g) would single out the most deserving of wrongfully incarcerated individuals, while leaving untouched the vast majority of claimants who are in no position or need of remedy by an action at law. Once again, the Bobby Johnson case provides a preeminent illustration. Unlike most cases (e.g., DNA cases), in Johnson's case there was egregious law enforcement misconduct involving a series of improperly extracted false confessions, and the deliberate falsification of police records to falsely implicate Johnson without disclosure of that information to the court or the prosecution, while Johnson languished for year after year in prison. Under the new language of subsection (g), Johnson would be put to the choice of foregoing his right to pursue legal action to remedy this egregious violation of his rights, at the cost of otherwise being deprived of any compensation whatsoever under the Claims Commission process. In contrast, a claimant whose wrongful incarceration did not include any misconduct on the part of any State actor, is provided a clear, cost-free path to recovery under the statute. If anything, the additional element of intentionally wrongful misconduct on the part of State actors in bringing about the wrongful conviction and incarceration of an innocent person should increase the compensation received, not erect a huge disincentive for pursuing compensation under the statute at all -- a statute, as amended, that itself allows no additional compensation whatsoever for such intentional mistreatment in bringing about the conviction as compared to the vast majority of cases where no such intentional mistreatment is present. In those rare cases where it is, the claimant should not be precluded from pursuing remedies in court (recognizing that there would be reduction in any recovery to account for compensation obtained under the statute, pursuant to the established law against double recovery referred to above).

- o To the extent the Committee is not prepared to delete the proposed changes to subsection (g) and restore the original language of the statute, it is respectfully submitted that, at minimum, the following change in the proposed language should be included to avoid the constitutional infirmities in purporting to limit a claimant's *federal* remedies: Insert in line 102, following the word "other", the following language: "State common law or State statutory". . . , and add the following sentence at the end of line 106: "Nothing in this section shall be

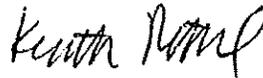
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construed to prevent such person from pursuing any federal statutory, common law or constitutional remedy that such person may have."

I am unfortunately unable to be present in person at tomorrow's hearing, but would request that these written remarks be submitted to the Committee and made part of the record.

Sincerely,



Kenneth Rosenthal

cc: Chief State's Attorney Kevin Kane
Deputy Chief S.A. Leonard Boyle
Chief Public Defender Susan Storey
Deputy Chief P.D. Brian Carlow