CCDLA
"Ready in the Defense of Liberty"
Founded 1988

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March 22, 2010

Hon. Andrew J. McDonald, Senator
Hon. Michael P. Lawlor, House Representative
Chairmen, Judiciary Committee
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: **Raised House Bill No. 5502, An Act Concerning Habeas Corpus Reform**

Dear Chairmen and Committee Members:

My name is Conrad Ost Seifert. I am an attorney practicing in Old Lyme and mostly handle appeals and criminal defense. Since 1982, I have represented inmates in habeas corpus litigation and habeas corpus appeals, and have testified as a legal expert witness regarding the ineffectiveness of counsel standard required under Strickland. I am the President of the Connecticut Criminal Defense Lawyers Association, CCDLA, and I am submitting this testimony on behalf of the CCDLA, as well as on behalf of myself.

CCDLA is a statewide organization of approximately 350 lawyers in both the public and private sectors dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States Constitutions are applied fairly and equally, and that those rights are not diminished.

CCDLA is strongly opposed to Raised Bill No. 5502, *An Act Concerning Habeas Corpus*

Reform. CCDLA acknowledges that there are a lot of habeas corpus petitions pending, that each year there are a lot of habeas corpus petitions filed and that each year dozens of habeas corpus petitions are denied often after a two hour habeas corpus hearing is held. But every so often, a petitioner who may have languished in prison for many years on end, presents compelling evidence of either factual innocence or ineffectiveness of their trial attorney and sometimes even proves ineffectiveness of their first habeas corpus attorney. When that happens, then the incarcerated inmate has their conviction and sentence set aside, resulting in freedom or a new trial. Now by imposing a statute of limitations in an area of state law that does not presently have a statute of limitations, CCDLA understands that the intent is to bring additional finality to the process and to lighten court dockets. But Raised Bill No. 5502 in Section 3 limits the time to bring habeas corpus cases to either three years after the sentence is imposed or one year after an appeal is final, whichever is later, subject to four exceptions which the petitioner has the burden of proof on. Those exceptions are: 1.) a disability or mental disease which prevented timely *assertion* of the claim, 2.) newly discovered evidence that could not have been discovered by the petitioner or the petitioner's attorney within the three years and which proves actual innocence, 3.) a change in constitutional law that applies retroactively, and 4.) proof that the state withheld exculpatory evidence. Id.

Here are some hypothetical examples where a valid and meritorious habeas corpus case would be barred by the new statute of limitations.

Case 1. An 18 year old with a 9th grade education goes to trial on a charge of murder, is convicted, sentenced to life, appeals and loses his appeal. While in prison he slowly but surely educates himself, gets his G.E.D. and then starts reading legal decisions. Two years after his

appeal is decided and five years after he is sentenced he learns through his multi-year experience of self-education and reading of appellate decisions that his criminal defense attorney failed to object to a line of questioning brought by the state's attorney. Assume this line of questioning and the witness's answers deprived the petitioner of a fair trial. (This does happen from time to time.) Further assume that the inmate's appellate attorney could not bring this up on appeal because the trial attorney failed to preserve the record for appeal by objecting. Because that hypothetical inmate is not disabled, does not have newly discovered evidence and there is no claim that the prosecutor withheld favorable defense evidence and there is no change in constitutional law to save him – that inmate is foreclosed from bringing what would be a successful habeas corpus case. That inmate will serve the rest of his life in prison whereas under current law he would get a new trial.

Case 2. Assume this time that the inmate received what appears to be competent representation and a fair trial but he is convicted nevertheless on the basis of circumstantial evidence. Assume that the case involved a shooting but no firearm was ever found. Assume it was a "he said - she said" type of case where <u>one</u> eyewitness testifies that the petitioner was the shooter. The petitioner has a prior criminal record and asserts the alibi that he was at home with his girlfriend the night of the shooting. The girlfriend testifies that her boyfriend <u>was</u> at home with her at the time of the shooting but he is convicted anyway and sentenced to 20 years of incarceration. A year and a half after the inmate loses his appeal, which is also 3½ years after he is sentenced, a new eyewitness contacts the inmate and tells him that he saw the shooting, knows the inmate is not the shooter and indeed the new eyewitness can identify the real shooter. This new eyewitness had a ground floor apartment 80 feet away from the scene of the shooting and

saw the shooting. Because the shooting victim was not murdered and only sustained a grazing type of bullet wound requiring 20 stitches at the emergency room, the police never canvassed the neighborhood after the original eyewitness identified the petitioner as the shooter. The new eyewitness did not want to be bothered by going to the police but if anyone had bothered to interview the new eyewitness, he would have given a statement and testified. So, 5½ years after the shooting occurred which, again, is 3½ years after the trial and conviction and 1½ years after the appeal is over, the new eyewitness voluntarily comes forward. Under proposed Bill 5502, this innocent inmate is foreclosed from having a habeas corpus hearing on the merits unless he can show the habeas court that the newly discovered testimony of the new eyewitness was undiscoverable by the "*exercise of due diligence by the applicant or the applicant's counsel prior to the expiration of the three year period*" for the filing of a habeas corpus petition. (R.B. 5502, Section 3(b)(2).) If you further assume that the accused or his attorney never sent an investigator to knock on doors and ask first floor apartment residents if they saw the shooting, in other words the defense never bothered to investigate if there were any eyewitnesses besides those listed in the police report, most judges would find that omission to be a lack of due diligence. Indeed, American Bar Association standards require that the defense attorney engage in some investigation in this type of fact pattern. Because in this hypothetical scenario the new eyewitness would have freely answered questions and identified the true perpetrator if only someone had just knocked on his door and asked if he saw the shooting, this failure to investigate (which is a well recognized ground supporting habeas corpus relief when the un-presented evidence would have made a difference in the trial outcome) reflects the lack of due diligence. Under Raised Bill 5502, Section 3(b)(2), the innocent inmate is out of luck and will serve the

entire 20 year sentence even though a credible eyewitness came forward 5½ years after the crime and has identified the true perpetrator.

Case 3. Largely relying on a drug addict's testimony that the addict eyewitnessed the petitioner brutally murder a shop owner, the jury convicts and the petitioner, who is factually innocent, is sentenced to life imprisonment. Two years after the petitioner loses his appeal, he finds out that a year and a half earlier, the addicted eyewitness had made statements in the community that the police coerced her into identifying the petitioner as the killer even though this so-called eyewitness was not even present at the shop when the shop owner was murdered. In short, the addicted eyewitness committed perjury and admitted to lying on the witness stand six months after the petitioner's conviction was affirmed on appeal. Assume that at the time the eyewitness admits she made up her testimony, the inmate has not filed any habeas corpus petition and was not investigating the circumstances behind the addict's original statement to the police. Assume that had the unrepresented inmate sent an investigator to talk to the eyewitness, she would have admitted committing perjury. However, word only reaches the inmate through a newspaper article about the recantation a year after the eyewitness first admits she framed the petitioner which again is a year and a half after the inmate's conviction was affirmed on appeal. Once again, because the petitioner would be filing his habeas corpus case more than one year after his appeal was over, he has to prove that the admission of perjury made by the witness six months after the appeal was final could not have been discovered by the exercise of due diligence within the one year window following the conclusion of the appeal. What exactly then is the "due diligence" required of someone who is incarcerated, unrepresented and has no habeas corpus case pending when the witness makes her surprise on-the-street statement that she

committed perjury in identifying the inmate as the murderer? The point is that the definition of "due diligence" becomes determinative. It means the difference between the innocent inmate being freed after being allowed to litigate his habeas corpus case versus being barred from litigating his habeas corpus case because he found out about the recanted statement only when it made the newspapers – more than a year after the appeal was over. If one defines "due diligence" to mean that an indigent, unrepresented inmate with no habeas case pending is required to somehow have an investigation of witnesses done within one year after their appeal is over to see if any of the testifying witnesses may have changed their testimony – then in this hypothetical, because the indigent, unrepresented inmate (who has no habeas case pending when the testifying witness recants her testimony 6 months after the inmate's appeal is filed) has failed to exercise due diligence, the exception to the statute of limitations in Section 3(b)(2) will not apply. Therefore the innocent inmate will spend the rest of his life in prison notwithstanding the credible recantation of the addicted eyewitness. On the other hand, if one is allowed to define "due diligence" to mean the very limited ability that an incarcerated, indigent inmate actually has available to him in order to investigate whether testifying witnesses have changed their stories, if "due diligence" is defined in that fashion, i.e. subjective to the indigent inmate, then <u>maybe</u> the inmate gets past the due diligence hurdle. The investigatory "due diligence" that an uneducated, indigent, unrepresented inmate is capable of is a lot narrower than the "due diligence" that an educated, wealthy inmate is capable of. The educated, wealthy inmate, months before any habeas suit is ever filed, and months before the one year statute of limitations expires, can hire a crack team of investigators to interview testifying witnesses to see if the witnesses' stories have changed. The indigent inmate will have to file his habeas corpus petition first, and ask questions

later after he obtains a free attorney and hopefully a free investigator. Perhaps some judges would define due diligence of the indigent uneducated inmate to mean that there is almost nothing the inmate can do to discover new evidence before that inmate files suit and obtains counsel and hopefully then is able to get an investigator and thus the criterion is met by sending a letter to someone. But if "due diligence" is defined to mean that type of research or investigation which involves someone, presumably a private investigator, interviewing testifying witnesses before the one year statute of limitations runs out, in that scenario then indigent inmates will never be able to demonstrate they exercised due diligence in discovering new evidence and they will be locked out of bringing a habeas corpus petition beyond the one year window because they are poor.

Turning to a different section of the proposed bill, Section 5(b) of Raised Bill No. 5502 is surprising if not alarming. This says verbatim: "*The ineffectiveness of any counsel who represented the applicant in an earlier habeas corpus proceeding shall not be a ground for relief in a second or subsequent application.*" Putting this into much plainer language, if an inmate files his first habeas corpus petition within the new statute of limitations and the inmate's habeas attorney is grossly ineffective in representing the inmate – the inmate is statutorily barred from bringing a second habeas corpus action challenging the ineffective representation the inmate received at the hands of his first, grossly ineffective habeas corpus attorney! Such a prohibition would make a mockery of the process and defeat the ends of justice. As an appellate attorney I believe that Section 5(b) constitutes nothing less than a legislative overturning of the Connecticut Supreme Court's landmark decision in Lozada v. Warden, State Prison, 223 Conn. 834 (1992). I urge each member of the Judiciary Committee to read the Lozada decision before making your

decision about Raised Bill 5502. Our Supreme Court's decision in Lozada addressed an issue of first impression. That question was, "*Was the Appellate Court correct in concluding that the petitioner was entitled to seek a writ of habeas corpus on the ground that his attorney in his prior habeas corpus proceeding rendered ineffective assistance of counsel?*" Lozada, supra at 838. The Connecticut Supreme Court in a unanimous decision answered this question in the affirmative. Thus if you pass Raised Bill 5502 you will have effectively overruled eighteen years of Connecticut Supreme Court precedent. This precedent has been cited with approval in several other jurisdictions and it is the law of various states: Iowa – Dunbar v. State, 515 N.W.2d 12 (Iowa 1994), North Dakota – Johnson v. State, 681 N.W.2d 769 (N.D. 2004), South Dakota – Jackson v. Weber, 623 N.W.2d 71 (S.D. 2001), Pennsylvania – Com. v. Albert, 561 A.2d 736 (Pa. 1989), Maryland – Stovall v. State, 800 A.2d 31 (Md. Sp. App. 2002). Here are some excerpts from the Lozada decision.

> "*The procedure for testing the competency of appointed counsel under § 51-296 – whether it be trial or appellate – by way of habeas corpus proceedings is so embedded in our jurisprudence that its availability is now beyond debate*." Id. at 841.
> . . .
> "*Surely, fundamental fairness opens the door for relief by habeas corpus when the state, in discharging its statutory duty, appoints incompetent counsel.*" Id. at 840.
> . . .
> "In this case, the subject of the writ – that is, whether the accused had reasonably competent habeas and trial counsel – are matters that ultimately challenge the underlying conviction. The respondent does not question that if this were the petitioner's first habeas corpus petition, he would be entitled to challenge the competency of his trial attorney, even though the petitioner's success would lead only to a new trial. See, e.g., Johnson v. Commissioner of Correction, 222 Conn. 87, 608 A.2d 667 (1992). Also, it is beyond dispute that the great writ may be used as a vehicle to challenge the competency of appellate counsel, even though granting the writ would likewise not result in release, but only in a new trial. See, e.g., Valeriano

> v. Bronson, supra.
> The same is true in the present case. To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components. First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense.... Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, reh. denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (9184).... Only if the petitioner succeeds in what he admits is a herculean task will he receive a new trial. This new trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement. **Accordingly, we reject the respondent's claim that habeas corpus is not an appropriate remedy for ineffective assistance of appointed habeas counsel.**" Id. at 842-843 (emphasis added).

Now rather than demonstrate the unfairness of Section 5(b) with a hypothetical, consider the real life case of Richard Lapointe. As most of you already know, Richard Lapointe has been incarcerated for the past 18 years having been convicted of murder and arson. He has what is known as Dandy Walker Syndrome and when he was interrogated by police he signed three inconsistent confessions. Last year the Connecticut Appellate Court partially reversed the judgment of the habeas court's dismissal of Mr. Lapointe's second habeas corpus petition in Lapointe v. Commissioner, 113 Conn. App. 378 (2009). If Section 5(b) were law, this second habeas case never would have happened because it alleged that Mr. Lapointe "was denied his right to the effective assistance of habeas counsel." Id. at 387. Mr. Lapointe, under the law as it is now, will be able to continue with his second habeas corpus case and may very well, after all

these years, be exonerated.

CONCLUSION: You, our legislators, are the guardians of this precious constitutional process known as habeas corpus. The United States Constitution, Art. I, Section 9, states, *"the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."* It was described by Blackstone as the "great and efficacious Writ." *3 William Blackstone, Commentaries on the Laws of England*, §131 (1769). Thus, the United States Supreme Court has said that "it must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." Bowen v. Johnston, 306 U.S. 19, 26, 83 L. Ed. 455, 59 S. Ct. 442 (1939). As Chief Justice Charles Evans Hughes put it in Bowen v. Johnston, the writ of habeas corpus, this "precious safeguard of personal liberty", must be maintained and we, the members of the Connecticut Criminal Defense Lawyers Association, ask that you safeguard Connecticut citizens' personal liberty by defeating this bill.

Respectfully Submitted,

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