CCDLA
"Ready in the Defense of Liberty"
Founded in 1988

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March 16, 2009

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

Re: Raised Bill No. 538
An Act Concerning Plea Agreements By Sexual Offenders

Dear Chairmen and Committee Members:

The Connecticut Criminal Defense Lawyers Association ("CCDLA") is a statewide organization of approximately 350 attorneys, both private and public, who are dedicated to defending people 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 also strives to improve legislative enactments that apply to the criminal justice system by either supporting or opposing bills such as Raised Bill No. 538.

CCDLA OPPOSES RAISED BILL NO. 538, AN ACT CONCERNING PLEA AGREEMENTS BY SEXUAL OFFENDERS

Raised Bill 538 is designed to thwart plea agreements for people charged with sexual offenses where the agreement would enable the person to plead guilty to an offense that did not require sex offender registration, while the original offense with which the person was charged did require sex offender registration. Realization of the Bill's objective would have a resounding negative impact on the administration of the Courts and would increase the likelihood of unjust dispositions for defendants and victims alike.

I. Raised Bill 538 Violates the Separation of Powers Doctrine Because It Will Significantly Interfere With the Orderly Functioning of the Superior Court's Judicial Role By Placing an Undue Strain on the Administration of Justice.

The most obvious impact of Raised Bill 538 is that it will result in more trials. Forcing the Court to require prosecutors to place specific reasons on the record for entering plea agreements with people that enable them to avoid registering as sex offenders, where they would have been required to do so if the prosecutor had not changed the original charge, *and* requiring

prosecutors to state on the record why registration is not required for public safety, will curb prosecutors' willingness to enter into plea agreements. Raised Bill 538 removes not only courts of discretion to accept or reject plea agreements in this class of cases, but it also usurps prosecutors' ability to enter into plea agreements.

The execution and administration of the business of the Court lies in the judicial department.[1] Consequently, the Court has the inherent power to accept negotiated guilty pleas where prosecutors have reduced a defendant's charges.[2] The Court's power to accept a guilty plea is based in common law jurisprudence and is a necessary tool in the administration of criminal justice.[3]

Raised Bill No. 538 significantly interferes with the Court's inherent power to accept guilty pleas and the court's efficient administration of justice. It represents an impermissible intrusion by the legislature into the function of the judiciary and thereby constitutes a violation of the separation of powers doctrine. A statute violates the separation of powers doctrine when it "significantly interferes with the orderly functioning of the Superior Court's judicial role."[4]

Defendants faced with the choice of pleading guilty to a sexual offense for which they will have to register as a sex offender and taking the case to trial, are more likely to choose trial. However, a defendant faced with a plea offer that reduces or changes the original charge to one that does not require registration, is more likely to enter a guilty plea. More trials will result in an increased drain on the Court's resources. Plea bargains are the way that cases move through the system; without them, Courts will be clogged with trials, and the increased trial activity will overwhelm the Judiciary, the Division of Criminal Justice and the Office of the Public Defender.

II. Raised Bill 538 Undermines Just Results In Plea Bargaining.

In many jurisdictions, prosecutors overcharge to gain negotiating leverage for the anticipated guilty plea.[5] The objective of overcharging is to pressure defendants to plead guilty

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[1] See Daley v. Warden, 20 Conn. Supp. 384, 386 (1957).

[2] Id.

[3] Id. at 387-387; see also Connecticut Practice Book § 39-7.

[4] State v. McCahill, 261 Conn. 492, 505-506 (2002).

[5] Hon. Rudolph J. Gerber, A System in Collapse: Appearance v. Reality in the Criminal Justice System, 12 St. Louis U. Pub. L. Rev. 225, 226, n.1 (1993) (citing Glanzer & Taskier, For Both the Experienced and the Neophyte Criminal Lawyer: The Fine Art of Plea Bargaining, 2 Crim. Just. 6 (Summer 1987)); see also John B. Mitchell, Redefining the Sixth Amendment, 67 S. Cal. L. Rev. 1215, 1258 n. 139; Note: Breathing New Life into Prosecutorial Vindictiveness Doctrine, 114 Harv. L. Rev. 2074 (2001); Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, 78 Cal. L. Rev. 539, 621 (1990); Daniel C. Richman, Bargaining About

to a lesser offense - often to the charge that absent strategic considerations *would have been selected initially* - simply to avoid risking conviction on the higher charge.[6] (Emphasis added). Certainly a just result in a case of overcharging would be for the prosecutor to reduce the charge to one that the evidence reasonably supports so that the defendant may plead guilty to that charge; however, Raised Bill 538 would make such a result improbable if not impossible because most prosecutors who engage in the practice of overcharging would be hard-pressed to admit, on the record, that they did so to leverage a plea bargain to the lesser charge.

III. Raised Bill 538 Undermines Prosecutors' Discretion to Plea Bargain Based on Complaining Witness Considerations and Evidentiary Deficiencies.

Frequently, prosecutors will lower or drop a charge based on complaining witness-related variables, including the nature of the evidence and the occasion where the complaining-witness is opposed to testifying.[7] Unless a prosecutor is inclined to dismiss the case, most prosecutors in this position would be hesitant to articulate, on the record, that there are evidentiary problems or that a complaining-witness is balking over taking the case to trial.

Additionally, even if a prosecutor is willing to state these reasons on the record, she may not be able to articulate that registration is not required for public safety because her rationale for the plea bargain is that she would very likely lose at trial, and not that she does not think registration is not required. If this is the case, Raised Bill 538 would either force a defendant to plead guilty to charges for which evidence is lacking, or force the State to prosecute an individual based on weak evidence.

CONCLUSION

The intended objective of Raised Bill 538 interferes with the efficient administration of the Court by restricting the discretion of judges and prosecutors in making and accepting plea bargains in a broad class of cases. The Bill substitutes its restricted and unconstitutional mandate for the collective wisdom and experience of judges, prosecutors and defense attorneys who know the facts of the cases before them and are in the best position to control their resolution. The result of this substitution undermines the fair administration of justice. The Connecticut Criminal Defense Lawyers Association urges the Judiciary Committee to oppose Raised Bill 538.

Respectfully submitted,

Future Jeopardy, 49 Vand. L. Rev. 1181, 1195 n.47 (1996); Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 87 (1968).

[6] Id.

[7] Russell K. Van Vleet, Leif-Erik T. Rundquist, Prosecutorial Perception in Sex Offense Cases, Criminal and Juvenile Justice Consortium, p. 8-12 (2002).

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ON BEHALF OF THE CONNECTICUT
CRIMINAL DEFENSE LAWYERS
ASSOCIATION