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JUDICIARY COMMITTEE
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Committee Bill No. 6186, An Act Protecting School Children

The Office of Chief Public Defender respectfully requests that the Judiciary Committee carefully consider how ***Raised Bill No.6186, An Act Protecting School Children***, impacts the quality of representation of law offices utilizing social workers employed as integral members of a legal criminal defense team. The bill increases the penalty for failure of a mandated reporter to make a report from a Class A Misdemeanor, now punishable by up to 1 year of incarceration, to a class E Felony, which is punishable by up to 3 years of incarceration. In addition, the bill provides that anyone "acting alone or in conspiracy with another, for purposes of intentionally and unreasonably interfering with or preventing the making of a report" will be guilty of a Class D felony, punishable by up to 5 years of incarceration.

The bill also substantially reduces the threshold required for making a report from a situation where a person may have reasonable cause to suspect or believe to a "reasonable suspicion." While the Office of Chief Public Defender is absolutely in support of protecting children, the proposed lower threshold and the enhanced penalties, once again raise concerns as our Agency fulfills its constitutional obligations. The mandated reporter statute and these proposed changes impact the delivery of legal representation services and a defendant's constitutional right under the 6th amendment to effective assistance of counsel.

This Office is required to raise its concerns again this year because designating criminal penalties for non- reporting has already had a chilling effect on the ability of public defender social work staff to fully participate in the holistic representation of our clients while preserving the attorney-client privilege. The public defender social workers are a vital part of the adult, delinquency defense, and child protection teams. Their clinical skills are critical to the attorneys' ability to provide effective representation in the legal process by obtaining crucial information from clients. Both the United States Supreme Court and the American Bar Association recognize and mandate this holistic approach: **Criminal Defense Function 4-4.1 (a)** states that: Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all

avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. See also ***Rompilla v. Beard***, 545 U.S. 374 (2005). This means that attorneys are not only obliged to counter the factual allegations, but also must lay groundwork for mitigation in sentencing: in essence, ensuring that the punishment matches the offender. Attorneys are not trained to be investigators or social workers, and that is why the public defender offices employ all three professions in a "Team Case Management" approach where all work confidentially in the representation of adult and juvenile defendants.

The success of the Connecticut "Team Case Management" approach of defense attorney and non-attorney support staff collaboration has served as the best practices model for indigent defense organizations throughout the country. The Office of Policy and Management and the Appropriations Committee have consistently supported the expansion of our Agency's integrated defense team model to include social workers for the past three decades in recognition of their value to the criminal and juvenile justice systems.

In 1990, nationally recognized legal ethics expert, Geoffrey C. Hazard, Jr., then Sterling Professor of Law at Yale Law School, issued an ethics opinion that public defender social workers had the same duty of confidentiality to their clients as the attorneys due to their professional role as part of the defense function. Recent conversations with Professor Hazard indicate no change in his opinion in this regard. As members of the defense team, the social workers and other non-lawyer staff have the same duty of confidentiality to the client, but under **Section 5.3 of the Professional Rules of Professional Responsibility** must also be made aware of and comply with the disclosure requirements of **Rule 1.6.** that applies to attorneys. **Rule 1.6** specifies that: "a lawyer shall reveal information to the extent necessary to prevent a client form committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm."

In 2013, the Legislature designated failure to report as a misdemeanor and interfering with a mandated reporter's ability to make a report as a felony. Criminalization for failure to report required this Office to seek clarification in the statute for the protection of public defender staff. During the last legislative session our Agency worked with DCF Commissioner Katz and reached what was believed to be a workable compromise solution to clarify the role of our social workers. However, despite the creation of a favorable legislative history, it soon became clear that without a specific exemption in the statute for communications protected by the attorney client privilege, public defender attorneys and social workers remain at risk of felony prosecution. This threat significantly interferes with the ability of public defender staff to provide effective assistance of counsel as guaranteed under the federal and state constitutions.

This is especially true in the cases of juveniles in view of the recent Connecticut Supreme Court ruling in ***State v. Akeem Riley***, S.C. 19109, released February 27, 2015 (official release date March 10, 2015) that courts must consider the "mitigating factors of a defendant's youth and its hallmark features "as well as the science that establishes such factors as generally applicable" before sentencing juveniles (defendants under the age of 18). The ruling will require defense counsel to more thoroughly delve into a juvenile client's social history including evidence of, neglect, sexual abuse, or other traumatic events or conditions that might be determined as mitigating client culpability. Defense attorneys are not trained to evaluate and synthesize such

evidence and must rely on social workers and mitigation specialists to assist them in developing the criteria outlined in the ***Miller*** decision for presentation to the court. It is extremely important to preserve the attorney- client privilege with all defense team members to obtain such sensitive and often painful information in these cases, but may be impossible to do so if our social workers are mandated reporters. By warning clients, especially children, not to disclose the very information about their lives that we most need to prepare their cases, we will not be able to fully develop the factors to comply with the ***Miller*** or the ***Riley*** decisions that require analysis according to the U.S. Supreme Court, Justice Kagan writing for the majority in ***Miller:***

"…consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . ."

Writing for the majority in ***Riley*** Justice MacDonald stated:

…We read the import of Miller as impacting two aspects of sentencing:
(1) that a lesser sentence than life without parole must be available for a juvenile offender; and
(2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a lifetime in prison. Accordingly, for the reasons set forth subsequently in this opinion, we hold that the dictates set forth in Miller may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that Miller deemed constitutionally significant before determining that such a severe punishment is appropriate….

In our collective experience, juvenile clients are not likely to reveal information that their attorneys and social workers most need to know if you warn them that you will have to call DCF if they reveal anything that should be reported. If a social worker makes a report against the client's express wishes, then an ethical conflict in continuing to represent the client may result for the attorney often requiring that assigned counsel be appointed in lieu of permanent public defender staff. As a result, public defender attorneys and social workers are in the untenable position of trying to provide constitutionally required zealous representation with a mandated reporter on the defense team. Neither are children any safer when social workers can't ask and children cannot reveal information about neglect or abuse. There must be a trusted individual who will keep the information confidential until the child is advised of his/her legal options and is emotionally prepared to handle the consequences of revelation.

Furthermore it has come to our attention that an organization in Washington D.C. plans to issue defense trial guidelines in Mid-March 2015 with the objective of setting forth a national standard of practice to ensure zealous, constitutionally effective representation for all juveniles facing a possible life sentence consistent with the United States Supreme Court's holding in ***Miller v. Alabama***, 132 S.Ct. 2455, 2469 (2012). It is our understanding that these guidelines will specifically call for the holistic team approach of attorneys, investigators and social workers as utilized in Connecticut public defender offices, but with all members acting as agents of defense counsel and having a duty to preserve the attorney-client privilege and client confidentiality.

In conclusion, the Office of Chief Public Defender would urge this Committee not to raise the penalties for non- reporting which were so recently adopted. In addition, this Office would urge this Committee not to lower the threshold required for making a report. We would also respectfully request that, at some point in the near future, the Committee re-consider whether or not it is good public policy to require mandated reporting by social workers employed in a law office setting that significantly infringes upon the attorney –client privilege, client confidentiality, and the 6th Amendment right to effective assistance of counsel. Thank you for the opportunity to explain our position.