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**Testimony of Jon L. Schoenhorn, President  
Connecticut Criminal Defense Lawyers Association**

**Raised House Bill No. 1245  
*An Act Concerning a Tender Years Exception to the Hearsay Rule***

**Judiciary Committee Public Hearing  
February 28, 2007**

As President of the Connecticut Criminal Defense Lawyers Association, I wish to add my opposition to *Raised House Bill No. 1245, An Act Concerning a Tender Years Exception to the Hearsay Rule*. At least with regard to its application to criminal and juvenile delinquency matters, this proposed statute is patently unconstitutional. For purposes of this correspondence, I wholeheartedly endorse the arguments presented on February 28, 2007, by my able colleague, Attorney Brian S. Carlow, Deputy Chief Public Defender.

However, I wish to supplement his testimony by referring this Committee to more recent United States Supreme Court precedent that categorically would preclude a "tender years" exception to the hearsay rule, including *Davis v. Washington*, 126 S.Ct. 2266 (2006) and a case decided on February 28, 2007, *Whorton v. Bockting*, No. 05-595 (2007 U.S. LEXIS 2826); as well as the Connecticut Supreme Court decision in *State v. Kirby*, 280 Conn. 361 (2006). In each of these cases, the courts emphasized that any so-called "testimonial" hearsay – *i.e.* an out-of-court statement gathered for purposes of criminal investigation – is inadmissible at trial because it violates the Confrontation Clause of the United States Constitution. None of these cases suggest that statements made by minors would be treated in a different manner.

In *Davis, supra*, the Supreme Court considered whether the Confrontation Clause of the Sixth Amendment prohibited two types of out-of-court statements: a 911 call for immediate assistance by an alleged victim and an affidavit given to police by the alleged victim. While the Court allowed the specific 911 call because the victim remained in apparent danger at the time of the call, it barred the affidavit given to an investigating officer who arrived after the fact. The Court emphasized in its decision that "testimonial hearsay" – defined as "interrogations solely directed at establishing the facts of a past crime . . ." – were inadmissible. *Id.* at 2276. Following *Davis, supra*, the Connecticut Supreme Court in *Kirby, supra*, reversed a conviction for kidnapping on Confrontation Clause grounds, because the trial judge allowed the jury to hear a taped call to police, in which the victim (who died a few days later) implicated the defendant.

Testimony of Jon L. Schoenhorn, CCDLA President  
Raised House Bill No. 1245  
February 28, 2007  
Page Two

Of particular note to this Committee is the fact that the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004) expressly overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which had been followed by many Connecticut courts, and which allowed certain hearsay statements if they fell under a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” *Id.* at 66. After *Crawford*, as further explained in *Davis*, the trustworthiness of the hearsay statements plays no role in their admissibility.

While none of the above-cited cases implicated child testimony *per se*, it is apparent that the rulings are sweeping and would bar all such out-of-court statements, if they are obtained as part of the criminal investigative process. In fact, in the wake of *Crawford* and *Davis*, so far appellate courts in at least three states have reversed convictions on Confrontation Clause grounds, where trial courts permitted the introduction of taped interviews with children. See, *People v. Sharp*, 2006 Colo. App. LEXIS 2069 (12/14/06); *State v. Hooper*, 2006 Idaho App. LEXIS 83 (8/11/06); and *State v. Blue*, 717 N.W. 2d 558 (N.D. 2006).

I would venture to suggest that any “Tender Years” statutes that exist in other states are now unconstitutional. Surely, House Bill No. 1245 can not survive constitutional scrutiny, and I urge the Committee to reject it.