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TO: Senator Nader Hashim
FROM: Tracy Kelly Shriver, State's Attorney
Dana Nevins, Deputy State's Attorney
Kati Sell-Knapp, Victim's Advocate
RE: **Legislation to protect victims of intimate partner violence**

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APPLICABLE LAWS

***Vermont Constitution,* Chapter II, §40**: All persons shall be bailable by sufficient sureties, except as follows: a person accused of a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence.

13 V.S.A. § 7553a: A person charged with an offense that is a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence.

13 V.S.A. § 7553b: Except in the case of an offense punishable by death or life imprisonment, if a person is held without bail prior to trial, the trial of the person shall be commenced not more than 60 days after bail is denied.

HOLD WITHOUT BAIL REQUESTS & DOMESTIC VIOLENCE

The overwhelming majority of cases in which the Windham State's Attorney's Office requests the court to hold a defendant without bail involve domestic violence charges between intimate partners. At a hearing on the State's request to hold someone without bail under § 7553a—commonly called a weight of the evidence hearing—the matter essentially proceeds in two stages. During the first stage, the State must prove that our

evidence supporting the felony charge demonstrates the likelihood of guilt is great. If the State makes that showing, the hearing proceeds to the second stage where the State must prove the defendant's release poses a threat of physical violence and no combination of conditions of release will reasonably prevent that violence. Hearings on the State's hold without bail requests are generally held within two weeks of arraignment—but could be as little as a few days—unless a defendant requests a delay.

The Vermont Supreme Court has made clear that, to meet its burden during the first stage of the hearing, the State is allowed to proceed by introducing affidavits, depositions, or other sworn admissible evidence in written or recorded form. In essence, the State must show that it has evidence from which a jury could find the defendant guilty beyond a reasonable doubt on the charged crime, but the State does not need to admit this evidence at this stage as if the hearing was a trial.

At the second stage of the hearing, the Vermont Supreme Court has articulated what *kinds* of evidence will meet the State's burden of establishing that a defendant's release will pose a substantial risk of physical violence and no conditions of release will mitigate that risk. These include a history of violence towards the same victim or other partner, the quality, quantity, and scope of violent behavior, whether the defendant's conduct towards the victim is based on such powerful emotions that they will not be able to conform their behavior to the court's directives, and a history of violating court orders.

The Vermont Supreme Court, however, has not clearly ruled on the *form* of the evidence that will meet this burden. Different trial judges have offered different interpretations as to the forms of evidence acceptable at this stage. Some judges require that the State's evidence conform to the rules of evidence. For much of the evidence that will meet the State's burden, this requires live testimony. Requiring live testimony is significant for the following reasons:

First, in other types of bail hearings, the law does not require the State to produce live testimony, and the State can proceed without putting a witness on the stand. *See* 13 V.S.A. § 7554(g)(allows evidence in bail hearings that does not have to conform to the rules of evidence); 13 V.S.A. § 7553 (allows State to proceed entirely by affidavits and other sworn evidence for bail hearings in life imprisonment cases).

Second, and most significantly, the live testimony must necessarily come from the victim in a majority of these situations. The victim is in the unique position of being the only one who possesses the most relevant information to a court's decision about whether a defendant will be violent if released on conditions. For example, we know that when police make an arrest for a domestic assault it is rarely the only—or indeed even the most significant—instance of violence in the relationship. The Supreme Court has made clear that this history of violent behavior and the scope of past violence is very relevant to the court's hold without bail decision. The victim, however, is often the only one who knows about the history of uncharged physical, sexual, or other abuse in the relationship.

The victim may also be aware of specific relevant threats (e.g. "If you go to the police, I'll kill you.") or a history of violating court orders that is unknown to the State (e.g. assaulting the

victim previously while on probation). It is hard to imagine a court making an informed decision about the likelihood of whether the defendant will be violent if released without considering this information. Without the live testimony of the victim, however, that is exactly what the court does.

Having the victim testify in a weight of evidence hearing is problematic for several reasons. First, forcing the victim to relive the event in a public forum, in the presence of the defendant, and to be subject to cross examination mere days after the assault is traumatic and harmful to the healing process. Having domestic violence victims "testify in court in judicial proceedings related to their abuser exacerbates [PTSD] symptoms, causing the DV victim to reexperience the trauma that caused the PTSD or causing the DV victim to completely dissociate during a hearing or trial to protect herself from the reoccurrence of the trauma that triggers the PTSD." Jerrell Dayton King & Donna J. King, *A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System*, 6 DEPAUL J. WOMEN GEN & L. 1, 29 (2016). Requiring a victim to testify at a bail hearing when they will have to testify again within 60 days of arraignment at a trial just compounds this traumatizing effect.

Second, a victim may not be able to attend the hearing so quickly after the assault. Victims may be physically recovering from the injuries sustained or may be hospitalized. They may be moving to a safe location or navigating the shelter system. They may be figuring out how to feed and clothe their children or pay their rent or other expenses after the loss of their abusive partner's income.

Third, testifying at a hearing against their abuser increases the risk to victims if the defendant is released after the hearing.

As a result, the State is left with a Hobson's choice of increasing trauma and risk to the victim of a violent crime or not presenting extremely relevant evidence for a court to consider at a weigh of the evidence hearing.

PROPOSED LEGISLATIVE FIX

We are proposing a legislative amendment to clarify that these bail hearings under 13 V.S.A. § 7553a should proceed in the same manner and with the same evidence that is allowed in all other bail hearings. With this change, a victim's *sworn* oral or recorded statements about the history of abuse and threats can be used in place of live testimony.

Our suggestion is to amend 13 V.S.A. § 7554(g) as follows:

> (g) Admissibility of evidence. Information stated in, or offered in connection with, any order entered pursuant to this section **or pursuant to section 7553a regarding whether a person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the violence** need not conform to the rules pertaining to the admissibility of evidence in a court of law. **Nothing in this subsection shall be construed to alter the existing standard courts apply to determine whether the evidence of guilt is great under sections 7553a or 7553.**

A defendant held without bail after this hearing will be entitled to a trial within 60 days where the victim's live testimony will be required.

This amendment will protect victims of violent crime and allow judges to make more informed decisions to keep the community safe. It will also bring Vermont in line with our sister states who provide some protection from victims testifying at hearing to hold a defendant without bail. *See* N.H. Rev. Statt. Ann. § 597:2, IV(c) (at a preventive detention hearing where live testimony is required "[t]here shall be a rebuttable presumption that an alleged victim of the crime shall not be required to testify at the bail hearing"); Mass. Gen. Laws. Ct. 276 § 58A (at a dangerous hearing on a felony crime of violence regarding whether someone will be held without bail "[t]he rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness").