



State of Connecticut  
DIVISION OF CRIMINAL JUSTICE

**Testimony of the Division of Criminal Justice**

*In Opposition to:*

**Raised Bill No. 320 – An Act Concerning Time Limitations on the Filing of Appeals and Habeas Corpus Applications in Capital Felony Cases**

*Joint Committee on Judiciary – March 10, 2008*

The Division of Criminal Justice commends the Committee for its consideration of the important issues addressed in S.B. No. 320, An Act Concerning Time Limitations on the Filing of Appeals and Habeas Corpus Applications in Capital Felony Cases. The Division, however, cannot support the bill as currently drafted and would strongly recommend that the Committee adopt a Joint Favorable Substitute Report providing for comprehensive reform of the habeas system. Abuse of the habeas process is literally brought this system to the brink of collapse. Rather than serving the interests of justice, the rampant abuse of the system is undermining the ability of our judicial system to achieve justice both for the innocent victims of crime and those accused of crime.

S.B. No. 320 does target a legitimate concern in capital litigation – the often substantial length of time between the imposition of the death sentence and the completion of the direct appeal. This concern is legitimate because:

- Economic and sociological studies have shown that it is the relative certainty of execution, and not merely the theoretical possibility, that creates a deterrent effect. Thus, to the extent that deterrence is viewed as a justification for capital sentencing, unnecessary delay in execution of a death sentence risks undercutting that deterrent effect.
- According to the 2003 study of the Connecticut Commission on the Death Penalty, some family members of murder victims believed that sentences rendered by juries were not implemented in a timely and certain manner and that their trust in the criminal justice system was damaged as a result.
- In capital litigation, delay in execution is essentially a defense victory, as it has the effect of converting a death sentence into a sentence to a term of imprisonment. The defense bar has effectively used the valid concern for thoroughness and accuracy in the capital appellate process to unduly prolong that process.

There is a factual basis for the belief that the direct appeal process in Connecticut capital cases is unduly prolonged. The direct appeal process in Connecticut capital cases takes substantially longer than the direct appeal process in serious, non-capital felony cases and appears to take longer than the analogous capital process in most other states.

- The 2003 Commission on the Death Penalty study reported that the average interval between filing of notice of appeal and filing of the defense brief in a capital matter was almost three years (two years, 284 days). The average interval between filing of the defense brief and the filing of the state's brief was one year, 125 days. For a rough comparison, in the appeal in the matter of *State v. Alex Kelly*, the defense brief was filed 13 months after the filing of notice of appeal and the state's brief was filed 11 months later. In *State v. Chasity West*, the defense brief took 23 months, the state's brief seven months. In *State v. Michael Skakel*, the defense brief took 15 months and the state's brief seven months. A survey of other states' practices we undertook several years ago revealed that defense briefs routinely were due within six months of completion of the transcript.

S.B. No. 320 attempts to address this issue by setting briefing deadlines for appeals in capital cases based on the date of imposition of sentence. Since a transcript of the proceedings is necessary before an appellant's brief can be written, however, briefing deadlines more accurately are tied to transcript completion, not the date of imposition of sentence. The existing rules of appellate procedure base briefing deadlines on the date of transcript completion. In the typical capital case, moreover, completion of the transcript by the court monitor requires more than four months. Thus, the requirement in the draft legislation that all briefs be completed within four months of imposition of sentence does not accurately reflect the need for preparation of trial transcripts, and briefs cannot be written without transcripts.

The existing rules of appellate procedure also limit briefs to 35 pages. It is rare that substantially longer briefs in criminal cases are permitted – with the one exception of capital cases. The Connecticut Supreme Court in recent years has essentially imposed no limitations on the length of briefs in capital cases. In the capital case being argued later this month, the defense brief is 306 pages and the state's brief is 320 pages. Most other states do not appear to routinely allow capital briefs in excess of 200 pages. It is unclear whether the absence of page limitations leads to delay in filing briefs or whether a lack of meaningful filing deadlines leads to longer briefs. The Committee may want to consider whether page limitations would provide another useful tool in addressing the issue of delay.

The Division of Criminal Justice in a non-capital case usually requires about five months from receipt of a defense brief to the filing of a state's brief. The writing of a typical non-capital brief requires between two weeks and two months, depending upon the crimes charged, the issues raised and the length of the trial transcript. For a serious non-capital crime, four to eight weeks is typical. The remaining time needed by the Division reflects the backlog of pending appeals. With present staffing it is not possible to begin work on a case as soon as the defense brief is received. It would be impossible for

both the state of the defense to meet the time frame set out in the draft legislation – four months from sentencing in which to file a defense brief, a prosecution brief and a reply brief. The deadlines and other provisions of S.B. No. 320 are not only unrealistic; they also raise serious legal questions and may very well be unconstitutional. The four-month deadline established in Section 1 of the bill for the filing an appeal would likely violate a defendant’s right to effectively present his or her arguments.

The 180-day deadline established in Section 2 of the bill for filing a writ of habeas corpus has even more problems. To do so would require the defendant to file a habeas petition before the appeal which that petition is likely challenging has even been decided. Put another way this would be a case of putting the habeas cart before the appellate horse. Obviously there would be potential constitutional problems. A simple case in point would be the fact that a common claim in habeas proceedings is that the defendant was denied the right to effective appellate counsel. How could one possibly frame such an argument before the appeal itself was even decided? Again, there are also practical problems. A habeas hearing is more akin to a trial. Both sides need time to investigate the claims and prepare their evidence. This provision would appear on its face to violate the defendant’s right to effectively pursue a claim.

For these reasons, establishing strict deadlines in statute are at the very least problematic. Where a time bar is established, there must be an allowance for reasonable exceptions. We would cite the example of claims brought pursuant to *United States v. Brady*, where a petitioner alleges that the government withheld exculpatory evidence. These cases involve the need to review and examine literally thousands of documents and/or exhibits and files and reports. The right to bring such claims is guaranteed by the United States Constitution as interpreted by the Supreme Court of the United States in *Brady*. No matter how laudable the goal, this right cannot be circumvented by state law.

The Division strongly supports the concept of limiting successive habeas petitions as proposed in subsection (b) of Section 2 of the bill. However, we have no choice again but to oppose the language as presented here. Not all habeas petitions are based on factual claims, i.e., that the petitioner is, in fact, innocent or that the sentence was improperly imposed. In many cases, habeas claims are based in law and an argument that the proper application of the law could or would have resulted in a different outcome, either in terms of a finding of guilt or in the imposition of the particular sentence.

While the Division opposes S.B. No. 320 as now written, we must stress in the strongest of terms our support for comprehensive habeas reform to address the widespread abuse and systemic problems that now threaten the system. The need for comprehensive habeas reform is not new. In the 2007 Regular Session, the Division sought to begin the reform process by recommending S.B. No. 1387, An Act Concerning Appellate Review of Certain Post Conviction Judgments. This bill did not pass.

There are many instances where victims and families of victims have suffered long after the trial and appeal because of untimely and repeated habeas corpus petitions. These instances include cases where convicted rapists have brought habeas petition years after their convictions seeking to force their victims to appear in court. In at least some

instances, the petitioners have brought these actions *pro se*, meaning that they would have the right to personally question their victims in court. In at least one case, the victim who would have been forced to testify had been granted witness protection because of the previous actions of the same convicted criminal who would now have the right to question her. We would note that these cases involved successive petitions – they were only the latest writ of habeas corpus filed by or on behalf of someone who has already been convicted at trial, had that conviction upheld on appeal and who had already brought at least one and usually more petitions for a writ of habeas corpus.

The victims of the original crime are not the only ones whose rights are being trampled through these proceedings. So are those individuals who are convicted of a crime they did not commit or who may otherwise have a legitimate claim to present to the courts. The cry for habeas reform should be echoed by all who are legitimately concerned with constitutional rights and anyone who thinks they know of an individual who was wrongfully convicted. This is the person who will have to stand in line and wait for his or her turn to present a legitimate case while the courts are consumed by repeated and frivolous petitions from those who seek only to harass or intimidate. There is no way to describe these abuses other than to call them what they are – a waste of scarce public resources and the denial of justice to those who genuinely deserve it. For these reasons, the State's Attorneys of Connecticut are unanimous in our strong support for meaningful habeas reform. We must put an end to the flood of frivolous appeals and the resulting drain on state resources that has brought the habeas process to the brink of collapse.

The Division recognizes that comprehensive habeas reform may be difficult to accomplish in the so-called short session this year. Accordingly, we would recommend that the Committee initiate the process by adopting the simple change to Section 52-470 (b) of the General Statutes that was proposed in S.B. No. 1387 of the 2007 Regular Session.

The Connecticut Supreme Court has stated that the intent of the General Assembly in enacting Section 52-470 (b) was to discourage frivolous appeals in cases involving petitions for a writ of habeas corpus by requiring a party to first seek permission to appeal. *Simms v. Warden*, 230 Conn. 608,616 (1994) (*Simms II*); *Iovieno v. Commissioner of Correction*, 222 Conn. 254, 259-61 (1992). In practice, however, that has not been the case and the intent of Section 52-470 has essentially been unfulfilled, resulting in a great and unnecessary burden on the Division.

At present a party seeking to appeal from the judgment of a habeas petition must seek permission to appeal from the trial court. If permission is denied the party takes an appeal anyway and both parties must brief not only the question of whether or not permission should have been granted but also all of the other issues the party wishes to raise. The change proposed in S.B. No. 1387 addresses this needless drain on resources while preserving the right of the petitioner to be heard by the courts. What this proposal would do is effectively make appeals from decisions on habeas corpus petitions a two-step process. The first step would be to appeal solely the issue of whether or not the court erred when it denied permission to appeal; in other words, whether or not there is an issue in the case that is worthy of an appeal. This would be by way of a motion for review rather than a full appeal. This would not require full briefing or oral argument as motions

for review are not argued, but rather are decided "on the papers." Such a change would have a significant positive impact on the tremendous demand on resources that is now created by such appeals. This change would not only provide needed relief to the Division of Criminal Justice and the prosecutors who deal with appeals of habeas matters, but also to the Office of the Attorney General and the Division of Public Defender Services, which also deal with these matters. If the appellate court decides that permission to appeal should have been granted, then an appeal can be taken.

Virtually every habeas disposition today is challenged by the unsuccessful petitioner, usually in a direct appeal to the Appellate Court. Appeals from habeas judgments appear to comprise about one-quarter to one-third of the current active appellate caseload in the Division of Criminal Justice. According to our most recent review of court records, in 2006 the Appellate Court heard sixty-two habeas appeals from the Division of Criminal Justice. The petitioner (defendant) was given a remand for additional fact-finding by the habeas trial court in just three of those cases. The Appellate Court found no merit in any of the other appeals. Of the 73 appeals now pending in our Post Conviction Unit in the Judicial District of Fairfield, 35 are habeas cases. There are another 90 habeas cases pending from the Judicial District of Fairfield, all of which we fully expect will become appeals. In 2005, the Fairfield Post Conviction Unit filed seven habeas briefs; in 2006 the number had increased to 17 briefs. We are dealing with appeals on appeals. In each case, the matter must be fully briefed, usually requiring a legal brief of up to thirty-five pages – and all for cases where there is rarely any merit whatsoever.

In conclusion, the Division of Criminal Justice would respectfully recommend that the Committee adopt a Joint Favorable Substitute Report for S.B. No. 320 to incorporate the language of S.B. No. 1387 of the 2007 Regular Session. We thank the Committee for this opportunity present our input and recommendations and would be happy to provide any additional information or to answer any questions the Committee might have.