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State of Connecticut**

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**Testimony of Susan O. Storey, Chief Public Defender
Raised Bill No. 5445, *An Act Concerning the Death Penalty*
Judiciary Committee Public Hearing
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The Office of Chief Public Defender supports the abolition of the Death Penalty in favor of a sentence of life without possibility of release. Raised Bill No 5445, would not serve to make the Death Penalty more workable, however, the Bill does include many of the recommendations made in the 2003 report issued by the Death Penalty Commission. Such reforms may help to avoid wrongful and arbitrary convictions and promote consistency in the application of the death penalty in Connecticut.

The habeas proposals in this Bill are problematic and would engender costly litigation. The Office of Chief Public Defender opposes **Section 2 (c)** of the Bill which would reduce the time presently mandated for stays to remain in effect after disposition of a petition for certiorari by the U.S. Supreme Court, and after final determination of a state habeas petition by the state supreme court. This section would reduce the stay from 30 to 10 days, requiring the defendant to prepare and file both his state and federal habeas petitions 10 days after a loss at the previous stage. While the defendant has an incentive to file the state habeas claim as soon as possible in order to stop the running of the one year federal habeas statute of limitations, such unreasonably short time constraints place undue burdens on defendants' counsel and would serve to make it even more difficult for this Office to recruit private attorneys to act as special public defenders in capital habeas cases.

We are also opposed to the provision that the defendant in a capital case is not entitled to an automatic stay of his death sentence for a subsequent state habeas petition unless he can make a showing before the state supreme court that the petition is likely to succeed on the merits. This standard presents problems that will produce much litigation. For example, this provision would prohibit a stay where a defendant raises a claim that has a reasonable likelihood of success in federal court but little chance of success in state court. For example, a federal claim that might be lost could involve a Brady claim or an IAC (ineffective assistance of counsel) based on newly discovered evidence where the state court applies a different standard or reaches a different conclusion than may the federal

court. It is my understanding that the majority of federal habeas decisions that are favorable to petitioners in death penalty cases involve the federal court overturning a state court's denial of a state habeas petition on these two grounds. Last year, I discussed this same issue relative to the case of *Cone v. Bell*, 556 U.S. ____ (2009), where the petitioner lost his second state habeas petition, which raised the claim that the prosecutor had improperly withheld exculpatory mitigation evidence from the defendant. The United States Supreme Court held that Mr. Cone, a Vietnam Veteran, was entitled to a hearing on his meritorious claim. If his case had been in Connecticut with the proposed requirement that he show the state supreme court a likelihood of success on the merits before being granted a hearing, he would likely have been denied a stay of his death sentence.

These limitations are an extremely high burden to place on a defendant sentenced to death, even if one assumes that the proposal requires appointment of counsel. Such limitations in capital cases may be construed as a suspension of the writ, and therefore unconstitutional. Furthermore, the argument of whether or not the claim would likely succeed would take place before the state supreme court – the same court that would later review the habeas court decision on that issue. Would the factual determination necessitate an evidentiary hearing in the state supreme court? Would the defendant be allowed to subpoena witnesses into the state supreme court to make this claim and sustain the considerable burden? These are just a few examples of the complex issues surrounding capital habeas that would require litigation.

The Office of Chief Public Defender supports **Section 3** of Raised Bill No. 5445 which mandates that all criminal justice agencies involved in death penalty litigation and application must collect and maintain detailed information on the costs of capital felony cases. The Division of Public Defender Services supports this provision and has collected this information for several years. OCPD calculates that the Death Penalty consistently consumes from 5% to 7% of our Office's total budget per year for a very small number of cases. In FY 2008-09, costs attributable to the Death Penalty were estimated at \$2,497,065, or 5.2% of the total Office's budget of \$48.5 million dollars for .055% of the Division's total caseload. This information is reported in the Division's Annual Report. It is imperative that all agencies involved in death penalty cases collect this information in order that Connecticut residents can weigh the costs and benefits of retaining the death penalty. Determination of total costs must also include commonly overlooked transportation costs of capital defendants to and from court, the cost of additional security both in and out of court, i.e. marshals and DOC personnel, staff overtime, etc.

This Office supports **Section 4** of Raised Bill No. 5445 which seeks to implement several of the same proposals recommended by the members of the Commission on the Death Penalty in 2003. That Commission was comprised of a diverse group of people from different backgrounds and beliefs including law enforcement. They reached a consensus on reforms that would eliminate arbitrary factors from interfering with the consistent administration of the Death Penalty throughout the state. These reforms included the creation of a database to collect and maintain information on all homicide cases whether

or not charged as a capital felony, information on geographical areas where offense occurred and were prosecuted, the nature and circumstances of the offenses, the offense for which the defendant was charged and the offense for which he was prosecuted, the race, ethnicity, gender of persons serving on the jury and those excused, the offense for which the defendant convicted or acquitted, the sentence sought by the prosecution, whether conviction was a result of a trial or plea, and the sentence imposed. This data would also help implement **Section 11** of this Bill, which would reinstate Proportionality Review in capital cases.

The Office of Chief Public Defender supports **Section 5** of the Bill, which seems to be modeled on North Carolina's Racial Justice Act (August 2009) and would allow the defendant in a capital case to raise a pretrial claim that considerations of race, ethnicity, gender, religion or sexual orientation of the defendant or the victim played a significant and impermissible part in the decision to seek a sentence of death in his or her case. Although we support this provision, additional language should be added to articulate **Section 5(a)** that the defendant should also be allowed to challenge the **sentence** of death on this basis. Also at this time, the Office of Chief Public Defender, special public defenders representing death row inmates and the Division of Criminal Justice are engaged in ongoing habeas litigation regarding *In Re: Racial Disparities in Death Penalty Cases*. This litigation has in the past and may again require requests for additional emergency funding for experts and the appointment of special public defenders for those persons sentenced to death who must join the consolidated litigation, pursuant to *State v. Cobb* and *State v. Reynolds*. Statistical analysis must be performed, maintained, and routinely updated in order to insure that factors such as the race of the defendant or the race of the victim do not produce inconsistent results in the implementation of the Death Penalty in Connecticut.

The Office of Chief Public Defender also supports **Section 6** of the Bill which provides for the implementation of another best practices recommendation made by the Commission on the Death Penalty. The recommendation that there should be established a Death Penalty Authorization Committee comprised of all 13 state's attorneys and the Chief State's Attorney who shall review all requests of state's attorneys seeking the death penalty in a pending case is patterned on the federal death penalty process. The federal system allows the defense attorney a reasonable opportunity to present any facts and mitigating factors that the committee could consider in making a decision whether or not to approve the pursuit of the death penalty in an individual case. Such a process anticipates considerable investigation into questions of guilt or innocence as well as mitigating factors prior to presenting the preliminary defense case to the committee and would require additional public defender staff to accomplish this in a timely fashion.

The Office of Chief Public Defender supports **Section 7** which would prevent the court from imposing a death sentence if a prosecutor had not obtained approval from the Death Penalty Authorization Committee prior to the commencement of trial or acceptance of the guilty plea.

Per **Section 8** of the Bill, The Office of Chief Public Defender supports and would welcome the opportunity to establish an annual training program for public defenders and special public defenders involved in capital cases. This recommendation was also proposed by the Commission on the Death Penalty. Representation by competent counsel is one of the best protections against wrongful convictions and unjust death sentences. Attorneys must be trained in substantive death penalty law, best practices in DNA and forensic science. The Division of Public Defender Services does not have the capacity to implement essential training at this time without additional resources. Such a program would require Capital Defense Unit staff to be available (not on trial), and funding for national training experts in order to implement this provision. Most Death Penalty training programs currently are held out-of state and are approved only on an individual attorney basis. **The cost for an Annual Training Program for capital defense staff and special public defender attorneys, investigators, mitigation specialists and paralegals including venue, speakers, and other expenses is estimated to between \$25,000 and \$40,000 annually.**

The Office of Chief Public Defender supports **Section 9** of the Bill which would provide comparable training for prosecutors.

This Office also supports **Section 10** of the Bill which would establish critical resources for a Capital Defense "Support" Unit to assist Private Attorneys acting as special public defenders in death penalty cases. This is a much needed resource to provide private attorneys with the support and training that they need to undertake competent representation of capital defendants. The support unit should be staffed with mitigation specialists, investigators, paralegals and clerical staff with services comparable to that provided to attorneys in the Capital Defense Unit. It is very difficult for these attorneys to undertake these cases and maintain a viable private practice. The establishment of such a unit would require additional space and nine employees. These positions would include a Director, 3 capital defense investigators, 3 mitigation specialists and 2 paralegals. Additional funding to support this Unit would initially include approximately \$750,000 for staff salaries, \$27,000 for equipment, \$10,000 for capital defense training, \$37,500 other expenses, annual lease estimated at \$75,500 for additional space. **Total estimate (not including fringe) is approximately \$900,000.**

The Office of Chief Public Defender also supports **Section 11** of the Bill which would require proportionality review in capital cases. Enactment of this provision would serve to make our capital punishment system more consistent and just. Implementation would also require additional appellate defense attorneys, i.e. more than one, on individual capital appeals.

Section 12 of the Bill proposes video and audio taping for the entire interrogation procedure of those persons suspected of murder who are detained and in the custody of law enforcement. These procedures are the most reliable way to determine the voluntariness of confessions and have been endorsed by our Office for many years.

This Office supports **Section 13** of the Bill which would establish a grant program for electronic recording of interrogations.

Section 14 of the Bill proposes eyewitness identification reforms pursuant to the double blind technique recommended as the most reliable method to prevent eye-witness mistaken identification. This Office has been a proponent of eyewitness identification procedure reforms for many years.

This Office also supports **Section 15** of the Bill which proposes that an evidentiary hearing be held to reduce the chance that a defendant in a capital case will be sentenced to death due to “informant” or “snitch” testimony. This type of testimony, second to mistaken eyewitness identification has resulted in the wrongful conviction of many defendants throughout the United States who were actually innocent and later exonerated.

Section 16 purportedly provides for an open file system and Discovery procedures in capital cases. Problematic however are subsection (a) that seemingly does not require the disclosure of police reports to defense counsel and subsection (d) that permits the court to deny disclosure. Therefore, it is imperative that the procedures for keeping an accurate inventory what materials are disclosed or not disclosed be made in order to protect the rights of the defendant in any further proceedings.

Section 17 provides for a victim impact statement to be read in court after the special verdicts are returned. There has been much discussion of how the Victims’ Rights Amendment to the Constitution and the rights of the defendant in a capital death case intersect at this point. The Commission on the Death Penalty recommended that the statement be read after the special verdicts on the presence of aggravating and mitigating factors and the weight of each in order to prevent factors that could be considered arbitrary in light of the state’s death penalty statutory scheme from interfering with the special verdict process. This Office agrees with the position as stated by the Death Penalty Commission.

The Office of Chief Public Defender supports **Section 18** of the Bill which would provide an appropriation for additional training as articulated in **Section 9**, and additional staff for the prosecutors engaged in appeals and capital habeas cases.

Implementation of **Section 19** would provide additional capital appellate staffing. This Office supports this proposal which would help address the serious shortage of qualified attorneys and resources to fully implement ABA standards for defending capital appeals and habeas petitions. ABA Standards call for the appointment of two qualified attorneys to represent the defendant in all stages of a capital case, including trial, appeal, and habeas corpus. In other states and in the federal system, two or more lawyers may work on an individual capital case. At this time, we are usually able to assign only one Division appellate attorney to handle the case from start to finish. Last year, when one of the Capital Defense trial attorneys retired, it was necessary to fill this vacancy with a capital appellate lawyer due to the number of appeals we have pending at this time. If a special public defender is necessary, we have often had to attempt to recruit attorneys

versed in death penalty case law from out of state. I have requested additional capital positions from OPM in past budget cycles and as recently as the 2010 mid-term budget adjustment, with negative results due to the state's financial crisis. This section also addresses the need to raise hourly rates paid to special public defenders in state capital case. At this time the state hourly rate is \$100 per hour in comparison to \$170 per hour paid to panel attorneys in federal death penalty cases.

The additional sum of \$458,648 (not including fringe) would necessarily be appropriated from the General Fund for the initial annual salaries for positions, Personal Services (PS) outlined in the proposed legislation. Additional leased space would also be necessary as currently no public defender office has space available to house additional employees. The annual lease for additional staff is estimated at \$70,000. Additional appropriations would also necessary for the Division's Other Expenses (OE Account) of approximately \$23,000, \$18,000 for equipment, training costs \$5,000. **Total additional appropriation necessary for this increase in staffing is estimated at \$574,648.**

This Office supports **Section 20** which would provide an additional appropriation to the Judicial Department for purposes of ensuring timely adjudication of habeas matters, **provided that this does not refer to the implementation of proposals as outlined in Section 2 (c) of this Bill, which we oppose.**