



**State of Connecticut**  
**DIVISION OF CRIMINAL JUSTICE**

**TESTIMONY**

*JOINT COMMITTEE ON JUDICIARY*

**H.B. No. 6439 (RAISED):**  
**An Act Concerning Habeas Corpus Reform**

**S.B. No. 1035 (RAISED):**  
**An Act Repealing the Death Penalty**

**H.B. No. 6425 (RAISED):**  
**An Act Revising the Penalty for Capital Felonies**

**H.B. No. 6427 (RAISED):**  
**An Act Concerning Post-Conviction Procedures in Death Penalty Cases**

**S.B. No. 1029 (RAISED):**  
**An Act Concerning Victim Impact Statements in Capital Murder Cases**

*March 7, 2011*

The Division of Criminal Justice wishes to essentially reiterate and reaffirm the testimony presented to the Joint Committee during the 2009 session regarding legislation concerning the death penalty.

Additionally, and in the strongest of terms, the Division would respectfully request the Committee's Joint Favorable Report for H.B. No. 6439, An Act Concerning Habeas Corpus Reform. The Division believes this bill is critically needed to correct a continuing and growing abuse of the legal process and the worsening and unacceptable impact that the abuse of the habeas process has on an already financially strained system and the innocent victims of crime, and even more importantly, on the few petitioners with meritorious claims that are not getting proper attention because of the mass of meritless, repetitive and untimely petitions swamping the system.

**DEATH PENALTY**

With regard to the bills concerning the death penalty, as we stated in 2009, the Division of Criminal Justice believes the question of whether there should or should not be a death

penalty is a fundamental question of public policy that depends on the evolving standards of the people of the State of Connecticut. It is the elected members of the General Assembly who must act in accord with their perception of these standards. As such the Division of Criminal Justice takes no position on whether or not there should be a death penalty. We must, however, reiterate unequivocally that we as prosecutors have a sworn, constitutional responsibility to enforce the law as established by the General Assembly and Governor and interpreted by the courts.

Regarding this policy debate the argument that it should be repealed because it is unworkable ignores the fact that the federal government and other states have made it workable, reliable and relatively timely, through legislation and rules of court. This body has the power to do so and to use that as an excuse to abolish it is deceptive.

Whether repeal of the death penalty will result in substantial cost savings is something that needs to be examined closely, not superficially. At least through the trial and sentencing stage the costs of prosecution will not be reduced substantially. Even in appellate and post conviction proceedings the amount of savings are difficult to determine because of the likely increase in habeas petitions that will be filed if there is no habeas reform. Many of the costs are caused by the extremes to which those opposed to the death penalty will go. While some of these costs are legitimate and called for, many are not. An examination of the costs incurred prior to the execution of Michael Ross, if it is possible, would shed some light on this issue.

Given the complexity of the legal issues and extensive deliberation that must be undertaken at all stages of a capital prosecution, the Division must urge the Committee to proceed with the utmost of caution as you consider the various bills and to fully and thoroughly consider all of the potential implications that even the slightest change to the capital felony statutes could have both in terms of policy and practice. Such considerations must include, but not necessarily be limited to:

- The notion that the death penalty can be repealed prospectively, as envisioned by H.B. No. 6425, An Act Revising the Penalty for Capital Felonies, is tenuous at best. Prospective repeal of the death penalty will create two classes of people: one will be subject to execution and the other will not, not because of the nature of the crime or the existence or absence of any mitigating factor, but because of the date on which the crime was committed. While the Division would endeavor not to be presumptuous as to how the courts would rule, there is an extensive body of existing law that leads to the obvious argument that it would be untenable as a matter of constitutional law or public policy to execute someone today who could not be executed for committing the same conduct at a date in the future. It is unlikely that the Supreme Court would permit the execution of a person after a prospective repeal of the statute and neither the public nor members of this body nor families of victims should be misled into believing the contrary.

- The repeal of the death penalty, either prospectively as proposed in H.B. No. 6425 or retroactively as proposed in S.B. No. 1035, An Act Repealing the Death Penalty, will result in little if any financial savings to the state in the long term. In fact, the Division of Criminal Justice may actually realize greater demands with the establishment of life in prison without the possibility of release as the sole penalty for a capital felony. Death penalty litigation will go

away only to be replaced by as much and possibly more litigation challenging convictions and/or sentences of life without release. And as our experience with habeas matters clearly shows, such litigation will likely continue unabated throughout the entire lifetime of the inmates so sentenced.

- Any change to the death penalty statutes including prospective repeal is certain to produce additional litigation and delay and should be undertaken only with the utmost caution and after the closest scrutiny. The prosecution of death penalty cases in Connecticut today is not a matter of delaying the inevitable but rather one of inevitable delay. Any question of the actual guilt of those convicted in the oldest cases still pending was resolved many years, if not, decades ago. The cases have been tried - and in some cases retried - and then affirmed on appeal by the highest court of this state. Yet the duly ordered sentence of the court has not been carried out and quite frankly will not be carried out in the near future given the current state of the legal proceedings. These oldest cases are not cases where the inmate will be exonerated through DNA technology. Guilt is not at issue; it is delay and delay solely for the sake of delay.

The processes for trial and direct appeal in death penalty cases are rigorous and thorough as they should be. The post-conviction process after the final appeal, however, has become a wasteland into which excessive amounts of money are dumped and through which the families and friends of victims are forced to wander as these proceedings drag on for years. It is inhumane that the innocent families of innocent victims of violent and unspeakable crimes should be subjected to the terror of decades of legal maneuvering before the punishment lawfully ordered by our judicial system can be carried out. Rather than encouraging all parties to work for the lawful and efficient resolution of claims, our lack of legal and procedural boundaries on post-conviction proceedings permits and even encourages the defense bar to prolong death penalty cases for as long as possible and to spend as much as possible to prevent a final resolution. The sole reason for the reported high cost of capital litigation is delay for the sake of delay and not incompetent counsel or overzealous prosecutors. In effect, the argument has become that it costs too much to execute a guilty person but that it can never cost too much to spare that same person from duly and rightfully ordered execution.

## HABEAS CORPUS REFORM

Unfortunately, this same trend of a never-ending circle of litigation is not limited to death penalty but rather is a worsening problem with regard to criminal convictions of all degrees. To address what is fast threatening to become a crisis in the criminal justice system, the Division of Criminal Justice respectfully requests in the strongest of terms the Committee's Joint Favorable Report for H.B. No. 6439, An Act Concerning Habeas Corpus Reform. The Division currently has more than 12 prosecutors working full time on habeas litigation and numerous other prosecutors are spending substantial time on habeas cases. While the need for *habeas* reform is certainly apparent in the area of capital litigation, it is by no means limited to death penalty cases. Regardless of whatever action the Committee takes on the death penalty and directly related issues, the Division believes it is imperative that *habeas* reform legislation proceed as an independent and urgently needed change. Given the critical need for this legislation, the Division has devoted substantial time and effort since the past session to collecting specific examples of abuse. We have also sought to work with the opponents of the legislation to try to identify common concerns and a solution acceptable to all parties. We

accepted an offer from the previous chair of the Judiciary Committee to facilitate a discussion in the off-session, which unfortunately did not materialize. Nonetheless, we believe this issue is so important, both in terms of its impact on the pursuit of justice and its financial impact, that we again reiterate our willingness to present all supporting documentation that you may need to proceed with reform.

"Something has got to be done." So were the words of the Honorable Elliot N. Solomon, Administrative Judge for the Judicial District of Tolland, in proceedings just a few weeks back on habeas petition filed some seven years ago. "This is the poster child for why habeas reform is needed," Judge Solomon stated in the proceedings where he also ordered that a copy of the transcript of his remarks be forwarded to the Chief Court Administrator, the Chief Justice and the Co-Chairs of this Judiciary Committee. And this was but one motion in one petition in what has become an ongoing flood of successive petitions filed by inmates. H.B. No. 6349 simply seeks to end to what has become this merry-go-round of never-ending habeas petitions seeking review of criminal convictions. Once a convicted individual loses one habeas petition he or she simply files another. In many cases these petitions are merely repetitive, raising claims that have already been adjudicated at trial, on appeal or in an earlier habeas. Unfortunately, the current system puts no limits on the number of petitions that can be filed and does nothing to sort out the few meritorious claims that might exist. The notion that the courts already have the authority to dismiss petitions because of previously filed petitions is a dream. The latest trend is for petitioners to withdraw their petitions just before trial and then re-file them. This abuse robs the system of limited resources while forcing innocent victims of crime to be victimized again and again years and even decades after their assailant has been duly convicted and sentenced.

At the outset, it is important to state that this bill would not prevent the bringing of a valid claim of actual innocence, and, in fact would clear the dockets of meritless petitions that only serve to delay the courts from hearing valid cases. H.B. No. 6439 would not limit the ability of anyone to bring a claim of actual innocence. What it would do is prevent the filing of petitions decades after a crime has been committed, when the witnesses, lawyers and others involved in the trial are gone or even no longer alive, the filing of the same claim time after time despite the repeated denial of those claims, and provide for a method for the courts to screen out cases that do not deserve to be heard.

We examined a sampling of cases filed by approximately 750 inmates for the period from January 2006 through December 2010. Of these 750 individuals, 120 had filed more than one petition challenging the same conviction. This sampling examined only a portion of the habeas cases handled by prosecutors working in the Office of the Chief State's Attorney. The number of inmates filing multiple petitions (120) did not include multiple or successive petitions that were declined or dismissed by the courts before reaching the Division of Criminal Justice. In terms of the time that has elapsed since the conviction, we can readily identify petitions - in some cases, first petitions -- for convictions dating back as far as 1979. At last check 60 of the approximately 175 petitioners whose cases are being handled by the Office of the State's Attorney for the Judicial District of New Haven had brought at least one prior petition. For the Judicial District of Fairfield (Bridgeport), 40 of the approximately 100 pending petitions were from individuals with a prior filing, and, again, in some case several previous petitions. It should be noted that a number of these repeat filers do not limit themselves to the

habeas process – they also have brought lawsuits, claims against the state and other actions in the legal system over the years. H.B. No. 6439 deals solely with habeas petitions.

This abuse of the process is costly one both in financial and in human terms. In our last analysis in 2010, the Division of Criminal Justice estimated our average costs for each habeas case at \$4,248. This is the average estimated cost solely for the Division; it does not include costs to the Judicial Branch or for the petitioner's representation at state expense. There is no question that a significant portion of the several million dollars spent each year for private attorneys serving as Special Public Defenders is for habeas cases. Additionally, we have noted a recent trend toward substantial costs in some instances for purported expert witnesses called by the petitioner's counsel. This can result in a battle of the experts where the state is required to retain an expert witness to counter the testimony of an expert witness called by the petitioner. In both cases, the witnesses are paid at public expense. There are also investigators being retained, even in cases where there is no showing that further investigation is warranted, or requiring the Division to send prosecutors out of state to attend depositions of witnesses whom petitioners want to have deposed. The process is simply out of control – and these costs will only continue to escalate without reasonable reform.

As great as these financial costs are, they may not be the highest costs of the out-of-control habeas process. As we have stressed repeatedly in the past, the highest cost may be the human costs to the innocent victims of crime and their families who are denied finality and in some cases victimized over and over again by the habeas process. We have provided specific examples to the Committee of cases where victims have been called to testify as witnesses in habeas proceedings many years after the crime and conviction of their assailant. Victims live with the never-ending fear that their assailant will be released. They are not only forced to relive the crime but are subjected to the indignity of essentially being mocked and victimized again. This in no way serves the interests of justice, and it could be argued infringes upon the rights guaranteed to victims of crime by our state Constitution.

The small percentage of habeas petitioners who have valid claims are equally victimized. They must stand in line while the courts devote substantial time and resources to meritless and frivolous petitions or claims that essentially were long ago resolved but are now brought back to life because of the lack of any limits on successive petitions. In some cases it would appear there is reluctance on the part of defense counsel to simply tell the inmate the truth – that the petition has no merit. This not only gives false hope to the petitioner but it denies the finality the victim and the system deserve. As the opponents of habeas reform constantly proclaim, habeas corpus is "The Great Writ," and it is, going back hundreds of years, but it is these opponents who have trivialized and abused it.

H.B. No. 6439 provides a well-reasoned and thoughtful approach to bring about the end to the abuse of the habeas system. Despite what some will argue, the General Assembly is fully within its authority to enact this legislation. The opponents of habeas reform will claim that this bill in some fashion would violate constitutional rights, yet they cannot point to a single case to support that argument. The statute of limitations and restrictions on successive petitions that are provided in this bill are common place in other jurisdictions. The federal system and some thirty states already place a reasonable statute of limitations on habeas petitions. These other jurisdictions also place significant limits on the filing of successive petitions. The federal system,

for example, provides that successive petitions are to be dismissed unless the petitioner makes specific showings similar to those required in H.B. No. 5502 (See 28 U.S.C. § 2244). And to restate emphatically, in the very tiny number of cases where an exception is in order, the bill provides an avenue for such exception. The Division would respectfully contend that it is the repeat and frivolous abuse of the process that undermines not only the "great writ" but the system that exists to uphold the rights it was established to protect.

In conclusion, the Division wishes to express its gratitude to the Committee for your consideration of these important issues. We stand ready to provide any additional information, including details of specific cases, that the Committee might require or to answer any questions that you might have.