



**Office of Chief Public Defender  
State of Connecticut**

30 TRINITY STREET, 4<sup>TH</sup> FLOOR  
HARTFORD, CONNECTICUT 06106  
TEL (860)509-6429  
FAX (860-509-6499  
susan.storey@jud.ct.gov

ATTORNEY SUSAN O. STOREY  
CHIEF PUBLIC DEFENDER

**TESTIMONY OF SUSAN O. STOREY, CHIEF PUBLIC DEFENDER**

**RAISED S.B. NO. 1029, AN ACT CONCERNING VICTIM IMPACT STATEMENTS IN  
CAPITAL MURDER CASES**

**JUDICIARY COMMITTEE PUBLIC HEARING  
MARCH 7, 2011**

Following the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), a number of states have enacted legislation permitting some form of victim impact evidence before a capital sentencing jury. However, the Office of Chief Public Defender opposes the passage of Raised S.B. 1029 for a number of reasons.

**First**, the Office of Chief Public Defender shares the view expressed by Superior Court Judge Thomas Miano to the Connecticut Commission on the Death Penalty in 2002. This view that the Connecticut Supreme Court might ultimately adopt based on our state constitution is that, "[t]he admission of victim impact evidence, particularly if it involves statements by bereaved family members, greatly increases the risk that the sentencing decision will be made based on passion, whim or prejudice rather than deliberation. These are not acceptable bases for decisions anywhere in our criminal justice system, but especially not in capital sentencing trials, in which it is constitutionally required that jury discretion be sufficiently guided to ensure that its decision is not based on such factors." (Report of the Connecticut Commission on the Death Penalty at 65) In addition to inviting arbitrary sentencing, the evidence permitted by this bill will completely eliminate the mitigating considerations a defendant proffers as his case for life, unfairly tilting the scale to death.

**Second**, the scope of evidence permitted by Raised S.B. 1029 exceeds what the U.S. Supreme Court decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), permits. The principle underlying *Payne* is that it does not violate the Eighth Amendment *per se*

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for a capital sentencing jury to hear evidence of the "specific harm caused by the defendant." *Payne*, at 825. *Payne* does not, however, authorize states to permit capital sentencing judgments on the basis of the worthiness of the victim – judgments that are inevitable if a victim's social relationships and accomplishments are presented to a capital sentencing jury. Such evidence *would* violate the Eighth Amendment by undermining the reliability of the decision that a defendant is worthy of death, and would violate the defendant's right to due process, requiring reversal of a death sentence in state or federal court.

**Third**, as the Supreme Court held in *Payne*, and the Connecticut Supreme Court recognized in *State v. Reynolds*, 264 Conn. 1, 172-74 (2003), victim impact evidence that does not violate *Payne* or the Eighth Amendment still has the potential to be unduly inflammatory and prejudicial, and thus violate a defendant's right to due process, requiring reversal of a death sentence in state or federal court.

**Fourth**, the bill's potential breadth, lack of specificity, and non-integration with the death penalty statute itself (Conn. Gen. Stats. §53a-46a) create a host of potential legal issues:

- Our capital statute subjects the State's case for death to the rules of evidence, but Raised S.B. 1029 would permit the introduction of evidence that would not comply with the rules of evidence. The evidence would not be subject to cross-examination and could not be rebutted by the defendant. This is a result of both the hearsay form of the evidence permitted (information presented in the form of a written narrative, photographs, or video recording, and by a "legal representative") and the non-factual nature of the substance of the evidence – e.g., characterization of the victim's accomplishments and social relationships. Evidence of this type presented through any of these means would violate a defendant's state and federal constitutional rights of confrontation.
- The bill does not delineate the purpose or role of victim impact evidence in the capital sentencing hearing and decision-making process provided for in C.G.S. §53a-46a. As Judge Miano told the Commission, victim impact evidence is not relevant to aggravating or mitigating factors (Report at 65), and it does not fit into our present scheme. As a matter of constitutional law, aggravating factors must narrow the crimes for which death can be imposed, and must be capable of consistent, standardized application. This bill introduces additional, irrebuttable considerations into the process on the death side of the scale in a non-specified way, and with no guidance to the sentence, rendering the death-sentencing process arbitrary and capricious, and thus unconstitutional. It invites the sentencer to decide what punishment a defendant deserves on the basis of the victim's popularity and stature

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in the community, and on the eloquence of the designated speaker or the craft of the videographer.

- If the bill is clarified or construed to permit the evidence to be considered as facts and circumstances relevant to whether the defendant's proffered evidence is mitigating in nature, the sentencer's decision whether mitigating factors have been established will be based on an assessment of the comparative worth of the defendant and victim – an unconstitutional basis for excluding mitigating evidence from the weighing decision. It is our view that the second step for finding mitigation under C.G.S. §53a-56a(d) – whether evidence presented by the defendant in mitigation is mitigating in nature considering all the facts and circumstances of the case – is an unconstitutional threshold for relevance in a weighing statute. The Eighth Amendment does not permit any device that excludes mitigating evidence from the sentencer's ultimate decision whether to impose death, which, under our statute, is reached through the process of weighing aggravating and mitigating factors.

Fifth, the breadth of evidence permitted by the bill and the authorization of an undefined "legal representative" to present it promotes the stratification of victims based on their socio-economic status and their family members' articulateness and access to eloquent spokespersons, thus adding to the disparate effects of the operation of the death penalty in Connecticut.

These considerations implicitly underlay the Supreme Court's decision in *Booth v. Maryland*, 482 U.S. 496, 505-06 (1987), which was partially overruled by *Payne*:

"But in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe. The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information. Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die. See 306 Md., at 233, 507 A. 2d, at 1129 (Cole, J., concurring in part and dissenting in part) (concluding that it is arbitrary to make capital sentencing decisions based on a VIS, "which vary greatly from case to case depending upon the ability of the family member to express his grief").

Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in

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which it was not." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.).  
See also *Skipper v. South Carolina*, 476 U.S. 1, 14-15 (1986) (Powell, J., concurring in  
judgment).

The Supreme Court has also noted that, "We are troubled by the implication  
that defendants whose victims were assets to their community are more  
deserving of punishment than those whose victims are perceived to be less  
worthy. Of course, our system of justice does not tolerate such distinctions." Cf.  
*Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

In conclusion, the Office of Chief Public Defender urges rejection of this  
proposed legislation.