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State of Connecticut*

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TESTIMONY OF SUSAN O. STOREY, CHIEF PUBLIC DEFENDER

**RAISED BILL NO. 1035, *AN ACT REPEALING THE DEATH PENALTY*
RAISED BILL NO. 6425, *AN ACT REVISING THE PENALTY FOR CAPITAL FELONIES***

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

The Office of Chief Public Defender supports the total abolition of the Death Penalty in Connecticut, and therefore supports **Raised Bill No. 1035**. Enactment of this bill would serve to abolish the Death Penalty in all cases, including commutation of sentences for those already sentenced to death, in favor of a life sentence without the possibility of release. In the alternative, the Office of Chief Public Defender supports abolition prospectively as proposed by **Raised Bill No. 6425**.

While lawmakers and residents of the State may differ in good conscience regarding whether or not the State should have the Death Penalty, other states are abandoning it for various reasons, including the enormous financial drain on their economy. During times of economic crisis, difficult policy choices must be made that make economic sense as well as effectively protect public safety.

The Budget implications are extraordinary. The Division of Public Defender Services incurred expenditures of \$3.4 million in the last FY attributable to capital case defense representation at trial, habeas and appeals. This was a 39% increase over the prior fiscal year, and 7.2% of the Public Defender Services Commission's total appropriation. These expenses are being incurred in part due to the nature of very high profile death penalty cases, including Cheshire co-defendants Steven Hayes and Joshua Komisarjefsky, defendants Christopher DiMeo, and Richard Rozkowski in Fairfield, among others.

The highest percentage of costs in these cases is incurred in the penalty phase of the capital trials. If the state is seeking death in a capital case, the trial takes place in two parts. The first phase is the guilt phase, and if the defendant is convicted of capital felony, the case proceeds to the penalty phase. In the penalty phase the defense is ethically and legally obligated to present mitigating evidence that the jury may consider in their life or death decision. Mitigating evidence is not confined to statutory mitigating factors, and can be any evidence that the defense team feels will persuade the jury that life in prison without release is sufficient punishment. If the defense team fails to fully investigate the client's past to present significant mitigation evidence, then the case may be overturned for ineffective of assistance of counsel at a habeas proceeding.

In capital cases where the State is not seeking death, the trial proceeds as in any other murder case. The jury selection process is much shorter and comparable to any other jury selection in a murder cases. Jurors do not have to go through exhaustive questioning to be "death qualified." If the defendant is convicted of capital felony, then there is no second penalty phase. The sentence of life without the possibility of release that the court imposes is mandatory and there is no parole. Further costs are saved because these trials may often proceed with one defense attorney rather than a team of 2 attorneys as advised by the American Bar Association and required by Public Defender Commission policy. Appeals and Habeas claims in these cases would proceed much more expeditiously, if at all, because none of the voluminous appellate issues attached specifically to a death sentence would be litigated.

It is becoming increasingly difficult for the Capital Defense Unit in the Office of Chief Public Defender to handle capital cases in the time frames demanded by the court and the public. That is why the Office of Chief Public Defender requested a Budget Expansion Option for this biennium that included 5 additional staff for the Capital Defense Unit that is responsible for representing public defender clients facing the death penalty statewide. It is also becoming more difficult to recruit attorneys from the private bar to act as special public defenders in these cases. Lawyers who represent capital clients must have significant trial experience to qualify to act as special public defenders at trial and significant appellate experience to act as appellate counsel.

Private attorneys find that they must devote nearly all their time to these cases for more than a two year period. During that time some find that they are unable to maintain their private practice, and some have found that they lose private clients due to the high profile nature of the defendants that they represent. It has also become more common for capital defense attorneys to be vilified by the press and for them to receive death threats against themselves and their families. Recently, witnesses who are important to the defense have refused to testify because they fear the consequences for themselves, their families and their businesses.

Significantly, since the Committee last took testimony on the repeal of our death penalty statute, the American Law Institute (ALI) withdrew the capital sentencing provisions from the Model Penal Code, because of the "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." ALI Statement (available at http://www.ali.org/_news/10232009.htm). The American Law Institute summarized the Model Penal Code's failings:

Section 210.6, which in many respects provided the template for contemporary state

capital schemes, represents a failed attempt to rationalize the administration of the death penalty and, for the reasons we discuss in greater detail below, its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty. Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty (April 15, 2009), p.7, available at http://www.ali.org/doc/Capital%20Punishment_web.pdf.

The factors that led the American Law Institute to reject the death penalty are relevant to Connecticut's future with the death penalty, and should produce the same result. The significance of this development cannot be overstated. The Supreme Court looked to the Model Penal Code provisions as a template for a constitutionally valid capital sentencing procedure:

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.

Gregg v. Georgia, 428 U.S. 153, 193-94 (1976), citing ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis in original); *see also Gregg*, 428 U.S. at 193 n.44 (setting forth Model Penal Code recommended list of aggravating and mitigating factors). The Court's conclusion that the concerns about the death penalty being imposed in an arbitrary and capricious manner "are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information," 428 U.S. at 195, depended largely on these now-withdrawn Model Penal Code provisions. *See also Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (upholding Florida death penalty statute that was "patterned in large part on the Model Penal Code").

Like most modern state death penalty statutes, the Connecticut statute has the same basic structure as the Model Penal Code, and as our Supreme Court has noted, a bifurcated hearing and statutorily mandated aggravating factors are the means of complying with the Eighth Amendment mandate that "the death penalty may only be imposed in a manner that is consistent and reliable." *State v. Ross*, 230 Conn. 183, 232 (1994). (Connecticut anticipated the bifurcated proceeding recommended in the Model Penal Code and adopted it before most other states. *See Public Acts 1963, No. 588; Conn. Joint Standing Committee Hearings, Judiciary, 1963 Sess., pp. 155-56, testimony of Rep. Satter. After that statute was invalidated by Furman, the legislature passed the non-weighing statute, Public Act 73-137, which was based on a federal legislative proposal being considered at that time by Congress. See Hon. James R. Browning, The New Death Penalty Statutes: Perpetuating a Costly Myth, 9 Gonzaga L. Rev. 651, 679 n.130 (1974); 16. S Proc., Pt. 4, 1973 Sess., pp. 1869-70, remarks of Sen. Guidera. A report analyzing the federal proposal explained that it included a bifurcated penalty phase but rejected the Model Penal Code's provision for weighing aggravating and mitigating factors. Senate Rept. 93-721 p. 15. With the adoption of the weighing statute in 1995, the Connecticut legislature accepted that*

aspect of the basic framework proposed in the Model Penal Code.) Abandonment of this influential legal framework by the organization that developed it is compelling evidence that the death penalty is incapable of being imposed in a fair and non-arbitrary manner, and that Connecticut's death penalty should be abolished.

One factor that influenced the American Law Institute is the Supreme Court's invalidation of the death penalty for categories of offenders in recent years, evidencing a clear trend in the direction of complete prohibition. ALI Report 46; *see Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2009); *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). The ALI Report underscores the significantly changing landscape:

Together, these decisions reflect a considerable broadening of the criteria available to discern evolving standards of decency, including evidence of elite, professional, and world opinion. Two of the cases – *Atkins* and *Simmons* – overruled relatively recent decisions, and, along with *Kennedy*, the decisions signal an unprecedented willingness of the Court to rein in capital practices deemed excessive.

ALI Report at 46.

The ALI Report finds “[t]he best evidence of the inadequacies of constitutional regulation of capital punishment [in] the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. . . . We can think of no other constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. Such reservations strongly suggest that the constitutional regulation of capital punishment has not succeeded on its own terms.” ALI Report at 20-21.

Justices Blackmun and Powell, “two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty.” ALI Report at 20. Justice Stevens, “one of the three-Justice plurality that reinstated the death penalty in the 1976 cases, [in the 2008 Term] concluded that the death penalty should be ruled unconstitutional.” *Id.* Justices Scalia and Thomas “have repudiated the Court’s Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion.” *Id.* at 20 & 10 n.28. Justices Kennedy, Souter and Breyer “each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice.” *Id.* at 20. Justices O’Connor and Ginsburg “have both given speeches questioning the soundness of the capital justice process on the ground of inadequate provision of capital defense services.” *Id.*

Another factor that influenced the ALI was the difficulty of eliminating racial bias. “The combined influences of discretion, underrepresentation, historical practice, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.” ALI Report at 31. A 2009 report showed that Connecticut and Texas had the highest percentage of minority inmates among states with 10 or more on death row; in both states, 70% of the individuals on death row were black or Latino. *See* Death Penalty Information Center Website, <http://deathpenaltyinfo.org/News/past14/2009> last visited 3/3/11). In 2011, that percentage has not changed for Connecticut. Comparison with the general population reveals even greater disparity in Connecticut than Texas, where only 22.7% of the

population is black or Latino, compared to Texas, where 48.9% of the population is black or Latino. U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/09000.html>; <http://quickfacts.census.gov/qfd/states/48000.html> (last visited 3/3/11). This stark disparity certainly contributes to an appearance of racial bias in the administration of capital punishment in Connecticut, an issue that deeply troubled many legislators during the 2009 debates, and should continue to do so.

Currently consolidated habeas corpus litigation entitled, *In Re: Racial Disparities in Death Penalty Cases*, continues in the Rockville Habeas court regarding allegations of racial disparities and other evidence of arbitrariness in Death Penalty cases in Connecticut. This litigation involves 18 petitioners either sentenced to death or charged with a death penalty offense. Professor John Donohue III, the Yale Law School expert retained on behalf of the petitioners, has indicated in his report that evidence of arbitrary geographical application of the death penalty and evidence of racial bias, especially as to the race of victim, exist in Connecticut. See *Capital Punishment in Connecticut, 1973-2007, A Comprehensive Evaluation From 4600 Murders to One Execution*, April 29, 2008. It is not clear how this case would progress if the General Assembly abolishes the Death Penalty prospectively as both non-convicted and convicted litigants are joined in this case.

It is also not clear what other consequences would ensue without total abolition of the Death Penalty. This would in part depend on decisions made by the Chief State's Attorney, individual state's attorneys in their constitutionally independent capacity, and litigation to invalidate the death sentences of those already convicted. It is likely that the appeals and habeas cases of those persons already sentenced would continue, and the State would not see the same extraordinary savings that would result from total abolition.

In conclusion, and for the reasons stated above, the Office of Chief Public Defender urges the Legislature to abolish the Death Penalty in Connecticut in favor of a penalty of life imprisonment without the possibility of release.