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INFORMATIONAL FORUM AGENDA
CAPITAL FELONY APPELLATE PROCESS REFORM
JUDICIARY COMMITTEE

MAY 8, 2009

The State's proposal to "reform" the capital felony appellate process has three major components to accelerate the post conviction process toward execution:

- The requirement that court reporters complete transcripts in capital cases within 90 days.

- A statute of limitations for state habeas corpus petitions in capital cases with exceptions that include:

    - physical disability or mental disease precluded timely assertion of the claim
    - newly discovered evidence establishes actual innocence –and is not merely impeachment evidence

- The requirement that no stay of execution pending a second or subsequent state habeas petition will issue unless the defendant shows the state supreme court that there's a likelihood of success on the merits.

The proposal for capital case transcripts to be fully prepared within 90 days may not be reasonable given the lack of transcribing technology and the considerable responsibilities that court reporters and monitors have in other matters. It is my understanding that it usually takes about a year for the transcript to be completed in capital jury cases that include a penalty phase. It might be possible to shorten the time frame if court reporters rather than court monitors were used in capital cases, and the reporters were equipped

with technology that allows them to produce transcripts in real time. Giving preferential treatment to capital case transcripts could upset the timelines as mandated by the Supreme Court in Gaines v. Manson in other types of criminal appeals. The Court Reporters should be consulted about this provision to determine whether it is feasible or not.

It is the rest of the process, however, that is largely dependent on people, constitutional requirements, and the appellate courts' decision making process in capital cases that cannot be appreciably shortened. Once all transcripts in a death case have been obtained, it may take one to two years for the defendant's counsel to read the voluminous trial transcripts, make necessary motions to the trial court to articulate their rulings to insure that they will be considered by the Connecticut Supreme Court, complete research and writing of the brief and appendix. It usually takes comparable time for the State to file their brief, and three months for the defendant to file a reply brief. The Court itself may take a year or more after the appellate argument to decide the case. For example, the direct appeal in State v. Courchesne was argued before the Connecticut Supreme Court in March of 2008, nearly fourteen months ago, and has not yet been decided. The decision in the Reynolds case was not issued by the Court for nearly two years.

There are many reasons for the time-consuming nature of the defense briefing process. One explanation is that there are few defense attorneys in Connecticut qualified to handle a death penalty appeal or habeas, and even fewer private lawyers willing and able to represent defendants as special public defenders in post conviction matters. Our Division does not have sufficient existing resources to substantially accelerate the capital appeals process, and in some cases, only one appellate attorney is assigned to a case. The Division's Appellate Unit is small compared to that of Criminal Justice, which customarily lists multiple lawyers on their briefs.

The Division has also considered hiring out of state lawyers experienced in capital cases. However, Connecticut's death penalty statute differs significantly from those of other states. Without admission to the Connecticut Bar, otherwise qualified lawyers from New Jersey and New York, states where the death penalty has been abolished, cannot act as primary appellate counsel in death cases. Other reasons for this difficulty in obtaining post conviction counsel are the exhaustive amount of work that goes into handling a death penalty appeal, the state hourly rate of $100 per hour compared to the federal rate of $175 per hour, and the emotional risk that the client you represent may eventually be executed despite your best effort.

Delays in the briefing process are closely monitored by the Supreme Court. Counsel on both sides must file motions for extensions of time to file their briefs if they anticipate that they will not be able to meet the deadlines set by the Court. The Court will either grant or deny the request based on their best judgment of the situation. It is noteworthy that the Court usually grants requests for extension of time in these cases, an indication that the Justices understand the nature of the work involved in preparing a death penalty appeal. Furthermore, experience tells us that any legislative changes to the death penalty statutes, such as passed in 1995, require more litigation, research, and delay, not less.

The State's proposal also bars meritorious second or subsequent habeas petitions in capital cases if filed more than three years after the date that the sentence was imposed or the commitment ordered if no direct appeal was taken, or more than one year after the date of final appellate action. The only exceptions are if the petitioner can establish due diligence in presenting the claim **and** if he establishes that a physical disability or mental disease precluded a timely assertion of the claim or new evidence establishes by clear and convincing evidence the petitioner's **actual innocence**. The proposal additionally asserts that such new evidence cannot be considered if it is for impeachment purposes. Such limitations are extremely harsh, without precedent, and likely would not withstand constitutional challenge.

The courts would likely rule that these provisions are unconstitutional because they would deprive death-sentenced defendants access to a forum that could hear legitimate legal claims brought against their death sentences. This was made evident by the U.S. Supreme Court last year in United States v. Bourmediene, where the Justices explained that the availability of habeas corpus to bring such claims has been recognized as necessary to protect individual liberty and freedom since this country was founded. And just last week, that Court decided a case that demonstrates how the State's proposal would violate state and federal constitutional protection of the right to habeas corpus in a death penalty case, and how it would promote grave injustice, Cone v. Bell, No. 07-1114, decided April 28, 2009

In this case, Gary Cone, a Vietnam veteran sentenced to death, contended that the State of Tennessee violated his right to due process by concealing witness statements and police reports that would have corroborated his insanity defense at the guilt phase of the trial and bolstered his mitigation presentation at the penalty phase. This case clearly illustrates the potential for grave injustice that the Chief State's Attorney's proposal could create if enacted. Under this proposal, Mr. Cone would have been barred from filing the successive petitions that eventually brought to light the improper withholding of exculpatory evidence by the prosecution. The discovery of such injustice would also have been barred by the proposed statute of limitations and the fact that the evidence did not have any bearing on actual innocence, but included impeachment evidence critical to discrediting the state's witnesses. Such evidence could have persuaded the jury to impose a life sentence instead of the death penalty.

The prosecutors discredited Cone's claim of drug addiction at trial in 1982- calling it "baloney." It was not until 10 years later, that Cone discovered that the prosecutors had withheld evidence from his defense counsel that supported his claim of extreme drug addiction at the time of the murders. In 1992 the Tennessee Court of Appeals held that the State's Public Record Act allowed a criminal defendant to review the prosecutors' actual files. It was only then that Cone gained access to the actual witness statements and police reports that could be considered by the Court as "newly discovered" evidence. These statements were not evidence of actual innocence, but strong mitigation evidence that bolstered his claim of drug addiction and which could have been utilized for impeachment and mitigation purposes at his trial.

All of the above would be barred by the State's proposal. Their proposal provides only for subsequent claims that would establish actual innocence-**not** evidence that would have impacted the defendant's sentence of death or life without the possibility of release. One of the most common reasons that federal courts overturn death sentences is due to flawed presentations of mitigating evidence that might have persuaded a jury to vote for life instead of death. The state's proposal would eliminate cases where there may have been an unfair trial or an unjust imposition of the death penalty, and would limit the opportunity to be heard in court to the few cases where actual innocence was the claim.

It took twenty seven years for Gary Cone to finally gain the relief he was seeking, a full court review of the withheld evidence and its potential impact on his death sentence. The U.S. Supreme Court found that Cone may have been deprived of a fair trial because the prosecutors failed to turn over information regarding his drug addiction that could have impacted the jury's decision on life or death and impeached the state's witnesses at trial. The Court stated that the evidence concealed by the State would have bolstered the defendant's theory of mitigation at the penalty phase. Justice Stevens repeated the Court's holding in Brady v. Maryland, stating that it doesn't matter if the prosecution acted intentionally or unintentionally – when it withholds evidence that is favorable to the accused on either matter of guilt or punishment, the State has violated his right to due process and a fair trial.

Although it may be hard to imagine, cases similar to Gary Cone's have also occurred in Connecticut. It was only by chance that defense counsel learned that exculpatory information indicating that the defendants were innocent was being withheld by prosecutors in a capital case in Bridgeport. Defendants Roy White and Winston Watkins were charged and convicted of capital felony. On appeal, the Connecticut Supreme Court ruled that the prosecutors' failure to disclose the information had deprived the defendants of their constitutional rights. The Court ordered that a new trial be held, and the cases against both men were subsequently dropped. We know that innocent people get convicted in Connecticut, and it can take many years, if ever, to undo those mistakes. It is vitally important to make sure these people have access to the courts.

The Chief State's Attorney's proposal would prevent death-sentenced Connecticut inmates, with cases similar to those of Gary Cone, Roy White, and Winston Watkins, from filing subsequent meritorious state habeas petitions, or from proceeding with legitimate claims if they filed their claims past the statute of limitations. Such requirements are far more restrictive than federal habeas provisions, and also treat death sentenced inmates more harshly than other time sentenced prisoners. Reviewing courts could consider this legislation to be unconstitutional as a "Suspension of the Writ" under both our state and federal constitutions. Suspension of the Writ by legislative action for reasons not specifically enumerated in the Constitution also violates separation of powers. Such disparate treatment also may be held to violate the due process and equal protection rights of death sentenced inmates.

We understand that the Chief State's Attorney is concerned about the issue of undue delay. It is important that I emphasize to you that men currently on Connecticut's Death Row have not filed multiple or successive state habeas claims. Each of the four whose direct appeals have concluded have filed **one** state habeas petition, and have done so within one to fifteen days of the U.S. Supreme Court's denial of their Petitions for Certiorari. Furthermore, death sentenced inmates would almost never have occasion to file a second habeas petition within the one year statute of limitations provided in this proposal, because their **first** habeas petition case would as yet be unsettled when the proposed one year limit would be up.

Long-standing federal law, known as the "exhaustion requirement," mandates that any claim raised in a federal habeas petition must first be raised in the state courts. The State's proposal would prevent a death-sentenced defendant from meeting this requirement, and would thereby prevent consideration of a valid new claim in federal court.

The State's proposal would also amend Connecticut General Statutes §54-95 to prohibit an automatic stay of a death sentence for a subsequent state habeas petition. If enacted, such an amendment would more likely lengthen the process, not shorten it. The proposal would require the defendant to making a showing of "reasonable likelihood of success upon the merits" to the Connecticut Supreme Court, to stay his death sentence while litigating a subsequent state habeas petition. The proposed standard is too vague. It 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. This could be construed as a suspension of the writ, and therefore may be unconstitutional.

Additionally, such a high standard would require the defendant, in effect, to litigate his claim in the very court that will later review its disposition in the habeas court. Moreover, a subsequent habeas petition is more likely to be based on new facts than on new law, and indeed, under the State's proposed statute of limitations, the petition can only be based on a claim of actual innocence. It is unclear whether setting forth allegations in the petition would be sufficient, or would the defendant have to make a factual showing to an appellate court before they have been established at a hearing? It may not be possible to produce affidavits voluntarily from witnesses who could otherwise be subpoenaed for a hearing. A defendant with a meritorious claim could lose the stay application.

This provision does not address any existing abuses or problems in Connecticut. As a practical matter, a subsequent habeas petition is likely to be filed when the defendant is already in federal court on a federal habeas petition in order to exhaust a new claim in state court, and not facing imminent execution. If the defendant is facing imminent execution, however, this provision adds more time to the process, and could result in the execution of a defendant with a valid claim that never gets heard.

If the Committee wishes to consider enacting some sort of burden on the defendant to obtain a stay of execution at this point in the process, I urge the Committee to study the

matter further, and consider a more efficient procedure such as a finding of "good cause" or that the petition raises a claim that is "not frivolous" or is of "colorable merit" by the habeas court.

Finally, I would like to point out that the State's proposal would also 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 Connecticut Supreme Court. The statute presently keeps these stays in effect for 30 days. The State proposes reducing this to 10 days. This would require the defendant to prepare and file a state habeas petition 10 days after losing a petition for certiorari. This reduction saves little additional time, and is not necessary because the defendant has a built-in incentive to file a state habeas petition as soon as possible, because doing so stops the running of the one-year federal habeas statute of limitations. As previously indicated, the four defendants presently in state habeas filed their petitions 1-15 days after their certiorari petitions were denied. Ten days to prepare and file a federal habeas petition and an application for a stay of a death sentence in federal district court is an unreasonably short period of time, and puts a difficult burden on counsel, which will make it even more difficult to find attorneys willing to handle these cases.

If members of this Committee truly desire to enact death penalty reform, then you should not raise false hope for victims' families that the justice process in these cases can be substantially curtailed. I would urge you to consider following the lead of other states such as New Jersey, New York, and New Mexico, and indeed almost every other civilized country in the world, and abolish the death penalty. The most effective way to achieve justice, morality, and finality in capital cases is to impose the sentence of life without possibility of release.

Connecticut Capital Appeals (as of May 7, 2009)

Case	Trans. pages	Death sentence	trans. ordered, received, total prep. time	Defendant's brief filed; time calculated from receipt of transcripts*	State's brief filed	Reply brief filed	Oral Argument	Direct Appeal Decision	Sentence to Decision
Ross I	20,000	7/6/1987	ordered 1988; rec'd 10/9/1991; **4 years**	5/15/1992 1 yr 7 mos	5/3/1993 1 year	10/15/1993 5 months	2/15/1994 4 months	7/26/1994 5 months	7 years
Breton I	6,500	10/27/1989	rec'd 10/9/1991 **? 2 years**	5/7/1993 1 yr 7 mos	6/30/1994 1 yr 1 mo	10/28/1994 4 months	2/7/1995 3½ months	8/22/1995 6 ½ months	5 years 10 months
Webb (private att; PD on LI remand)	9,484	9/12/1991 (LI hearing on remand 7/7/1998)	ordered 11/8/1991 rec'd 8/21/1992 **9 months**	? 7/25/1994 ? 2 years	9/14/1995 1 yr 2 mos	11/3/1995 7 weeks	11/3/1995 12/1/1995 (reargued) LI arg: 10/28/1999	7/30/1996 7 months LI decision: 2/15/2000 4 months	4 yrs 11 mos to LI decis: 8 yrs 5 mos
Cobb	3,275	9/24/1991	ordered 12/15/1991 rec'd 2/24/1992 **2 months**	2/19/1997 (disqualification motion barred start of briefing until 8/2/94) 2 yrs 6 mos	5/14/1998 1 yr 3 mos	9/30/1998 4 months	2/19/1999 5 months	12/7/1999 10 months	8 years* 2½ months
Johnson (1½ attorneys)	13,035	6/10/1993	ordered 7/1/1993 rec'd 12/13/1993 **5½ months**	5/31/1996 2 yrs 5 mos	7/15/1998 2 yrs 2mos	3/12/1999 8 months	10/26/1999 7 months	5/2/2000 6 months	6 years 11 months
Reynolds	7,067	4/13/1995	ordered 5/4/1995 rec'd 8/24/1995 **3½ months**	8/14/1998 3 years	7/25/2000 2 years	7/6/2001 11½ mos	9/28/2001 2½ months	7/15/2003 (10/8/2003) 1 yr 10 mos	8 years 3 months
Breton II (penalty only)	2,500	1/9/1998	ordered 2/11/1998 rec'd 5/29/1998 **2½ months**	5/22/2000 2 years	1/5/2001 7 months	8/17/2001 7 months	9/9/2002 1 yr 1 mo	6/24/2003 9½ months	5 years 5 months
Rizzo I (penalty only)	7,076	8/13/1999	ordered 9/27/1999 rec'd 3/21/2000 **6 months**	8/10/2001 1 yr 5 mos	7/29/2002 1 year	10/7/2002 3½ months	10/14/2002 1 week	10/14/2003 1 year	4 years 2 months
Ross II (penalty only)	10,176	5/12/2000	rec'd 2/1/2001 **6 months**	11/15/2002 1 yr 9½ mos	7/1/2003 7½ mos	8/15/2003 1½ months	9/10/2003 1 month	6/1/2004 9 months	4 years 1 month
Colon	10,154	12/5/2000	ordered 12/12/2000 rec'd 8/16/2001 **8 months**	8/1/2002 1 year	8/12/2003 1 year	9/26/2003 1½ months	10/30/2003 1 month	12/28/2004 1 yr 2 mos	4 years
Courchesne	8,602	1/15/2004	rec'd 11/22/2004 **8 months**	1/30/2006 1 yr 2 mos	6/22/2007 1 yr 5 mos	11/16/2007 5 mos	3/19/2008 4 months		
Santiago	7,290	1/31/2005	ordered 4/6/2005; rec'd 3/27/2006; **1 year**	5/28/2008 2 yrs 2 mos	not yet filed				
Rizzo II (penalty only)	5,260	6/23/2005	ordered 10/05, 4/06; rec'd 2/2006, 7/2006; **7 months**	7/31/2008 2 years	not yet filed				
Campbell	20,000	8/2007	ordered 11/26/2007	transcript incomplete,18 mos					
Peeler	9,000	12/10/2007	ordered 2/27/2008	transcript incomplete,17 mos					
Ashby	20,000	3/28/2008	ordered 8/11/2008	transcript incomplete, 9 mos					

* Brief filing time affected by transcript length, record size, number/nature of issues, articulation process, individual circumstances of case/client, attorney caseload

Attorneys' names on death penalty direct appeal briefs

Case	Defense	State[1]
Ross I	2 (Drager, Nash)	**1** on cover (Weller) **5** on signature page (Weller, Satti Sr., Marks, Fischer, Rossi)
Breton I	2 (Nash, Drager)	**1** on cover (Weller) **4** on signature page (Weller, Connelly, Rossi, Keegan)
Webb (private counsel)	2 on cover (Pattis and Williams) 1 on signature page (Williams)	**1** on cover (Sugrue) **5** on signature page (Sugrue, Weller, Thomas, Creamer, O'Connor)
Cobb	1 (Drager)	**1** on cover (Weller) **3** on signature page (Weller, Connelly, Keegan)
Johnson	2 (Emanuel, Drager) (RE read all transcripts; Drager wrote 1/3 points) [opinion adds Bruckmann; his name is on one of two reply briefs filed]	**1** on cover (Dauster) **6** on signature page (Dauster, Solak, Marks, O'Hare, Smith-Rosario, Weller)
Reynolds	1 (Drager)	**1** on cover (O'Hare) **8** on signature page (O'Hare, Connelly, Keegan, Marks, Weller, Brody, Dauster, Lockwood)
Breton II	1 (Rademacher)	**1** on cover (Weller) **3** on signature page (Weller, Connelly, Keegan)
Rizzo I	2 (Zeldis, Gold) [opinion adds Holdridge & Rademacher; reply brief signature page includes them plus Gold, Zeldis]	**1** on cover (O'Hare) **7** on signature page (O'Hare, Connelly, Keegan, Marks, Weller, Longstreth, Scheinblum)
Ross II	2 (Weisfeld, Streeto)	**1** on the cover (Weller) **5** on signature page (Weller, Kane, McShane, Marks, Dauster)
Colon	2 (Holdridge, Rademacher)	**1** on cover (Scheinblum) **12** on signature page (Scheinblum, Connelly, Keegan, Rossi, Marks, O'Hare, Weller, Clark, Sugrue, Shair, Dauster, Lockwood)
Courchesne	2 (Holdridge, Rademacher)	**1** on cover **3** on signature page (Scheinblum, Connelly, Lenczewski)
Santiago	1 (Rademacher)	not yet filed
Rizzo II	2 (Borman, Bourn)	not yet filed

[1] State's brief covers all name one attorney following the words, "to be argued by"

Death-Sentenced Cases in State Habeas (as of May 8, 2009)

Case	Death Sentence	Direct Appeal Decision	Denial of Certiorari	State habeas petition filed	Status of state habeas petition
Breton	10/7/1989 on retrial, 1/9/1998	on first trial - 9/22/1995 on retrial - 6/24/2002	12/1/2003	12/2/2003 **1 day after cert** **18 months after direct appeal**	Amended petition filed 2/14/2006 has not yet proceeded to trial*
Webb	9/12/1991	7/30/1996 (ordered remand on lethal injection) decision following remand, 2/15/2000	10/2/2000	10/17/2000 **15 days after cert** **8 months after direct appeal**	Amended 3/19/03, 4/1/03, 5/16/03, 10/1/04 Motion to dismissed denied in part, 10/8/2003 Briefs filed 2006 **Trial completed 1/25/2007** **Awaiting disposition**
Cobb	9/24/1991	12/7/1999	10/2/2000	10/17/2000 **15 days after cert** **10 months after direct appeal**	Amended 10/17/200, 8/28/2001 **Petition denied 11/8/2004** (4 years, 11 months after direct appeal) **Appeal filed in/moved to Supreme Court 4/4/2005; on hold due to consolidated race litigation***
Reynolds	4/13/1995	7/15/2003 opinion corrected on 10/7/2003	3/8/2004	3/19/2004 **11 days after cert** **8 (5) months after direct appeal**	has not yet proceeded to trial*

In series of rulings, 1995-2003 (2005, too – Ross), Connecticut Supreme Court ruled that race and systemic issues pertaining to operation of statute were to be raised on habeas, and in a consolidated hearing on behalf of all defendants who wished to raise those claims, in spite of §53a-46b(b), which requires the Court to consider on appeal, whether a death sentence was the product of passion, prejudice, or any other arbitrary factor.

The consolidated proceeding was initiated on August 29, 2005. It is the reason that these four case have not progressed further than they have. (Cobb's state habeas appeal, filed 3 years ago, would have been well underway by now.)