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State of Connecticut

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TESTIMONY OF SUSAN O. STOREY, CHIEF PUBLIC DEFENDER

RAISED BILL NO. 280, *AN ACT REVISING THE PENALTY FOR CAPITAL FELONIES*

JUDICIARY COMMITTEE PUBLIC HEARING

MARCH 14, 2012

The Office of Chief Public Defender strongly supports the abolition of the Death Penalty in Connecticut and therefore supports the passage of SB 280. We do continue to believe the death penalty should be abolished altogether and we therefore also urge that the bill be amended to abolish the death penalty retroactively as well as prospectively.

The Legislature previously made the policy choice to abolish the death penalty in 2009. The lengthy and thorough debates that preceded passage of Public Act 09-107 explored the many reasons the death penalty is not good criminal justice policy for our State. Those reasons are even more compelling today.

- Public opinion polls show that less than half of Connecticut residents prefer the death penalty when asked whether the punishment for people convicted of murder should be the death penalty or life in prison with no possibility of release.

- Other states continue to reject the death penalty as an expensive policy that does not deliver fair or accurate results.

- The complex legal framework governing death penalty cases is mandated by the United States Supreme Court and requires extraordinary time and resources but nonetheless is prone to a high rate of error.

- Few death sentences are actually carried out. Nationally, only 15% of all death sentences imposed between 1977 and 2010 resulted in executions in that period.

- Nationally, it is not unusual for death sentences imposed for crimes committed over 25 years ago to still be in the process of court review. There are hundreds of inmates on death row in other States for crimes committed in the 1970s and 1980s.

- States that attempt to truncate appeals or post conviction review risk executing individuals who are innocent, were incompetently represented at trial, whose death sentences were obtained through police or prosecutorial misconduct, or whose juries misunderstood how to consider the evidence in deciding whether to impose a death sentence.

- The drugs used for lethal injection are increasingly difficult to obtain because pharmaceutical companies refuse to allow drugs manufactured for medical treatment to be used in executions. The pharmaceutical companies are restricting distribution of those drugs, and the courts and the federal government are stepping in to prevent States from carrying out executions with illegally obtained drugs.

- Connecticut has no system in place to ensure that the few cases in which the death penalty is sought or imposed represent only the most culpable of the much larger number of individuals who have committed capital offenses.

- Connecticut has not taken adequate steps to eliminate the influence of racial bias on the death penalty.

- A prospective repeal would be an important advance, but leaving existing death sentences in place would not fully implement the policy goals of repealing the death penalty, and litigation of existing cases would continue to consume resources that could be put to better use elsewhere.

Less than half of Connecticut residents favor the death penalty as compared to life imprisonment without the possibility of release. Public opinion polls are often cited as a reason to retain the death penalty. However, the most recent Quinnipiac University poll shows less than 50% of Connecticut residents prefer the death penalty when asked if the punishment for murder should be the death penalty or life without any possibility of release.[1] Women, young people, and Democrats all prefer life without release over the death penalty.

	Total	Women	Age 18-34	Democrats
Life/no release	43%	49%	55%	57%
Death penalty	48%	42%	34%	37%

[1] See Quinnipiac University Poll, March 10, 2011. Response to Question 42.

Other states continue to reject the death penalty. States that take a hard look at the death penalty are deciding that it is an unfair and expensive policy that has no place in their criminal justice system.

- Illinois abolished the death penalty in 2011.

- New Mexico abolished the death penalty in 2009.

- New Jersey abolished the death penalty in 2007.

- New York ended the death penalty when its Court of Appeals held it was unconstitutional in 2004 and overturned the last remaining death sentence in 2007.

- In Oregon, the Governor has halted all executions in that state for as long as he remains in office. He concluded that the death penalty was not imposed fairly because some inmates serving life sentences had committed similar crimes to those committed by inmates on death row and that Oregon's system is arbitrary because it was only executing those who volunteered by giving up their legal appeals.

- In California, a ballot initiative to repeal the death penalty is underway with the support of the sponsor of the 1978 initiative that expanded California's death penalty.[2] The Chief Justice of the California Supreme Court, a former prosecutor, has called for a reevaluation of the state's death penalty system, asking whether the criminal justice system can make better use of the state's resources.[3]

- In Maryland, the legislature changed its law in 2009 to allow prosecutors to seek the death penalty only for cases with DNA evidence, videotaped evidence of the crime, or a voluntary videotaped confession.[4] In the two cases tried under the new law, the jury rejected the death penalty, including last month's life verdict in a case involving an inmate's murder of a correctional officer where the jury found that substantial mitigation evidence called for a sentence of life without release rather than death.[5] A full repeal bill is now under consideration.

- In Kansas, a repeal bill is under consideration.

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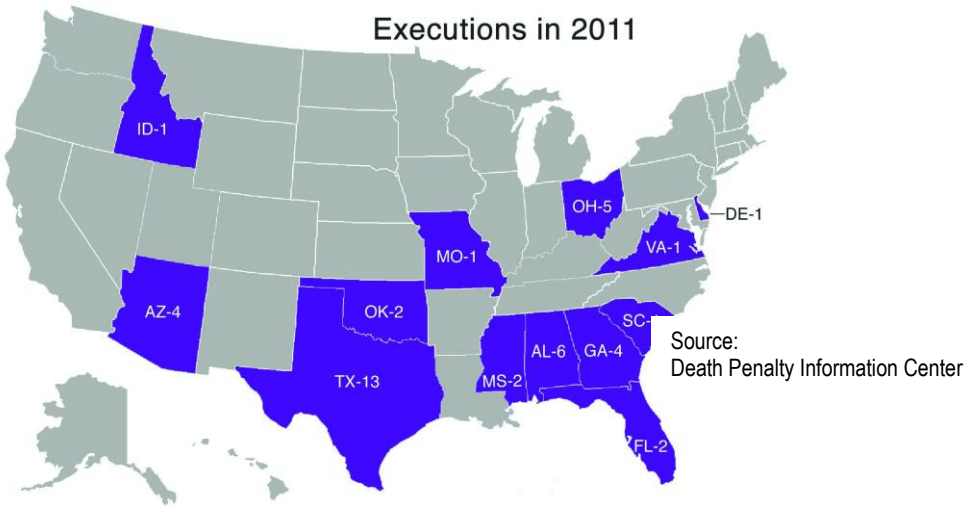
[2] Briggs, "California's death penalty law: It simply does not work. We believed the Briggs initiative – the death penalty measure we wrote in 1977 – would bring greater justice. We were wrong." *Los Angeles Times*, Feb. 12, 2012.

[3] Dolan, "California chief justice urges reevaluating death penalty," *Los Angeles Times*, Dec. 24, 2011.

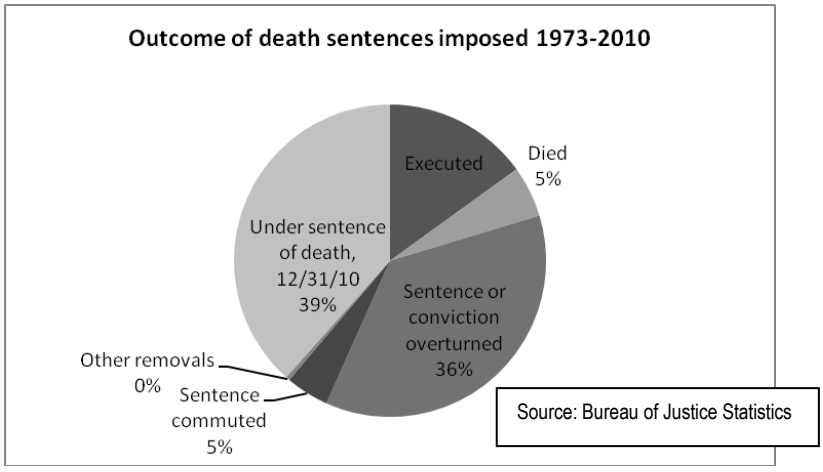
[4] "O'Malley signs law restricting death penalty," *The Washington Times*, May 8, 2009.

[5] Rawlyk, "Inmate spared from death penalty: Stephens gets life without parole for guard killing," *Maryland Gazette*, Feb. 29, 2012; Siegel, "No death penalty for man convicted of killing prison officer," *The Baltimore Sun*, Feb. 29, 2012.

Death sentences are carried out rarely and in only a few states. There were only 43 executions in 2011, the lowest number in any year since capital punishment was reinstated in 1976. In states with death penalty laws, executions are exceedingly rare. Most occur in Texas and a handful of other states.

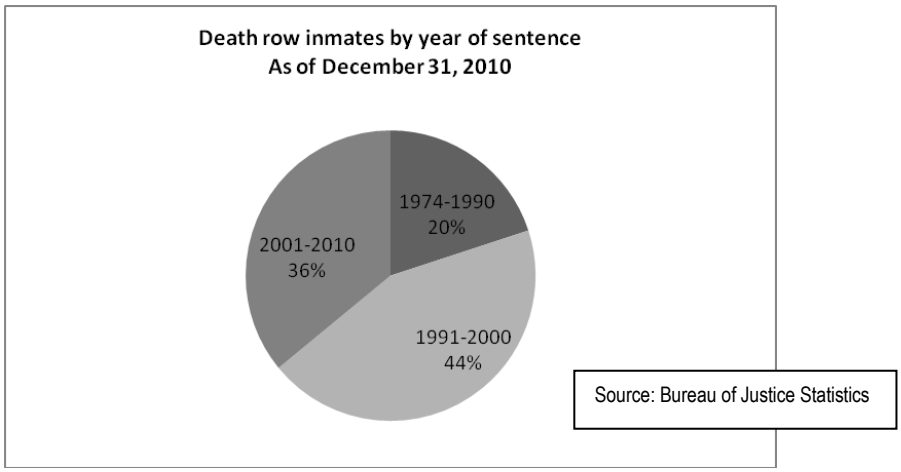


The vast majority of death sentences do not result in executions. The U.S Department of Justice Bureau of Justice Statistics (BJS) reports that only 15% of death sentences imposed between 1977 and 2010 in the United States resulted in executions during that period.[6] Almost half (44.3%) of inmates sentenced to death from 1977 through 2010 were subsequently removed from death row. Over a third (36%) were either overturned because of a court decision finding that the death sentence was unlawfully imposed or commuted because of questions about whether the death sentence was appropriate. Over a third (38%) remained under court review at the end of 2010, awaiting possible reversal or commutation.



[6] The Bureau of Justice Statistics collects data from the state departments of correction and the Federal Bureau of Prisons on persons held under sentence of death and persons executed during each calendar year. This information can be found at www.bjs.ojp.usdoj.gov/index.cfm?ty=pddetail&iid=2236.

In most states, it is not uncommon for death sentences imposed for crimes committed decades ago to still be in the process of court review. At the end of 2010, the BJS reported that 2022 of the 3158 inmates on death row (64%) were there for death sentences imposed prior to 2001. One in five of those (630) had death sentences imposed prior to 1991.



The few executions that are carried out occur long after the crime and the death sentence. For executions in 1973-2010, the average time between sentencing and execution was almost 15 years. For executions carried out in 2011, excluding two volunteers who gave up their appeals, the average time between sentencing and execution was 19 years. Half of the executions were for crimes committed between 20 and 33 years ago.[7]

Death penalty cases are complex and prone to a high rate of legal error. Conviction of a capital offense is only the first step in the process of seeking a death sentence. In a separate penalty phase, the prosecution must prove at least one aggravating factor. Then the jury considers the aggravating and mitigating factors to decide whether circumstances concerning the crime or aspects of the defendant's character and background suggest that a sentence of life without the possibility of release is the appropriate sentence rather than death. Those who call for the death penalty in particular cases based solely on the facts of the crime have no understanding of the more complex legal framework that governs how juries must decide whether one who has been found guilty of a capital offense should receive a death sentence.

The consideration of mitigation, sometimes criticized as focusing more on the defendant than the victims, is constitutionally mandated by the United States Supreme Court. Any State that chooses to authorize the death penalty must operate within this constitutional framework. Its purpose is to provide the sentencing process with some form of rational guidance. Because jurors in a capital case act as the conscience of the community in deciding whether or not the government may take the life of one of its citizens, they are constitutionally required to consider anything about the circumstances of the crime or the

[7] Death Penalty Information Center, Execution Database, available at www.deathpenaltyinfo.org; www.clarkprosecutor.org/html/death/usexecute.htm.

individual as a person in deciding whether death is the appropriate punishment. Any State that attempts to short circuit this process will have its death sentences overturned in federal court.

It is extraordinarily difficult for any State to get the process right. The complexity of the legal framework and the constantly evolving requirements announced by the United States Supreme Court mean that lengthy appellate and post conviction review and repeated retrials are the norm in any State that seeks to carry out the death penalty in a fair and constitutional manner. A chart attached to this written testimony gives summaries of a selection of court decisions reversing death sentences in other States in just the past year. These decisions provide a sense of the reasons for reversal that may arise in Connecticut cases, including on federal court review of cases in which the Connecticut Supreme Court has upheld a death sentence.

Attempting to truncate the appellate and post conviction review of death sentences sacrifices accuracy and fairness. Death penalty supporters sometimes suggest that we look to states like Virginia and Texas as models for how Connecticut might shorten the time between a death sentence and an execution. The rate of reversing death sentences in those states is far below the national average. This suggests that they may have a higher tolerance for error and are willing to sacrifice accuracy and fairness by moving cases more quickly so that executions are carried out without a full review of the legal errors in the case.

Connecticut's own history of wrongful convictions shows that a single appeal does not suffice to protect those who are innocent. Four individuals who served lengthy prison terms before being exonerated had their convictions upheld by the Connecticut Supreme Court years before they were released.

Name	Connecticut court decisions upholding conviction	Exonerated and released
Lawrence Miller	State v. Lawrence Miller, 202 Conn. 463 (1987)	1997, after 16 years in prison
James Tillman	State v. James Tillman, 220 Conn. 487 (1991) James Tillman v. Commissioner of Correction, 54 Conn. App. 749 (1999), cert. denied, 251 Conn. 913 (1999)	2006, after 16 years in prison
Kenneth Ireland	State v. Kenneth Ireland, 218 Conn. 447 (1991)	2009, after 20 years in prison
Miguel Roman	State v. Miguel Roman, 224 Conn. 63 (1992)	2009, after 21 years in prison

Had these men been sentenced to death, they may well have faced execution despite their innocence. In death penalty cases, where the results are irreversible, thorough and painstaking review of death sentences through direct appeal and state and federal habeas review is simply a necessary part of a system that even aspires to be fair and nondiscriminatory and to avoid the wrongful execution of innocent persons.

A person who is guilty of murder may be innocent of the death penalty. The State must prove more than the commission of a murder to obtain a death sentence. The State must also prove at least one aggravating factor and that the aggravating factor outweighs mitigating evidence that tends to support a sentence of life imprisonment without the possibility of release rather than death. Connecticut's statute also prohibits a death sentence if mental illness played a significant role in the commission of the

capital offense. If any one of these legal requirements is not satisfied, then the individual is as "innocent" of the death penalty as one who has not committed a crime is "innocent" of the crime. The attached chart of recent court decisions reversing death sentences gives examples of such cases where the State's evidence did not prove the elements required to obtain a death sentence. Those cases reinforce the need for thorough appellate and post conviction review to ensure that the State does not overstep the legal boundaries of the death penalty to seek and obtain death sentences when not warranted by the evidence.

Controversies over execution protocols and the source of drugs used for lethal injection prevent States from carrying out executions. Questions about States' execution protocols and how they obtain the drugs used for lethal injection increasingly prevent executions from going forward. Courts have put executions on hold because of questions about the lethal injection protocols in Arkansas, California, Colorado, Maryland, Nevada and North Carolina.[8] Last year, the federal Drug Enforcement Administration confiscated unlawfully obtained execution drugs from state corrections officials in Alabama, Georgia, Kentucky, South Carolina and Tennessee, and the U.S. Department of Justice has forbidden their use elsewhere.[9] Drug companies are ceasing production of drugs used in executions or creating distribution checkpoints to ensure that their drugs intended for medical use are not used for executions.[10]

Courts are stepping in to stop the execution of inmates with serious mental illness. Courts are also increasingly stopping executions when they question whether the inmate is mentally competent to be executed. A 2007 United States Supreme Court decision prohibits the execution of an individual who lacks a rational understanding of the reason he is being punished by death rather than a prison sentence.[11] A large portion of those who are sentenced to death suffer from serious mental illness, which is only exacerbated by confinement on death row. Even after years of court review that upholds a death sentence as legally valid, it is becoming increasingly common for courts to stop the execution from going forward because the person does not meet the Supreme Court's competency standard.[12]

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[8] Death Penalty Information Center, "State by State Lethal Injection Information" (available at www.deathpenaltyinfo.org).

[9] Bluestein, "Emails Show States Didn't Register Execution Drug," abcnews.go.com, May 19, 2011; Associated Press, "Tennessee, Kentucky turn over lethal injection drugs to DEA," *USA Today*, April 1, 2011; World News with Diane Sawyer, "DOJ Tells Arizona it Illegally Obtained Death Penalty Drug," abcnews.com, May 25, 2011.

[10] News Release, "Hospira Statement Regarding Pentothal (sodium thiopental) Market Exit," Jan. 21, 2011; News Release, "Lundbeck overhauls pentobarbital distribution program to restrict misuse; New specialty pharmacy drop ship program will deny distribution of pentobarbital to prisons in U.S. States currently carrying out the death penalty by lethal injection," Jan. 7, 2011.

[11] *Panetti v. Quarterman*, 551 U.S. 930 (2007).

[12] For example, in *Eldridge v. Thaler*, 2009 U.S. Dist. LEXIS 106991 (S.D. Tex. Nov. 17, 2009), a Texas federal court issued a stay on the day of the inmate's scheduled execution because of evidence of his deteriorating mental health, including his belief that prison guards were poisoning his food, his refusal to eat, and his loss of approximately 60 pounds. Other courts have halted executions in Tennessee, Pennsylvania and Mississippi due to the inmate's mental condition see*Thompson v. Bell*, 580 F.3d 423, 429 (6th Cir. 2009), *Commonwealth v. Banks*, 29 A.3d 1129 (Pa. 2011), *Billiot v. Epps*, 671 F. Supp. 2d 840 (S.D. Miss. 2009). In the Mississippi case, the court issued an indefinite stay of execution after staff at the Mississippi State Hospital refused to treat the inmate for the purpose of rendering him mentally competent to be executed.

The death penalty in Connecticut and elsewhere is imposed in an arbitrary and discriminatory manner. In the 2009 debate, many legislators said they could not support the death penalty as a legitimate policy for our State because they could not say it was free of the influence of racial bias or that it was not being randomly imposed. These irremediable flaws are only more apparent today.

Professor John Donahue addressed this issue in his study of how the death penalty is implemented in Connecticut, "Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution" (2011) ("Donahue Report"). The Donahue Report provides a wealth of valuable and disturbing information for the legislature to consider in deciding whether the death penalty is an acceptable policy in our State.[13]

At the outset, Professor Donahue describes how his study of possible racial disparity and other arbitrariness was made more difficult and time-consuming because of Connecticut's failure to maintain even the most basic data on its capital punishment system.

> Unfortunately, this is a daunting task given the failure of the State to maintain comprehensive records about the treatment of cases that could be prosecuted as capital felonies. Whereas some other states – New York, for example, during its restoration of the death penalty from 1995-2004 – maintain comprehensive records on all felony arrests and the subsequent disposition of death-eligible cases, Connecticut has no central repository for the relevant data needed to undertake a study such as this one.

Donahue Report, pp. 24-25.[14]

Based on the available data, Professor Donahue identifies five main points about Connecticut's capital charging and sentencing process on which he and the State's expert witness agree:

1. There are enormous and unexplained geographic disparities.

2. Death sentences are not confined to the worst murders.

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[13] Professor Donahue' complete report is available at http://works.bepress.com/john_donohue/87/.

[14] Professor Donahue notes that the State failed to undertake any data collection even after the specific recommendation of remedial action in this regard by the Connecticut Commission on the Death Penalty in 2003. Donahue Report, p. 25. The State's continuing failure to mandate the necessary data collection means that any effort to report on the implementation of our death penalty system must be preceded by a time-consuming and labor-intensive data collection process. The responsibility for that process fell to the Office of the Chief Public Defender in connection with the racial disparity litigation ordered by the Connecticut Supreme Court. However, that data does not come close to the Commission's recommendation of requiring all agencies involved in capital felony cases to collect and maintain comprehensive data concerning all cases qualifying for capital felony prosecution, to be maintained at every stage of the prosecution, from arrest through imposition of sentence. For a complete picture of how our death penalty operates, more complete data collection and evaluation should be mandated from all agencies involved in implementing the death penalty, including the court system and the State's Attorneys.

3. There is gender bias in death sentencing.

4. There is racial bias in capital outcomes.

5. There is arbitrariness in the key charging and sentencing decisions of the Connecticut death penalty system.

See Donahue Report, p. 12. Professor Donahue explains that such results are not surprising given the complete discretion of the State's Attorneys as to charging decisions and the absence of any mechanism to ensure that decision-making at every stage of capital prosecutions is rational and fair rather than arbitrary and discriminatory.

> The pattern of arbitrary, capricious, and discriminatory decisions is not surprising to those who understand how Connecticut's death penalty works. Leaving so much discretion in the hands of thirteen different State's Attorneys invites this arbitrariness. In one judicial district a prosecutor can seek a death sentence for any case construed to fit within the contours of Connecticut's capital sentencing statute. Elsewhere, prosecutors believe that the death penalty should truly be limited – as the U.S. Supreme Court has instructed – to the "worst of the worst" murder cases. Still other Connecticut prosecutors no doubt feel considerable ambivalence about the death penalty in light of the increasing evidence concerning its lack of deterrent benefit, high cost of imposition, the frequency of errors in murder convictions across the nation (as well as in Connecticut, just in the recent past), the ever-present concerns of racial discrimination, and the fact of its infrequent application. The end result is that identical murders within Connecticut will be treated very differently depending on illegitimate factors, such as race or judicial district.
>
> Of course, the legislature initially made an effort to control the arbitrary implementation of the death penalty through proportionality review, but that device was narrow in scope and ultimately repealed. Nothing in Connecticut's current death penalty system examines whether similar crimes are treated in similar fashion – from charging decision to sentencing. There is no ongoing means to determine whether these decisions are marred by discriminatory or arbitrary patterns of capital sentencing. Indeed, since Connecticut doesn't even collect – let alone analyze – this information, the State has not been in a position to address these problems.

Donahue Report, pp. 399-400.

Unfortunately, the death penalty is not the only aspect of our criminal justice system that suffers from a lack of vigilance in collecting data and investigating and eradicating the influence of racial bias. In December 2011, the U.S. Department of Justice found a pattern or practice of biased policing against Latinos by the East Haven Police Department.[15] In February 2012, the Hartford Courant reported on its analysis of more than 100,000 traffic stops statewide in 2011 found that black and Hispanic drivers are

[15] Letter dated December 19, 2011 from Thomas E. Perez, Asst. Attorney General to the Honorable Joseph Maturo, Jr. (available at www.justice.gov/crt/about/spl/easthavenpd.php).

significantly more likely to receive a ticket or a court date than white drivers stopped for the same offense.[16] These practices might have been uncovered and prevented earlier had the Legislature insisted upon compliance with the data collection called for by the racial profiling law passed in 1999, rather than leaving that task to journalists or federal law enforcement authorities.

Insufficient attention to the influence of race is not only unfair but can lead to wrongful convictions. Before his trial in 1989, James Tillman told the judge that he was not getting a fair trial before a jury of his peers because he had to pick a jury from panels that included no black males and only one person from Hartford. On appeal, former Connecticut Supreme Court Justice Robert Berdon urged that Mr. Tillman's conviction be reversed for this reason.

> When a black man, as in the present case, is accused of serious crimes such as the sexual assault of a white victim, that black defendant – and, indeed, the black community – cannot perceive that he has received a fair trial from a jury that is entirely composed of white persons, drawn from an array made up of very few blacks because of deliberate practices that resulted in their elimination.

State v. Tillman, 220 Conn. 487, 515 (1991) (Berdon, J., dissenting). Unfortunately, Justice Berdon was outvoted by his colleagues, and Mr. Tillman remained in prison for another 15 years for a crime he did not commit.

A year later, Justice Berdon argued that Miguel Roman's "confession" should have been suppressed because the police gave him Miranda warnings in Spanish but conducted their interrogation in English. Again, he was outvoted and Mr. Roman had to spend 17 more years in prison before establishing his innocence. In his dissenting opinion, Justice Berdon wrote of the broader implications of upholding a conviction based on untranslated interrogation.

> The issue in this case boils down to an even more fundamental question – that is, the perception of justice. When the defendant's primary language is Spanish, and the police officers insist on conducting the interrogation in English, the entire process smacks of unfairness that will result in the perception by the Hispanic community that the criminal justice system is tilted against them. This is especially true in the present case in which a police officer, fluent in English and Spanish, was available and could have provided word-for-word translation for the defendant or could have conducted the interrogation in Spanish.

State v. Roman, 224 Conn. 63, 80 (1992) (Berdon, J., dissenting).

The cases show how the pernicious influence of racial bias can affect the outcome of a case even when it is not necessarily the product of intentional racial bias. The subjective decision-making at every stage of a capital case provides many opportunities for conscious or unconscious racial bias to influence whether the defendant is charged with a capital offense, whether the death penalty is sought, and whether a jury decides to impose it. Connecticut is not alone in grappling with the problem of racial disparity and

[16] Kaufmann, "Unequal Enforcement: Black, Hispanic Drivers Face Tougher Treatment from Police," *Hartford Courant*, Feb. 25, 2012; Editorial, "Ticketing Disparities Reveal Specter of Racism," *Hartford Courant*, Feb. 21, 2012.

arbitrariness in its death penalty system. The American Law Institute (ALI), the author of the Model Penal Code, decided in 2009 to disapprove the Model Penal Code capital sentencing provisions in part for this very reason. The ALI concluded that the framework of aggravating and mitigating factors on which most state death penalty laws are based had failed to accomplish its objective of ensuring that the death penalty is rationally imposed and not based is based arbitrary factors, including race. Two key findings of the ALI were:

- No state over the past thirty years "has successfully confined the death penalty to a narrow band of the most aggravated cases."

- It is "extraordinarily difficult to disentangle race from 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) at 31, 30 (available at http://www.ali.org/doc/Capital%20Punishment_web.pdf).

Other states continue to find racial disparities in their own death penalty schemes.

- In North Carolina, the legislature passed the Racial Justice Act in 2009 to give death row inmates a chance to have their sentences changed to life without parole if they proved that race played a significant role in determining punishment. In the first state court hearing under that law, the judge is considering whether a 1994 death sentence must be reduced to life without parole because of evidence of a statewide pattern of excluding black jurors from death penalty cases.[17]

- In Maryland, the Maryland Commission on Capital Punishment recommended abolition in 2008 upon finding racial and jurisdictional disparities in the death penalty and substantially higher costs in death penalty cases than those in which life without parole is sought. Former U.S. Attorney General Benjamin Civiletti, who chaired the Commission, said, "There are so many flaws within the system that we could not imagine . . . ways in which to cure it . . . It's haphazard in how it's applied, and that's terribly unfair."[18] As noted earlier, Maryland is currently considering repeal.

The Donahue Report provides important information for the Legislature to consider in deciding whether to retain the death penalty. However, the State's failure to collect the type of data being examine in other States means that there remain important aspects of the death penalty decision-making process that have not yet been explored. A full picture of the possible influence of race would need to consider whether mitigation in capital charging and sentencing decisions is considered in a racially neutral manner

[17] Editorial, "Race and Death Penalty Juries," *New York Times*, Feb. 5, 2012. The evidence includes a study of jury selection in capital cases in North Carolina finding race to be a factor in jury selection: "We have documented the strike decisions and race for more than 7,400 capital jurors in 173 cases from 1990 to 2010. In every analysis that we performed, race was a significant factor in prosecutorial decisions to exercise peremptory challenges in jury selection in these capital cases." O'Brien & Grosso, Report on Jury Selection Study (2011) (available at http://digitalcommons.law.msu.edu/facpubs/331/).

[18] Rein, "Panel Calls for Abolition of Death Penalty; System Is Open to Error, Costs Too Much and Fails to Deter Crime, Members Say," *The Washington Post*, Nov. 12, 2008.

and the racial makeup of the juries that decide death penalty cases, including whether minority members of our communities are disproportionately excluded from participation as capital jurors.

In assessing the influence of race on our death penalty, legislators should consider not only formal reports and statistical analyses but also a far broader range of information that includes their own everyday experiences and those of their constituents. We have no safeguards in place to ensure that death penalty decision-making is immune from the influence of conscious or unconscious racial bias that continues to infect other aspects of our criminal justice system. The State's Attorneys' unreviewable charging discretion, without any guidelines or screening mechanism to provide criteria to decide when the death penalty is sought and when it is not means that we have no assurance it is being sought in an evenhanded and racially neutral manner. Nor do we have any demographic data to evaluate whether or not the juries that decide death penalty cases are truly representative of our communities.

In making policy on an issue that says so much about who we are as a State, the legislature must ask whether it can assure the citizens of Connecticut that the death penalty rationally selects the most culpable offenders and that race plays no role in that process. Based on the system as it exists today, it is simply not possible to give that assurance. That is reason enough to end the death penalty in our State.

The death penalty continues to divert needed resources away from the Division's core mission of providing effective representation to all criminal defendants. Annual costs for capital defense now require over 8% of the total Public Defender Budget for only .04% of total Public Defender caseload. The expenditures required in capital cases have doubled over the past six years.

FY 05 $ 1,990,224	5.0%
FY 06 $ 2,586,177	6.1%
FY 07 $ 2,336,315	5.4%
FY 08 $ 2,383,334	5.0%
FY 09 $ 2,497,065	5.2%
FY 10 $ 3,400,000	7.0%
FY 11 $ 3,813,443	8.19%

Allocating such a significant portion of our resources to such a small number of cases diverts resources from providing effective representation to all of our clients. Thorough investigation and skilled advocacy are crucial to prevent the wrongful conviction of innocent persons and to ensure just results for those who are properly convicted. The resources we currently must devote to capital cases would be far better utilized in support of this core mission of the Division of Public Defender Services. Furthermore, I have requested that the Appropriations Committee provide us with additional funding for five additional positions for our Capital Defense Unit if the death penalty is not repealed prospectively. The Division is unable to provide sufficient resources to remain in compliance with ABA and Public Defender Commission standards for representation in the most serious of cases.

A prospective repeal will retain the remnants of a costly and unjust system. After New Mexico abolished the death penalty prospectively in 2009 without taking action to commute existing death sentences, the New Mexico Supreme Court refused to halt the capital prosecution of Michael Astorga pending at the time of the repeal from going forward. The Court instead held that the trial judge could instruct the jury that they could consider the prospective repeal in their deliberations. That case is now in

the process of jury selection, with over 2500 potential jurors being called for possible service.[19] This case and the two other remaining death sentences are expected to be litigated for years to come.

The Office of the Chief Public Defender continues to support complete abolition of the death penalty. The prospective repeal in SB 280 will still require us to continue to devote extraordinary resources to litigating the cases of clients with death sentences or those who remain subject to capital prosecution. At some point, it will be necessary for the state and federal courts to decide the effect of the prospective repeal on these individuals. While we certainly believe there are valid constitutional arguments against carrying out their death sentences, there is simply no way to predict what the courts will do. Our Office has apprised the Governor's Office and the Appropriations Committee that should this legislative session not result in prospective abolition of the death penalty at the very least, our Agency will require five additional staff for the Capital Defense Unit in order to comply with ABA Standards for Representation in Death Penalty Cases and Public Defender Commission Guidelines.

Position	Number Requested	Cost Per Position	Total Cost
Attorney	3	$ 111,882	$ 335,646
Mitigation Specialist	1	$ 77,753	$ 77,753
Investigator	1	$ 72,009	$ 72,009
Total	**5**	**$ -**	**$ 485,408**

In conclusion, the Office of Chief Public Defender supports this bill, but we would ask this Committee to also seriously consider abolition of the death penalty in all cases.

[19] Contreras, "N.M. high court: Death penalty trial to go on," www.santafenewmexican.com, Sept. 1, 2011; Associated Press, "Santa Fe residents to receive 2,500 jury summons for death penalty case," www.santafenewmexican.com, Feb. 10, 2012.