

1 Docket No.: CV05-4000632S

2
3 *In Re: Claims of Racial* } State of Connecticut
4 *Disparity* } Superior Court
5 *vs.* } Judicial District of Tolland
6 } at Somers
7 *Commissioner of Correction* }
8 } February 27, 2008
9

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STATE OF CONNECTICUT
SUPERIOR COURT
CA. 19

10 Memorandum of Decision

11 The instant case that is before this Court is unique, certainly in the jurisprudential
12 history of Connecticut and, perhaps, in our nation. This case involves a claim by virtually
13 *all* of the inhabitants of Connecticut's Death Row to the effect that the death penalty in
14 Connecticut is unconstitutional in that it is imposed in a racially and geographically
15 discriminatory basis.

16 The genesis of this proceeding can be found in the direct appeal of petitioner Sedrick
17 Cobb in his 1994 direct appeal of his murder conviction and subsequent death sentence.¹
18 The Supreme Court concluded that this type of review was not possible under the direct
19 appeal, however, it clearly noted that "he will be permitted to raise [the claim of racial
20 disparity in imposition of the death penalty] by way of a petition for a writ of habeas
21 corpus." *State vs. Cobb*, 234 Conn. 735, 741 (1995). During the pendency of his direct appeal,
22 the petitioner, Cobb, requested that his case be remanded to the trial court for an

¹ "The defendant argues that 'the preliminary evidence of racial ... disparities in the administration of the death penalty in Connecticut presents a genuine risk that the death penalty scheme in this State is tainted by impermissible considerations.'" *State v. Cobb*, 234 Conn. 735, 738-740 (1995).

1 evidentiary hearing pursuant to CGS §53a-46b (b)(1) to determine if “the *race of the victim*
2 and the *race of capital defendants* impermissibly influences the decision of whether a particular
3 defendant will be sentenced to death or not.” *State vs. Cobb*, 251 Conn. 285, 499 (1999).
4 Our Supreme Court declined so to do and once again reiterated its opinion that this issue
5 should be raised in a petition for a writ of habeas corpus.

6 As the population of Connecticut’s Death Row grew over the years,² the issue of racial
7 disparity cropped up again, specifically in the direct appeal undertaken by Richard Reynolds.
8 *State v. Reynolds*, 264 Conn. 1 (2003). Reynolds asserted “that he was entitled to an
9 evidentiary hearing for the purpose of presenting facts in support of his claim that,
10 notwithstanding the jury verdict, he should be sentenced to life imprisonment without the
11 possibility of release because of the allegedly flawed manner in which this state’s death
12 penalty statute is implemented.” *Reynolds, infra*, at 230. The Supreme Court agreed with this
13 general proposition, but concluded “that it is not appropriate for capital defendants to make
14 such a claim in the trial court before which their penalty phase hearings will be or have been
15 held. Such a claim properly is presented in the consolidated habeas proceeding.” *Reynolds,*
16 *infra*, at 233-234. The Supreme Court concluded that “judicial economy, as well as fairness
17 to both defendants and the state, mandates that this claim be litigated before the same
18 habeas judge and in the same general consolidated hearing on behalf of all defendants who
19 have been sentenced to death.” *Infra* at 233.

² As of the date of this Memorandum of Decision, there are nine men condemned to death in Connecticut. Three (3) are Caucasian, Four (4) are African-American, and Two (2) are Latino. There has been but a single death sentence actually executed in the previous forty eight years, that of a white male on May 13, 2005.

1 In order to facilitate this consolidated habeas proceeding, in December 2002, then Chief
2 Justice Sullivan appointed retired Chief Justice Robert Callahan³ to serve as a special master
3 to manage the process and timetable by which the claim would be litigated in the habeas
4 court. On August 29, 2005 the instant case, pursuant to the order of the Special Master,
5 was docketed in the Judicial District of Tolland at Somers and assigned Docket number
6 CV05-4000632. The petitioners filed an amended complaint on April 3, 2006. The
7 Respondent's Motion to Dismiss was filed with the Court on July 13, 2007. After having
8 been marked off and later reclaimed by the Respondent, the matter was set down for a
9 hearing on the Motion to Dismiss at the Northern Correctional Institution on December
10 13, 2007. The Respondent requested and was permitted to file a supplemental brief on
11 January 11, 2008.

12 The Respondent asserts that the petitioners have abused their right to petition the
13 Court for habeas relief and that as a result, this Court should enter an order dismissing the
14 petitioners' consolidated habeas proceeding.⁴ The authority for this dismissal is alleged to
15 be pursuant to Connecticut Practice Book §23-29(5).⁵ Specifically, the Respondent claims
16 that the Petitioners have: (1) failed to assert their claim with due diligence, and (2) advanced
17 a claim that is patently devoid of evidentiary support. The Respondent sought to introduce
18 witnesses and other documents to support these claims. Indeed, Respondent indicated that
19 the hearing on this matter would consume three full court days. Notwithstanding, on

³ Chief Justice Sullivan added Judge George Levine as a Special Master in this matter on April 18, 2005. Former Chief Justice Callahan is no longer involved in this action.

⁴ Indeed, counsel for the Respondent, in his argument in court on December 13, 2007, called this case "the most egregious abuse of the writ of habeas corpus, ever."

⁵ "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that ... (5) any other legally sufficient ground for dismissal of the petition exists." PB §23-29(5).

1 November 29, 2007, this Court determined that the introduction of witnesses in support of
2 this Motion to Dismiss was improper and the Respondent was prohibited from calling
3 witnesses.⁶

4 At the outset, respondent concedes, and correctly notes that “the writ of habeas corpus
5 is an extraordinary remedy available to correct, not merely a mistake at trial, but a
6 miscarriage of justice that has led to an unjust conviction. *Safford v. Warden*, 223 Conn. 180,
7 190 (1992); *Bunkley v. Commissioner of Correction*, 222 Conn. 444,461 (1992).”⁷
8 Notwithstanding, the respondent then goes on to state that the petitioners are abusing the
9 right to file that writ and are merely seeking to delay the imposition of the “legally imposed
10 sentences of death.” During argument on the Motion to Dismiss, Respondent’s counsel
11 commented that delay is the goal of death penalty litigation and that anything that delays the
12 execution of the sentence is a victory for the petitioners. Implicit within these arguments
13 seems to be a belief that the petitioners are somehow doing something wrong when they
14 attempt to utilize the precious constitutional right to seek redress through the filing of a
15 Writ of Habeas Corpus. That argument is categorically rejected as improper.

16 The writ of habeas corpus is an ancient and time-honored component of our Anglo-
17 American jurisprudence. One of its earliest recorded appearances was in the late 13th
18 century, around the time that the great Scot patriot, Sir William Wallace, was pursuing the
19 cause of freedom for Scotland. “We do well to bear in mind the extraordinary prestige of

⁶ The Court based its determination on the fact that a “speaking demurrer,” the predecessor to a motion to dismiss was improper. “The demurrer admits the facts averred, and no others, and there is no way known to the law whereby other facts may be imported into the issue tendered by the demurrer, or whereby that issue can become any other than one as to the sufficiency of the allegations of the complaint as they are made.” *Ryan v. Knights of Columbus*, 82 Conn. 91 (1909).

⁷ Respondent’s Memorandum in Support of Motion to Dismiss dated July 13, 2007, at page 13.

1 the Great Writ, habeas corpus *ad subjiciendum*, in Anglo-American jurisprudence: 'the most
2 celebrated writ in the English law.' 3 Blackstone Commentaries 129. It is 'a writ antecedent
3 to statute, and throwing its root deep into the genius of our common law. ... It is perhaps
4 the most important writ known to the constitutional law of England, affording as it does a
5 swift and imperative remedy in all cases of illegal restraint or confinement. It is of
6 immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."
7 *Fay vs. Noia*, 372 U.S. 391 at 399 (1963). When the United States achieved independence
8 from England, the writ was embodied in our law as well. "Received into our own law in the
9 colonial period, given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2,
10 incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c.
11 20, § 14, 1 Stat. 81-82, habeas corpus was early confirmed by Chief Justice John Marshall to
12 be a 'great constitutional privilege.' *Ex parte Bollman and Swartwout*, 4 Cranch 75, 95." *Fay vs.*
13 *Noia*, *infra* at 400 (1963).

14 Given the history of this writ, it would be a draconic and drastic measure to take the
15 step of denying access to the courts by granting the Respondent's motion to dismiss. "[I]t
16 is not simply a question of state procedure when a state court of last resort closes the door
17 to any consideration of a claim of denial of a federal right. And that is the effect of the
18 denials of habeas corpus in a number of cases now before this Court, for in none of the
19 cases does the Attorney General suggest that either of the other two Illinois post-trial
20 remedies, writ of error and *coram nobis*, is appropriate. Unless habeas corpus is available,
21 therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this
22 kind." *Young v. Ragen*, 337 U.S. 235 at 238(1949).

1 While the following is a lengthy excerpt, it clearly shows the current thinking of the
2 Supreme Court.

3 “We [next take] note of the basic purpose underlying what is one of the most
4 extraordinary and unique legal remedies in the procedural armory of our law. . . . Although it
5 is true that the United States Supreme Court has not always followed an unwavering line in
6 its conclusions as to the availability of [t]he [writ of habeas corpus] . . . from the time the
7 writ originated in seventeenth century England, its central purpose has been to test the
8 legality of detention. English legislation and common law have been recognized by the
9 United States Supreme Court as authoritative guides in applying the writ in the federal
10 courts. *McNally v. Hill*, 293 U.S. 131, 136-37, 55 S.Ct. 24, 79 L.Ed. 238 (1934), overruled on
11 other grounds, *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968).

12 “In applying federal habeas statutes, the United States Supreme Court has said that [t]he
13 purpose of the proceeding defined by the statute was to inquire into the legality of the
14 detention. . . . There is no warrant in either the statute or the writ for its use to invoke
15 judicial determination of questions which could not affect the lawfulness of the custody and
16 detention, and no suggestion of such a use has been found in the commentaries on the
17 English common law. *McNally v. Hill*, [supra, 293 U.S. 136-37]; see also *Engle v. Isaac*, 456
18 U.S. 107, 136, [102 S.Ct. 1558, 71 L.Ed.2d 783] (1982) (Stevens, J., concurring in part and
19 dissenting in part) (relief available to a prisoner only if he is held in custody in violation of
20 the constitution or laws or treaties of the United States); *Preiser v. Rodriguez*, 411 U.S. 475,
21 484, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) ([i]t is clear, not only from the language of [the
22 federal habeas statutes], but also from the common-law history of the writ, that the essence

1 of habeas corpus is an attack by a person in custody upon the legality of that custody); *Fay*
2 *v. Noia*, [372 U.S. 391, 402, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963)] (writ's root principle is that
3 in a civilized society, government must always be accountable to the judiciary for a man's
4 imprisonment; if the imprisonment cannot be shown to conform with the fundamental
5 requirements of law, the individual is entitled to his immediate release); [H. Hart & H.
6 Wechsler, *The Federal Courts and the Federal System* (3d Ed. 1988) p. 1468] (Great Writ
7 always serves the function of precipitating a judicial inquiry into a claim of illegality in the
8 petitioner's detention for the purpose of commanding his release, or other appropriate
9 disposition.); P. Bator, 'Finality in Criminal Law and Federal Habeas Corpus for State
10 Prisoners,' 76 *Harv.L.Rev.* 441, 444-45 (1963) ([i]ts function, in the great phrase, is to test
11 "the legality of the detention of one in the custody of another). . . .

12 "The history of our own jurisprudence is wholly in accord with these principles.
13 Habeas corpus provides a special and extraordinary legal remedy for illegal detention. . . .
14 The deprivation of legal rights is essential before the writ may be issued. . . . Questions
15 which do not concern the lawfulness of the detention cannot properly be reviewed on
16 habeas corpus. . . . When a habeas petition is properly before a court, the remedies it may
17 award depend on the constitutional rights being vindicated. . . . Further, any remedy must
18 be commensurate with the scope of the constitutional violations that have been
19 established." *Johnson vs. Commissioner of Correction*, 258 Conn. 804 at 813 (2002).

20 In the instant case, the petitioners allege that they are to be deprived of their lives in a
21 proceeding that has been tainted by the imposition of improper racial determinations. The
22 stakes are, therefore, extraordinarily high for these petitioners and merit the closest of

1 scrutiny before throwing the complaint out of court without any opportunity to prove the
2 validity of the claims.

3 The Respondent asserts that the petitioners have been dilatory in their litigation of the
4 case. It is true that it is possible to trace the genealogy of this case back a long way.
5 Nevertheless, this is an extraordinary proceeding that has been steadily evolving over the
6 past fourteen or more years. For the majority of those years, this consolidated habeas
7 proceeding could be found only by reading between the lines of several decisions of the
8 Supreme Court. Nevertheless, in 2005, the instant case, finally took on an identity of its
9 own and was assigned a docket number. The petitioners have acted with due diligence in
10 pursuing the litigation of this case. No orders of the Court have been violated and no dates
11 upon which pleadings have been required have been missed. To be sure, the original dates
12 may have been extended by order of the Special Master. Even if these extensions were
13 granted reluctantly,⁸ they were nonetheless granted. There simply is no basis for this Court
14 to conclude that the petitioners have been dilatory and failed to prosecute this matter with
15 due diligence. Consequently the first basis upon which the respondent asserts the petition
16 should be dismissed is rejected.⁹

17 As to the second basis, the respondent asserts that the petitioners are advancing a claim
18 that is patently devoid of evidentiary support. It is implicit, and indeed conceded at oral

⁸ This Court does detect a certain note of frustration that may be in some of the grants of additional time to complete pleadings, however, it would be totally inappropriate to grant a party additional time to do something and then penalize that party when the action was completed in accord with the amended date.

⁹ Moreover, the arguments of the respondent are directed primarily at the claims set forth by Sedrick Cobb. Although counsel for the respondent appeared ready to concede that some of the petitioners could not be held accountable for the delays (for example, petitioner Russell Peeler was formally sentenced to death only three days prior to the argument on the Motion to Dismiss), that concession never materialized and the respondent continues to assert that the petition should be dismissed in its entirety as to all of the petitioners.

1 argument, that the petitioners have stated a claim upon which this Court could grant relief.
2 There is little argument that the overall general concept of Capital Punishment is
3 constitutional under both the state and federal Constitutions. Notwithstanding, as noted by
4 the U.S. Supreme Court in *Furman vs. Georgia*, 408 U. S. 238, 242 (Justice Douglas,
5 concurring) (1972), "the generality of a law inflicting capital punishment is one thing. What
6 may be said of the validity of a law on the books and what may be done with the law in its
7 application do, or may, lead to quite different conclusions. It would seem to be
8 incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates
9 against him by reason of his race, religion, wealth, social position, or class, or if it is
10 imposed under a procedure that gives room for the play of such prejudices."

11 That is the gravamen of the complaint. The petition is not a global challenge to the
12 death penalty, instead, the petition alleges that there is impermissible racial disparity and
13 other impermissible factors that creep into the decisions to charge, to prosecute, to impose
14 and to inflict this most ultimate of penalties. The petition clearly asserts that this is a
15 violation of the Constitution of the State of Connecticut. It is clear that such a claim under
16 the federal Constitution would be unavailing. See *McCleskey vs. Kemp*, 481 U.S. 279 (1987).
17 Statistical challenges to the imposition of the death penalty were ruled insufficient in that in
18 order to achieve federal habeas relief, the petitioner must demonstrate racial discrimination
19 in his or her own case. "Capital punishment is now the law in more than two-thirds of our
20 States. It is the ultimate duty of courts to determine on a case-by-case basis whether these
21 laws are applied consistently with the Constitution. Despite [petitioner's] wide-ranging
22 arguments that basically challenge the validity of capital punishment in our multiracial

1 society, the only question before us is whether in his case, ... the law of Georgia was
2 properly applied." *McCleskey, infra* at 319.

3 It is well established in Connecticut that our Constitution may contain greater individual
4 rights than those contained with in the United States Constitution. "[F]ederal constitutional
5 and statutory law establishes a minimum national standard for the exercise of individual
6 rights and does not inhibit state governments from affording higher levels of protection for
7 such rights. ... (Citations omitted; internal quotation marks omitted.) *State v. Geisler*, 222
8 Conn. 672, 684, 610 A.2d 1225 (1992). Although [our Supreme Court has]] often relied
9 upon decisions of the United States Supreme Court interpreting the fourth amendment to
10 define the protections provided by related provisions of our state constitution, [it has] at
11 times determined that the state constitution affords greater protections to the citizens of
12 Connecticut than does the federal constitution, as interpreted by the United States Supreme
13 Court. *Id.*; see also *State v. Marsala*, 216 Conn. 150, 579 A.2d 58 (1990); *State v. Dukes*, 209
14 Conn. 98, 547 A.2d 10 (1988). ... The Connecticut constitution is an instrument of
15 progress, it is intended to stand for a great length of time and should not be interpreted too
16 narrowly or too literally so that it fails to have contemporary effectiveness for all of our
17 citizens.' *State v. Dukes, supra*, 115. Thus, 'the law of the land may not, in [the] state
18 constitutional context, also be 'the law of the state of Connecticut.' *Id.*, 114. [We] must
19 decide whether article first, 7 and 9 of the Connecticut constitution afford greater
20 protection to the citizens of this state than does the federal constitution in the
21 determination of what constitutes a seizure. We conclude that they do." *State v. Oquiendo*,
22 223 Conn. 635, 649-650, (1992).

1 It is clear that the petitioners may seek to demonstrate that the imposition of the death
2 penalty in Connecticut violates the Constitution of the state of Connecticut, even though
3 such a statistical attack might be unavailing on the federal arena. It is clear then, that the
4 petition alleges a cause of action upon which this Court *could* afford relief. Being able to
5 state a cognizable claim does not, of course, in any way mean that the petitioners will be
6 successful in obtaining their desired relief. As correctly noted by the respondent the burden
7 of proof in the habeas petition rests with the petitioner.

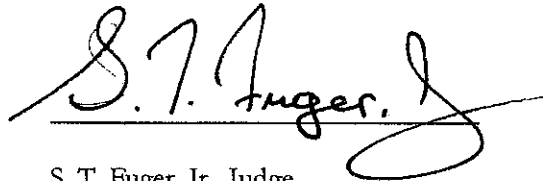
8 The respondent asks this Court to dismiss the petition without even the chance for the
9 petitioners to submit any evidence because, as counsel for the respondent put it, the
10 petition is "patently devoid of evidentiary support." In other words, the respondent is
11 saying that the claim of any racial disparity in imposition of the death penalty is obviously
12 lacking in any proof. To demonstrate that, the respondent wanted to submit something like
13 three court days worth of evidence to establish that there was no basis to the petitioners'
14 case. In essence, the respondent sought to prove her case that the petitioners lacked a case
15 without allowing the petitioners the opportunity to even present any evidence supporting
16 the positions they set forth. Such action would be wholly and completely inappropriate.

17 Despite the fact that this Court is going to deny the respondent's motion to dismiss, it
18 does not necessarily follow that the petitioners will ultimately be successful in this petition.
19 It is a heavy burden of proof that the petitioners undertake and, if the offer of proof
20 submitted by the respondent as to what would have been presented in this motion to
21 dismiss is any indication, one that will generate a vigorous opposition from the respondent.
22 The denial of the motion to dismiss is not to prejudice the right of the respondent to seek

1 summary judgment, if appropriate, or to renew a motion for judgment following the
2 petitioners presentation of their case. In this stage in the proceeding, however, it is clear
3 that the petitioners have stated a cognizable claim, have averred that there is evidence to
4 support that claim and are therefore, at least as of now, entitled to proceed with the trial of
5 that claim.

6 The respondent shall forthwith file her answer so that this case may expeditiously
7 proceed to trial.

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9 **The Respondent's Motion to Dismiss is denied.**

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A handwritten signature in cursive script, reading "S. T. Fuger, Jr.", is written over a horizontal line. The signature is fluid and includes a large, sweeping flourish at the end.

S. T. Fuger, Jr., Judge

Copies mailed to:

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