SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 17344

MISSIONARY SOCIETY OF CONNECTICUT

V.

BOARD OF PARDONS AND PAROLES

BRIEF OF THE AMICUS CURIAE CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE PLAINTIFF-APPELLANT

with attached appendix

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AMICUS CURIAE'S ISSUES

1. Does the plaintiff have standing?
2. Did the defendant violate due process by not conducting a commutation hearing in this case?

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Amicus curiae, Connecticut Criminal Defense Lawyers Association, is a bar organization comprised of lawyers who practice criminal defense law in Connecticut, in both federal and state court. Its members are stridently devoted to protecting the constitutional rights of Connecticut citizens.

This appeal involves matters of enormous public importance, namely whether or not the Missionary Society has standing pursuant to a private attorney general role on behalf of the public interest to litigate the framed question, **"Can the Board, absent any written regulations or policies as to who may request a commutation hearing, arbitrarily and capriciously deny a request for a hearing based on its unilateral declaration that the requesting party was not the appropriate party to make such a request?"** Inherent in the quoted question is the second issue, namely whether the defendant violated procedural due process in refusing to conduct a commutation hearing pursuant to the plaintiff's request.?

I. STATEMENT OF FACTS AND PROCEEDINGS

The amicus curiae relies on the factual history recited in plaintiff's January 20, 2005 "Application For Certification To Appeal." (App. p. A36.) As was stated therein:

> "In furtherance of its mission, on January 4, 2005, the Missionary Society sent a letter to the Board, the entity authorized by General Statute section 18-26[1] to commute death sentences, demanding that it conduct an immediate hearing regarding the commutation of the death sentence scheduled to be imposed on Mr. Ross by the Connecticut Department of Correction on January 26, 2005.
>
> This request was premised on two grounds, First, Public Act No. 04-234 (d) expressly confers on the Chairperson 'the *authority and responsibility* for . . . *adopting policies* in all areas of pardons and paroles including . . . *commutations from the penalty of death.'* (Emphasis added.) See supra footnote one. At the present time, the Board has adopted neither regulations nor policies regarding commutation hearings. See Complaint, dated January 11, 2005, ¶ 7, ('Compl.'). Therefore, although the Board has been granted the power to commute death sentences, it has failed to promulgate regulations or policies that would force to this authority,
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> Second, Public Act No. 04-234(f) violates Mr. Ross's equal protection rights by granting the Board *'independent decision-making authority . . . to grant . . . commutations from the penalty of death.'*[2] (Emphasis added.) Of the states that authorize the death penalty, only two others, Georgia and Idaho, vest the power to commute death sentences solely in an administrative agency. . . .
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> By way of a letter dated January 6, 2005, the Board denied the Missionary Society's request for a hearing. In its denial, the Board stated:
>
> The Board of Pardons and Paroles will consider written applications for

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[1] General Statutes section 18-26 provides, in relevant part: "Jurisdiction over the granting of, and the authority to grant commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the Board of Pardons."

[2] Public Act No. 04-234(f) provides: "The Board of Pardons and Paroles shall have independent decision-making authority to (1) grant or deny parole in accordance with sections 54-125, 54-125a, as amended by this act, 54-125e, as amended by this act, and 54-125g, (2) establish conditions of parole or special parole supervision in accordance with section 54-126, (3) rescind or revoke parole or special parole in accordance with sections 54-127 and 54-128, as amended by this act, (4) grant commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death in accordance with section 18-26."

> clemency from eligible prisoners or from their authorized representatives. However, correspondence from others does not constitute an application for clemency and will not move the Board to action.

The Board further stated that:

> Although your letter purports to make arguments on behalf of Michael Ross, in fact, the Missionary Society of Connecticut does not represent Mr. Ross and has no standing to make such arguments on his behalf. While we . . . appreciate the Society's self-described 'long-standing opposition to the death penalty,' that stance alone does not provide legal standing to advocate on behalf of Mr. Ross.

Upon receipt of the Board's denial of its request for a hearing, the Missionary Society applied to the Superior Court, requesting that the court (1) order the Board to conduct an immediate commutation hearing, and (2) order a temporary stay of execution until such a hearing is competed. Through the Office of the Attorney General, the Board moved the court to dismiss the action.

Following a hearing on January 18, 2005, the court (Beach, J.) granted the Board's motion to dismiss, finding the Missionary Society lacked standing, and therefore, that the court lacked subject matter jurisdiction. See Memorandum of Decision, January 19, 2005, p. 6.('Mem. Dec.' App. p. A 41.) In response to the plaintiff's position that it was bringing the action under the 'private attorney general' doctrine, the court opined that 'it would make little sense to craft such an exception in a situation where one with clear and obvious standing exists, but chooses not to pursue the issue.' Id. Thereafter, the court entered judgment of dismissal. Id. The Missionary Society now seeks immediate appellate review of that ruling." (App. pp. A42-54.)

On January 20, 2005 the Connecticut Supreme Court granted plaintiff's application.

II. LEGAL ARGUMENT

A. The Plaintiff Has Standing

The plaintiff conceded at the hearing that it was not proceeding as " next friend" of the condemned inmate. (Mem. Dec. p.4, App. p. A 39 .) It was also conceded that "it has no such personal interest different from that of society. . . ."Id. at 4, App. p. 39.) Amicus Curiae argues that in certain special circumstances, third parties may assert society's interest in the fair, proper and constitutional imposition of the death penalty. This may be called the societal standing argument.

Our traditional common law definition of standing is found in Ardmare Construction Co, Inc. v. Freedman, 191 Conn. 497 at 501 (1983): "'Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.' Hiland v. Ives, 28 Conn. Sup. 243, 245, 257 A.2d 822 (1996)." In a representative capacity, the 97,000 members of the plaintiff have adopted resolutions which "have consistently opposed the death penalty in recent years." (Mem. of Dec. p. 2, App. p. .) Its membership certainly can be said to have an "equitable right . . . or interest in the subject matter of the controversy." (Ardmare Construction Co., supra, at 501.) Ardmare Construction Co. v. Freedman, supra, discussed how standing would be found by our common law in certain circumstances, even when the competitive bidding statute did not otherwise "provide the disappointed bidders with standing." Id. at 504. In Ardmare Construction, the following was noted:

> "In Spiniello Construction Co. v. Manchester, 189 Conn. 539, 456 A.2d 1199 (1983), we recognized that our prior decisions had the effect of preventing judicial review of potentially meritorious claims concerning the implementation and execution of competitive bidding statues. *We also acknowledged the fact that the group most benefitted by the statute - the public - had no effective means of protecting their interests. We substantially adopted the position in Scanwell that '[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general".'* Scanwell Laboratories, Inc. v. Shaffer, supra, 864. *Thus, we held that where fraud, corruption or acts undermining the objective and integrity of the bidding process existed, an unsuccessful bidder did have standing under the public bidding statute."* (Id. at 504-505, emphasis added.)

The Amicus Curiae argues that the above rationale is analogous to the instant matter. The plaintiff filed suit in its members' interest, which is reflective of the public interest and plaintiff is therefore "acting essentially as a 'private attorney general'." (Id. at 504). While there

is no suggestion that fraud or corruption contributed to the defendant denying the request to conducting of the commutation hearing or that fraud or corruption caused the defendant to fail to promulgate its own commutation hearing protocols - the failure to promulgate these crucially required regulations clearly "undermines the objective and integrity" (Id.) of the commutation hearing process. Thus, applying the rationale of Ardmare Construction Co., the plaintiff has standing. The concept of the plaintiff appearing in the private attorney general context was advanced by plaintiff at the hearing and preserved. It was analyzed by the trial court without considering the Ardmare Construction Co. rationale. (Mem. of Dec. pp.1-6, App. pp. A36-41.)

Needless to say, the stakes cannot be higher and they transcend whether or not Ross is executed or wants to be executed. Indeed, although the convict's wishes are relevant to the adjudication and outcome of a commutation hearing, the convict's wishes about whether or not Connecticut law requires a hearing in the first place are totally irrelevant. A similar concern was addressed by Justice Marshall in his dissenting opinion in Hammett v. Texas, 448 U.S. 775, 276 (1980). In Hammett, the United States Supreme Court granted a pro se death convicted inmate's motion to withdraw his petition for review. Justice Marshall dissented, declaring that the majority had endorsed "state-administered suicide" and that no defendant should be able "by his consent [to] permit a State to impose a punishment forbidden by the Constitution." Id. at 726. (Marshall, J., dissenting.) Minimal due process required that the defendant at least have some regulations in place before denying that a hearing even occurs.

There appears to be little in the way of scholarly review regarding the topic of so-called third party standing in such cases when the third party is a concerned group of citizens or society at large. It is briefly addressed in *Stopping the Rush to the Death House: Third Party Standing In Death-Row Volunteer Cases,* 26 ARIZ ST LJ 201, 225-228 (1994). In the case at

bar, the trial court appropriately noted that pursuant to Whitmore v. Arkansas, 495 U.S. 149 (1990) a "'generalized interest of all citizens in constitutional governance' did not suffice to create a justiciable case or controversy." (Mem. of Dec. p. 5, App. p. A 40.) The commentator notes that the rationale of Whitmore v. Arkansas, supra, "prevents anyone from ever having standing to litigate this question. If a defendant waives the appeals process, and no one has standing to argue that the defendant cannot waive appeals, then no case will be before the court, and the defendant will be executed." Id. at 227. It was further observed that,

> "the death penalty is a unique, final punishment. Society does not suffer in the same way from a defendant's waiver of appeal in a minor felony case because the result is only a few years in prison for the defendant. When the state executes an inmate, it does so on behalf of all citizens of that state. Justice Brennan recognized that *'it is society that demands, even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.'"* (citing Furman v. Georgia, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., dissenting , emphasis added).

The CCDLA is not arguing that society's generalized interest in how we execute condemned convicts is so special, so grave and so serious that any segment of society must always be declared to have standing to participate in commutation hearings, no matter what.

The Amicus Curiae *is* arguing that here, because the defendant in this particular case failed to have *any* commutation hearing protocols and regulations in place, that this so undermines "the objective and integrity" of the commutation hearing process itself that standing must be conferred to the plaintiff "in the public interest by one acting essentially as a private attorney general." Ardmare Construction Co. v. Freedman, 191 Conn. 497 at 504 (1983). Here, something much more precious than the misuse of taxpayer dollars is at stake. If we acknowledge standing to a private attorney general in a public interest suit when the granting of a state contract occurred "through arbitrary or capricious action", standing must be found in this case. Standing must be found because the defendant's refusal to conduct a

commutation hearing in accordance with the plaintiff's request (when the defendant is acting lawlessly in the absence of any regulations) is the epitome of capriciousness.

B. The Unilateral Action of the Board's Chairman, in Denying the MSC's Request for a Commutation Hearing, was of No Legal Force or Effect, Because the Chairman's Actions Violated the Most Rudimentary Notions of Due Process.

Regardless of the extent, if any, to which the chairman's ruling violated the due process rights of Michael Ross, the ruling probably violated the due process rights of a number of other individuals, organizations, and even public officials. Of course, the exact number and the identity of these persons or entities is currently unascertainable–and will remain so unless, and until, the Board of Pardons and Paroles (BPP) formally adopts regulations which specify *who* may properly request commutation hearings in cases in which a sentence of death has been imposed. Elementary principles of due process require no less.

In *State v. Long*, 268 Conn. 508 (2004), this Court recently summarized the due process principles applicable in the context of an administrative proceeding:

> "The United States Supreme Court [has] set forth three factors [which this court has followed] to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) . . . . Due process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures."(Brackets in original.) Id., 523-24.

Measured against this due process framework, it is evident that the defendant Chairman's action cannot withstand scrutiny, because *there was no* process. Perhaps the

easiest way to demonstrate the complete lack of process is to consider the following questions: *1. Does Michael Ross (or his legal representative) have the authority to request a commutation hearing? 2. Does the Governor of Connecticut have the authority to request a commutation hearing for Michael Ross (regardless of his wishes)? 3. Does any one else have the authority to request a commutation hearing for Michael Ross (regardless of his wishes)?* Everyone would readily assume that the answer to the first question is yes, although there is no statutory authority, or administrative regulation, that provides the answer. For example, Gen. Stat. § 18-26(a) provides in pertinent part that "Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and *commutations from the penalty of death shall be vested in the Board of Pardons*." (Emphasis added.) Notably, that statute is silent on the question of *who* may request a commutation hearing. Similarly, the recent legislation which creates the "new" Board of Pardons and Paroles, Public Act 04-234, grants the Board the authority to commute death sentences, id., § 1(f)(4), but the enactment says nothing about who is eligible to request such relief. Of similar effect is the 1996 opinion of Attorney General Richard Blumenthal, to the effect that "it is within the discretion of the Board of Pardons to provide when hearings will be held *and the person(s) who may request such a hearing*. Moreover, it appears that the Board may initiate a hearing without any request at all." (Emphasis added.) Op. Atty. Gen. No. 1996-010 (July 17, 1996, App. p. A 55). It thus appears that currently, Michael Ross' eligibility to seek a commutation, rests entirely on the Chairman's unilateral and *ad hoc* opinion that Ross (or his

authorized representative) may do so.[3]

Can the chief executive of this state, who has no authority to commute a death sentence[4], nevertheless request a commutation hearing for an inmate? Nothing in General Statutes §18-26, or Public Act 04-234, provides the answer. Apparently, the Governor's eligibility to seek a commutation also would depend on the unilateral opinion of the Chairman.[5]

Obviously, the Uniform Administrative Procedure Act (UAPA), which governs an "agency" such as the Board of Pardons and Paroles, see Gen. Stat. § 4-166, never contemplated "one-person" rule making. Instead, like any other agency, the BPP has not only the authority, but the obligation, to adopt "regulations."[6] But as far as regulations are concerned, the BPP has failed to reach square one. It has not yet complied with the most basic statutory provision of all–the one that *mandates* the adoption of regulations setting forth the rules of practice and procedure for the agency. See Gen. Stat. §4-167.[7]

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[3] In his letter to the MSC, the Chairman indicated that the Board "will consider written applications for clemency from eligible prisoners or from their authorized representatives," and further stated that "the Missionary society . . . has no standing to make such arguments on [Mr. Ross'] behalf."

[4] See Op. Atty. Gen. No. 1992-020 ("It is clear from reading and comparing the powers of the Governor and the Board of Pardons that the authority to permanently commute a death sentence lies with the latter. The authority of the Governor is limited 'to grant[ing] reprieves after conviction . . .until the end of the next session of the General Assembly and no longer.") (Atty. Gen. R. Blumenthal).

[5] And of course, the same would currently be true for all other individuals or entities that might seek to request a commutation hearing for Michael Ross.

[6] Gen. Stat. § 4-166 (13) provides in part that "'Regulation' means each agency statement of general applicability, without regard to its designation, *that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency*." (Emphasis added.)

[7] Gen. Stat. § 4-167 provides: "(a) In addition to other regulation-making requirements imposed by law, each agency *shall*: (1) Adopt as a regulation a description of its organization, *stating the general course and method of its operations*

As this Court has noted, there are "detailed statutory procedures for the adoption of regulations by administrative agencies." *Quinnipiac Council, Boy Scouts of America, Inc., v. CHRO*, 204 Conn. 287, 293 n. 5 (1987). In order for the BPP to adopt regulations governing its practice and procedure (and specifying who is eligible to request a commutation hearing), the Board would first have to adhere to the basic requirements of Gen. Stat. § 4-168, which include, inter alia: (1) giving at least thirty days' notice to the public, and an opportunity for "interested persons" to "present their views on the proposed regulation, see Gen. Stat. § 4-168(a)(1); and (2) giving notice to "each joint standing committee of the General Assembly having cognizance of the subject matter of the proposed regulation," see Gen. Stat. § 4-168(a)(2).[8]

But that is not all. Proposed regulations also must be approved by the Attorney General, see Gen. Stat. § 4-168(e) and § 4-169, and *then* must be approved by the standing legislative regulation review committee, as provided by Gen. Stat. § 4-168(e) and § 4-170.

The requirements of approval by the Attorney General, and by the legislative regulation review committee, are especially important. The Attorney General's mandate is to review the "legal sufficiency" of the proposed regulation, which "means (1) the absence of conflict with any general statute or regulation, federal law or regulation or the Constitution of this state or

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and the methods whereby the public may obtain information or make submissions or requests; (2) adopt as a regulation *rules of practice setting forth the nature and requirements of all formal and informal procedures available* provided such rules shall be in conformance with the provisions of this chapter; and (3) make available for public inspection all regulations and all other written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions, and all forms and instructions used by the agency." (Emphasis added.)

[8] A "proposed regulation" "means a proposal by an agency under the provisions of section 4-168 for a new regulation or for a change in, addition to or repeal of an existing regulation." Gen. Stat. § 4-166(12).

of the United States and (2) compliance with the notice and hearing requirements of section 4-168." Gen. Stat. § 4-169. Would the Attorney General approve a regulation specifying that *only* an inmate or his authorized representative could request a commutation of a death sentence? Perhaps. Would the legislative regulation review committee approve such a regulation? Maybe. But matters of life and death should not depend on such uncertain and equivocal answers.

This Court is urged to hold that the defendant is powerless to deny requests for commutation hearings (on the ground that the requesting party is *not* eligible to make the request), until such time as it adopts regulations specifying who *is* eligible to make such requests. In the absence of such regulations, any action taken by its Chairman should be deemed of no legal consequence or effect.

III. CONCLUSION

For all the above reasons the judgment of the trial court must be reversed and the scheduled execution of Mr. Ross must be ordered stayed.

RESPECTFULLY SUBMITTED:
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