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IN RE APPLICATION FOR PETITION FOR WRIT OF HABEAS CORPUS BY DAN ROSS AS NEXT FRIEND ON BEHALF OF MICHAEL B. ROSS
(SC 17342)

IN RE APPLICATION FOR PETITION FOR WRIT OF HABEAS CORPUS BY THE OFFICE OF THE CHIEF PUBLIC DEFENDER AS NEXT FRIEND ON BEHALF OF MICHAEL B. ROSS
(SC 17343)

Sullivan, C. J., and Norcott, Vertefeuille, Zarella, Lavery, Foti and Dranginis, Js.

Argued January 21—officially released January 27, 2005*

Jon L. Schoenhorn, for the plaintiff in error (petitioner Dan Ross).

Temmy Ann Pieszak, chief of habeas corpus services, with whom was *Adele V. Patterson*, assistant public defender, for the plaintiff in error (petitioner office of the chief public defender).

Harry Weller, supervisory assistant state's attorney, with whom were *Kevin T. Kane*, state's attorney, and *Michael O'Hare*, supervisory assistant state's attorney, and, on the brief, *Robert J. Scheinblum*, assistant state's attorney, and *Jessica Probolus*, special deputy assistant state's attorney, for defendant in error (respondent commissioner of correction).

Edward J. Gavin filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

ZARELLA, J. This opinion relates to the orders of this court dated January 25, 2005, dismissing the motions to stay the execution of Michael B. Ross[1] filed by the plaintiff in error, Dan Ross, and the plaintiff in error, the office of the chief public defender, respectively.[2] See *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. , A.2d (2005) (*In re*

Application II). The motions were filed in connection with two separate writs of error brought by the plaintiffs in error challenging the orders of the habeas court dismissing their respective petitions for a writ of habeas corpus on behalf of Michael Ross. *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. , A.2d (2005) (*In re Application I*). We affirmed the orders of the habeas court and dismissed the writs of error on the ground that the plaintiffs in error lacked standing to bring the habeas petitions. Id., . Accordingly, we dismissed the motions to stay as moot. *In re Application II*, supra, . In our opinion dismissing the motions to stay as moot, we indicated that this opinion explaining in greater detail the reasons for the dismissal of the motions would follow. Id., .

The underlying facts and procedural history of this case are set forth in our decisions in *In re Application I* and *State* v. *Ross*, 272 Conn. 577, A.2d (2005). In summary, these cases involve attempts by the plaintiffs in error to obtain next friend status in the underlying criminal proceeding against Michael Ross in order to pursue postconviction relief on his behalf, including participation in the ongoing consolidated habeas litigation on behalf of several defendants who have been sentenced to death. We have concluded that they have no standing to do so. See *In re Application I*, supra, 272 Conn. ; *State* v. *Ross*, supra, 611. The plaintiffs in error have argued in their briefs in these proceedings that Michael Ross cannot waive his right to pursue further postconviction remedies and, therefore, his execution must be stayed. We disagree. As we have noted, we have concluded, and the dissenting justices agree, that the plaintiffs in error have no standing to bring habeas proceedings on behalf of Michael Ross and, therefore, the habeas petitions properly were dismissed. See *In re Application I*, supra, . The motions for stay were filed in conjunction with the writs of error that have been dismissed. Accordingly, the motions to stay must be dismissed as moot.

The dissenting justices conclude, however, that: (1) General Statutes (Rev. to 1987) § 53a-46b[3] creates a nonwaivable right to reap the benefit of litigation raised by others claiming that their sentences of death were the result of "passion, prejudice or any other arbitrary factor";[4] and (2) this court has an independent institutional duty to exercise its supervisory powers to prevent the execution of a death sentence that may be the product of an arbitrary factor. We disagree. It simply is unprecedented for this court to conclude that, although it has no jurisdiction over the case before it, it may grant a motion in that case to enter a stay in a separate proceeding. Moreover, the dissenting justices misconstrue § 53a-46b as providing for mandatory review of postconviction proceedings in death penalty cases. That statute provides only for mandatory sentence review, which already has taken place in the criminal proceed-

ing against Michael Ross and which resulted in the affirmance of his death sentences. See *State* v. *Ross*, 269 Conn. 213, 350, 849 A.2d 648 (2004). In addition, the dissenting justices' conclusions are inconsistent with our cases indicating that participation in the consolidated litigation is voluntary; see, e.g., *State* v. *Colon*, 272 Conn. 106, 377–79, A.2d (2004); *State* v. *Reynolds*, 264 Conn. 1, 226–34, 836 A.2d 224 (2003), cert. denied, U.S. , 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Breton*, 264 Conn. 327, 405, 824 A.2d 778, cert. denied, 540 U.S. 1055, 124 S. Ct. 819, 157 L. Ed. 2d 798 (2003); *State* v. *Cobb*, 251 Conn. 285, 499, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000) (*Cobb II*); *State* v. *Cobb*, 234 Conn. 735, 761–63, 663 A.2d 948 (1995) (*Cobb I*); and with the well established principle that, even in death penalty cases, constitutional claims and claims raising the specter that the death sentence was the result of an arbitrary factor are waivable. See, e.g., *State* v. *Colon*, supra, 154 n.26.

Whether § 53a-46b (b) creates a nonwaivable right to reap the benefit of litigation brought by others claiming that their sentences of death were the result of ''passion, prejudice or any other arbitrary factor'' is a question of law over which our review is plenary. See, e.g., *State* v. *Ross*, supra, 272 Conn. 598.

To provide context for our discussion of the statute, we begin our analysis with a history of the consolidated habeas litigation. The issue of racial disparity in the administration of the death penalty statute in Connecticut was first raised in *Cobb I*, supra, 234 Conn. 735. The defendant in that case, Sedrick Cobb, ''had moved for enlargement of the class of similar cases that [this court would] consider in determining whether his death sentence [was] justified in light of the prohibition against disproportionality provided by . . . § 53a-46b (b) (3).'' Id., 737. Specifically, Cobb requested that we consider ''all cases prosecuted in Connecticut after October 1, 1973, in which a capital felony *could have been charged* pursuant to . . . § 53a-46b and which resulted in a homicide conviction, following a plea or trial.'' (Emphasis in original; internal quotation marks omitted.) Id., 738. Cobb argued that this expanded universe of cases was ''necessary to enable this court to evaluate his claim that race has an impermissible effect on capital sentencing decisions in Connecticut . . . .'' Id. We rejected Cobb's claim, concluding that ''the legislature did not intend proportionality review to encompass a comparison [of] all homicide cases prosecuted since 1973 in which a capital felony could have been charged.'' Id., 747.

We also concluded, however, that Cobb could have raised his racial disparity claim under § 53a-46b (b) (1). Id., 761. Under § 53a-46b (b) (1), however, ''it would have been necessary for [Cobb] to have made his statis-

tical record in the trial court, and to have subjected it to a full evidentiary hearing, as in [*McCleskey* v. *Zant*, 580 F. Sup. 338 (N.D. Ga. 1984), aff'd sub nom. *McCleskey* v. *Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)], before presenting it on appeal. To hold that [Cobb] could raise this claim on appeal under § 53a-46b (b) (1), without having first created an adequate factual basis in the trial court, would be incorrect for many of the same reasons that we reject [Cobb's] claim under § 53a-46b (b) (3), because it would assume, without any clear indication, that the legislature intended this court to engage in the same extraordinary process of data gathering and fact-finding. Thus, both subdivision (1) and subdivision (3) of § 53a-46b (b) ordinarily contemplate not data gathering and fact-finding by or under the aegis of this court from disputed evidence, which [Cobb's] claim would require, but evaluation by this court of the trial court record of the case on appeal, and with respect to subdivision (3), of the trial court records of similar cases.'' *Cobb I*, supra, 234 Conn. 762.

We also concluded in *Cobb I* that, ''even though [Cobb] has not created a trial record . . . that would permit him to present, in his direct appeal, his statistical claim under § 53a-46b (b) (1) . . . he should be permitted to do so by way of a postappeal habeas corpus petition . . . . Although ordinarily habeas corpus cannot serve as a surrogate for a claim that could have been presented on direct appeal . . . we conclude that, with respect to the claim that [Cobb] seeks to present by this motion, he should not be bound by that principle because the scope and meaning of § 53a-46b (b) have remained uncertain and, until [1995], have been the subject of only one published decision of this court . . . . Furthermore, the nature of [Cobb's] claim of systemic racial bias, and the seriousness and finality of the death penalty, counsel against raising any undue procedural barriers to review of such a claim.'' (Citations omitted.) Id., 762–63.

''In *Cobb II* [supra, 251 Conn. 285], we reaffirmed our holding in *Cobb I* that a racial disparity claim 'was cognizable under § 53a-46b (b) (1), but must [be] based on a full evidentiary hearing made at trial in the trial court.' [Id.], 499. Because [Cobb] had not made such a record [in] the trial court, he was required to proceed by way of a habeas petition. Id. In support of this conclusion, we noted 'two further aspects of [his] claim. First . . . this claim was brought in *Cobb I* by motion of [Cobb's] separate proportionality counsel ''*because [Cobb's] other appellate counsel [did] not intend to raise such a claim under § 53a-46b (b) (1).*'' . . . *Cobb I*, supra, 234 Conn. 740. Needless to say, that ''other appellate counsel'' is the same counsel who now brings this claim, nearly four years later. Second, this appeal was filed in October, 1991. [Cobb's] brief was not filed in this court until February, 1997, more than six

years later. Under these circumstances, it ill behooves [Cobb's] counsel to request a remand for an evidentiary hearing (1) on a claim that he represented nearly four years earlier he did not intend to bring, and (2) in an appeal the disposition of which has been delayed for nearly eight years largely because of his delay in filing his brief. We see no valid reason to delay the disposition of this appeal further. The state, the victim's family and the defendant are entitled to a disposition of this appeal now.' . . . *Cobb II*, supra, 499–500 n.105.'' (Emphasis in original.) *State* v. *Breton*, supra, 264 Conn. 400–401.

In *State* v. *Reynolds*, supra, 264 Conn. 1, we again considered whether the defendant, Richard Reynolds, was entitled to a hearing before the trial court on his claim that the death penalty is imposed in a racially discriminatory and arbitrary manner in this state. See id., 226. After the jury returned its verdict imposing the death penalty, Reynolds requested such a hearing and indicated that ''he was not prepared to proceed immediately with the requested hearing and that he needed 'several months' to do 'detailed research into court records and other similar preparation' before the hearing. . . . [He] also requested that his sentencing be postponed until after a hearing and decision on his motion for the imposition of a life sentence.'' Id., 229. We agreed that Reynolds ''was entitled to an evidentiary hearing for the purpose of presenting facts in support of his claim that . . . he should be sentenced to life imprisonment without the possibility of release because of the allegedly flawed manner in which this state's death penalty statute is implemented.'' Id., 230. We concluded, however, that Reynolds ''was not entitled to an indefinite period of time within which to attempt to develop facts in support of his claim.'' Id., 231. Accordingly, we concluded ''that the proper course [was] not to remand [Reynolds'] claim to the trial court but, rather, to afford [Reynolds] an opportunity to renew his claim by way of a habeas corpus petition.'' Id., 232. We recognized that, since our decisions in *Cobb I* and *Cobb II*, a habeas proceeding had been instituted in the *Cobb* matter and that Chief Justice William J. Sullivan had appointed former Chief Justice Robert Callahan to serve as a special master to oversee the proceeding. Id., 233. We concluded that, in the interest of judicial economy and fairness to the parties, capital defendants should no longer raise claims of racial bias before the trial court; instead, all such claims should be presented in the consolidated habeas proceeding. Id., 234. We noted that, under ordinary circumstances, a capital defendant's failure to raise the claim in a timely manner might constitute a procedural bar to habeas proceedings, but cited our statement in *Cobb I*, supra, 234 Conn. 763, that the circumstances of the case counseled against raising such a bar. *State* v. *Reynolds*, supra, 232 n.204. Finally, we noted that the issue of ''whether any particular defendant or the state would be barred from

litigating a claim of this nature in the consolidated habeas proceeding that we contemplate when that defendant desires to present a different variation of the claim or when the state has a different variation of its response to the defendant's claim'' would be left to the discretion of former Chief Justice Callahan and the habeas judge. Id., 234 n.207; see also *State* v. *Breton*, supra, 264 Conn. 405 (in light of untimeliness of defendant's racial disparity claim, if defendant intended to pursue claim he was required to raise it in habeas proceeding).

With this background in mind, we now turn to the issue of whether § 53a-46b renders participation in the consolidated habeas proceeding mandatory and nonwaivable. General Statutes (Rev. to 1987) § 53a-46b provides in relevant part: ''(a) Any sentence of death imposed in accordance with the provisions of section 53a-46a shall be reviewed by the supreme court pursuant to its rules. . . .

''(b) The supreme court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor . . . .''

We agree with the dissenting justices that these provisions constitute a mandatory directive to this court to review sentences of death. We further conclude that the obligation of this court to review death sentences cannot be discharged by virtue of a defendant's expressed desire to forgo review. Accordingly, we conclude that, in every *case* in which a sentence of death is imposed, this court is required, without exception, to conduct a sentence review.

We do not believe, however, that § 53a-46b creates a nonwaivable right to a review of any and all *claims* implicating the arbitrariness of a death sentence, regardless of when, how and by whom the claim is raised. It is well established that, even in capital cases, the defendant waives claims—including those of constitutional magnitude and those implicating the arbitrariness of the sentence—if the claim was not raised at trial and the record is inadequate for review by this court.[5] See *State* v. *Colon*, supra, 272 Conn. 154 n.26 (''even in capital cases, we have held that, [a]lthough the defendant's brief adverts to independent rights under the [state] constitution, [when] no such arguments have been briefed . . . they are . . . deemed to have been waived'' [internal quotation marks omitted]), quoting *State* v. *Ross*, 230 Conn. 183, 208, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); see also *State* v. *Rizzo*, 266 Conn. 171, 290 n.69, 833 A.2d 363 (2003); *State* v. *Webb*, 238 Conn. 389, 423 n.32, 680 A.2d 147 (1996); cf. *State* v. *Reynolds*, supra, 264 Conn. 206–207 (when defense counsel made tactical decision to refrain from objecting to state's attorney's improper conduct, defendant could

not raise claim on appeal).

Moreover, our cases discussing the proper procedure for bringing a racial disparity claim do not suggest that a defendant in a death penalty case cannot waive a claim of racial disparity. Rather, they indicate the opposite. We criticized the defendants in *Breton* and *Reynolds* for their attempts to delay the completion of the proceedings by bringing their claims at the eleventh hour and clearly indicated that that was the reason that the claims had to be presented in a habeas proceeding. See *State* v. *Breton*, supra, 264 Conn. 405; *State* v. *Reynolds*, supra, 264 Conn. 231. In other words, we concluded that mandatory review of the claims by this court had been waived. Moreover, although we stated in *Cobb I* and *Reynolds*, apparently in the exercise of our supervisory power, that ''the nature of the defendant's claim of systemic racial bias, and the seriousness and finality of the death penalty, counsel against raising any undue procedural barriers to review of such a claim''; *Cobb I*, supra, 234 Conn. 763; accord *State* v. *Reynolds*, supra, 264 Conn. 232 n.204; we never suggested that § 53a-46b mandated the bringing of a habeas action or barred the habeas court from dismissing such an action on procedural grounds. Indeed, we clearly have suggested otherwise. See *State* v. *Colon*, supra, 272 Conn. 379 (defendant must bring racial disparity claim in habeas action *if he intends to bring one*); *State* v. *Breton*, supra, 264 Conn. 407 (same); see also *State* v. *Reynolds*, supra, 234 n.207 (similar claims ''of this nature'' may be barred). If § 53a-46b does not require a defendant to bring a habeas action to litigate a racial disparity claim, it does not require him to participate in such an action brought by others.

We further note that the case cited by the dissenting justices in support of their argument that there is a distinction between mandatory sentence review and appellate review supports the view that claims may be waived in mandatory review proceedings. In *State* v. *Dodd*, 120 Wash. 2d 1, 838 P.2d 86 (1992), the Washington Supreme Court construed a death sentence review statute that, like ours, distinguished between appellate review and death sentence review, and concluded that the sentence review could not be waived. Id., 20. The defendant in that case, Westley Allan Dodd, had ''chose[n] not to present mitigating evidence and so instructed his attorneys.'' Id., 9. The Washington sentence review statute required the court to determine ''[w]hether sufficient evidence justifies the finding that 'there are not sufficient mitigating circumstances to merit leniency' . . . .'' Id., 24. The court concluded that the jury's determination that sufficient mitigating circumstances did not exist to merit leniency was supported by the record. Id., 25. The court did not suggest that, because its review of the mitigating evidence was mandatory, the presentation of a case in mitigation could not be waived.[6] See id.; see also *Pike* v. *State*,

Docket No. E2002-00766-CCA-R3-PD, 2004 Tenn. Crim. App. LEXIS 635, *38–*41 (2004) (defendant in death penalty case may waive right to present mitigating evidence even though statute provides for mandatory sentence review).

In support of their argument that claims that would be subject to mandatory sentence review if raised cannot be waived, the dissenting justices place heavy reliance on the decision of the New Jersey Supreme Court in *State* v. *Martini*, 144 N.J. 603, 677 A.2d 1106 (1996), cert. denied, 519 U.S. 1063, 117 S. Ct. 699, 136 L. Ed. 2d 621 (1997). The court in that case concluded that a defendant in a death penalty case could not waive postconviction relief proceedings for certain claims. See id., 613–14. The court recognized, however, that other jurisdictions have not adopted such a rule. Id.; see also *Pike* v. *State*, supra, 2004 Tenn. Crim. App. LEXIS *43 (''no jurisdiction other than the New Jersey Supreme Court has adopted a bright-line rule mandating post-conviction review in every capital case, even when the challenge is over the objection of the death-sentenced inmate''). In light of our clear precedent to the contrary, we see no reason to join the New Jersey court in its isolation.

On the basis of the foregoing analysis, we conclude that § 53a-46b (b) does not create a nonwaivable right to mandatory sentence review by this court of any and all claims that the death sentence was ''the product of passion, prejudice or any other arbitrary factor,'' regardless of the time and manner in which the claim was raised.[7] In other words, the statute does not require this court to impose a moratorium on the execution of death sentences whenever an unproven claim of systemic arbitrariness in the administration of the death penalty scheme is raised.[8] Nor do we believe that we should do so in the exercise of our supervisory powers.

Over the course of almost twenty years of litigation, Michael Ross has never raised the claim that his death sentences for the brutal murders of four young women were the product of systemic racial bias. Indeed, he has expressly stated on the record during a competency hearing in the underlying criminal proceedings that he ''[does] not wish to be a part of [the consolidated litigation] . . . .'' We have no reason to think that he or his counsel, in fact, believes that his sentence was the product of such bias. We have concluded that § 53a-46b did not bar him from waiving this claim at trial, thereby waiving mandatory sentence review of the issue by this court. Similarly, § 53a-46b does not require him to raise this claim in a habeas proceeding or to share in the legal effect of a proceeding brought by others.[9] Accordingly, we conclude that § 53a-46b does not require this court to stay Michael Ross' execution until the completion of the consolidated habeas litigation. We disagree, therefore, with the conclusion of the dis-

senting justices that the motions to stay filed by the plaintiffs in error should be granted.[10]

In this opinion SULLIVAN, C. J., and VERTEFEUILLE and FOTI, Js., concurred.

* January 27, 2005, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] We hereinafter refer to Michael B. Ross as Michael Ross.

[2] We hereinafter refer to Dan Ross and the office of the chief public defender collectively as the plaintiffs in error. We hereinafter refer to the office of the chief public defender as the chief public defender.

[3] General Statutes (Rev. to 1987) § 53a-46b provides in relevant part: ''(a) Any sentence of death imposed in accordance with the provisions of section 53a-46a shall be reviewed by the supreme court pursuant to its rules. In addition to its authority to correct errors at trial, the supreme court shall either affirm the sentence of death or vacate said sentence and remand for imposition of a sentence in accordance with subdivision (1) of section 53a-35a.

''(b) The supreme court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor . . . .

''(c) The sentence review shall be in addition to direct appeal and if taken, the review and appeal shall be consolidated for consideration. The court shall then render its decision on the legal errors claimed and the validity of the sentence.''

[4] We note that the dissenting justices makes no argument that waiver of postconviction relief is constitutionally prohibited.

[5] We find the reliance of dissenting justices on the existence of statutes from other states limiting sentence review to proceedings ''on the record'' in support of the proposition that this court is required to consider matters not in the record to be misplaced. Nothing in § 53a-46b suggests that this court may reverse a death sentence on the basis of a claim that is not supported by the record. Rather, our cases clearly establish that, if a claim was not made before the trial court and there is no record for review, the claim is waived. Such a claim *may* be brought in a habeas proceeding, but the habeas court may conclude that the claim is procedurally barred, thus precluding any further review by this court. Nor do § 53a-46b or our cases suggest that, if the habeas court does not dismiss the claim, there is mandatory, nonwaivable review by this court if the court ultimately rules against the defendant.

All further references in this opinion to § 53a-46b are to the 1987 revision unless otherwise specified.

[6] We note that, in conducting its sentence review, the court in *Dodd* considered the mitigating nature of the evidence that had been presented. *State* v. *Dodd*, supra, 120 Wash. 2d 25. Similarly, in Michael Ross' case, this court conducted its mandatory review of his sentence on the basis of the record before it. See generally *State* v. *Ross*, 269 Conn. 213, 849 A.2d 648 (2004). The fact that Michael Ross chose not to present evidence of systemic racial bias does not somehow render that review defective.

[7] Although we recognize that the dissenting justices go to some lengths to limit their argument that claims that the death penalty was the product of an arbitrary factor are nonwaivable to claims that the administration of the death penalty is infected by racial bias, we do not believe there is any principled line to be drawn between such claims and other claims of arbitrariness. We cannot conclude, for example, that a sentence that is the product of racial animus or racial favoritism is inherently more arbitrary than a sentence that is the product of prosecutorial misconduct. Cf. *McCleskey* v. *Kemp*, 481 U.S. 279, 315–17, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (eighth amendment claim that sentence impermissibly rests on irrelevant factor of race easily could be extended to apply to claims based on other minority groups, gender, race or gender of defense attorneys or judges, defendant's facial characteristics or physical attractiveness of defendant or victim). Accordingly, adoption of the reasoning of the dissenting justices would render nonwaivable virtually *any* claim that a death sentence is ''the product of passion, prejudice or any other arbitrary factor''; General Statutes (Rev. to 1987) § 53a-46b (b); regardless of when or how it was raised. This would be entirely inconsistent with our precedent and would render our death penalty scheme unworkable.

We further note that the dissent of Justice Norcott states that, ''[i]f the defendants who have chosen to participate in the consolidated habeas pro-

ceeding are successful, it will be because they will have proven that the administration of the death penalty statutes as applied violates the equal protection rights guaranteed to all defendants by our state constitution . . . .'' The specific claims being raised in the habeas proceeding are not before us in this case, however. We note that § 53a-46b was intended to implement the eighth amendment requirement for a reliable and nonarbitrary death sentence. See *State* v. *Webb*, 238 Conn. 389, 494–505, 680 A.2d 147 (1996). The participants in the consolidated habeas proceeding could prevail by showing that racial bias creates arbitrariness in violation of the eighth amendment without establishing any equal protection violation. Thus, the racial bias claim does not necessarily implicate constitutional protections that are not implicated by other claims of arbitrariness.

[8] We express no opinion as to the merits of the consolidated habeas litigation. We note only that, as of yet, systemic racial bias has not been demonstrated. We further note that, even if it is ultimately determined that systemic racial bias exists, that will not necessarily mean that the death sentences of the participants in the litigation will be reversed. See *McCleskey* v. *Kemp*, 481 U.S. 279, 292–97, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (statistical evidence relating to imposition of death sentence does not constitute proof that discrimination existed in defendant's particular case).

[9] As we noted in *State* v. *Ross*, supra, 272 Conn. 580 n.2, Michael Ross ''has not 'waived' his right to further legal proceedings in the sense that he has forfeited the ability to exercise that right in the future. The parties [in the underlying criminal case] are in agreement that [Michael Ross] may exercise his right to file a petition for a writ of habeas corpus at any time and that, if he does so, the execution will be stayed.''

[10] The dissenting justices agree that the writs of error filed by the plaintiffs in error were properly dismissed but states that they would grant the motions to stay. If the writs of error were properly dismissed, however, the motions to stay clearly are moot. Accordingly, we believe that the action proposed by the dissenting justices more properly should be characterized as the entering of a sua sponte stay of execution. We further believe that, because our dismissal of the writs of error in this case voids the underlying habeas actions, the arguments of the dissenting justices more properly should have been made in response to our opinion on the writs of error in the underlying criminal case. See *State* v. *Ross*, supra, 272 Conn. 577.