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Procedural Default in Capital Cases

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Before I begin my remarks, which focus on these recommendations, let me echo something that Dean Lefstein mentioned yesterday, and it was picked up somewhat in Professor Zimring's eloquent address to us. Even though this document might not become a basis of model legislation, or have a snowball's chance in hell of being passed in Massachusetts or anyone else, it does remind us, in states that have the death penalty, of severe shortcomings in our processes. And it reminds those states in the Midwest—Iowa, Minnesota, Michigan, Wisconsin—who might want to think about adopting the death penalty that there are some serious problems and some things they really have to think over. That is going to be one of the key contributions, not only of the Report, but of this conference which has contained some marvelous comments and ideas.

I think it was during Professor Zimring's presentation that he waved a document at us which was a thick report, produced by the Criminal Law Study Commission here in Indiana, on a charge from the late Governor Frank O'Bannon, after the Illinois experience, to see whether there is a danger of executing innocent persons in Indiana. It was a very narrow charge. And the commission that studied this issue came up with the conclusion, basically, that everything is peachy keen in Indiana. We haven't executed anybody who was innocent, and given the multiple levels of review that are available, the wonderful provision of counsel, even through the postconviction process, there really isn't any danger of that either.

They did come up, however, with two recommendations. One, let's raise the age of execution eligibility to eighteen, and, two, let's make the jury responsible for imposing the death penalty, which is now constitutionally required anyway. They also found one interesting fact: extensive statistical analysis concluded that the death penalty process exceeds the cost of life without parole by 13–17%. But they decided not to make any recommendations based upon that finding.

Now there were some minority members on that Commission that wanted to discuss the kinds of recommendations that we've been looking at here. But the Chairman, in essence, said, "Those are out of order. We're not going to discuss those." They said, "We'd like to file a minority report, where we can detail these kinds of concerns." And he said, "No, you can't file a minority report." So, in essence, that big document was nothing but a whitewash, and I think we haven't had any meaningful study of this problem in Indiana. And God knows there are problems. I see them all the time in situations with which I am involved, and I talk to others about them.

I'm going to limit my comments to recommendation number nine and the first paragraph, which really doesn't deal with the post-trial process, but which deals with pretrial screening. It provides that the trial judge should—I'd rather that be "must"—the trial judge should examine carefully the aggravating circumstances that were identified by the prosecution as the basis for the capital murder prosecution. In other words, a pretrial screening of aggravating circumstances, as opposed to pretrial screening of the basis for a murder charge, which takes place in evidentiary preliminary hearings or grand jury proceedings.

I did some research on this some years ago, because I had a case involving this very question out of Indiana. To take the other extreme, in Indiana, there is virtually no screening whatsoever of the prosecutor's decision to charge murder as opposed to the death penalty. I mean, no screening whatsoever on death penalty aggravators. The only screening that is available for any felony charge in Indiana, including murder, is an ex parte judicial determination of probable cause, premised upon an affidavit submitted in support of an arrest warrant. So a person could be arrested for shoplifting and the prosecutor could say, "Well, gee, you know, this guy also was involved in a murder down the street. So let's charge him with that, and then the death sentence follows along." There is no review of that whatsoever.

Now, I'll give you an example from a case I handled some years ago. This involved the killing of a white police officer by two African-American males. The police officer was forcibly entering their home to serve an arrest warrant—by the way, the police officer was illegally entering that home, because he had not properly announced his purpose and his authority—and he was shot and killed in the process. That happened in the predawn hours of a December morning. By the time the 6:00 o'clock news was aired that night, the prosecutor announced his decision to seek the death penalty for these two individuals, without any investigation as to what really happened. Of course,

after that, the investigation was skewed entirely toward establishing the prosecution's theory. We raised that issue on appeal through the federal courts, but were shot down all the way. That is why I think this is such an important provision.

Now, it doesn't say anything about the form this inquiry should take. That could be achieved in a variety of ways. My preference would be for an adversarial preliminary hearing, where defense counsel can get in there and really test whether these aggravating circumstances are met.

Again, there is a similarity between the provisions in the Council's Report and the circumstances of the Indiana case I mentioned. One of the aggravating circumstances in that case was the murder of a police officer. In this instance, the question was whether the persons knew this was a police officer they were shooting at the time. And that was an important issue that came out in the trial, although inadequately addressed. That would have been a very apt subject for preliminary inquiries or evidence to support the knowledge that who they were shooting at was this police officer. Under the Massachusetts recommendations, that inquiry is more intense—you have to say not only whether he knew he was a police officer, but was this for the very purpose of obstructing an investigation? So that could be a very important feature of a preliminary exam.

It could also take the form of a prosecutor's offer of proof supported by affidavits, for example, or simply an oral offer, whether it be ex parte or whether that would be available to the prosecution. But nonetheless, I think this is an important check on the prosecutor's discretion, which is already limited in the Report. So it's a double protection. But there are states out there that have no protection whatsoever, so I think this is a very important consideration.

The second thing I want to remark on, in terms of my agreement with the Report, is the provision that appellate counsel be someone other than a lawyer who has been involved in the trial process. It is typical for the lawyer who does the trial to take the appeal, and that's understandable because you are familiar with the record. But there are occasions, probably in most cases, where lawyers, no matter how good they are, screw up at some point during the course of the trial. And it's very hard to go to the appellate court and say, "I'm sorry, I screwed up. Help me get out of this mess." Or, the alternative, and the temptation, is to bury it; not mention it, and hope it will go away. Hope that you get reversed on other grounds, and therefore your screw-up will not be publicly aired. So, the provision of appellate counsel who was not trial counsel is very good.

The last thing I want to talk about is the procedural default issue. Just going back a moment, this is such a well-crafted process that if it's followed all the way through, and everybody does their job, the appellate lawyers in Massachusetts doing death penalty appeals are going to feel like the Maytag repairman; they are not going to have anything to do. But we all know, no matter how carefully the process is laid out, judges, lawyers, and prosecutors screw up. And the more procedural steps that you have in a process, the more chances of screw-up. So as an appellate lawyer, I look at this and I say, "Hooray." Now, in addition to the kinds of trial appeals I normally would have, I have all of these procedures that I can examine, and perhaps attack, as not being adequately provided in this particular trial. So it could expand the grounds for appeal.

I have a couple of points on procedural default. That is one of the biggest problems we face in the appellate and postconviction process. You look at a record, and as you're reading through you say, "Holy cow, here is a dead-bang *Doyle* violation." That

is, the prosecution mentioned the fact that my client's codefendant made a statement that incriminated him, and that codefendant has not testified. The defense counsel had no chance to crossexamine that witness. It is hearsay and denial of confrontation. Or, this prosecutor made an inflammatory and improper argument to the jury, depriving the defendant of a fair trial. But no objection; no motion to strike.

And so, when you try to raise that on appeal, what you get from the other side and from the courts is, "Well, that may be bad, that may be terrible, but you didn't raise the objection in the appropriate way. Therefore, it's procedurally defaulted, and you can't argue that unless you can meet some other very narrow exceptions." That carries on into the federal process as well. So you've got a constitutional violation that wasn't properly preserved by the lawyer, but you can't argue it because of procedural default.

Now, I notice that in the Report you make a distinction between trial errors, i.e., those kinds of errors that may occur during the trial process, and those that are originally made in the sentencing process. Procedural default doesn't apply in the sentencing stage, but does still apply in the trial stage. But, given my defense orientation, I'd rather procedural default be done away with entirely, and you can revert to the old federal rule of "deliberate bypass." Seems to me that is a workable rule at the state level.

But there are carryovers. Let me illustrate this by the closing argument example that I suggested. Again, in this case of the police killing in Indianapolis, during the closing argument in the guilt phase, the prosecutor violated every rule with respect to a proper closing argument, including making overt racial references to the defendants. Here is the prosecutor using racial references—in effect, telling the jury, "I'm letting my racial biases creep into this process; it's okay if you let yours creep into this process." There was no objection, of course, either after the argument or during the argument, and the issue was procedurally defaulted through the whole process.

Now, under the Massachusetts rule, that might be procedurally defaulted as a basis for reversing the conviction. But I think there is a carryover in cases like that where you get into the sentencing process. This very well might be the straw that tips the scale in favor of the death sentence for some improper, almost substantive reason. That's the kind of fairness aspect I think you are talking about here; something that is basically procedural, but affects the substance of the decision that is being made. So this carryover, I think, will apply here in cases like that.

That is a very good provision; I wish we had that in Indiana at the time of my case. And that will apply without regard to whether it's actually raised in the sentencing process before the judge, because it could also be raised on appeal. Then it would be preserved for federal habeas corpus. The federal habeas corpus court could come in, as they did in my case, and say, "Well, you procedurally defaulted, but because the merits were allowed to be argued in the state court, we can consider it."

So I commend the Council for attacking this issue of procedural default. I wish you had gone further, but it is definitely a step in the right direction.

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