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Consistency, Proportionality, and Substantive Judicial Review in Capital Sentencing

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CONSISTENCY, PROPORTIONALITY, AND SUBSTANTIVE JUDICIAL
REVIEW IN CAPITAL SENTENCING

H. Geoffrey Moulton, Jr.

I need to start off with two disclaimers. First, it may be unnecessary to say, but the views I express here are my own and not necessarily those of the Department of Justice. The second disclaimer is that my professional experience with the death penalty is really quite limited. In the Eastern District of Pennsylvania, where I work, we have had two capital cases since *Furman* [*v. Georgia*, 408 U.S. 238 (1972)], both in the last three years. The first case was tried a couple of times and resulted in a temporary holding that fingerprint evidence is not admissible in federal court, and then resulted in a life sentence. So we obviously have no postconviction review issues in that case. The second case was indicted about a year ago and has yet to go to trial. It's scheduled for the spring.

Despite that limited practical experience and the fact, I think, that the Council's proposals are much more likely to have an impact in other states than they are on the federal system, I'm enormously interested in the project and I thank Professor Hoffmann and the Law School for inviting me to participate. I also want to thank Governor Romney and the Governor's Council for doing a great service, I think, for everyone who is interested in the death penalty. Whether you are a strong supporter of the death penalty, an abolitionist, or a respectful agnostic, you have reason to hope that the Council's work is going to have an impact and will certainly enhance both the nature and quality of the debate on the subject.

Before I turn to the proposals for postconviction review, I would like to begin with a related general observation. I think that the Governor's Council has done a superb job of identifying and then addressing most of the most significant non-abolitionist objections to the death penalty, although we've heard in the last two days that addressing the problem doesn't necessarily mean you've solved it. But, I think you've addressed them quite well.

The Council has worked very hard, and I think successfully, to blunt the set of very legitimate practical objections to the death penalty that center on the risk that undeserving people, either people who aren't guilty or people who don't deserve the death penalty, might be executed. And we've learned in the last couple of days that the proposed scheme effectively and sharply limits the crimes eligible for death. It also notes the problem of aggravator creep, although I don't think it solved that problem. It addresses the tragically pervasive problem of underqualified or unqualified defense counsel; although it doesn't describe the funding mechanism it's going to create to handle that problem. And it includes several factors, including ones that we're talking about today, that are designed to make sure that we are really sure that the defendant both committed the crime in question and that the defendant in some sense, a moral sense, deserves the death penalty.

In short, the Council has gone very far down the road of reducing the risk of what Professor Lillquist described yesterday as false positives. One of those proposals that I think is quite problematic is the requirement of strongly corroborative scientific evidence. I guess I should give another disclaimer and that is the case of a death penalty prosecution pending in our district. We don't have any strongly corroborative scientific evidence. It's a witness retaliation murder and we've got great evidence. But,

we don't have any scientific evidence. So perhaps that colors my criticism of that provision.

There are other false-positive reducing proposals that I think are good ideas and I think that probably ought to be implemented both inside and outside the death penalty. One of those is the development and use of appropriate instructions on how to evaluate eyewitness testimony and how to evaluate accomplice testimony. If they're properly crafted, and again, the devil is in the details, as someone said yesterday, I think those are instructions that ought to be used in ordinary criminal cases as well as in capital cases.

My central question about the entire project is whether the Council has tried so hard to appease critics of the death penalty that it has created a system in which it will be almost impossible to obtain a death sentence. To put it differently, has the understandable and legitimate fear of overinclusive application of the death penalty led to the creation of a system that is dramatically underinclusive to the point of rendering the prospect of the death penalty largely illusory. That's not an entirely rhetorical question, although my answer would be yes, or at least probably, or maybe more hopefully, I hope we'll have the chance to see.

That doesn't mean I'm a supporter of wide application of the death penalty or even a supporter of the death penalty. I'm going to take the Council's prerogative and keep that a secret. But what's not a secret is my view that even if it turns out that there is the political will in Massachusetts to pass this set of proposals, I think the death penalty there will turn out to be very much more symbolic than real. There are lots of reasons why I hope that does happen. One of which is, I think some of us would like to get back together here at Indiana to watch Professor Zimring move the nickel across the campus with his nose.

But in any event, turning to the postconviction proposals, I certainly believe that there is a place for substantive appellate review in criminal sentencing including in capital cases. I work in the federal system where substantive appellate review of sentences is a daily fact of life. It is the principal grist of our appellate practice. Or at least it will be until the Supreme Court rules on *Blakely* [*v. Washington*, 124 S. Ct. 2531 (2004)] and *Booker and Fanfan* [*United States v. Booker*, 125 S. Ct. 738 (2005)]. Substantive appellate review of sentencing can be and is quite useful. Over time a body of law develops around each of the guideline provisions, or has developed around each of the guideline provisions, and that body of law helpfully guides sentencing judges and other system participants, and promotes the goals of consistency and rationality in sentencing.

I understand from Professor Hoffmann's comments yesterday and today that the Governor's Council considered and rejected, or at least in appearance rejected, one form of substantive appellate review and that's comparative proportionality review. The Council accepted Professor Hoffmann's argument, I gather, that that sort of review is hopelessly flawed. I don't pretend to know enough to know whether that was a good call or a bad call. But at least comparative proportionality review would have or could have given judges some guidance on how they are supposed to review death sentences. It will be interesting to see, particularly in light of Mr. Meade's comments, in Illinois and Massachusetts, whether comparative proportionality review actually becomes the mechanism by which judges choose to review capital sentencing, because it doesn't appear that they're given much else in the proposal in Massachusetts.

And what the Council proposes instead of comparative proportionality review is to allow the trial judge—Professor Hoffmann focused on appellate review; my concerns are mostly focused on the trial judge—in the first instance, and then the Supreme

Judicial Court later, to decide whether or not they agree with the jury's decision to impose death. I learned last night that the trial judge's decision to reject death may be reviewable by the Supreme Judicial Court. It still appears to me that there are no real meaningful standards offered to govern the question of whether judges should uphold the death sentence or not.

Again, I'm talking about cases that qualify for death both in terms of culpability standards and in terms of evidentiary standards. I assume that there will be no problem when appellate review endeavors to correct an erroneous determination that the murder in question qualifies for death or that there was adequate corroborating scientific evidence. I think that would work just fine. But that's not what we're talking about. We're talking about the gut check review by the trial judge first and the Supreme Judicial Court later of the decision to impose death by the jury.

I think it's worth quoting the relevant language of the proposal, which I recognize the Council largely inherited from existing Massachusetts law. Trial judges are directed to set aside the death sentence, "Whenever the trial judge finds the death sentence to be inappropriate on any basis in fact or law, including the trial judge's own disagreement with the exercise of capital sentencing discretion by the jury." In case anyone didn't get the point, the Council notes this language should be broadly construed. I'm not quite sure how else you can construe that language. Assuming a jury-imposed death sentence survives the trial judge, then the Supreme Judicial Court is instructed to set aside the sentence whenever that Court finds, and again I'm quoting, "The verdict was against the law or the weight of the evidence," and we're okay so far, "or for any other reason that justice may require." Again, the Council says that phrase includes situations where the only reason to set aside the death sentence is that the Court simply disagrees with the exercise of capital sentencing discretion by a jury.

To my mind, a likely consequence of such a system, particularly in the trial court, is to undermine both consistency and rationality in capital sentencing with the only possible benefit being the reduction of false positives through the raw reduction of capital sentences overall. We will reduce false positives because judges will throw out death sentences, and as a result, we may feel better when we go to bed that night. But the question is whether that benefit, the raw reduction of capital sentences overall, thereby reducing some measure of false positives, is then worth the cost?

To answer that question we have to remember what sort of false positives we're protecting against here in the Massachusetts system. I'm not talking about Indiana or anywhere else. We have a defendant who has been found guilty of murder; the murder in question was found to fit within the narrow band of capital murders defined by the statute, assuming we don't have aggravator creep; the conviction was based in part on strongly corroborative scientific evidence; and the jury had no lingering or residual doubt. So the only real question is whether the jury got it right in terms of weighing the defendant's specific mitigators. How do we know whether the jury got it right? Well, I guess Professor Hoffmann and Justice Harlan said we don't and we can't know whether the jury got it right. We're just giving a couple of other bodies the opportunity to make their own call.

I think it's a system that, as constructed, does not allow juries and judges in subsequent cases—I guess just judges; juries we're going to try to keep this a secret from—but juries and judges in subsequent cases aren't going to get much meaningful guidance from this substantive review about how to exercise capital sentencing discretion. To me the benefit of substantive appellate review is not to just to get it right in the particular case, but to give guidance in the future so we get it right in future

cases. This proposal only has half of that. And at the trial level I don't think it even offers that help.

Now, maybe Massachusetts could or will or maybe even already does require a statement of reasons anytime a judge or a court sets aside a capital sentence based on disagreement with the jury's choice. If that were not the case, then I would certainly recommend that there be a required statement of reasons. Then perhaps there might develop a sort of common law governing the exercise of capital sentencing discretion that would guide judges in the future given the nature of the standard as articulated, though I'm not optimistic that even if we required a statement of reasons that we would develop helpful guidelines. Unless perhaps it just evolved into comparative proportionality review.

A careful and narrowly defined set of capital-eligible murders, which I think we have here in this Massachusetts proposal, has a number of purposes. One is to ensure that only those deserving death get death. Another purpose is, or ought to be, to reduce the chance that those deserving death manage to escape it. In other words, a narrow set of aggravators addresses the related problems of overinclusiveness and underinclusiveness. By allowing judges, in particular trial judges, to set aside capital sentences without meaningful standards to guide them, I think we are promoting arbitrary underinclusiveness. And that's bad for the legitimacy of the death penalty. It's probably bad for the criminal justice system as a whole.

I don't pretend to know much about the trial bench in Massachusetts, but if it's much like that in Pennsylvania or even the Eastern District of Pennsylvania in federal court, the prospect of getting a jury sentence of death set aside will vary wildly depending on who the judge is. And I know Professor Schornhorst, if he were in Massachusetts, the first thing he's going to do is find out who the judge is. And it's going to make a big difference to him as to whether the death sentence is going to stand or not stand.

It may be that the Supreme Judicial Court can afford a greater measure of consistency and maybe impose some discipline on trial judges. If they're going to review trial judges' disagreements with jury imposition of the death penalty, I'm not sure how they're going to do it. But as far as I can tell, the review mechanism is not set up now to create a coherent set of guidelines that will steer future exercises of discretion. Instead, it looks to me like a mechanism designed to reduce false positives using the blunt instrument of arbitrary reduction of death sentences.

I just have two other comments. My other comment about recommendation number nine is a positive one. And that goes back to the role of the trial judge in advance of trial. Giving trial judges the ability to weed out cases that are not legitimate capital cases as early as possible in the process makes good sense, but Professor Schornhorst and I might disagree about what that proceeding ought to look like. There is no reason to continue an extraordinarily costly process down the road when you can make judgments early in the process and take it out of the capital stream. Although, again, if the Attorney General in his or her oversight role does a good job, there probably won't be that many cases in this sort of system where it's necessary to dismiss a case that is charged capitally inappropriately.

As for recommendation number ten, which calls for creation of a Death Penalty Review Commission, I think that's a great idea. Although, again, under the totality of the Commission's proposals, I don't think that Commission is going to have very much work to do. Thank you.
