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## The Value of Procedure

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## THE VALUE OF PROCEDURE

*Stephen R. Creason*

I also should start with a disclaimer. I don't speak for the Attorney General of Indiana or his office; while I do perhaps in court, not here. And any proposals I might suggest should not be interpreted as something that the Attorney General would like to see implemented here in Indiana.

My first question when reading recommendation number nine is: What exactly does the substantive review mean? I assumed that there was a body of case law, and some of it has been explained today. But what strikes me about the language in the statute is that it can mean almost anything that a particular judge wants it to mean. We all know that rules, when interpreted by courts, are always subject to reinterpretation. That can work for or against a particular defendant or the prosecution. As legal trends change the implementation of the death penalty in Massachusetts may actually cause a widening of that rule.

My point is, especially for other states who might be considering it, such a statute really depends ultimately on what the court that is going to be interpreting it wants it to mean. The intent of the legislature is often times of secondary importance. In Indiana, there is no legislative history. So the court guesses, ultimately, on what the intent of the legislators was. That would make it difficult for parties to really understand what substantive review is and what it should be and for the court ultimately to use it.

Regarding procedural default, procedural default waiver rules are tremendously important in the administration of justice. I believe that throughout our deliberations this weekend oftentimes they've been cast in a prejudicial light, as if they actually hinder justice. It is a given—sometimes they may. But more often than not, they actually allow courts to do their job. And they exist for good reasons, for example, it both facilitates full and fair trials in the first place and it facilitates an effective appellate review. If an issue wasn't preserved, wasn't discussed, and the evidence not flushed out regarding the issue at a trial level, an appellate court is really guessing about what is the accurate decision to make. If what we're concerned about is increasing accuracy in substantive review, ultimately that has to be done in a trial court.

An appellate court is no more accurate than any other individual, especially when you're looking at a cold record. In fact, I would suggest oftentimes they are more inaccurate. Preserving issues and making a record is essential to accuracy, and it really makes meaningful substantive review possible. Without it, I don't think that one can really say that they have done meaningful substantive review without having first had the parties truly discuss the issue and had a trial judge make some preliminary rulings on it at the very least.

Also, the procedural default rules create an incentive for parties to litigate issues at the first, and, frankly, the most important, opportunity, which is at trial. Without the procedural default rules it seems to me that a defendant can really hide an issue and create one which the state has no opportunity to respond to except for the first time perhaps in briefing or an appellate oral argument. That's litigation by ambush. And that is not a fair trial. It is not a fair appellate proceeding. The state could theoretically do the same to a defendant. That seems to me to be extremely troublesome if we're looking for accuracy; if we're looking at what really happened and whether or not the person is innocent or not. If that's what we're looking for, it seems to me we need to keep these things in mind before we toss the baby out with the bath water.

Of course, none of this is to say that procedural default rules are entirely good. In fact, I would agree with many people who say that proceduralism for the sake of proceduralism is actually a hindrance to any sort of criminal justice system. I think we are moving away from that. States such as Indiana have exceptions to every waiver rule. In the federal system, it might be plain error. In Indiana, it's fundamental error. And you actually have to show that the result of the trial would likely be different. And it seems to me that if a defendant, or the state for that matter, does not complain in the first instance he needs to show that indeed his trial would have been different or likely would have been different. And, of course, that is always subject to interpretation by the judges you have; and ultimately it's a human process.

As for whether or not it undermines a jury's sense of responsibility, I think it's naive to say that juries don't know about the long, drawn-out death penalty appeals process. Everyone knows about it. I think it is dangerous territory to start telling a jury what it really is doing. Because it may not be, in fact, what they are doing. If they're not the last role, if they're not the last fact finders in the case, and should they be treated as such, should they then be told, even in a blatant lie, that they are? These are questions I don't necessarily have the answers to.

One of the questions that Professor Hoffmann proposed we should consider is whether or not substantive appellate review would create an explosion of litigation. Many cases in Indiana are ancient in terms of criminal litigation. It seems that the expansion of death penalty appeals couldn't be carried any further. And, of course, in nearly every case, especially those that end in appellate litigation, clever and very competent defense attorneys prove me wrong. And Professor Schornhorst pointed out that every one of these review processes are yet another grounds for appeal. That's not a problem in the sense that I think that defendants shouldn't have the opportunity to raise every issue at least once. They have the opportunity now to raise them many more times. But, it is interesting that from a defense attorney's perspective, everything is something that can be used to set aside the death penalty. That too should be kept in mind for any state that is looking at reviewing their death penalty system.

I think the proportionality review also has a problem with scale. Proportional to where? Is it locally? Is it regionally? Is it at a state level? In a state like Massachusetts it would be quite easy, I think, to do a proportionality review. There are only, I believe, seven or eight district attorneys. In Indiana there are ninety-two counties. And in Texas there are well over a hundred, almost 200, I think. In California, I'm told, the northern culture is quite different from the southern culture. And it seems to me that you can't do a national proportionality review.

So, inherent in the proportionality review question is the question, "proportional to what?" If a crime in Indianapolis is, as prosecutors tell me, often times yet another routine murder, or in Gary, Indiana, which for a long time had the highest murder rate in the nation. But, here in Bloomington the same crime would be a truly appalling and shocking murder; one that would demand a more severe sentence. Perhaps that should not be the way that we decide whether or not someone is eligible for the death penalty. But in whether or not it is appropriate for an offender, it seems to me to be quite relevant.

Another proportionality issue relates to charging; it seems to me that some prosecutors will never charge the death penalty—I know this for a fact. It happens more often than you think. Sometimes it's for personal reasons. Sometimes it's for political reasons. And sometimes it's because there is just no way a single prosecutor with a part-time deputy could handle such a case. But you can't have consistency and

proportionality review in a state where you have some places that will charge the death penalty perhaps too often, and you have other places that would never charge the death penalty even for the most heinous crime. I'm not an advocate for a statewide prosecutor who makes the decisions on the death penalty across the board. I believe such decisions are better left in the hands of local prosecutors. But it is something that seems to me to be left out of, and not discussed in the Report.

Finally, what is inappropriate in the context of an "appropriateness" review? In Indiana we have appropriateness review for every sentence. It's a recent addition to our case law (and one which has left my office wondering)—we don't even know in the Court of Appeals of Indiana who the judges in any given case will be; there are blind panels. You don't know until you either have oral argument or a decision.

Also, what attorneys really end up doing if they're trying their sentencing cases to an appellate court, who is going to be reading something in black and white on a piece of paper, they don't see the evidence or the witnesses. They don't really know what they're judging. Sometimes, for gross inaccuracies, appropriateness review can be accurate. But it seems to me that for the majority of cases it's going to be very difficult to determine what is appropriate and what isn't. And this compounds the comparative proportionality review process, and makes that even more inaccurate. I think these are things that any state or any legislature who would be considering such a thing should think about.