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Open Discussion: Post-Trial Review

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OPEN DISCUSSION

MEADE

I'm not sure if there was an understanding that 33E review is confined to sentencing issues. It's not. It's trial issues as well. Now, I have some good news for Mr. Creason, and some bad news for you, Professor Schornhorst. The First Circuit has held that the Supreme Judicial Court's decision to review an unpreserved claim, to determine whether a miscarriage of justice has occurred, does not waive the procedural default issue—and I agree with what you were talking about, Mr. Creason.

Procedural default is a very important aspect of the state criminal justice process. It's important to respect the rights of states to correct their own errors and have an opportunity to see those issues for the first time. And it's an important principal of federalism.

In *Coleman v. Thompson* [501 U.S. 722 (1991)], I think Justice O'Connor starts her opinion by saying this is a case about federalism. And that's exactly what it is. I think that's the type of respect that the First Circuit showed when they made that decision.

More recently, on another aspect of 33E that I didn't discuss, after you've had your front-loaded, substantive review, it's more difficult for those who have been convicted of first-degree murder to come back a second time. They have to ask permission, basically, of a single Justice of the SJC for leave to appeal denials of future motions for new trial. And they have to raise issues that are new and substantial. That's a phrase right out of the statute.

And the single Justice acts as a gatekeeper. And he or she determines whether or not the issue raised in the motion for new trial is new and substantial. And they're conjunctive requirements. If he or she decides that they are not, that's it. There is no appeal from the gatekeeper's denial. And a determination that those issues are not new and substantial (or at the very least, not new), the First Circuit has also determined, is a procedural default of the rule. So, it's not as open-ended as you may have thought.

HOFFMANN

Well, I just want to further clarify because some of the students in the crowd may not understand the interaction of these comments. What Mr. Meade just indicated is that exercising substantive review, essentially without regard to procedural default, in the state court system, is not necessarily going to waive the right of a state to assert procedural default when the case goes into the federal system. The recommendation, as outlined—and this is something that Professor Schornhorst noted and I just want to highlight it again—we do not propose, or do not suggest, the elimination of procedural default entirely in the state system, either. What we are saying is that the substantive review of the case—that particular kind of special review that we're all talking about—should be exercised without regard to procedural default.

So in other words, the appellate court is supposed to look at the merits of the case without regard to whether the defendant defaulted some procedural issue or something like that.

Mr. Meade also just pointed out that that's unlikely to trigger additional habeas review, until and unless the habeas courts adopt their own form of substantive review. The habeas courts, of course, could themselves someday choose to exercise their Eighth Amendment right to engage in substantive review as well. And those who know me know that I wrote an article suggesting exactly that in the *Texas Law Review* about four years ago or so. [Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 *TEX. L. REV.* 1771 (2000).] It actually was the genesis of the idea that eventually led to the state-level Fundamental Justice Amendment in Illinois.

These are very smart people on this panel, and they have got it almost exactly right, in terms of what we on the Council thought were some of the issues that grow out of these particular recommendations. As both Mr. Moulton and Professor Kamin quite accurately suggest, the kind of substantive appellate review that we recommend in this Report is unlikely to develop into any kind of common law of the death penalty. And that's the way we wanted it. That was the deliberate choice that we made.

In our view, we did not think that this would necessarily mean that whatever reduction of death sentences would occur would be arbitrary. Because, after all, it's not as if the appellate judges are going to exercise this authority by rolling dice or flipping coins. They're not going to randomly select the cases they reverse. It really comes down to the question of whether, in general, such substantive decisions about the merits of a death sentence are better made by legal rules or through the exercise of sound discretion. And you hope it will be by sound discretion. We chose the path outlined by Justice Harlan—it's a path that is very much supported by what I think remains, to this day, the most brilliant article I've ever read about the death penalty. The article was published in the early 1980's, in the *Supreme Court Review*, entitled *Deregulating Death*, by Bob Weisberg. Professor Weisberg, no friend of the death penalty, nevertheless acknowledged, in his view, the fact that using rules may not be the best way to make these kinds of substantive decisions. [Robert Weisberg, *Deregulating Death*, 1983 *SUP. CT. REV.* 305.] We use rules to make procedural decisions all the time; it's a given that procedural issues should be governed by rules. Bob Weisberg made the same point in his article that Justice Harlan made: that on the substantive death sentencing decision, it's not at all apparent that you get better, less arbitrary results from rules than you would get from sound discretion.

And so, we chose that path in the way we outlined this substantive review power. And everything you said about that was, I think, exactly on the money.

KAMIN

What's interesting, though, is that Harlan and Weisberg were both talking about decisionmaking by jurors.

HOFFMANN

They were. You're exactly right. We have now given juries a kind of mixed message that says: "Well, you have discretion, but we're guiding that discretion with something that looks like rules—these aggravating and mitigating circumstances." And there has been a lot of literature over the years about whether that mixed message has, in fact, undermined the quality of decision making by juries, because they're kind of in this netherworld where it's neither one nor the other. But in any event, we did make the deliberate choice that on the substantive level, not the legal procedural level, this review would be done discretionarily rather than by the development and application of rules.

SCHORNHORST

Professor Hoffmann, may I exercise emeritus professor prerogative to address the students?

HOFFMANN

You absolutely may.

SCHORNHORST

The importance of knowing and complying with procedural rules cannot be overemphasized. And I hope you can take this with you back to the classrooms and not fall asleep during these procedural discussions. On August 20th of this year, just a few weeks ago, the Seventh Circuit Court of Appeals decided in the case of *Gregory Johnson v. Daniel McBride* [381 F.3d 587 (7th Cir. 2004)], that after exhausting state remedies, an application for federal habeas corpus was dismissed because counsel filed one day late, beyond the statute of limitations provided by the Antiterrorism and Effective Death Penalty Act.

The deadline was June 28th. Counsel filed her petition. Not filed—put it in the mail on June 25th, ahead of the deadline. It didn't reach the Court of Appeals Clerk's Office until the 29th of June, one day late. Out of court. No federal habeas corpus review. No issue preserved. Bang. Now, that's procedural default with a vengeance, and it has nothing to do with accuracy.

ZIMRING

Did she use the postal service?

SCHORNHORST

Used the postal service.

ZIMRING

That's ineffective assistance.

SCHORNHORST Well, but that's another catch. Effective assistance of counsel is not a constitutional guarantee in collateral proceedings. "Tough," as we say in the Navy.

LEIPOLD I was just wondering, picking up on Mr. Moulton's point that it matters a lot who your judge is. Maybe this is best directed to Mr. Meade. Is there some sense that this wide discretion to, in particular, trial judges, is (a), something they want? And (b), whether they want it or not, is it likely to influence which judges?

And which people end up becoming trial judges as vacancies occur? Might this become a sort of litmus, in other words? Someone who opposes the death penalty in all circumstances, there is no chance of becoming a trial judge in Massachusetts, because if they get one of these cases, they know, "I have this authority to just bounce it like that." And so the cases will never get brought in the first place.

MEADE Well, I think, on the first part of your question, that I'm sure there are a lot of trial judges in Massachusetts that would not like to have that discretion. But I think there are even more that would relish it. I think also, or I'll add also, that the Governor doesn't impose litmus tests on judges. We have a rather complicated judicial nominating process that people go through, and a confirmation process through our Governor's Council, which has seven people not of the Governor's party on it currently. So there are good checks and balances in the system to prevent those concerns from coming to life.

HOFFMANN Surely it must be the case, though, that if a death penalty were to be reinstated in Massachusetts, surely it would be the case that this would become a more relevant issue for both trial and appellate judges in the Commonwealth of Massachusetts. I mean, in terms of their careers and their profession.

POKORAK I think the Commission did not really take on and address many critical questions about mitigating evidence. What are the standards of proof? Is this a weighing state or is it not a weighing state? And in fact, if you think about it that way, then what Professor Kamin says judges don't do, they actually are doing in many jurisdictions.

So imagine that the Massachusetts statute says that a jury must be convinced, beyond a reasonable doubt, that no mitigating circumstance exists that calls for life rather than death. The burden is on the state to win the weighing, if you will. Then all you need really is sufficiency review. On the issue of whether or not that burden of proof, and that weighing, has been met.

And it's a prolife way of putting discretion, if you will, in a narrowed way, back in the judge's hands to weigh that out. And historically, before there was bifurcation, judges did this all the time. So let's not pretend that it's never been done. If they saw a mentally retarded defendant who went through a very quick trial in a non-bifurcated way, they overturned death sentences. And I imagine when people find things insufficient, or whatever Indiana's view is, what they're really doing is saying there is some problem here with the nature of the crime versus the amount of mitigation and the type of mitigation.

HOFFMANN

I think you open up two very important points. One is that I agree completely that, over the sweep of American capital punishment history, judges have exercised substantive review authority. The problem until fairly recently, in most states, is that they've had to find ways to do it, because the path was not open to them to simply say that's what they were doing. Sometimes they were able to do it through sufficiency review. In the earlier, discretionary system, they may have had many different ways they could have accomplished this. In more recent years, they've tended to have to do it by finding procedural violations and saying that that was why they were reversing, if in fact they felt that there was something substantively wrong with the sentence.

Again, part of the deliberate choice that the Council made, and that Illinois made with the FJA, was to open this up and give judges this power explicitly, rather than have to have them try to find an alternative path to do it. The other side, though, when you say it should perhaps be done through sufficiency review, I guess just speaking personally, I'm not sure that that would be enough. Because we all know that sufficiency review tends to be exercised under standards like: "Could any reasonable juror have plausibly read this evidence arguably to be enough to meet the standard of proof?" And I would argue that that would not be a strong enough authority in the reviewing court. I want them to be more free than that to say "Yes, there was legally sufficient evidence here, but I nevertheless think that the jury simply made a bad decision about that evidence."

POKORAK

I'm not sure sufficiency is really the right word, but we know that Supreme Court says appellate courts can reweigh. That would be absolutely constitutional.

HOFFMANN

Yes. And we did not say anything about the process of how mitigation gets weighed, I think mostly because—well, I can't speak for other members of the Council, but I think most of us figured that was pretty much understood. That the way this generally gets done is that all mitigation comes in, and then the jury does weigh that against what they've already found (under

our recommendation) at the guilt-innocence phase on the aggravation side. We did not say anything about the standard, but I can assure you it would be the highest standard used in any jurisdiction.

KAMIN If I could just echo that. There is a lot to be said for honesty.

HOFFMANN Sometimes.

KAMIN Sometimes. I would rather have appellate judges doing non-comparative proportionality review than going out and looking for procedural hooks on which to hang death penalty reversals. This statute gives judges the power to do what they rarely have the power to do, namely, to determine that the death sentence ought not to be imposed on an individual, even in the absence of any substantive errors.

I have read more of the California Supreme Court's death penalty opinions, I think, than anyone has or should. And as you read through those opinions you can see the courts doing exactly what this statute lets them avoid. The Rose Bird Court overturned 62 of 66 death sentences in the ten years it was in office. And in some cases they really had to go looking for a procedural hook on which they could hang the reversal of a death sentence. I would rather have had that court say, "We are exercising our discretionary power; we don't think the death sentence was appropriate in this case and as a result, we are overturning the jury's verdict." Again, there is something to be said for honesty.

MURPHY I just wanted to again remind everyone of what I said yesterday about sanctions. If we look at Illinois, the case that I had, *People v. Jimerson* [652 N.E.2d 278 (Ill. 1995)], where this man was absolutely innocent, as were his three codefendants, and through prosecutorial misconduct supporting perjury of a witness and then supporting the witness to lie in court There was no deal made. This man was convicted, as were his fellow defendants. And to this day there have been no sanctions against any prosecutor on that case.

And what they are saying in Illinois, the exonerated, is that prosecutors would rather see us die than admit they are wrong. So I think we have got to look at this. Not just with prosecutors, but also with incompetent defense lawyers and judges who allow people to practice before them who are drunk, incompetent, racially biased. Let's take that with us. Because otherwise, we're learning nothing.

HOFFMANN Well, on that note, and with that recognition of the importance of deterring the kind of misconduct that we would like to discourage, I will call the conclusion of the public portion of this conference. Thank you.