The Need for Uniform Standards in Death Penalty Cases – Tinkering with the Machinery of Death

December 26, 2009 – Terry Lenamon's Death Penalty Blog

Currently, not only the federal government but a majority of states provide for capital punishment (the death penalty) in certain crimes. There are those that argue that true fairness in this country would be an all-or-nothing approach: either every state in the union should impose capital punishment or no state should. Otherwise, two individuals convicted for the same crime may not face the same punishment – death -- depending upon which side of a state boundary they sit. From this perspective, imposition of a true uniform standard in death penalty cases would be to abolish capital punishment in this country.

However valid one may find this argument to be, federalism and the United States Supreme Court allow for this incongruity today. Given this reality, perhaps the more critical question we can ask right now is what standards are being imposed within those jurisdictions that allow the government to kill people as punishment for crimes. Are there uniform standards in the imposition of the death penalty?

Arbitrary and Unguided Imposition of Death Forbidden by Furman v. Georgia

In 1972, the United States Supreme Court found both the capital punishment laws of Texas and Georgia (and indirectly, every other death penalty statute in the country) unconstitutional because they were allowing arbitrary, unguided imposition of death sentences. *Furman v. Georgia*, 408 U.S. 238 (1972) was a per curiam opinion with all nine justices writing either concurrences (Douglas, Brennan, Stewart, White, Marshall) or dissents (Burger, Blackmun, Powell, Rehnquist) --- and the case effectively halted capital punishment in this country for a significant period of time. Over thirty state legislatures were forced to enact new death penalty statutes –which then had to undergo judicial scrutiny (*e.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976)).

What was the power of *Furman?* According to this decision, a death sentence in this country cannot be imposed unless the sentencing authority finds at least one statutory aggravating factor and then weighs that aggravating factor against mitigating factors provided by the defense. Before death can be the punishment, the penalty must be based upon a consideration of both the circumstances of the

case and the character of the defendant – all shown in a "specific and detailed" way to those responsible for sentencing the individual.

Post-Furman Death Penalty Statutes

In *Gregg,* the High Court found the newly enacted Georgia death penalty statute constitutional. There, either a Georgia judge or a Georgia jury may act as the sentencing authority. There must be a bifurcated trial. In the sentencing portion of the trial, ten aggravating factors are listed in the statute and one of these must be found to exist beyond a reasonable doubt before death can be imposed. The sentencing authority must also consider mitigating factors presented by the defense, and the sentence (which is subject to automatic judicial review) must identify its basis in the statutorily defined aggravating factors.

That same year, both Texas' statute (Jurek v. Texas, 428 U.S. 262 (1976)) and Florida's death penalty law (Proffitt v. Florida, 428 U.S. 242 (1976)) were also found compliant with federal constitutional provisions. In *Texas,* death was limited to five specific situations of capital homicides where the murders were intentional and knowing with a jury as the sentencing authority in a two-phase trial being required to answer three statutorily defined questions "yes," in order to impose death. In *Florida*, as in Texas and Georgia, a bifurcated trial was set by the new law. However, sentencing authority involved an advisory jury verdict with a sentencing judge to consider both aggravating factors and mitigating ones, with the findings upon which the death sentence is based to be provided in writing with expedited judicial review.

The Problem of Individualized Sentencing

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Ohio death penalty statute was reviewed by the US Supreme Court post-*Furman* and found lacking. The *Ohio* death penalty statute provided that upon finding a defendant guilty of "aggravated murder" together with one of the seven (7) statutorily-specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determined that at least one of the three (3) statutorily defined mitigating circumstances was established by a preponderance of the evidence. According to the High Court (in a plurality opinion), a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U. S. at 605.

And here lies the crux of the problem – how is the state to effectively balance the "uniqueness of the individual" against the consistent, uniform imposition of the death penalty in the various states as well as by the federal government? How can a systemic formula truly impose fairness in any particular circumstance, particularly when death is in the offing?

The Impossible Situation

As Justice Blackmun foresaw so well (dissenting in *Callins v. Collins*, 510 U.S. 1141 (1994)): "….[t]he basic question -- does the system accurately and consistently determine which defendants "deserve" to die?-- cannot be answered in the affirmative.…The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution." Justice Blackmun drew his own line in the sand in that historic dissent, announcing that "…[f]rom this day forward, I no longer shall tinker with the machinery of death," having considered the High Court's "experiment" with the death penalty to be a failure. *Id.*

Nevertheless, the courts still continue to "tinker with the machinery of death," using Blackmun's terms – and still, that attempt to balance the needs of the system for uniformity and the needs of the individual for unique consideration is sought unsuccessfully. Do we need uniform standards in the imposition of the death penalty? Yes. Can they be achieved? Many respected legal minds aside from Justice Blackmun suggest not.

For example, Professor Linda Greenhouse recently opined in the New York Times that the U.S. Supreme Court applied "selective empathy" in its consideration of two death penalty cases this fall, where the two defendants shared histories of "similarly horrific" childhoods. The result? One man escaped the death penalty (Porter); the other did not (VanHorn).

Just last month, in considering the "guided discretion approach" originating in the Model Penal Code template, Kentucky Coalition to Abolish the Death Penalty President Don Vish eloquently pointed out in the Louisville Courier Journal that "… competing constitutional values get in the way of one another and, like Virgil's army, crowd the field so totally that none has room to do its work … [and] justice in death penalty cases is becoming to the Constitution what absolute zero is to the laws of thermodynamics: a place one can progress toward but never reach."

Perhaps the best interests of both our system of justice and the interests of the individual would be best served by what many continue to avoid as this legal tinkering continues: abolishing the death penalty in its totality – not only would this be the most uniform of standards to be implemented, as we all are aware, it would definitely be the cheapest.