

A Comparison Between Governor Romney's Massachusetts Death Penalty Report and California's Capital Punishment System

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June 17, 2004

The Massachusetts Governor's Council on Capital Punishment issued its report recently. It makes ten recommendations for legislation and regulations which should be put in place if that state were to permit capital punishment. California's actual capital punishment system, in place since 1977/78, fails to conform to ANY of the ten recommendations of the Massachusetts Council. An analysis of this failure further supports a denial of due process claim in California capital litigation.

The Massachusetts Council acknowledges that it had the opportunity to draw on other studies, including that conducted by the Illinois Commission. The Massachusetts Council report does seem to summarize the current thinking on criminal justice and capital case issues. Of course, the Illinois Commission also considered the literature and practices extant at the time and it is not surprising that they come to similar conclusions.

The comparison of the California system to the Illinois Report in my article (44 Santa Clara Law Review 101 (2003)) applies to the Massachusetts report in many respects and many of the footnotes would provide relevant citations to a comparison of California to the Massachusetts report. The Massachusetts Council would provide some greater protections against conviction of the innocent or unfair and discriminatory imposition of the death penalty. I certainly do not support the creation of a death penalty scheme in Massachusetts; however, this report does provide an additional vehicle to show how deficient the California system is and has been. This would support a further systemic denial of due process claim against the California system -- in the particulars and also to the system as a whole.

Here are the ten recommendations of the Massachusetts Council and a very brief comparison to California practice:

- 1) Narrowly define list of death-eligible murders: California is notorious for having expanded the list of crimes that are death-eligible to almost all murders.
- 2) Appropriate controls over prosecutorial discretion in potentially capital cases: California has none. Individual prosecutors are permitted to exercise their own discretion many places and decisions vary from county to county -- some having no death sentences and other much more than their proportionate share. The de facto result is that California's death row is entirely poor, disproportionately of color, and populated by the mentally deficient, the mentally ill, those abused as children, the generally marginalized of society and those whose victims were white. This de facto result demonstrates the gross injustice of California's lack of controls over the exercise of discretion. Ironically, the only case in which prosecutorial discretion was brought into question within the executive branch was the recent case in San Francisco where the Attorney General threatened to intercede to seek the death penalty.
- 3) A system to ensure high-quality defense representation in potentially capital cases: Almost all of the people on death row were sent there during the time when there were no requirements for qualifications of trial counsel. Most who have counsel on appeal and habeas (and a large number are still waiting) were appointed counsel before the qualifications for appointment were enacted here. However, the qualifications for counsel currently only apply to appointed counsel and fall far short of the ABA Standards and those recommended by the Massachusetts Council.
- 4) New trial procedures to avoid the problems caused by the same jury for both stages of a bifurcated capital trial: California has no such procedure. A defendant gets one death qualified jury which hears a trial on guilt or not guilty then turns to mitigation and aggravation which can present inherent difficulties for the trial of both phases.
- 5) Special jury instructions concerning the use of human evidence to establish the defendant's guilt: California does not have these protections. Many studies have shown that eyewitness identification, particularly during the

excitement of a homicide or where the identification is cross-racial are the cause of innocent people being convicted and sent to death row. The same is true of coerced or otherwise false confessions, testimony of co-defendants or jail house snitches. Once again proposals are made to provide safeguards against these serious problems, safeguards that are not provided to the accused in California.

6) A requirement of scientific evidence to corroborate the defendant's guilt: Again, there is no such provision in California. The Council acknowledges that placing the defendant at the crime scene or connecting him or her to the weapon are not guarantees that the defendant is, in fact, guilty. However, they feel that this is a significant feature in helping to avoid the innocent being convicted.

7) A heightened burden of proof to enhance the accuracy of jury decision-making: California has no such requirement. Here the Council would require that, unless waived by the defendant, the jury at sentencing would have to make an additional finding that there is "no doubt" that the defendant is guilty even though they already determined that s/he was guilty "beyond a reasonable doubt."

8) Independent scientific review of the collection, analysis, and preservation of scientific evidence: California has no such requirements. Throughout the country, historically and recently, shoddy or fraudulent forensic evidence has been used to convict and condemn people to death.

9) Broad authority for trial and appellate courts to set aside wrongful death sentences: California's practices are much more restrictive than the Council would require. Rather than weighing and re-weighing evidence to determine if it supports the jury finding of death under California Penal Code Section 190.4(e), here the trial judge could and should set aside the death verdict if s/he finds it inappropriate or disagrees with the jury's exercise of capital sentencing discretion. This is much broader. Furthermore, the Massachusetts Council would further extend this same review function to a second review by their Supreme Court. The California Supreme Court seems proud to not disturb the decision of the jury or the trial court and refuses to do inter-case proportionality review.

10) The creation of a death-penalty review commission to review claims of substantive error and study the causes of such error: California still does not have such a commission.

In all, the proposed Massachusetts system acknowledges flaws which have existed in other capital systems and which have led to wrongful convictions and discriminatory or unfair imposition of the death penalty. Just like the Illinois Commission Report, the reports of some other states and the underlying scientific literature, the clear message of the Massachusetts Council is that systems like California's are doomed to failure. If that is so, California, in these particulars and as an overall flawed system, does not provide minimal due process and is, therefore, unconstitutional.