Testimony
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Commission on Capital Punishment
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I come before you as a former state's attorney who over a thirty year career as a prosecutor attempted to administer Maryland's death penalty. I have tried capital cases as a prosecutor and many years ago as a defense attorney as well. I have read the Furman case many times, which called a temporary halt to the death penalty, and I have studied the Gregg case and the many cases that followed it. I have concluded, as have many others, that the essence of those cases called for the state to apply the death penalty fairly and consistently. The Furman court condemned a system that permitted an uneven or "freakish" application of the penalty. Many cases since have tried to define what is fair and proper and some have approved statutes that seek to guide the verdicts to assure that the selection of those to receive a death sentence are not just "hit by lightning," by are condemned by a system with even and proportional standards. Based upon my experience, my observations, and my research I am convinced that we in Maryland cannot avoid applying it in the manner condemned by Furman and we would be wise to abandon it along with almost all of the industrialized countries in the world.

When I first embarked on a career in prosecution in 1966, I thought that whatever personal reservations about the death penalty I maintained would not interfere with carrying forth the responsibilities attendant to enforcing state capital punishment law. Under the former procedure condemned by Furman, I personally prosecuted several cases in which the court could have imposed the death penalty but did not. I took some small comfort in knowing that in my prosecutions I was only enabling a judge to determine the exact punishment. My responsibilities were confined to the trial of the cases, not deciding the punishment. Those days did not require as a predicate that the state "ask" for the death penalty or go though any certification process. Long tradition in Montgomery County at that time had the state's attorneys leave all the discretion of punishment to the judges.

But times and the law have changed. Supreme Court jurisprudence after Furman and Gregg and then the Maryland statute now make the various

state's attorneys the critical actors in selecting and asking the juries, or in the case of bench trials, the judges, to give the death sentence. No longer can the state just enable the courts or the juries to make the determination by a guilty verdict. It is up to the prosecutors before the trial begins to decide whether the case is going to proceed with the death penalty as a possible result. The General Assembly in reaction to the Supreme Court's ruling put the prosecutors in the forefront by requiring them to give notice before a capital trial can begin.

I worked with the General Assembly to draft our death penalty statute and tried to assure that it would pass constitutional scrutiny. I read the several landmark cases with multiple opinions and sought advice from an organization designed to help prosecutors get capital cases through the courts without error: the National Association of Government Counsel in Capital Cases. I have over the years had substantial misgivings about the utility and morality of the death penalty; nevertheless, I tried conscientiously to carry forth the law after Maryland readopted it. As the Montgomery State's Attorney, I attempted to set up an internal system within the office to guide our discretion. Without a doubt, some of the horrible crimes that our office handled had defendants who were mean criminals and who displayed a complete lack of regard for human life. I had little doubt about prosecuting them and asking for sentences that forfeited their rights to live in our organized society. I regarded the death penalty under the law as a deserved punishment for the very worst of the people who commit horrible crimes.

The Montgomery County system had the assigned trial attorneys study and evaluate the murder cases that came into the office to see if they contained the aggravating factors that the Maryland law set out. If they did, those cases were then prepared for discussion within the office at meetings of the experienced prosecutors. Often we would contact defense attorneys in the cases to learn of any mitigating factors we would have to contend with at trial that might not be apparent in the police investigations. Our evaluation paralleled the statutory aggravators established in the statute and attempted to predict how our juries would regard the cases. Then the office would "vote," that is, give me a consensus of what the experienced prosecutors thought would be the likelihood of conviction and the justice or fairness of the death penalty. We did not formally ask in most cases what the opinions

of the victims' families were, but when we declined to go forward and certify the cases for a capital trial, someone would meet with the victims' representative to try to explain our reasons. In some selected cases, I would be the one to meet with them.

I didn't keep count of the number of cases in which we met and determined whether or not to ask for the death penalty. I guess it was somewhere around twenty-five. I recall having given notice on six, going to trial on four, getting capital verdicts on two, and then after reversals, either after direct appeal or after post conviction procedures, having both cases overturned. On retrial both of those cases resulted in life sentences. In all of the cases in which we went to trial without asking for the death penalty, the cases ended up having the verdicts sustained on appeal.

In hindsight, although I think we made an earnest attempt to carry forth the mandates of the law and the courts' decision, I believe we failed. A review of our cases in Montgomery County and across the state to me demonstrates that we have not achieved a consistent and even application of the death penalty either in our county or statewide.

The Supreme Court said that that we should select and impose capital punishment "fairly and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112. (19820. It is incontrovertible that we in Maryland do not seek it with reasonable consistency, but instead have adopted a variety of standards that are uncoordinated and independent. We have 24 jurisdictions that apply it individually and inconsistently.

Before I left the office to join the Court of Special Appeals, I had come to the conclusion that in capital punishment what we had been doing was not a productive use of court and prosecution resources; and prosecutors are not the appropriate officials to make the life and death decisions about which defendants get the death penalty.

To start with, Justice White in his concurring opinion in Gregg, set out the fallacious assumption about how the nation's prosecutors in the first instance select in and select out the capital cases. In replying to the dissents he said:

> Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus, defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. [Gregg v. Georgia, 428 U.S. 153, 224 – 225]

Judge Rita Davidson, in a capital punishment case dissent in Maryland, referenced testimony given under oath by eighteen Maryland states' attorneys that dramatically contradicts Judge White's optimistic view of how prosecutors decide when to seek death. Judge Davidson's analysis of the state's attorneys' testimony shows that institutionally, we prosecutors start off with widely different considerations that make it impossible for us to conform to a common standard and instead guide the lightning that Justice Stewart condemned in the Furman decision that he observed juries doing without standards. [Tichnell v State, 297 Md 432, 496 – 498]

I believe that today, after watching how the state's attorneys have tried to carry out their individual duties in most if not all cases with the best of intentions, we should recognize that prosecutors are as different as any group of lawyers and have their individual philosophies and judgments. Their offices have varying limitations on their resources and represent distinctive groups who also have their widely variant outlooks toward crime. As prosecutors, we have no special training or expertise designed to guide us in determining who is the worst of the worst. We consider the weight of the evidence and the likelihood of conviction. But is an unsophisticated or remorseful defendant who confesses really more deserving of death than a professional killer who more successfully hides the evidence? Prosecutors face a thicket of influences, including politics, the wishes of victims, the media, and the opinions of other law enforcement. Yet to avoid these pressures is to seek the death penalty in all eligible cases – a heavy load on the system and not a sensible option. There is not a common standard among the state's attorneys today any more than there was when we first sought to

reform the system and make it more uniform. Yet the death penalty is a state – not a county – law, and its high profile nature creates a state interest in uniformity that we simply cannot meet. Uniformity in death sentencing directly contradicts with prosecutorial discretion, which is otherwise an important hallmark of our system in other kinds of cases.

I left the state's attorney's office more than ten years ago, but I still remember the agony of attempting to make the fundamental decision whether to ask a jury or judge to condemn someone to death. Our system invests an individual prosecutor with unfettered discretion to make that decision. I now believe that to do so rationally and fairly is beyond human capabilities.

The time has come for Maryland to abandon a relic from earlier less sensitive times and free the prosecutors from the impossible task of trying to call for capital punishment fairly.