LOOKING BEYOND PROSPECTIVE GUIDANCE

Sentencing Discretion in Capital Drug Framework and Lessons from the US

With effect from 1 January 2013, changes to Singapore's legislative framework for capital drug offences introduced, *inter alia*, the court's discretion not to impose the death penalty if certain prerequisites were fulfilled. However, no prospective guidance was enacted to guide the exercise of the new discretion. This article contends that prospective guidance is not an appropriate means of regulating judicial discretion under the new death penalty framework because such prospective guidance is not possible, desirable or necessary. It draws upon the US experience in the modern era of death penalty regulation. Looking beyond prospective guidance, it proposes an incremental change to enhance fairness and consistency in the sentencing of capital drug offences, namely, that judges' reasoning where they impose life sentences on persons convicted of capital drug offences should be captured and made accessible, in order to promote the development of rational and holistic sentencing principles.

Peggy **PAO-KEERTHI** Pei Yu*
BA (Oxford), LLM (New York University);
Deputy Senior State Counsel/ Deputy Public Prosecutor,
Attorney-General's Chambers, Singapore.

I. Introduction

1 The mandatory death penalty for the unauthorised trafficking, manufacture, importation and exportation of certain controlled drugs ("capital drug offences") has been a cornerstone of Singapore's "zero tolerance" policy against controlled drugs since 1975.[1] This aspect of our anti-drugs policy has remained unchanged notwithstanding both

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1 See the second reading of the Misuse of Drugs (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1379 *ff* and the second reading of the Misuse of Drugs (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89.

domestic and international criticism.[2] Various challenges to the constitutionality of the mandatory death penalty for such offences were made – and rejected by our courts – over the years.[3]

2 However, signs of a possible shift in this policy emerged in December 2010, when the Ministry of Home Affairs commenced studies relating to the death penalty as generally applied in Singapore.[4] In July 2011, based on the studies, the Ministry embarked on a review of the drug situation in Singapore and our death penalty legislation. A moratorium was placed on capital sentences as all executions that came due since the review began were deferred.[5] Finally, in 2012, changes to our death penalty legislation were enacted, including the introduction of the court's discretion *not* to impose the death penalty for capital drug offences if certain requirements ("the prerequisites") were fulfilled ("the new discretion").[6] Although these changes were introduced in 2012, they took effect from 1 January 2013, and thus this article will refer to them as "the 2013 amendments".[7]

3 The introduction of the new discretion has been greeted by a mixture of reactions. Broad policy arguments have been made regarding whether the new discretion will unduly weaken the deterrent effect of our laws, or whether the changes are a welcome liberalisation of our death penalty legislation, that should perhaps go even further.[8] Such

2 K S Rajah, "Death Penalty: The Unconstitutional Punishment" *The Straits Times* (28 August 2003); Amnesty International, "Singapore: The Death Penalty – A Hidden Toll of Executions" Index Number ASA 36/001/2004 (15 January 2004) <http://www.amnesty.org/en/library/info/ASA36/001/2004/en> (accessed 4 April 2014); see the Singapore Government's Response to Amnesty International's Report (30 January 2004) at the Ministry of Home Affair's website <http://www.mha.gov.sg/basic_content.aspx?pageid=74> (accessed 4 April 2014); Michael Hor, "The Death Penalty in Singapore and International Law" (2004) 8 SYBIL 105.

3 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489; *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103; *Ong Ah Chuan v Public Prosecutor* [1981] AC 648.

4 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

5 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

6 The negative phrasing "discretion not to impose" is found in the title of the new provision s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) itself. The full title is "Discretion of court not to impose sentence of death in certain circumstances".

7 See the detailed discussion of the 2013 amendments at paras 29–46 below. Changes to the application of the mandatory death penalty for homicides were also introduced but are beyond the scope of this article. See the second reading of the Penal Code (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89.

8 See *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Christopher de Souza, Member of Parliament); Chua Mui Hoong, "Discretion is

(*cont'd on the next page*)

policy considerations aside, there are also concerns about whether the death penalty framework for capital drug offences after the 2013 amendments ("the new death penalty framework") will be a fair and just one, under which individuals are dealt with in a consistent and non-arbitrary manner. As has been said, "that there should be consistent and evenhanded treatment of individuals within the framework of our legal system is such a commonly accepted notion that it hardly merits discussion and analysis".[9] In a local context, the Singapore Court of Appeal has recognised the general principle, under Art 12(1) of the Constitution of the Republic of Singapore[10] ("Constitution"), that "[e]quality before the law and equal protection of the law require[d] that like should be compared with like".[11]

4 The fairness and consistency of treatment of individuals under the new death penalty framework will be affected both by prosecutorial and by judicial decisions.[12] However, this article focuses on the issue of how to ensure consistent judicial *sentencing* under the new death penalty framework.

5 After the introduction of the new discretion, the courts in Singapore now have – for the first time – the option of not imposing the death penalty on accused persons who have been convicted of capital drug offences. However, there is no prospective guidance (meaning a relatively formal and static catalogue of mitigating and aggravating factors, which is explicitly set out *ex ante* by Parliament or some other authority, for the purpose of being applied by judges in future exercises of their discretion) in the Misuse of Drugs Act[13] ("MDA") on how the

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Fine, but Stay Tough on Crime" *The Straits Times* (10 July 2012); Tham Yuen-C, "Lawyers Hail Move as Significant Milestone" *The Straits Times* (10 July 2012); and *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Lawrence Lien, Nominated Member of Parliament).

9 Norman Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion" (1971–1972) 19 UCLA L Rev 1 at 4.

10 1999 Rev Ed.

11 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [61] (quoting the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at [35]). Article 12(1) of the Constitution of the Republic of Singapore (1999 Rev Ed) states: "All persons are equal before the law and entitled to the equal protection of the law."

12 Under the new death penalty framework, the Prosecution retains its discretion to reduce capital drug charges to non-capital charges, by framing the charge by reference to a quantity of capital drugs that is lower than the actual quantity of capital drugs that has been found to be involved in the offence: see paras 21 and 24 below. Furthermore, the Prosecution now has the additional power to certify whether the offender has "substantively assisted" the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore, which is one of the prerequisites: see para 33 below.

13 Cap 185, 2008 Rev Ed.

court should exercise its discretion. The new discretion therefore appears to be absolute.

6 It has been argued that there should be prospective guidance to control the judges' exercise of the new discretion. Although this argument has thus far only been articulated in the context of the discretionary death penalty for homicide offences, in time it may well extend to the judges' discretion not to impose the death penalty on capital drug offenders who have fulfilled the prerequisites.[14]

7 The thesis of this article is that prospective guidance is not possible, desirable or necessary for the control of judicial discretion under the new death penalty framework. This article advocates the organic and incremental development of principles through the accumulation of cases or decisions over time.[15] However, in order to ensure the development of rational and holistic principles, the court's sentencing reasoning in sentencing and re-sentencing cases where the accused has been given a life sentence instead of the death penalty should be properly captured.[16]

8 To support this thesis, this article adopts a *comparative* approach. A comparative approach is necessary because Singapore's experience with the discretionary death penalty is extremely limited (albeit the word "discretionary" itself is contentious and warrants further discussion).[17] In contrast, the US grappled with the question of whether such absolute sentencing discretion should be controlled by prospective guidance as far back as the 1970s.[18] Although the US Supreme Court ("Supreme Court") initially took the view that prospective guidance was not necessary, possible or desirable, it changed its view shortly thereafter.[19] Since then, much intellectual energy has been devoted to the question of *how* to guide sentencing discretion.[20]

9 It is acknowledged that much of the US death penalty jurisprudence appears to be based on the Eighth Amendment, which finds no equivalent in the Constitution.[21] However, it is evident that the concerns undergirding the Eighth Amendment cases in the US actually pertain to equal treatment, which is enshrined as a constitutional right

14 See S Chandra Mohan & Priscilla Chia Wen Qi, "The Death Penalty and the Desirability of Judicial Discretion" *Singapore Law Gazette* (March 2013) <http://www.lawgazette.com.sg/2013-03/697.htm> (accessed 26 March 2014).
15 See para 83 *ff* below.
16 See para 86 *ff* below.
17 See para 77 below.
18 See para 49 below.
19 See para 52 below.
20 See paras 54–64 below.
21 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489.

in Art 12(1) of our Constitution.[22] Douglas J said in *Furman v Georgia*[23] that: "There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual punishment'." In any case, it is unequivocal that fairness and consistency are *desiderata* in all criminal justice systems. Thus, these issues with which the Supreme Court has been wrestling in the modern era of death penalty regulation are pertinent to us.

10 The second part of this article summarises Singapore's death penalty framework in respect of drug trafficking and related offences prior to the 2013 amendments ("the old death penalty framework"). The third part discusses the 2013 amendments and the cases that have been decided, or re-sentenced, under the new death penalty framework. The fourth part examines the US experience in the use of prospective guidance to regulate judicial discretion in capital sentencing.

11 The fifth part of the article considers whether the "absolute" discretion of the Singapore judge ought to be controlled by prospective guidance in a manner broadly similar to the US. It argues that significant prospective guidance is already built into the statute and the real issue is whether there should be *further* prospective guidance. It contends that such further prospective guidance is not possible or desirable. It is also unnecessary because fairness and consistency can be promoted by the incremental development of sentencing principles by the accumulation of case law.

II. Singapore's death penalty framework prior to the 2013 amendments

A. The mandatory death penalty

12 In Singapore, the death penalty has been a punishment for the unauthorised trafficking, manufacture, importation and exportation ("the relevant offences") of certain controlled drugs since 1975. The relevant offences are provided for in the MDA. The MDA was first enacted *vide* Act 5 of 1973, which repealed the Dangerous Drugs Act (Cap 151) and the Drugs (Prevention of Misuse) Act (Cap 154).[24] In this first incarnation of the MDA, the maximum penalty under the Act was 30 years or $50,000 or both, and 15 strokes of the cane (for trafficking in

22 See para 53 below (the core theme of *Furman v Georgia* 408 US 238 (1972)) and para 3 above (Art 12(1) of the Constitution of the Republic of Singapore (1999 Rev Ed)).

23 408 US 238 at 249 (1972).

24 The relevant offences were provided for in ss 3, 4 and 5 of the Misuse of Drugs Act 1973 (Act 5 of 1973) respectively.

a Class A or Class B controlled drug to persons below 18 years of age and for manufacturing a Class A or Class B controlled drug).[25]

13 In 1975, the penalties for the relevant offences were amended *vide* the Misuse of Drugs (Amendment) Act 1975.[26] The provisions for fines were removed. Specific penalties were introduced for trafficking, manufacturing and importing or exporting specified drugs or drugs with specified content.[27] The death penalty was introduced for the import, export or trafficking of more than 30g of morphine or more than 15g of diamorphine.[28] It was also introduced for the manufacture of morphine or diamorphine, irrespective of the amounts involved.[29] Significantly, the newly introduced death penalty was *mandatory*, such that once a person was convicted of the relevant offence, the court had no discretion to sentence him to any other punishment. This was reflected in the wording of the amended provision of the principal Act: "the sixth column shows the punishments *to be imposed* on a person convicted of the offence" [emphasis added].[30]

14 The rationale given in Parliament (by then Minister for Home Affairs and Education, Chua Sian Chin) for the introduction of these amendments was that there were indications of a "Communist plan to use narcotics to corrupt and soften the population of the various states in South-East Asia for the purposes of subversion and eventual take-over", which would thereby threaten "vital and sensitive institutions of the State, like the Police and the Armed Forces", as well as undermine the productivity of the populace, thereby "strik[ing] at the very foundations of our social fabric and undermin[ing] our economy".[31] The imposition

25 Section 29 read with the Second Sched to the Misuse of Drugs Act 1973 (Act 5 of 1973). Section 29(3) provided for the offender to be liable to twice the punishment if the offence was a second or subsequent one. The maximum penalty for import or export of a controlled drug was the same, save that there was no provision for caning.

26 Act 49 of 1975.

27 Sixth column in the Second Sched to the Misuse of Drugs Act 1973 (Act 5 of 1973).

28 Sixth column in the Second Sched to the Misuse of Drugs Act 1973 (Act 5 of 1973). Diamorphine is the medical name for heroin: see DrugScope UK, "Heroin and Other Opiates" <http://www.drugscope.org.uk/resources/drugsearch/drugsearch pages/heroin> (accessed 7 April 2014). Apparently, diamorphine was first marketed as a morphine substitute by the drug company Bayer in 1895 under the trade name "heroin", but turned out to be highly addictive: see Online Etymology Dictionary, "Heroin" <http://www.etymonline.com/index.php?term=heroin> (accessed 13 May 2014). Heroin metabolises into morphine: see Mayo Clinic, "Opiates" <http://www.mayomedicallaboratories.com/articles/drug-book/opiates.html> (accessed 7 April 2014).

29 Sixth column in the Second Sched to the Misuse of Drugs Act 1973 (Act 5 of 1973).

30 Section 29(2)(*b*) of the Misuse of Drugs Act 1973 (Act 5 of 1973), as amended by s 9 of the Misuse of Drugs (Amendment) Act 1975 (Act 49 of 1975).

31 *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1380 (Chua Sian Chin, Minister for Home Affairs and Education).

of severe punishments was therefore necessary in order to prevent the supply of narcotics into Singapore and to check drug addiction.[32]

15 The mandatory death penalty was introduced specifically for offences relating to morphine and diamorphine because heroin was "one of the most potent and dangerous drugs".[33] The Minister emphasised that "it [was] not intended to sentence petty morphine and heroin pedlars to death".[34] It has been argued that this statement evinces that the legislative policy has always been that the mandatory death policy was inapplicable to mere conduits (or "couriers"[35]).[36] However, this interpretation of the Minister's statement has been rejected by the Court of Appeal.[37] The court was of the view that the Minister's statement had been made to explain why the threshold quantity of the relevant drugs needed to attract the mandatory death penalty was set at a level much higher than the daily requirements of a drug addict.[38] Indeed, the Minister's remarks which followed the statement do show that he was more concerned with the *quantity* of the drugs involved, rather than the *acts* carried out by the offender.[39] Thus, at this juncture of development in our death penalty laws, there was no clear legislative intent to exempt couriers from the mandatory death penalty.

16 Over the years, the principal Act was amended several times to extend the mandatory death penalty to the trafficking, importing or exporting of certain quantities of new specified drugs, or the manufacture of new specified drugs (regardless of the quantities involved). The justification given for these extensions of the scope of the

32 *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1380 (Chua Sian Chin, Minister for Home Affairs and Education).

33 *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1381 (Chua Sian Chin, Minister for Home Affairs and Education).

34 *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1382 (Chua Sian Chin, Minister for Home Affairs and Education).

35 See para 32 below.

36 See *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [31].

37 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [31].

38 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [31].

39 In *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1382 (Chua Sian Chin, Minister for Home Affairs and Education), the Minister said:

> It is not intended to sentence petty morphine and heroin pedlars to death. It is, therefore, necessary to specify the quantity by weight, exceeding which the death penalty will be imposed. The weights refer to the pure substance. For heroin any quantity in which the pure heroin content is above 15 grammes will attract the death penalty. Such an amount when mixed with adulterants is sufficient to spike some 500 heroin cigarettes. One heroin-spiked cigarette is usually shared by a few beginners. Thus 15 grammes of pure heroin can do considerable damage and ruin a very large number of our youths.

mandatory death penalty was essentially that they would ensure the continued effectiveness of our anti-drug laws.[40]

17 Thus, immediately prior to the 2013 amendments, the death penalty was mandatory for the offences of:

(a) Trafficking in, importing or exporting:[41]

(i) more than 1,200g of opium (containing more than 30g of morphine);[42]

(ii) more than 30g of morphine;

(iii) more than 15g of diamorphine;

(iv) more than 30g of cocaine;[43]

(v) more than 500g of cannabis;[44]

(vi) more than 1,000g of cannabis mixture;[45]

(vii) more than 200g of cannabis resin;[46] and

(viii) more than 250g of methamphetamine.[47]

(b) Manufacturing:[48]

40 See *Singapore Parliamentary Debates, Official Report* (29 May 1989) "Drug Abuse (Steps to Curb)" vol 54 at col 162 (explaining that the Government would be extending the mandatory death penalty to trafficking and related offences involving opium, cannabis and cocaine "to ensure that the law continues to be effective to combat the problem"); the second reading of the Misuse of Drugs (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (10 November 1993) vol 61 at col 928 (explaining that the mandatory death penalty would be extended to trafficking and related offences involving cannabis mixture because the Central Narcotics Bureau had detected some cases in which cannabis was trafficked in mixed form, *ie*, the plant was broken up and mixed with other vegetable matter such as tobacco); and the second reading of the Misuse of Drugs (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (1 June 1998) vol 69 at cols 40–42 (explaining that the mandatory death penalty would be extended to trafficking and related offences involving methamphetamine, or "ice", which were examples of psychotropic drugs that were increasingly emerging as a major global threat).

41 By this time, the substantive offence provisions had been renumbered to ss 5 (trafficking) and 7 (import or export) respectively.

42 See Misuse of Drugs (Amendment) Act 1989 (Act 38 of 1989) (as qualified by the Misuse of Drugs (Amendment) Act 1993 (Act 40 of 1993) which added the requirement that more than 30g of morphine must be involved).

43 See Misuse of Drugs (Amendment) Act 1989 (Act 38 of 1989).

44 See Misuse of Drugs (Amendment) Act 1989 (Act 38 of 1989).

45 See Misuse of Drugs (Amendment) Act 1993 (Act 40 of 1993).

46 See Misuse of Drugs (Amendment) Act 1989 (Act 38 of 1989).

47 See Misuse of Drugs (Amendment) Act 1998 (Act 20 of 1998).

48 By this time, the substantive offence provision had been renumbered to s 6.

(i) morphine (or any salt, ester, or salt of ester of morphine);

(ii) diamorphine (or any salt of diamorphine);

(iii) cocaine (or any salt of cocaine);[49] and

(iv) methamphetamine (or any salt of methamphetamine).[50]

18 This article refers to the drugs listed above[51] as "capital drugs".

B. The role of the Prosecution

19 Although prosecutorial decision-making is not the focus of this article, our understanding of how the death penalty operates in Singapore would not be complete without a brief examination of the role of the Prosecution. The Attorney-General is the Public Prosecutor and has the control and direction of criminal prosecutions and proceedings in Singapore.[52] This prosecutorial power is a constitutional power vested in the Attorney-General pursuant to Art 35(8) of the Constitution.[53] Article 35(8) confers a wide prosecutorial discretion on the Public Prosecutor to "institute, conduct or discontinue any proceedings for any offence". Similar to prosecutors in other common law criminal justice systems, this discretion extends to the making of charging decisions, including whether to charge and what charges to prefer (if charging), as well as decisions on whether to maintain charges in response to arguments made by defence counsel to withdraw or reduce them.[54]

20 The Public Prosecutor discharges his functions with the assistance of Deputy Public Prosecutors and Assistant Public

49 See Misuse of Drugs (Amendment) Act 1989 (Act 38 of 1989).

50 See Misuse of Drugs (Amendment) Act 1998 (Act 20 of 1998).

51 See para 17 above.

52 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 11(1).

53 See Art 35(8) of the Constitution of the Republic of Singapore (1999 Rev Ed); see also *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [43].

54 See the former Attorney-General and present Chief Justice Sundaresh Menon SC's 2011 Association of Criminal Lawyers of Singapore Annual Lecture, "Judicial Review of Prosecutorial Discretion in Singapore: A Comparative Perspective" at para 3; James Vorenberg, "Decent Restraint of Prosecutorial Power" (1981) 94 Harv L Rev 1521 at 1524–1525 ("[t]he core of prosecutors' power is charging, plea bargaining, and, when it is under the prosecutor's control, initiating investigations"); William T Pizzi, "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform" (1993) 54 Ohio St LJ 1325 (useful examination of differences between common law and civil law prosecutors).

Prosecutors.[55] These officers perform such day-to-day tasks as assessing the evidence in criminal investigation files from the various enforcement agencies; making recommendations or determinations of whether to charge and what charges to prefer; drafting charges; and appearing in court for pre-trial conferences and other hearings.

21 Over the years, a practice had developed whereby prosecutors could choose to frame a drug trafficking, importation or exportation charge by reference to a quantity of capital drugs that was *lower* than the *actual* quantity of capital drugs that had been found to be involved in the offence ("the prosecution's discretion to reduce capital drug charges"). The amount in the charge was typically described as "not less than" 0.01g below the amount that would carry the mandatory death penalty ("the capital amount"), *eg*, "not less than 14.99g of diamorphine", although in a recent case the court framed such a charge as involving "not *more* than 14.99g of diamorphine" [emphasis added].[56] In essence, by virtue of this practice, the Public Prosecutor and his deputies could determine whether an accused person would potentially receive the death penalty or not. If the prosecutors reduced the amount of capital drugs in the charge below the capital amount, there was no possibility of the accused person receiving the death penalty upon conviction. If, however, the prosecutors did not reduce the amount in the charge, the death penalty would be mandatorily imposed on the accused person if he was convicted of the charge.

22 In recognition of the importance of the charging decision in this context, several layers of internal checks and balances have been implemented.[57] To begin with, more than one Deputy Public Prosecutor is assigned to the case. These Deputy Public Prosecutors review the file and make their joint recommendation on what charge(s) to prefer to a committee of senior prosecutors. The committee of senior prosecutors in turn makes its recommendation to the Chief Prosecutor.[58] The Chief Prosecutor makes his recommendation to the Solicitor-General, who finally makes his recommendation to the Attorney-General. At each review stage, the prosecutors apply their minds to the sufficiency of

55 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 11(3).

56 Compare the charge against Winai ("not less than 14.99g of diamorphine") in *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [4] with the second charge ("not more than 14.99g of diamorphine") in *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734.

57 See Kumaralingam Amirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines" [2013] Sing JLS 50 at 61.

58 The Chief Prosecutor of the Criminal Justice Division, which is responsible for the prosecution of capital offences. There are currently three other Chief Prosecutors in the Attorney-General's Chambers ("AGC"), who each head a division responsible for prosecuting its allocated offences and/or managing its allocated projects. See the AGC's Crime Cluster website <https://app.agc.gov.sg/What_We_Do/Crime_Cluster.aspx> (accessed 31 March 2014).

evidence, the application of the facts to the law, the sufficiency of investigations and the public interest in prosecuting the individual.[59] Internal prosecution guidelines are also referred to in order to ensure consistency in decision-making.[60] The Attorney-General is not bound to accept the recommendations of the Solicitor-General, but rather may review the entire file, and the recommendations of the prosecutors at each level, before arriving at his decision.

23 Defence counsel are entitled to send in representations to the Prosecution at any point before or after the offender is charged.[61] Defence counsel are also able to meet with prosecutors to discuss, *inter alia*, issues relating to the charge, either in statutorily mandated sessions known as Criminal Case Disclosure Conferences or in informal meetings known as Criminal Case Management System meetings.[62] It is not uncommon for the Prosecution to reduce a capital charge to a non-capital charge (*eg*, amend a charge for trafficking diamorphine from one of trafficking the actual amount to one of trafficking "not more than 14.99g of diamorphine") upon consideration of these representations and discussions.[63]

24 The Prosecution's discretion to reduce capital drug charges has been held to be constitutional by the Court of Appeal.[64] Nothing in the 2013 amendments limits or overrides the Prosecution's discretion to reduce capital drug charges. The cases since the 2013 amendments have also not overruled or cast doubt on the Court of Appeal's rulings on the constitutionality of this power in *Ramalingam Ravinthran v Attorney-General*[65] and *Quek Hock Lye v Public Prosecutor*.[66] Thus, this prosecutorial practice remains constitutional under the new death penalty framework. Having considered the role of the Prosecution, we

59 Attorney-General's Chambers Press Release, "The Exercise of Prosecutorial Discretion" (20 January 2012) at para 4 <https://app.agc.gov.sg/Newsroom/Media_releases_and_News.aspx> (accessed 31 March 2014).

60 Attorney-General's Chambers Press Release, "The Exercise of Prosecutorial Discretion" (20 January 2012) at para 6 <https://app.agc.gov.sg/Newsroom/Media_releases_and_News.aspx> (accessed 31 March 2014).

61 Generally, however, representations are best sent in before trial commences in order to avoid wastage of court time and resources.

62 See s 176 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (providing for criminal case disclosure conferences in the context of cases triable by the High Court) and Attorney-General's Chambers of Singapore, *Annual Report 2004/2005* <https://app.agc.gov.sg/Who_We_Are/Annual_Reports.aspx> (accessed 8 April 2014) (describing the implementation of the Criminal Case Management System).

63 As they did, for example, in respect of the co-offender Winai in *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012. Full statistics are not publicly available.

64 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [65]; *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [26]–[31].

65 [2012] 2 SLR 49.

66 [2012] 2 SLR 1012. See para 38 *ff* below.

now move on to consider the role of the courts under the old death penalty framework.

C. The role of the courts

25 Where the Prosecution decides to proceed on a capital charge against the accused, the case is heard in the first instance by a single trial judge in the High Court.[67] Under the old death penalty framework, the court's role in such cases was limited to deciding whether the accused person was guilty of the capital charge or should be acquitted. In the event that the accused person was convicted of the capital charge, the court had no discretion to impose a lesser punishment in lieu of the death penalty.

26 There was no automatic appeal to the Court of Appeal. The convicted offender had to file a notice of appeal against his conviction and/or sentence within 14 days of the sentence.[68] The trial judge was not obliged to give written grounds of decision unless such a notice was filed.[69] However, in practice, trial judges gave written grounds of decision in almost all such cases because nearly all convicted offenders sought appeals against their convictions and/or sentences.[70]

27 Apart from appeals against conviction, accused persons who were convicted of capital drug offences could challenge their convictions via applications for judicial review of the Prosecution's decision to proceed against them on capital charges.[71] This remains unchanged

67 This has been the case since 1992. Michael Hor, "The Death Penalty in Singapore and International Law" (2004) 8 SYBIL 105 at 115.

68 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 377.

69 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 377(5).

70 Rachel Chang, "Automatic Appeal for Death Sentences" *The Straits Times* (18 November 2012) <http://news.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20121115-383665.html> (accessed 8 April 2014). (In the two years prior to November 2012, all but one convicted offender sought appeal against their death sentences.)

71 The exercise of the prosecutorial discretion conferred by Art 35(8) of the Constitution of the Republic of Singapore (1999 Rev Ed) is reviewable in Singapore on two grounds: first, abuse of power (*ie*, "an exercise of power in bad faith for an extraneous purpose"); and secondly, breach of constitutional rights (*eg*, a discriminatory prosecution which deprives an accused of his right to equality under the law and equal protection of the law under Art 12 of the Constitution): see *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [17(b)], citing *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51], which in turn cited *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149]. The courts will presume that the Prosecution has exercised its discretion lawfully, on the basis of the separation of powers. Where an offender alleges that the exercise of the prosecutorial discretion to prosecute him for an offence is in breach of his constitutional rights, the burden lies on him to produce evidence of a *prima facie*

(*cont'd on the next page*)

under the new death penalty framework but is beyond the scope of this article.

28 As for cases in which the Prosecution reduces the capital drug charges ("reduced cases"), the accused persons would usually plead guilty to the reduced charge(s), again before a single judge in the High Court.[72] Having escaped the death penalty, very few such accused persons would appeal against their sentences and therefore it was rare for the judge to issue written grounds of decision.[73] Although the judge was obliged to give at least an oral judgment, these were not usually reported.[74]

III. The 2013 amendments

A. The rationale for change

29 The rationale given for the 2013 amendments was broadly twofold: first, there was an increasing phenomenon of offshore drug syndicates targeting and exploiting vulnerable groups to do the high-risk work of transporting and delivering capital drugs while remaining behind the scenes.[75] This phenomenon clearly raises a real concern about fairness, in that the people who are most often apprehended and convicted for capital drug offences tend to occupy a very low position in the drug syndicate, while the sophisticated masterminds who profit the most from large scale drug operations escape any legal consequences for their actions. In this respect, the Minister also cited a prudential justification for the legislative amendments, in that making co-operation by couriers a condition for qualifying for exemption from the mandatory death penalty would help in the broader enforcement effort.[76]

30 Secondly, society's norms and expectations were changing. While a broad acceptance still remained that we should be tough on

breach of such rights. See *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [17].

72 Section 178 read with s 227(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

73 For a rare case in which the accused appealed against his non-capital sentence on the basis that it was excessive, see *Tan Kheng Chun Ray v Public Prosecutor* [2012] 2 SLR 437.

74 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 298.

75 See *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

76 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

drugs and crime, there was also an "increased expectation that, where appropriate, more sentencing discretion should be vested in the courts".[77]

B. The new legislative framework

31 Section 33B of the MDA (which was inserted *vide* Act 30 of 2012 and took effect from 1 January 2013) provides for the discretion of the court *not* to impose the death penalty for an offence which would otherwise carry such a penalty, if two requirements are fulfilled.[78] Each of these will be briefly explained in turn.

32 First, the convicted offender must prove, on a balance of probabilities, that his involvement in the offence of trafficking, importing or exporting was limited to transporting, sending or delivering the drugs.[79] Although the provision itself does not contain the term "courier", it was explained in the Ministerial Statement relating to the amendments that this first requirement is intended to apply to traffickers who "only played the role of courier, and must not have been involved in any other activity related to the supply or distribution of drugs".[80] Hence, this shall be referred to as the "courier requirement". The Deputy Prime Minister and Minister for Home Affairs, Teo Chee Hean, clarified that the mandatory death penalty will continue to apply to all those "who manufacture or traffic in drugs – the kingpins, producers, distributors, retailers – and also those who fund, organise or abet these activities".[81]

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77 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

78 This article focuses on the new discretion of the court to impose life imprisonment and caning of not less than 15 strokes in lieu of capital punishment, in cases where the courier requirement and the substantive assistance requirement have been fulfilled. However, for the purposes of completeness, it should also be noted that s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) also provides that the court "shall" (*ie*, must) impose a sentence of life imprisonment instead of the death penalty, where the convicted offender has proven, on a balance of probabilities, the courier requirement and that he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence: s 33B(1)(*b*) read with s 33B(3) of the Misuse of Drugs Act.

79 Or offering to do so, or doing or offering to do any act preparatory to or for the purpose of doing so.

80 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

81 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Enhancing Our Drug Control Framework and Review of the Death Penalty" vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

33 Secondly, the Public Prosecutor must certify that, in the Public Prosecutor's determination, the offender has "substantively assisted" the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities within or outside Singapore ("substantive assistance requirement").[82] "Substantive assistance" may include "the provision of information leading to the arrest or detention or prosecution of any person involved in any drug trafficking activity", and "[a]ssistance which does not enhance the enforcement effectiveness of the CNB will not be sufficient".[83]

34 The court does not have the discretion to choose *any* alternative sentence; instead, if the death sentence is not imposed, a sentence of life imprisonment and caning of not less than 15 strokes must be imposed instead.[84]

35 The provisions in respect of appeals against conviction and/or sentence, as well as reduced cases, remains largely unchanged under the new death penalty framework.[85] However, since 1 January 2013, as a result of separate amendments to the Criminal Procedure Code, the Court of Appeal will review a conviction and sentence of death even if no appeal has been filed within the stipulated time period.[86] The rationale for these amendments is "to provide another safeguard in our capital punishment regime".[87] The Prosecution has the responsibility of lodging a petition for confirmation with the Registrar of the Supreme Court, whereupon the trial judge is obliged to give his written grounds of decision even though no notice of appeal has been filed.[88] Significantly, the procedure for automatic review does not apply where the accused has been convicted of a capital drug offence but has been sentenced (or re-sentenced) to life pursuant to the court's exercise of the new discretion. The implications of this are discussed below.[89]

82 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 33B(2).
83 *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89.
84 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 33B(1)(*a*). The usual exceptions to caning apply: see s 325 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). Life imprisonment in Singapore means the whole of the convicted offender's remaining natural life: *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842, although the prisoner is entitled to review before a Life Imprisonment Review Board after serving 20 years: reg 125 of the Prisons Regulations (Cap 247, Rg 2, 2002 Rev Ed).
85 See paras 26 and 28 above.
86 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 394A–394E.
87 Second reading of the Criminal Procedure Code (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89.
88 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 394A–394E.
89 See paras 86–96 below.

36 The Misuse of Drugs (Amendment) Act 2012[90] contains transitional provisions which provide for persons who have been convicted and sentenced under the old death penalty framework to be "re-sentenced" under the new death penalty framework if they fulfil the prerequisites.[91] The Attorney-General's Chambers has stated that there were 34 persons who have been sentenced to death for murder or drug offences and could apply to be "re-sentenced" under the new regime.[92] Other reports suggest that capital drug offenders make up the majority of these people.[93]

37 There has yet to be any authoritative judicial decision or other pronouncement on how the new procedures under the new death penalty framework will work in practice. In *Public Prosecutor v Chum Tat Suan*,[94] the parties had agreed on the following procedure: after the conviction of an offender of a capital drugs charge, the court ought to then hear the question of whether the offender was merely a courier. If the court were to hold that the offender had acted in a manner that rendered him more than a courier, the sentence of death would have to be imposed and the proceedings would end there. If, on the other hand, the court were to hold that the offender had fulfilled the courier requirement, the Prosecution would then make its determination of whether he had fulfilled the substantive assistance requirement. If the Prosecution decided in the affirmative, it would issue a certificate of substantive assistance. Only then would the court reach the question of whether to impose the death penalty or to impose a sentence of life imprisonment and caning.[95] However, this procedure has been doubted by the High Court and is currently the subject of consideration by the Court of Appeal.[96]

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90 Act 30 of 2012.

91 Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) s 27.

92 Attorney-General's Chambers Press Release, "Revisions to the Mandatory Death Penalty Regime – Follow-up Actions by the Attorney-General's Chambers" (14 November 2012) at para 4 <https://app.agc.gov.sg/Newsroom/Media_releases_and_News.aspx> (accessed 31 March 2014).

93 Chun Han Wong, "Drug Couriers May Escape Singapore Gallows" *Wall Street Journal blog* (18 September 2013) <http://blogs.wsj.com/searealtime/2013/09/18/drug-couriers-may-escape-singapore-gallows> (accessed 8 April 2014) (stating that the Attorney-General's Chambers had placed the number of drug offenders who could apply for re-sentencing at 26). See the Ministerial Statement on Changes to the Application of the Mandatory Death Penalty to Homicide Offences, *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89 (putting the number at 28).

94 [2013] SGHC 221 at [4].

95 The procedure in a case where the accused seeks to prove that he is suffering from an abnormality of mind under s 33(B)(3)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) was not considered in detail in *Public Prosecutor v Chum Tat Suan* [2013] SGHC 221 and is likely to be different. See n 78 above.

96 See para 42 below.

C. Sentencing cases decided under the new death penalty framework

38 There have been four "re-sentencing" cases decided under the new death penalty framework thus far. The details of the cases are as follows. In the case of Yong Vui Kong ("Yong"),[97] Yong had challenged his conviction in 2012 on the basis that the Prosecution's decision to proceed on a capital charge against him (while his co-offender was granted a dismissal not amounting to an acquittal ("DNAQ") in respect of the capital charges against him) breached Art 12 of the Constitution. That challenge was dismissed by the Court of Appeal and his conviction and sentence of death were upheld.[98] Subsequent to that decision, however, while Yong was on death row, the 2013 amendments came into effect. Yong's case therefore came up for re-sentencing before the High Court.[99] On 14 November 2013, he was re-sentenced to life imprisonment and 15 strokes of the cane.[100] The court's judgment was not reported and as no appeal against the decision was made, no written grounds of decision were issued.[101]

39 In the case of Subashkaran s/o Pragasam ("Subashkaran"), Subashkaran had been convicted in the High Court of a charge for trafficking in 186.62g of diamorphine.[102] He appealed against his conviction on evidential grounds (namely, whether the Prosecution had proved certain elements of the charge beyond reasonable doubt) and the Court of Appeal upheld his conviction.[103] However, he was eligible for re-sentencing as a result of the 2013 amendments.[104] On 6 January 2014, he became the second convicted offender on death row to be spared the death penalty and re-sentenced to life imprisonment and 15 strokes of

97 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872. See also *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 (Yong's challenge to the constitutionality of the mandatory death penalty).

98 Subsequently, Yong was denied clemency. He brought an application for judicial review of the clemency process but this challenge was also rejected: *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189. If the 2013 amendments had not come into effect, Yong's remedies would have been exhausted.

99 Criminal Motion No 56 of 2013.

100 Selina Lum, "Malaysian is First Condemned Drug Trafficker to be Spared the Gallows Following New Law" *The Straits Times* (14 November 2013); Joyce Lim *et al*, "A Street Urchin's Journey to Death Row and Back" *The Straits Times* (27 November 2013).

101 Subsequently, Yong challenged his sentence but the challenge was against the constitutionality of caning. See Selina Lum, "Drug Courier Challenges Caning Sentence" *The Straits Times* (1 May 2014).

102 *Public Prosecutor v Mervin Singh* [2011] SGHC 222.

103 *Mervin Singh v Public Prosecutor* [2013] SGCA 20.

104 Criminal Motion No 59 of 2013.

the cane.[105] Again, the court's judgment was not reported and no written grounds of decision were issued because no appeal was filed.

40 In the case of Yip Mun Hei ("Yip"), Yip had been convicted in the High Court of a charge of trafficking in 18.43g of diamorphine.[106] He appealed against his conviction and sentence, but his appeal was dismissed by the Court of Appeal on 7 September 2010.[107] However, he was eligible for re-sentencing as a result of the 2013 amendments. On 26 May 2014, he was re-sentenced to life imprisonment and 15 strokes of the cane.[108] As with the above two cases, the court's judgment was not reported and no written grounds of decision were issued because no appeal was filed.

41 For completeness it should be noted that on 3 March 2014, Dinesh Pillai A/L Raja Retnam became the first person to be re-sentenced to a term of life imprisonment on the basis that he had been a mere courier and had suffered from such abnormality of mind as substantially impaired his mental responsibility for his offence.[109] The judgment was not reported and no written grounds of decision were issued.

42 There have also been a few cases in which the offenders were convicted of capital drug offences and sentenced after the 2013 amendments came into force. In *Public Prosecutor v Chum Tat Suan*[110] and *Public Prosecutor v Abdul Kahar bin Othman*,[111] the High Court essentially expressed doubt about the procedure for determining whether the convicted offenders were mere couriers and therefore gave them the benefit of the doubt in holding that they were mere couriers. These two cases are pending judgment in a criminal reference before the Court of Appeal.[112]

43 In *Public Prosecutor v Abdul Haleem bin Abdul Karim*[113] ("*Abdul Haleem*"), the two accused persons ("Abdul Haleem" and "Ridzuan") faced, *inter alia*, a joint capital charge for possessing 72.5g of diamorphine

105 Ian Poh, "Drug Trafficker on Death Row is Re-sentenced to Life Imprisonment and 15 Strokes" *The Straits Times* (6 January 2014).
106 *Public Prosecutor v Leong Soy Yip* [2009] SGHC 221.
107 *Leong Soy Yip v Public Prosecutor* (Criminal Appeal No 7 of 2009).
108 Criminal Motion No 31 of 2014.
109 Attorney-General's Chambers Media Statement, "First Person to Qualify for Re-Sentencing under the Diminished Responsibility Limb" (3 March 2014) <https://app.agc.gov.sg/NewsRoom/News.aspx> (accessed 3 April 2014).
110 [2013] SGHC 221.
111 Criminal Case No 8 of 2013.
112 *Public Prosecutor v Chum Tat Suan* (Criminal Reference No 5of 2013) and *Public Prosecutor v Abdul Kahar bin Othman* (Criminal Reference No 6 of 2013) (both heard in the Court of Appeal on 30 May 2014).
113 [2013] 3 SLR 734.

for the purpose of trafficking ("capital charge"). Both accused persons were Singaporeans. Abdul Haleem was 29 years old and Ridzuan was 27 years old at the time of arrest. The subject of the capital charge was that Abdul Haleem had collected the diamorphine (in the form of seven bundles of heroin) from a drug runner on Ridzuan's instructions. Abdul Haleem admitted to having knowingly collected the drugs and argued that he fulfilled the courier requirement because his only intention had been to collect the drugs and hand them to Ridzuan.[114] Ridzuan, however, claimed that he (Ridzuan) did not know the nature and amount of the drugs that was inside the bundles.[115]

44 The court ultimately disbelieved Ridzuan's defence and convicted both defendants of the capital charge.[116] In respect of sentencing, it held that both defendants had fulfilled the courier requirement under s 33B(2)(*a*) of the MDA.[117] The Public Prosecutor did not certify that Ridzuan had fulfilled the substantive assistance requirement and therefore the court passed the mandatory death sentence on him.[118] Significantly for our purposes, the Public Prosecutor certified that Abdul Haleem had fulfilled the substantive assistance requirement and, therefore, the court had the discretion not to impose the death penalty on him.[119] The court exercised its discretion and sentenced Abdul Haleem to life imprisonment with 15 strokes of the cane.[120]

45 Unlike the re-sentencing cases above, the court had to issue written grounds of decision because Ridzuan appealed against his conviction.[121] The court cited the following considerations in passing the non-capital sentence on Abdul Haleem:[122]

114 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [23].
115 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [27].
116 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [31] and [49].
117 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [56].
118 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [60].
119 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [57].
120 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [57].
121 The appeal against conviction was dismissed: see *Muhammad Ridzuan bin Md Ali v Public Prosecutor* [2014] SGCA 32. However, Ridzuan had also sought to challenge the Public Prosecutor's decision not to issue him a certificate of substantive assistance *vide* Criminal Motion No 68 of 2013. In *Muhammad Ridzuan bin Md Ali v Public Prosecutor*, the Court of Appeal dismissed Criminal Motion No 68 of 2013 on the ground that the application had been brought by the wrong procedure. Ridzuan subsequently filed an application for leave to seek judicial review of the Public Prosecutor's decision not to issue him a certificate of substantive assistance *vide* Originating Summons No 348 of 2014, which was dismissed. Ridzuan has filed an appeal against the dismissal in Criminal Appeal No 131 of 2014.
122 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [58].

(a) although Abdul Haleem had two previous drug-related convictions (namely, one for trafficking in diamorphine and one for consuming morphine), his involvement in the trafficking of the seven bundles in the instant case was "really quite incidental and unplanned";

(b) Abdul Haleem never had direct contact with the person who had arranged the transaction with Ridzuan, and was merely following Ridzuan's directions to collect the bundles from the drug runner;

(c) Abdul Haleem was not motivated by any monetary benefit in taking part in the transaction;

(d) there was no evidence of any sophistication or planning in the offence – he simply collected the drugs as instructed;

(e) the quantity of diamorphine, while "much more than enough to attract a capital charge", had to be weighed against "his minor involvement for only a very short period of time";

(f) he had co-operated fully with CNB from the start and had told only the truth to the investigators and in court;

(g) he committed the instant offences at the relatively young age of 27 and had only recently turned 30 prior to his conviction; and

(h) together with the sentences imposed for the other charge he faced, he had to face life imprisonment as well as the total maximum 24 strokes of the cane allowed by law.[123] This should be sufficient punishment for him in the circumstances of the case and act as a deterrent to others.

46 In the recent case of *Public Prosecutor v Devendran A/L Supramaniam*,[124] the accused was convicted after a trial on a capital charge of importing not less than 83.36g of diamorphine under s 7 of the MDA. The Prosecution did not issue a certificate of substantive assistance and the accused therefore did not fulfil the prerequisites for the exercise of the new discretion. He was sentenced to death accordingly. From the foregoing, it is apparent that the case law under the new death penalty framework is still at a developmental stage. It is to be hoped that a body of sentencing principles will develop over time with the accumulation of decided cases. This is elaborated on below.[125]

123 Section 328(6) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that where an accused is sentenced at the same sitting for two or more offences punishable by caning, the aggregate sentence of caning imposed by the court shall not exceed 24 strokes in the case of an adult.

124 Criminal Case No 4 of 2014.

125 See paras 86–96 below.

IV. The US experience in death penalty regulation

A. The run-up to the modern era: Furman v Georgia

47 Having described the Singapore death penalty system, we now turn to the US experience of regulating the death penalty. Although it is mentioned above that the US has had some 40 years' experience in regulating the discretionary death penalty, this refers to its "modern" era of death penalty regulation. For historical completeness it should be noted that the long movement towards making the death penalty discretionary in the US began as early as the 1700s.[126]

48 By the 1960s, the death penalty had been significantly weakened in the US, as many states abolished the death penalty (either for the offence of murder or totally) and the NAACP Legal Defense and Educational Fund brought constitutional challenges against the death penalty in every jurisdiction, leading to an effective moratorium on executions by 1967.[127] During the same period, there were increasing calls from academic and professional sources for jury sentencing discretion to be controlled by prospective guidance.[128] The development of §210.6 of the Model Penal Code by the American Law Institute ("ALI") typified the kind of efforts that were made to develop such guidance.[129] Section 210.6 of the Model Penal Code mandated a special sentencing procedure in capital cases, and defined cases appropriate for capital punishment as follows: only murder, then only if there are "aggravating circumstances" (which were listed in §210.6), and even then not if, *inter alia*, "substantial mitigating circumstances" (which were also listed in §210.6) "call for leniency".[130]

126 For the history of death penalty reform at the state level in the US, see Jordan Steiker, "The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism" (2013) 67 U Miami L Rev 329 at 331 *ff*; *McGautha v California* 402 US 183 at 197–203 (1971). For the history of death penalty reform at the federal level in the US, see Linda Carter *et al*, *Understanding Capital Punishment* (LexisNexis, 3rd Ed, 2012) at p 412 *ff*.

127 Jordan Steiker, "The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism" (2013) 67 U Miami L Rev 329 at 339.

128 *McGautha v California* 402 US 183 at 202 (1971).

129 See American Law Institute, *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009) <http://www.ali.org/doc/Capital Punishment_web.pdf> (accessed 8 April 2014).

130 American Law Institute, *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009) at p 2 <http://www.ali.org/doc/Capital Punishment_web.pdf> (accessed 8 April 2014). The aggravating circumstances listed pertained to murder because the drafters of the Model Penal Code took the view that only murder was appropriate for capital punishment. The aggravating circumstances were:

(a) The murder was committed by a convict under sentence of imprisonment.

(*cont'd on the next page*)

49 However, none of the states adopted the Model Penal Code or other specimens of prospective guidance. In *McGautha v California* ("*McGautha*"),[131] a majority of the Supreme Court justices ("*McGautha* majority") held that the "absolute" or "untrammeled" discretion of the jury under the statutes of California and Ohio to determine whether a death sentence should be imposed did not offend the constitutional guarantees under the Fourteenth Amendment of the US Constitution.[132] In that case, two defendants, McGautha and Crampton, had been convicted of first-degree murder in California and Ohio respectively.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnaping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

The mitigating circumstances were:

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

131 402 US 183 (1971).

132 See the majority opinion of the court in *McGautha v California* 402 US 183 (1971), in which the jury's discretion was described as "absolute" (at 197) and "untrammeled" (at 207). Brennan, Douglas and Marshall JJ were the dissenting judges. The Fourteenth Amendment of the US Constitution is also known as the Due Process Clause and states, *inter alia*, that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

They were sentenced to death pursuant to the statutes of those states. In both cases, the determination of whether the death penalty should be imposed or not was left to the jury's absolute discretion.[133] The Supreme Court granted *certiorari* to consider, in both cases, the question of whether the defendant's constitutional rights under the Fourteenth Amendment were infringed by permitting the jury to impose the death penalty without any governing standards.[134] The court declined to consider claims under the Eighth Amendment guarantee against cruel and unusual punishments.[135]

50 The *McGautha* majority made specific reference to the criteria in §210.6 of the Model Penal Code.[136] They, however, concluded in robust terms that the absolute sentencing discretion of the jury was constitutionally permissible. The majority said:[137]

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133 In the case of McGautha, the jury's instructions included the following (see *McGautha v California* 402 US 183 (1971) at 189–190):

> Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.
>
> Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury.

In the case of Crampton, the jury was instructed that:

> If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life.
>
> The jury was given no other instructions specifically in relation to the recommendation of mercy, but was told in connection with its verdict generally that:
>
> > You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.
> >
> > Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

See *McGautha v California* 402 US 183 at 194–195 (1971).

134 Additionally, *certiorari* was granted in the Crampton case as to the further question whether the jury's imposition of the death sentence in the same proceeding and verdict as the trial for guilt was constitutionally permissible. See *McGautha v California* 402 US 183 at 185 (1971).

135 See *McGautha v California* 398 US 936 (1970) (limited grant of *certiorari*). The Eighth Amendment of the US Constitution is also known as the Cruel and Unusual Punishment Clause and it proscribes the infliction of cruel and unusual punishments.

136 *McGautha v California* 402 US 183 at 202–203 (1971).

137 *McGautha v California* 402 US 183 at 207 (1971).

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

51 In coming to this conclusion, the *McGautha* majority took into account the following factors:

> (a) None of the states had followed the Model Penal Code in adopting statutory criteria for the imposition of the death penalty (as has been mentioned above).[138]
>
> (b) Those who have had to come to grips with the "hard task of actually attempting to draft means of channelling capital sentencing discretion" have confirmed that to draft such means is one that is "beyond present human ability". In this respect, the court cited the experience of the UK's Royal Commission on Capital Punishment, which had concluded that "no formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder".[139]
>
> (c) The criteria in the Model Penal Code did not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They essentially did no more than to suggest some non-exhaustive subjects for the jury to consider during its deliberations.[140]
>
> (d) States were entitled to assume that jurors "confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision" and will consider the sentencing factors suggested by the evidence or by the arguments of defence counsel.[141]
>
> (e) A catalogue of the sentencing factors by the court could inhibit rather than expand the scope of consideration, for no list of circumstances could ever be really complete.[142]
>
> (f) Given the "infinite" variety of cases and circumstances in each case, any general standards would be either meaningless "boiler-plate" or so obvious as to be unnecessary.[143]

138 See para 49 and *McGautha v California* 402 US 183 at 203 (1971).

139 See *McGautha v California* 402 US 183 at 204–205 (1971), quoting the Report of the Royal Commission on Capital Punishment (1949–1953, Cmd 8932) at para 595.

140 *McGautha v California* 402 US 183 at 206–207 (1971).

141 *McGautha v California* 402 US 183 at 208 (1971).

142 *McGautha v California* 402 US 183 at 208 (1971).

143 *McGautha v California* 402 US 183 at 208 (1971).

52 It is apparent from the above that the *McGautha* majority took the position that the promulgation of prospective guidance for capital sentencers is not necessary, possible or desirable. However, a little over half a year after that case, the Supreme Court heard another case on the constitutionality of the death penalty, *Furman v Georgia*[144] ("*Furman*"), and reached the opposite conclusion on prospective guidance. This time, the challenge was made on the basis of the Eighth Amendment as applied to the states by the Fourteenth Amendment.[145]

53 Each justice issued a separate opinion. Five of the justices held that the death penalty was unconstitutional. Out of these five, two justices (Brennan and Marshall JJ) held that the death penalty was unconstitutional *per se*, *ie*, in all circumstances, while the remaining three justices (Douglas, Stewart and White JJ) held that it was constitutional *as applied*.[146] The Justices' opinions have been ably summarised and analysed by numerous academics and it is not necessary to go into them at length here.[147] It suffices to note that the core theme that emerged was the need for consistency in terms of who received the death penalty.[148] This can be further broken down into several concerns (which interrelate and overlap in part):

(a) about *randomness*, where death penalty decisions are made so capriciously or arbitrarily, with "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not", that receiving the sentence is akin to being struck by lightning;[149]

(b) about *discrimination*, whereby death penalty decisions are made on the basis of prejudice regarding some characteristic such as race or class;[150]

144 408 US 238 (1972).

145 See n 135 above. The challenge was brought by three defendants who had received the death penalty: two under the death penalty statute of Georgia, for murder and for rape respectively, and one under the death penalty statute of Texas, for rape.

146 Interestingly, Stewart and White JJ had been in the majority in *McGautha v California* 402 US 183 (1971) which had held that the absolute discretion of the jury to decide on the sentence of a person convicted of a capital offence did not violate the Fourteenth Amendment of the US Constitution. See paras 49–51 above.

147 See, *eg*, Scott W Howe, "Furman's Mythical Mandate" (2007) 40 U Mich JL Reform 435; Janet C Hoeffel, "Risking the Eighth Amendment: Arbitrariness, Juries and Discretion in Capital Cases" (2005) 46 BCL Rev 771; Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355.

148 Janet C Hoeffel, "Risking the Eighth Amendment: Arbitrariness, Juries and Discretion in Capital Cases" (2005) 46 BCL Rev 771 at 774–775. See, however, Scott W Howe, "Furman's Mythical Mandate" (2007) 40 U Mich JL Reform 435 generally (asserting that the court's focus on consistency in *Furman v Georgia* 408 US 238 (1972) was purely rhetorical).

149 See *Furman v Georgia* 408 US 238 at 309 and 313 (1972), *per* Stewart J.

150 See *Furman v Georgia* 408 US 238 at 255–257 (1972), *per* Douglas J.

(c) about over-inclusion, namely, that persons who, according to expressed legislative will, do not deserve the death penalty are sentenced to death;[151] and

(d) about under-inclusion, namely, that persons who, according to expressed legislative will, should be sentenced to death do not receive the death penalty).[152]

B. The modern era of death penalty regulation

54 *Furman* ushered in the modern era of death penalty regulation. In response to *Furman*, many states issued prospective guidance in the form of newly enacted or amended death penalty statutes, many of which were based on the Model Penal Code.[153] The Supreme Court asserted constitutional oversight over the death penalty statutes enacted by various states and reversed death sentences in many cases, spawning a complex and complicated body of jurisprudence.[154]

55 The constitutionality of five of these state statutes was considered by the Supreme Court in 1976 in five separate cases.[155] In this quintet of cases, the Supreme Court articulated the principles which were to found the bedrock of death penalty jurisprudence in the US. Indeed, it has been said that "the seeds of all of the rest of the Court's capital jurisprudence can be traced to the themes it sounded in 1972

151 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 366.

152 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 366.

153 See American Law Institute, *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009) at Pt V(A) <http://www.ali.org/doc/Capital Punishment_web.pdf> (accessed 8 April 2014). See also Scott W Howe, "Furman's Mythical Mandate" (2007) 40 U Mich JL Reform 435 at 443 (stating that within four years of *Furman v Georgia* 408 US 238 (1972), 35 states enacted new death penalty legislation). For the argument that *Furman v Georgia* did not mandate such statutes, see Janet C Hoeffel, "Risking the Eighth Amendment: Arbitrariness, Juries and Discretion in Capital Cases" (2005) 46 BCL Rev 771 at 777–780.

154 See Jordan Steiker, "The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism" (2013) 67 U Miami L Rev 329 at 348–349.

155 For a concise summary of what happened in 1976, see Scott W Howe, "Furman's Mythical Mandate" (2007) 40 U Mich JL Reform 435 at 444–445. The court held that the statutes of three states (Georgia, Florida and Texas) were constitutional: *Gregg v Georgia* 428 US 153 (1976); *Proffitt v Florida* 428 US 242 (1976); and *Jurek v Texas* 428 US 262 (1976). It held that the statutes of North Carolina and Louisiana, which imposed a mandatory death penalty upon conviction of a capital offence, were unconstitutional: *Woodson v North Carolina* 428 US 280 (1976) and *Roberts v Louisiana* 428 US 325 (1976).

and 1976".[156] These principles will therefore be elaborated on here, drawing upon the later cases where appropriate. The most relevant core principles are: that states should "guide" the sentencing discretion of the sentencer by statute ("guided discretion"); and that they should facilitate the robust consideration of mitigating evidence in individual cases ("individualised consideration").[157]

(1) Guided discretion

56 In *Gregg v Georgia*[158] ("*Gregg*"), the Supreme Court said that "*Furman* mandates … that discretion [in capital sentencing] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action". The *Gregg* court addressed the reasoning of the *McGautha* majority, noting that although it had been argued that standards to guide a jury's discretion were impossible to formulate, the fact was that such standards had been developed in the form of the Model Penal Code as well as numerous state statutes that had been passed after *Furman*.[159] The court reasoned that while such standards were "by necessity somewhat general", they did "provide guidance" to the sentencing authority and thereby reduced the likelihood that the sentencing authority would impose an arbitrary sentence.[160] The court therefore concluded that, in the light of *Furman*, *McGautha* should be viewed as standing only for the proposition that the standardless jury sentencing procedures were not applied in the *McGautha* case so as to violate the Due Process Clause.[161] Such a reading, however, is not consistent with the generality of the reasoning in *McGautha*.[162]

156 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 364.

157 See Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 371 *ff* and Jordan Steiker, "The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism" (2013) 67 U Miami L Rev 329 at 340. Other core principles include: that certain categories of offenders should be excluded from the death penalty because they are deemed undeserving by contemporary standards (*eg*, juveniles and mentally retarded persons) ("proportionality"); and that there should be more stringent procedural safeguards in capital proceedings ("heightened procedural reliability"). However, since the principles of guided discretion and individualised consideration are most pertinent for the purposes of debates about prospective guidance, we will focus on them.

158 428 US 153 at 189 (1976).

159 *Gregg v Georgia* 428 US 153 (1976) at 179–180 and 193.

160 *Gregg v Georgia* 428 US 153 (1976) at 194–195.

161 *Gregg v Georgia* 428 US 153 at fn 47 (1976).

162 See para 51 above.

57 Although the *Gregg* court robustly supported standards to guide jury discretion in capital sentencing, it is apparent from the decision in that case itself that the standards envisaged by the Supreme Court were not very detailed or demanding. Under the *Gregg* statute, the capital trial was a "bifurcated" proceeding that entailed a "guilt stage" and a "sentencing stage".[163] After the defendant had been convicted at the guilt stage, in order to determine whether the defendant was eligible to receive the death penalty, the sentencer had to find beyond reasonable doubt at least one of ten statutory aggravating circumstances.[164] (Such cataloguing in statute by the State of aggravating circumstances to aid the jury in determining whether the given defendant is eligible for the death penalty has been called "narrowing".[165] The decision that is made by sentencers at this stage has been called the "eligibility decision".)[166]

58 Thereafter, in order to determine whether the defendant should in fact receive the death penalty, the sentencer was free to consider any other aggravating and mitigating evidence, including evidence that was not specifically catalogued in the statute.[167] (This has been called the "selection decision".[168] Some states provide prospective guidance in their statutes as to the types of aggravating and mitigating evidence that can be considered in the selection decision. This has been called "channelling".)[169] In jury cases, the judge was bound by the recommendation of the jury as to whether or not to impose the death penalty.[170] There was a process of special expedited direct review of the appropriateness of the sentence by the Georgia Supreme Court, including of "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".[171] This has come to be called "comparative proportionality review" and is discussed further below.[172]

59 The *Gregg* court held that this statute provided sufficient guidance to sentencers. Furthermore, it rejected Gregg's argument that

163 *Gregg v Georgia* 428 US 153 at 158 and 163 (1976).
164 *Gregg v Georgia* 428 US 153 at 161 and 164–165 (1976).
165 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 372–373.
166 Linda Carter *et al*, *Understanding Capital Punishment* (LexisNexis, 3rd Ed, 2012) at p 65.
167 *Gregg v Georgia* 428 US 153 at 161 and 164 (1976).
168 Linda Carter *et al*, *Understanding Capital Punishment* (LexisNexis, 3rd Ed, 2012) at p 65.
169 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 378 *ff*.
170 *Gregg v Georgia* 428 US 153 at 166 (1976).
171 *Gregg v Georgia* 428 US 153 at 166–167 (1976).
172 See para 66 and n 240 below.

the statutory aggravating circumstances were too broad and too vague.[173] The court reasoned that even though the circumstances were facially broad, the state Supreme Court could and had construed them in a narrow manner, and therefore they provided sufficient guidance to the sentencer.[174]

60 It is thus apparent that *Gregg*, while enunciating and elaborating on the principle of "guided discretion", simultaneously applied it in a manner that rendered the concept less potent than it appeared at first blush. The decision in *Gregg* suggested that "guided discretion" in fact required only that the State narrow the categories of defendants at the eligibility decision stage (by providing that the sentencer had to find the existence of at least one statutory aggravating sentence beyond reasonable doubt). It did not seem to require that the State had to channel the discretion of the sentencer, by listing relevant aggravating or mitigating evidence, or by structuring the jury's consideration of such evidence (*eg*, by telling the jury to weigh the aggravating evidence against the mitigating evidence, or how to weigh them).

61 Indeed, since the decision in *Gregg*, the Supreme Court has clarified and confirmed that "guided discretion" does not require the State to channel the jury's discretion at the selection decision stage. In *Zant v Stephens*,[175] the Supreme Court explicitly recognised that:

> In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, *the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty*. [emphasis added]

62 Yet, the court held that the structure of the statute was constitutional, because it provided for narrowing at the eligibility decision stage, and for individualised consideration and appellate review

173 Gregg had specifically challenged the following statutory aggravating circumstances on this basis:

(a) that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim";

(b) that the defendant had a "substantial history of serious assaultive criminal convictions"; and

(c) that the defendant caused "great risk of death to more than one person".

174 *Gregg v Georgia* 428 US 153 at 201–203 (1976).

175 462 US 862 at 873–874 (1983).

at the selection decision stage.[176] In numerous cases since then, the Supreme Court has assumed that this is the right approach.[177]

(2) Individualised consideration

63 As mentioned above, the Supreme Court struck down the statutes of North Carolina and Louisiana, because their mandatory death penalty statutes precluded the consideration of all mitigating evidence.[178] Subsequently, in *Lockett v Ohio*,[179] the Supreme Court held that "the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, as a mitigating factor, *any aspect* of a defendant's character or record and *any of the circumstances of the offense*" [emphasis added]. Thus, in that case, the Ohio death penalty statute was held to have unconstitutionally restricted the sentencer's consideration of mitigating evidence by providing that the death penalty could not be imposed if one or more of only three mitigating circumstances was established.[180] In the cases that have followed *Lockett v Ohio*, the Supreme Court has treated almost all mitigating evidence as relevant and admissible.[181]

64 Thus, the defendant now has a "virtually unconstrained right to present any conceivably mitigating evidence that might influence the sentencer's punishment decision".[182] The Supreme Court has not fully articulated a coherent theory to circumscribe the types of mitigating evidence that can be taken into account in a death penalty sentencing decision.[183] This has led to the presence of catch-all phrases in many

176 *Gregg v Georgia* 428 US 153 at 206–207 (1976).

177 See, *eg*, *Tuilaepa v California* 512 US 967 (1994); *Ring v Arizona* 536 US 584 (2002); and *Kansas v Marsh* 548 US 163 (2006).

178 See *Woodson v North Carolina* 428 US 280 (1976) (plurality opinion) and *Roberts v Louisiana* 428 US 325 (1976) (plurality opinion).

179 438 US 586 at 604 (1978), *per* Burger CJ.

180 See Ohio Revised Code Annotated § 2929.04(B) (1975). The three mitigating circumstances were: (a) the victim of the offence induced or facilitated it; (b) it is unlikely that the offence would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; and (c) the offence was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defence of insanity.

181 See, *eg*, *Eddings v Oklahoma* 455 US 104 (1982) (troubled childhood of the accused was relevant mitigation); see also Carol Steiker & Jordan Steiker, "Let God Sort Them Out? Refining the Individualisation Requirement in Capital Sentencing" (1992) 102 Yale LJ 835 generally.

182 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 382. See also Linda Carter *et al*, *Understanding Capital Punishment* (LexisNexis, 3rd Ed, 2012) at pp 174–175.

183 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 391.

death penalty statutes that give sentencers the freedom to take account of any mitigating factors.[184]

C. Criticism of the modern regulatory experiment

65 The period of increased legal regulation initially contributed to the stability and robustness of the US death penalty, in part because of increased moral legitimacy due to the Supreme Court's constitutional approval and in part due to decreased scrutiny from those who had previously opposed absolute sentencing discretion.[185] Since then, however, the US has entered a period of profound pessimism about capital sentencing regulation, as such regulation failed to achieve the asserted goal of fairness and consistency.[186]

66 There have been two major strands of critique: first, that the Supreme Court's standards are not very demanding in practice.[187] Academics have repeatedly highlighted that the court has not limited the number of statutory aggravating circumstances, nor required much specificity in the framing of individual statutory aggravating circumstances.[188] States are required only to statutorily narrow the sentencers' discretion at the eligibility decision stage, but not to channel their discretion at the selection decision stage.[189] Provision for comparative proportionality review is not mandatory, and where it exists, is often not rigorously implemented.[190] The reality therefore is that, as was foreseen in *McGautha*, prospective guidance in the various

184 See, *eg*, Florida Statutes Title XLVII §921.141(6)(h) ("[t]he existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty") and Georgia Code Title 17 §17-10-30.1 ("any mitigating circumstances"). See also para 73 below.

185 Jordan Steiker, "The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism" (2013) 67 U Miami L Rev 329 at 348–349.

186 See Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 357–359; Scott W Howe, "Furman's Mythical Mandate" (2007) 40 U Mich JL Reform 435 at 435–437.

187 See Janet C Hoeffel, "Risking the Eighth Amendment: Arbitrariness, Juries and Discretion in Capital Cases" (2005) 46 BCL Rev 771 at 781 *ff*.

188 See, *eg*, Scott W Howe, "Furman's Mythical Mandate" (2007) 40 U Mich JL Reform 435 at 454; see also para 59 above.

189 See paras 60–62 above.

190 See generally Bidish Sarma *et al*, "Struck by Lightning: *Walker v Georgia* and Louisiana's Proportionality Review of Death Sentences" (2009) 37 SU L Rev 65 and Kristen Nugent, "Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure" (2009–2010) 64 U Miami L Rev 175.

state statutes has done little to ensure consistency and fairness in the imposition of the death penalty.[191]

67 The second major critique is that the command of consistency is fundamentally irreconcilable with the demands of individualised consideration. As Steiker pointed out, the absolute discretion afforded to sentencers at the selection decision stage rendered insignificant whatever structured guidance had been achieved at the eligibility decision stage.[192] This tension between structured guidance and individualised consideration has constituted "the central dilemma in post-*Furman* capital punishment law".[193]

68 Indeed, in 2009, the ALI withdrew §210.6 from the Model Penal Code.[194] Among the reasons cited for this decision was that the ALI was not confident of recommending procedures that would meet the concerns discussed above.[195] The ALI therefore felt that it should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.[196] Given that §210.6 was adapted by many states in designing death penalty statutes in order to meet the *Furman* requirement of "guided discretion", ALI's decision has been viewed as tantamount to "the collapse of any pretense of principle to support the system of death penalty sentencing".[197]

69 The pessimism about the attempts to regulate the death penalty in the US via prospective guidance has not been restricted to academic quarters. There has been significant judicial gloom about the regulatory enterprise as well, with several Supreme Court justices expressing views both in their opinions and extra-judicially that the regulatory

191 See para 51(f) above.

192 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 382.

193 Carol Steiker & Jordan Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (1995) 109 Harv L Rev 355 at 382.

194 See American Law Institute, *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009) <http://www.ali.org/doc/Capital Punishment_web.pdf> (accessed 8 April 2014).

195 See at paras 66–67 and American Law Institute, *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009) at Pt V(B) <http://www.ali.org/doc/Capital Punishment_web.pdf> (accessed 8 April 2014).

196 American Law Institute, *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009) at Pt V(B) <http://www.ali.org/doc/Capital Punishment_web.pdf> (accessed 8 April 2014).

197 Franklin E Zimring, "Pulling the Plug on Capital Punishment" (2009) 32(14) *The National Law Journal* 42.

experiment had failed and therefore that the death penalty should be abolished.[198]

D. Current US death penalty statutes for drug trafficking

70 Nevertheless, capital punishment has been retained at the state level (by 32 states) and at the federal level.[199] Indeed, there are statutes in the US that provide for the death penalty for drug trafficking offences.[200] Unsurprisingly, however, these statutes do not provide much meaningful guidance for sentencers.

71 For example, under the Federal Death Penalty Act which was enacted in 1994, it is a capital crime for a person to commit a continuing criminal enterprise offence (which is a narcotics-related offence), if he is the *principal* or one of several principal administrators, organisers or leaders of the enterprise, *and* the violation involved either a certain quantity of a stipulated controlled substance or US$20m in gross receipts during any 12-month period of the enterprise.[201]

72 If the offender is convicted, a separate sentencing hearing is conducted either before a jury or before the court alone if the defendant waives his right to jury.[202] In order for the convicted offender to be *eligible* for the death penalty, the jury must unanimously find that at least one of a list of statutory aggravating factors exists.[203] The list of aggravating factors includes some very broad factors which do not appear difficult to fulfil:

> (a) the defendant has previously been convicted of at least two federal or state offences involving drug importation,

198 Andrew Cohen, "Why Don't Supreme Court Justices Ever Change Their Mind in Favor of the Death Penalty?" *The Atlantic* (10 December 2013).

199 The Death Penalty Information Center website, "States With and Without the Death Penalty" <http://deathpenaltyinfo.org/states-and-without-death-penalty> (accessed 2 April 2014).

200 See, *eg*, Florida Statutes Title XLVII §921.142. See further the discussion of the Federal Death Penalty Act 18 USC (US) (1994) at paras 71–76 below.

201 18 USC (US) §3591(b) (1994). To give an example, the head of a drug syndicate who had been found to have possessed with the intent to distribute 60kg or more of a substance containing heroin or to have received US$20m in any 12-month period of his syndicate's operation could be charged for this capital offence. The offence of being involved in a "continuing criminal enterprise" is provided for in 21 USC (US) §§848(e)–848(r) (1988). This was enacted by Congress (after a certain lapse of time) via the Drug Kingpin Act in response to *Furman v Georgia* 408 US 238 (1972). For a brief discussion of the Drug Kingpin Act, see Linda Carter *et al*, *Understanding Capital Punishment* (LexisNexis, 3rd Ed, 2012) at pp 415–416.

202 Federal Death Penalty Act 18 USC (US) §3593(b) (1994).

203 Federal Death Penalty Act 18 USC (US) §3593(d) (1994). See para 57 above.

> manufacture or distribution, each punishable by a term of imprisonment of more than one year;[204] and
>
> (b) the defendant has previously been convicted of a federal or state offence involving the manufacture, distribution, importation or possession of a controlled substance, for which a sentence of five or more years of imprisonment was authorised by statute.[205]

73 The statute also contains a *non-exhaustive* list of mitigating factors, including the catch-all "other factors in the defendant's background, record, or character or any other circumstance of the offence that mitigate against imposition of the death sentence".[206]

74 The sentencer has to consider whether the aggravating factor or factors found to exist outweigh(s) the mitigating factor or factors found to exist, or in the absence of any mitigating factor, whether the aggravating factor or factors alone are sufficient to justify the sentence of death.[207] No further guidance is given as to how to conduct this weighing exercise.

75 The constitutionality of this statute has never been tested in the Supreme Court and perhaps never will.[208] Nevertheless, based on the Supreme Court's current jurisprudence, it is likely that such a statute would be found to provide sufficient guidance because the sentencers' discretion is narrowed at the eligibility decision stage (in that the sentencer must find that at least one statutory aggravating factor exists) and the sentencers' consideration of mitigating circumstances at the selection decision stage is not circumscribed.[209] This further illustrates the failures of the modern regulatory experiment in the US.

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204 Federal Death Penalty Act 18 USC (US) §3592(d)(2) (1994).

205 Federal Death Penalty Act 18 USC (US) §3592(d)(3) (1994).

206 Federal Death Penalty Act 18 USC (US) §3592(a). A finding that a mitigating factor exists need not be unanimous and can be made by a single juror: 18 USC (US) §3593(d) (1994).

207 Federal Death Penalty Act 18 USC (US) §3593(e) (1994).

208 Harm Reduction International ("HRI") Report, "The Death Penalty for Drug Offences: Global Overview 2012, Tipping the Scales for Abolition" at p 41 <http://www.ihra.net/contents/1290> (accessed 1 August 2014). HRI categorises the US as a "symbolic application state", namely, a country that has the death penalty for drug offences within their legislation but there is no record of any executions for drug offences in the country: at p 25.

209 See paras 60–62 above. Note that in *Kennedy v Louisiana* 554 US 407 (2008), a majority of Supreme Court justices rejected the death penalty for child rape, opining that the death penalty should not be expanded to crimes against individuals where the victim's life was not taken. However, the majority stated that it was not addressing offences against the State, including drug kingpin activities: at 437.

76 It appears that the failures of the modern regulatory enterprise in the US have led many back to the view, first espoused by the *McGautha* majority, that it is not necessary, desirable or possible to provide meaningful prospective guidance for the exercise of sentencing discretion in the death penalty context.[210] The US experience, therefore, provides valuable cautionary lessons for Singapore. Of course, it may be argued that the failure of the US regulatory experiment was not inevitable but rather was due to the Supreme Court's adoption of lenient standards for reviewing the constitutionality of state death penalty statutes. This argument is addressed further below.[211]

V. Whether prospective guidance for the court should be enacted under s 33B of the MDA

77 Having examined the experience of the US in the use of prospective guidance to control capital sentencing discretion, we shall now consider whether there should be prospective guidance for our courts in exercising the new discretion under s 33B of the MDA. In fact, the new discretion is entirely unlike the US sentencing discretion in death penalty cases, which is triggered once an offender has been convicted and would be entirely open if not for the existence of the catalogues of sentencing factors.[212] Instead, the new discretion is only reached after a convicted offender has crossed two difficult hurdles: first, of proving to the court that he is a mere courier; and secondly, of obtaining a certificate of substantive assistance from the Public Prosecutor. In other words, the *eligibility* decision *is* already substantially guided (or "narrowed"), as a result of the prerequisites built into the statute.[213]

78 The real question, therefore, is whether there should be *further* prospective guidance for the court to *channel* its *selection* decision, in the form of a list of aggravating and mitigating factors added to s 33B of the MDA.[214]

A. Further prospective guidance is not possible or desirable

79 This article does not support the enactment of further prospective guidance to channel the new discretion, for reasons that

210 See paras 49–51 above.
211 See para 81 below.
212 See paras 57–58 above.
213 See para 57 above.
214 See para 58 above.

were foretold in *McGautha* and are borne out by the US experience.[215] The reasons are as follows.

80 First, it is not *possible* to craft a catalogue of aggravating and mitigating factors that could provide meaningful guidance to the sentencer. Indeed, in debating the 2013 amendments, the Minister for Law had also noted the difficulties of formulating meaningful and effective prospective guidance.[216] The weaknesses of death penalty sentencing statutes in the US – that they contain long lists of broad or vague aggravating factors; that catch-all phrases are used; and that little or no guidance is given to sentencers on how to weigh the various aggravating and mitigating factors – are not symptoms of incompetent drafters or poor doctrinal choices. Rather, they are indicative of the ineluctable trade-off between the need for consistency and the imperative of doing justice in the individual case.

81 It might be thought that the trade-off is merely the result of the particular doctrinal choices made by the Supreme Court and that it could be resolved simply by abandoning the requirement of individualised consideration.[217] In *Tennard v Dretke*,[218] Scalia J said that the requirement of individualised consideration had no basis in the US Constitution and should be cut back "because requiring unchanneled discretion to say *no* to death cannot rationally be reconciled with our prior decisions requiring canalized discretion to say *yes*" [emphasis in original].[219] The problem, however, is that it is untenable to preclude the consideration of *all* mitigating circumstances. It then becomes necessary to articulate a narrowed theory of individualisation (*ie*, *what* mitigating circumstances should be relevant to the sentencing decision). For example, one academic suggestion has been to confine the consideration of mitigating circumstances to those that reduce a defendant's culpability.[220] However, because it is not possible or desirable to anticipate all types of evidence that might reduce culpability, the prospective guidance would have to be framed broadly and/or contain catch-all factors, thus reducing the utility of such guidance.[221] The problem is therefore endlessly recursive. (In any case, the restriction of mitigating evidence to only those of the kind that reduce an offender's ability to control or appreciate the consequences of his criminal

215 See paras 49–51 and 65–69 above.
216 See the resumption of the 2012 Parliamentary Debate, *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89.
217 See para 76 above.
218 542 US 274 at 293 (2004) (dissenting on a certificate of appealability ruling).
219 See also *Walton v Arizona* 497 US 639 (1990) at 673 and *Johnson v Texas* 509 US 350 (1993) at 373.
220 See Carol Steiker & Jordan Steiker, "Let God Sort Them Out? Refining the Individualisation Requirement in Capital Sentencing" (1992) 102 Yale LJ 835.
221 See paras 66 and 80 above.

behaviour is overly narrow. It is not consonant with the past decisions of the Singapore courts, which have recognised other factors, *eg*, co-operation with the authorities, as justifying a non-capital sentence for capital drug offenders.)[222]

82 Secondly, because it is not possible to craft meaningful guidance, the enactment of further prospective guidance is undesirable. The enactment of token statutory guidance which has little practical effect in terms of regulating judicial discretion will only invite criticism and cynicism, thereby undermining public confidence in this important aspect of the criminal justice system.[223]

B. Further prospective guidance is not necessary

83 Given the problems with further prospective guidance as described above, it is fortunate that such prospective guidance is in fact not necessary for the promotion of fairness and consistency in capital sentencing.

84 Instead, meaningful sentencing principles and considerations can develop incrementally, by the accretion of cases over time. Even without prospective guidance, counsel would still be able to identify and make relevant sentencing arguments. As suggested in *McGautha*, many relevant arguments would be apparent from the evidence.[224] Submissions could also be made by adapting general sentencing principles from non-capital cases, as well as applying first principles. As courts rule upon such arguments, a body of sentencing jurisprudence will accumulate and sentencing patterns will become discernible from the case law.[225]

85 After a suitable accumulation of precedent, the court itself may well articulate the sentencing factors that it takes into account in considering such offences.[226] However, the courts tend to be careful to emphasise in articulating such factors that they are not exhaustive and

222 See *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [78] and *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [25].

223 See paras 65–69 above.

224 *McGautha v California* 402 US 183 at 208 (1971).

225 As they have in other areas of criminal law. See, *eg*, *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 (summarising the sentencing patterns for credit card offences).

226 See *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [38]. See also the reference to the issuance of guideline judgments by judges hearing future Magistrates' Appeals in the Response by Sundaresh Menon CJ at the Opening of Legal Year 2014 (3 January 2014) at para 37.

that every case should be considered on its own facts.[227] Such an organic development of such principles allows counsel to make reasoned and well-founded sentencing arguments based on the growing body of case law, while at the same time affording the court the flexibility to deal with the individual circumstances of each case.

C. Proposal to advance the principled development of sentencing principles

86 However, this incremental approach will only work if there is a steadily growing body of case law which is captured and made publicly accessible, such that it can be cited and applied in parties' sentencing submissions in capital drug cases. In this respect, it is noteworthy that the court's reasoning in sentencing and re-sentencing cases where the accused was convicted of a capital drug offence but has escaped the death penalty is usually unarticulated or unreported. As mentioned above, in a majority of such cases, the accused persons do not appeal against their sentences; indeed, it would be pointless for them to do so because the judge does not have the discretion to impose any sentence other than a life sentence when he has determined that the circumstances of the case do not call for the death penalty.[228] The only way in which an accused who has been convicted of a capital drug offence could receive a *more favourable* outcome than a life sentence would be to succeed in overturning his conviction on appeal. In such cases, the written grounds of decision would address only issues that go towards guilt or innocence, and not sentencing.

87 It may be argued that the development of sentencing principles is unnecessary, because the "default" sentencing position where the prerequisites have been satisfied would be life imprisonment ("the default position argument"). However, the default position argument has been rejected in the context of homicide cases. In *Public Prosecutor v Kho Jabing*, the High Court said that:[229]

> *[T]here should not be a default position preferring the death penalty or life imprisonment in considering the appropriate sentence under s 300(c) of the Penal Code. In other legislation providing for punishment for offences, the courts have consistently accepted that there is no presumptive preference that the least severe punishment should be the starting or default position.* So if a law allows the court to impose imprisonment with or without caning or a fine or both, the court does

227 See *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [38].

228 See para 34 above.

229 *Public Prosecutor v Kho Jabing* [2014] 1 SLR 973 at [37]. The Public Prosecutor filed an appeal against sentence in Criminal Appeal No 6 of 2013. The appeal was heard by the Court of Appeal on 20 March 2014 and judgment was reserved.

> not begin its inquiry by asking why the offender should not be fined. Instead, it looks at all the circumstances of the case before deciding to impose one or the other or both of the punishments. The Minister's statement at [15] above also does not show a presumptive preference for life imprisonment as the starting point. Similarly, it would be wrong to regard the death penalty as the starting point and then see if there are factors which would justify the less severe alternative (see *Sia Ah Kew v PP* ([13] *supra*)). All the facts of the case should be looked at before deciding which is the appropriate punishment for offences under ss 300(*b*) to 300(*d*) of the Penal Code although there are only two stark choices of literally life or death. [emphasis added]

88 Granted, the argument against the default position argument is stronger in the context of homicides because Parliament had explicitly referred to sentencing factors that should be considered in "deciding whether and how to apply the death penalty to a particular [homicide] offence".[230] Nevertheless, there is nothing in the background materials to the new death penalty framework to suggest that Parliament had intended that life imprisonment should be the default sentence for capital drug offenders if the prerequisites under s 33B of the MDA were satisfied. Furthermore, the "default position argument" is inconsistent with the approach of the High Court in at least one case, in which the High Court did not impose life imprisonment on the accused as a matter of course after the prerequisites were satisfied but rather went through a relatively detailed process of reasoning as to whether the accused should be sentenced to life imprisonment.[231]

89 In any case, *even if* the default position argument were adopted in the context of capital drug sentencing, this would not mean that the death penalty would *never* be imposed. Thus, so long as it remains a possibility that *some* offenders under the new death penalty framework may be sentenced to death, the rational and transparent development of sentencing principles to determine who should receive the death penalty and who should receive life imprisonment is imperative for fairness and consistency.

90 It is therefore proposed that in sentencing and re-sentencing cases where a life sentence has been meted out, even where neither the accused nor the Prosecution has appealed against the sentence, judges should explain the reasons for their decision in their oral judgment, which should then be reported in LawNet, or at the very least, the relevant sentencing factors should be captured in a sentencing

230 *Singapore Parliamentary Debates, Official Report* (9 July 2012) "Changes to the Application of the Mandatory Death Penalty to Homicide Offences (Statement by Minister for Law)" vol 89.

231 See para 45 above.

repository system.[232] Alternatively, judges could issue short written grounds of decision in such cases, which would then be reported in the usual manner.

91 To give a concrete illustration of the importance of this approach, consider the following hypothetical cases. Defendant A has been convicted of a capital drug offence and has fulfilled the prerequisites. However, he has numerous antecedents for trafficking in the same type of controlled drugs (*eg*, diamorphine). Under general sentencing principles, the existence of similar antecedents would tend to constitute a relevant aggravating factor.[233] To what extent would this principle apply in the context of sentencing for capital drug offences? Should *non-capital* drug trafficking antecedents constitute "similar" antecedents for the purposes of sentencing *capital drug offenders*?[234]

92 Defendant B has been convicted of a capital drug offence and has fulfilled the prerequisites. However, the amount of drugs involved was extremely high and many times the minimum amount that carries the death penalty – say, 200g of diamorphine.[235] In *Public Prosecutor v Hardave Singh s/o Gurcharan Singh*,[236] the High Court said that "the primary consideration of the sentencing court in deciding an appropriate sentence for a drug trafficking offence is the quantity of drugs in the possession of the offender". To what extent does this apply in the sentencing of capital drug offenders? What range of amounts would generally be considered so "high" as to warrant the death penalty in the absence of countervailing factors?[237]

93 Consider finally the case of defendant C. He too has been convicted of a capital drug offence and has fulfilled the prerequisites. However, there is in his case a plethora of circumstances that would, in a non-capital setting, constitute potential aggravating factors (*eg*, numerous trafficking antecedents, and the amount of drugs involved was very high or many times the capital threshold) or potential

232 See para 96 below.

233 See generally Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at pp 657–688.

234 For a discussion of what constitutes "similar", "broadly similar" or "dissimilar" antecedents, see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at pp 657–667.

235 The minimum amount that triggers the death penalty is 15g of diamorphine: see the Second Sched to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).

236 [2003] SGHC 237 at [15].

237 The High Court has noted that the amount of 72.5g of diamorphine was "much more than enough to attract a capital charge" but had weighed this against the offender's minor involvement for only a very short period of time in imposing a life sentence on the offender: see *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 at [58]. Another High Court judge re-sentenced an offender who had trafficked 186.62g of diamorphine to life imprisonment: see para 39 above.

mitigating factors (*eg*, the accused is relatively young).[238] How do these sentencing factors interact with and weigh against one another?

94 In each of the above cases, if the court sentences the accused to life imprisonment but does not explain the reasons for its decision, or if the court explains the reasons but they are not captured in some manner, parties in subsequent cases involving similar aggravating or mitigating factors are left at sea as to the court's reasoning in respect of the questions raised above and, indeed, whether the court took those sentencing factors into account at all. In contrast, if the court gives reasons which are then captured as proposed above,[239] precedents are created which parties could refer to when arguing for or against the death penalty in subsequent similar cases. As precedents accumulate, it ultimately becomes possible to submit on principles that have emerged from the authorities, *eg*, that based on a scan of the authorities, the fact that the accused has numerous non-capital drug trafficking antecedents generally has or has not tended to weigh in favour of the death penalty.[240]

95 It is true that the High Court has addressed some of the questions raised above in the case of *Abdul Haleem*.[241] However, in *Abdul Haleem*, the High Court had only been compelled to explain its reasons for sentencing Abdul Haleem to life imprisonment because his co-offender, Ridzuan, had received the mandatory death penalty and appealed. There may be many more cases in future in which the facts of the case raise important or novel sentencing issues but no written grounds of decision are issued because no appeal was made. It is important to extract the sentencing data in all such cases and make it available in a usable form to promote the comprehensive and orderly development of the sentencing case law.

238 See generally Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at pp 677–688 (antecedents) and 691–704 (youth).

239 See para 90 above.

240 Note that this is a very different exercise from comparative proportionality review, in which the court is statutorily mandated to review the sentence in the present case by looking at past similar cases to see what sentences were imposed. In the US, there is controversy over whether comparative proportionality review entails comparing the current defendant's sentence with past defendants who were convicted of similar offences but did *not* receive the death penalty, or whether only the cases of those who *did* receive the death penalty need to be considered. See the Supreme Court's recent denial of *certiorari* in *Walker v Georgia* and the separate concurring opinions of Stevens J at 129 S Ct 453 (2008) (mem) and Thomas J at 129 S Ct 481 (2008) (mem). See further Kristen Nugent, "Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure" (2009–2010) 64 U Miami L Rev 175.

241 See para 45 above.

96 Indeed, the imperative of capturing and making available sentencing data as to promote research, transparency and consistency in sentencing has already been recognised in the context of criminal proceedings in the State Courts (formerly Subordinate Courts).[242] In January 2014, the Chief Justice announced that a Sentencing Information and Research Repository will extract sentencing data from the State Courts' case management system and be available to the general public via LawNet by the end of 2014.[243] Given that decisions in the capital drugs context are of even greater import (being literally of life or death), it is even more important that data about cases in which the accused was convicted of capital offences but received a non-capital sentence is captured and made publicly available in a similar manner.

VI. Conclusion

97 When confronted with what appears to be wide judicial sentencing discretion, the natural tendency of commentators is to call for immediate control in the form of prospective guidance. However, by looking at the path trodden by others before us, it is possible to see that the pursuit of such guidance may ultimately lead down a blind alley.

98 Instead, there is tremendous potential in our system to make incremental improvements which promote the criminal justice values of fairness and consistency, without the costs attendant to prospective guidance. This article has proposed one such change. It is hoped that constructive discussion on these issues will continue, so as to promote the robustness and fairness of our death penalty framework.

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242 See Response by Chief Justice Sundaresh Menon at the Opening of Legal Year 2014 (3 January 2014) at para 15.

243 See Response by Chief Justice Sundaresh Menon at the Opening of Legal Year 2014 (3 January 2014) at para 15.